

— Order the other parties to the proceedings to pay the costs.

Pleas in law and main arguments

1. It is disputed that there is graphic similarity between Community trade mark No 6314462 'AMICI JUNIOR' and Italian national figurative mark Nos 912114 'AJ ARMANI JEANS' and 998554 'ARMANI JUNIOR', or any aural similarity.
2. Article 8(5) of Regulation No 207/2009 and the principle that marks must be well known were applied in the judgment under appeal, even though Girogio Armani S.p.A. did not make any express reference to or rely on that provision or principle.

(¹) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

Appeal brought on 1 June 2012 by Telefónica SA against the order of the General Court (Eighth Chamber) delivered on 21 March 2012 in Case T-228/10 Telefónica v Commission

(Case C-274/12 P)

(2012/C 227/21)

Language of the case: Spanish

Parties

Appellant: Telefónica SA (represented by: J. Ruiz Calzado, abogado, M. Núñez-Müller, Rechtsanwalt, and J. Domínguez Pérez, abogado)

Other party to the proceedings: European Commission

Form of order sought

The appellant claims that the Court of Justice should:

- set aside the order under appeal;
- declare the action for annulment in Case T-228/10 admissible and refer the case back to the General Court for it to give judgment on the substance of the dispute;
- order the Commission to pay all the costs of the proceedings at both instances relating to admissibility.

Grounds of appeal and main arguments

1. The General Court erred in law in adopting a decision which infringes the right to an effective remedy. In considering, in a general manner, that the option of a reference for a preliminary ruling is always adequate and possible, the

General Court infringed the appellant's right at first instance to an effective remedy, such as laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and which is recognised expressly in Article 47 of the Charter of Fundamental Rights of the European Union.

2. The General Court erred in law by wrongly interpreting the case-law on the admissibility of actions against decisions on State aid declaring an aid scheme unlawful and incompatible.
3. The General Court erred in law in interpreting the fourth paragraph of Article 263 TFEU, *in fine*. The General Court erred in law in stating that decisions regarding State aid schemes, such as the contested decision, entail implementing measures within the meaning of the new Treaty provision (the fourth paragraph of Article 263 TFEU). In its order, the General Court failed to recognise that a negative decision regarding State aid has direct effect, immediately renders the aid granted unlawful, and normally implies an obligation on the part of the Member States to recover such aid.

Action brought on 8 June 2012 — European Commission v Hungary

(Case C-288/12)

(2012/C 227/22)

Language of the case: Hungarian

Parties

Applicant: European Commission (represented by: B. Martenczuk and B.D. Simon, acting as Agent(s))

Defendant(s): Hungary

Form of order sought

- Declare that Hungary has failed to fulfil its obligations under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data by removing the data protection supervisor from office before time.
- Order Hungary to pay the costs.

Pleas in law and main arguments

Directive 95/46/EC provides that one or more public authorities of the Member States, which are to act with complete independence in exercising the functions entrusted to them, are to be responsible for monitoring the application of the national provisions transposing that Directive.

In Hungary, that authority was, until 31 December 2011, the data protection supervisor. Under the Hungarian legislation in force until 31 December 2011, the data protection supervisor was elected by the Hungarian Parliament for a period of six years. The term of office of the data protection supervisor in post on 31 December 2011 began on 29 September 2008, so that, in normal circumstances, he should have remained in post until September 2014.

With effect from 1 January 2012 the Hungarian legislation on this subject was amended. As a result of those amendments, the post of data protection supervisor was withdrawn and the data protection supervisor who had occupied the post since 29 September 2008 was removed from office. The authority responsible for supervising data protection in Hungary, within the meaning of Directive 95/46 was thereafter the newly created Nemzeti Adatvédelmi és Információszabadság Hatóság (national authority for data protection and freedom of information, 'the authority'). According to the new legislation, the head of that authority is appointed by the President of the Republic on the proposal of the Prime Minister for a term of nine years. The previous data protection supervisor was not appointed to that post.

In the opinion of the Commission, the removal from office before time of the authority responsible for supervising data protection undermines the independence required by the Directive of that authority. The Directive does not fix the duration of the term of office of that supervisory authority, so that, in principle, the Member States are free to fix it. However, the term of office has to be of reasonable duration and it is indispensable that once a Member State has fixed the duration of that term of office, that duration should be respected. Otherwise, there would be a risk that the exercise of the functions of the supervisory authority would be influenced by the risk of removal from office before time, and that risk would undermine the independence of that authority.

As regards the admissibility of the application, the Commission alleges that, given that the authority previously entrusted with the supervision of data was not reinstated before the end of the period prescribed in the reasoned opinion, the infringement had not been remedied at that time. It takes the view that it is not impossible to remedy the infringement: Hungary needs to adopt the necessary measures to reinstate the previous data protection supervisor in the post referred to in Directive 95/46 for the

remainder of his term of office from 31 December 2011. The Commission would consider it an adequate remedy if the previous data protection supervisor were appointed for that period of time to the post of head of the new authority. In that regard, Hungary cannot pray in aid the independence of the current head of the new authority, because that would require it to plead its own infringement in its defence. The effects of the infringement must be remedied, not maintained.

According to the Commission, removal from office before time can only be justified by overriding and objectively verifiable reasons, but Hungary has not put forward any such reasons.

The Commission does not dispute the right of Hungary to reorganise the supervisory authority, moving, for example, from the previous model of 'data protection supervisor' to a model consistent with Hungarian law in the form of an 'authority'. However, the reform of the type of institution did not require in any way that the previous supervisory authority be removed from office. Hungary could have provided in its national legislation either that the new model should be applicable once the term of office of the data protection supervisor occupying the post had expired, or that the previous data protection supervisor should be appointed the first head of the new authority for the remainder of his term of office.

According to the Commission, if the position of the Member State regarding the change of model were to be accepted, all authorities responsible for supervising data protection in the Union would be permanently exposed to the risk of removal from office through a legislative measure cancelling the existing authority and establishing a newly created authority in its place to carry out the functions set out in Directive 95/46. It cannot be ruled out that such reforms could be used to penalise and monitor the authorities responsible for supervising data protection which earn the disapproval of the political authorities. The slightest risk of such influence is incompatible with the total independence of the supervisory authorities.

On the other hand, in the opinion of the Commission, Hungary cannot rely on vague statements by the previous data protection supervisor published in the press to presume that the latter was not prepared to fulfil the functions provided for by Article 28 of Directive 95/46, or to remove him from office before time on that basis.