

**Form of order sought**

- declare that, by not adopting appropriate measures needed to comply with Articles 5 and 6 of Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries<sup>(1)</sup> and in any event by not informing the Commission of such measures, the Republic of Poland has failed to fulfil its obligations under those articles of the directive;
- order the Republic of Poland to pay the costs.

**Pleas in law and main arguments**

Article 5 of Regulation No 847/2004 requires Member States to ensure 'a distribution of traffic rights among eligible [European Union] air carriers on the basis of a non-discriminatory and transparent procedure'. In addition, under Article 6 of the regulation, Member States are obliged to inform the Commission without delay of the procedures applied for the purposes of Article 5. The Commission publishes those procedures in the Official Journal. The carrying out of the procedures referred to in those provisions is dependent upon the adoption of an appropriate implementing regulation by the minister responsible for transport matters. That regulation had still not been adopted when the present action was brought and in any event the Polish authorities have not informed the Commission in that regard. In those circumstances, the Commission assumes that the carrying out of the procedures envisaged in Article 5 of Regulation No 847/2004 and the appropriate notification of the Commission on the basis of Article 6 of the regulation are not possible, given the lack of appropriate provisions in Polish law.

<sup>(1)</sup> OJ 2004 L 157, p. 7.

**Appeal brought on 23 February 2012 by Louis Vuitton Malletier against the judgment of the General Court (Third Chamber) delivered on 14 December 2011 in Case T-237/10: Louis Vuitton Malletier v Office for Harmonisation in the Internal Market (Trade Marks and Designs), Friis Group International ApS**

(Case C-97/12 P)

(2012/C 126/16)

*Language of the case: English*

**Parties**

*Appellant:* Louis Vuitton Malletier (represented by: P. Roncaglia, G. Lazzeretti, M. Boletto, E. Gavuzzi, avvocati)

*Other parties to the proceedings:* Office for Harmonisation in the Internal Market (Trade Marks and Designs), Friis Group International ApS

**Form of order sought**

The appellant claims that the Court should:

- set aside the judgment under appeal in so far as it dismissed the appeal filed by the Appellant against the contested decision and thus annul the First Board of Appeal decision in so far as it declared Community trademark registration No. 3693116 (figurative) invalid for 'optical apparatus and instruments, including spectacles, sunglasses and spectacle cases' in class 9, 'jewel boxes in precious metals, their alloys or coated therewith' in class 14, and 'travel bags, travelling sets (leather goods), trunks and travelling bags, garment bags for travel, vanity cases, rucksacks, shoulder bats, handbags, attaché cases, document cases and briefcases of leather, pouches, wallets, purses, key cases, card cases' in class 18;
- order OHIM to pay the costs incurred by Louis Vuitton Malletier S.A. during these proceedings;
- order Friis Group International ApS to pay the costs incurred by Louis Vuitton Malletier S.A. during these proceedings.

**Pleas in law and main arguments**

The present appeal is aimed at showing that the General Court infringed Article 7(l)(b) CTM Regulation<sup>(1)</sup> by holding that the absolute ground for refusal set forth in this provision is applicable to Community trademark registration No. 3693116 (figurative) (the so called 'FERMOIR S') with respect to all the goods it covers in classes 9, 14 and 18, save for 'jewellery, including rings, key rings, buckles and earrings, cuff links, bracelets, trinkets, brooches, necklaces, ties pins, ornaments, medallions; horological and chronometric instruments and apparatus, including watches, watchcases, alarm clocks; nutcrackers in precious metals, their alloys or coated therewith, candlesticks in precious metals, their alloys or coated therewith' in class 14 and 'leather and imitations of leather' and 'umbrellas' in class 18.

Firstly, the Appellant submits that the General Court erred in applying the case-law on three-dimensional shape marks to the present case (at least with respect to the majority of the goods covered by the contested mark) and thus in requiring as a legal standard for distinctiveness that the 'FERMOIR S' 'departs significantly from the norm or customs of the sector', which is a threshold higher than the general one (i.e., the 'minimum degree of distinctiveness').

In fact, the case-law clearly shows that, to apply the 'departing significantly' threshold, originally tailored for three-dimensional shape marks only, the relevant sign should be unequivocally related to the concerned goods, meaning that such sign must consist of, and be perceived by consumers as, a faithful representation either of the whole product or of one of its main parts, immediately recognizable as such.

Contrastingly, the General Court took the view that any sign representing the shape of a part of a product is subject to the principles set forth in connection with three-dimensional shape marks unless it is absolutely impossible to conceptually view such sign as a part of the products it designates. As a result, instead of asking whether the contested mark could be perceived by the public as an essential part of the goods it designates, the General Court limited itself to establishing whether this mark could theoretically be used as a closing mechanism for goods in classes 9, 14, and 18.

Secondly, the Appellant submits that the General Court erred when it came to assessing the validity of the contested mark with respect to those goods that it had found capable of including a closing mechanism, by infringing the rules concerning the burden of proof and distorting the clear sense of evidence.

In particular, the General Court failed to give sufficient deference to the presumption of validity afforded to CTM registrations by requiring that the Appellant 'provide specific and substantiated information to show that the trade mark applied for has inherent distinctive character' and thus shifting from Friis the burden of proving the invalidity of the contested mark.

For all the reasons above, the Appellant requests that the Court set aside the judgment under appeal, in so far as it partially upheld the decision of the First Board of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) of February 24, 2010, in Case R 1590/2008-1 that had declared the contested mark invalid for the goods it covers in classes 9, 14 and 18.

<sup>(1)</sup> OJ L 11, p. 1

**Reference for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 24 February 2012 — Wim J. J. Slot v 3 H Camping-Center Heinsberg GmbH**

(Case C-98/12)

(2012/C 126/17)

*Language of the case: German*

#### Referring court

Bundesgerichtshof

#### Parties to the main proceedings

*Appellant:* Wim J. J. Slot

*Respondent:* 3 H Camping-Center Heinsberg GmbH

#### Questions referred

1. Is there a matter relating to a consumer contract within the meaning of Article 15(1)(c) of Regulation No 44/2001 <sup>(1)</sup> if a trader has, by the design of his website, directed his activities to another Member State and a consumer domiciled in the territory of that Member State, on the basis of the information on the trader's website, travels to where his business is located and the parties sign the contract there,

or

does Article 15(1)(c) of Regulation No 44/2001 presuppose in that case that a distance contract is concluded?

2. If Article 15(1)(c) of Regulation No 44/2001 is to be interpreted as meaning that in that case the contract must in principle be a distance contract:

Does the consumer jurisdiction under Article 15(1)(c) in conjunction with Article 16(2) of Regulation No 44/2001 apply if the parties to the contract enter into a distance pre-contractual commitment which subsequently flows directly into the conclusion of the contract?

<sup>(1)</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12, p. 1.

**Action brought on 7 March 2012 — European Commission v Kingdom of Spain**

(Case C-127/12)

(2012/C 126/18)

*Language of the case: Spanish*

#### Parties

*Applicant:* European Commission (represented by: W. Roels and F. Jimeno Fernández, Agents)

*Defendant:* Kingdom of Spain