

Proprietor of the Community trade mark: The other party to the proceedings before the Board of Appeal

Applicant for the declaration of invalidity of the Community trade mark: The applicant

Grounds for the application for a declaration of invalidity: Italian trade mark registration No 747249 of the word mark 'CLICK', for goods in class 10; Italian trade mark registration No 927574 of the word mark 'MOUSTI CLICK', for goods in class 10; Italian trade mark registration No 801404 of the word mark 'ECO-CLICK', for goods in class 10; Italian trade mark registration No 801405 of the word mark 'ZANZA CLICK', for goods in class 10; International trade mark registration No 825425 of the word mark 'MOUSTI CLICK', for goods in class 10; Non-registered trade mark of the word mark 'CLICK', protected in the United Kingdom; Non-registered trade mark of the word mark 'ZANZA CLICK', protected in the United Kingdom.

Decision of the Cancellation Division: Declaration of partial invalidity of the Community trade mark

Decision of the Board of Appeal: Annulled the decision of the Cancellation Division

Pleas in law: Infringement and misinterpretation of Article 52(1)(b) of Council Regulation (EC) No 207/2009, as the Board of Appeal wrongfully excluded 'bad faith'. Infringement and misinterpretation of Rules 38(2), 39(2), 39(3) and 96(2) of Commission Regulation (EC) No 2868/95, as the Board of Appeal wrongfully related inadmissibility of the ground of action to the alleged omitted translation of the documents, and as it did not consider that the translation had been provided by the applicant. Misapplication of Articles 53(1)(a) and 8(1)(b) of Council Regulation (EC) No 207/2009, as the Board of Appeal misused its power. Violation and misinterpretation of Articles 53(1)(b) and 8(3) of Council Regulation (EC) No 207/2009, as the Board of Appeal wrongfully hold that misappropriation had to be excluded since the trademarks at issue were not identical. Violation of Articles 53(1)(c) and 8(4) of Council Regulation (EC) No 207/2009, as the Board of Appeal wrongly excluded passing off and wrongly stated that the file does not provide evidence about the way the product was presented on the market.

**Action brought on 15 December 2010 —
Quimitécnica.com and de Mello v Commission**

(Case T-564/10)

(2011/C 55/46)

Language of the case: Portuguese

Parties

Applicants: Quimitécnica.com — Comércio e Indústria Química, SA (Lordelo, Portugal) and José de Mello — Sociedade Gestora de Participações Sociais, SA (Lisbon, Portugal) (represented by: J. Calheiros, lawyer)

Defendant: European Commission

Form of order sought

The applicants claim that the General Court should

— partially annul, in accordance with Article 264 of the TFEU, the Commission Decision, adopted by its accounting officer by letter dated 8 October 2010, with the reference BUDG/C5/MG s737983, in so far as it requires the financial guarantee to be provided by a bank with long-term 'AA' rating;

— order the Commission to pay the costs.

Pleas in law and main arguments

In support of their application, the applicants allege:

1. First plea, regarding breach of essential formalities — failure to state reasons for the Decision adopted on 8 October 2010.

Based on this plea, the applicants claim that:

— Under Article 296 of the TFEU all acts, including decisions, must state the reasons on which they are based. The Decision adopted on 8 October 2010 does not state any reasons for the rating requirement of the bank issuing the guarantee.

— Considering the level of rating required, there should be such a statement of reasons. The requirement to state reasons is even greater in this case, where a discretionary, and not a circumscribed, power is being exercised.

— Furthermore, the Decision does not invoke any Community rule (even internal) on which such a requirement could be based. As the Decision lacks a statement of reasons it should, in this part, be annulled.

2. Second plea, regarding breach of the Treaty — the principle of proportionality.

Based on this plea, the applicants claim that:

— Under Article 85 of Regulation (EC, EURATOM) No 2342/2002, to allow additional time for payment, 'in order to safeguard the Community's rights, the debtor [is to lodge] a financial guarantee covering the debt outstanding in both the principal sum and the interest, which is accepted by the institution's accounting officer.' The interests that that guarantee is intended to protect, therefore, are the Community's rights, in this case the right to receive the amounts due.

— A first demand guarantee, along the lines of the model required by the Commission, issued by a credit institution, constitutes a proper and appropriate means of ensuring payment of the amounts due. Thus, the whole Portuguese legal system (and, in general, that of the other countries of the European Union) accepts the provision of a bank guarantee for the most diverse purposes, including to suspend the execution of judicial decisions.

— In the present case, the guarantee proposed by the applicants (and not accepted by the Commission) would be issued by the Banco Comercial Português, S.A., a credit institution having its head office in the European Union, subject to the rules of supervision and consolidation defined by the Community institutions. Thus, there seems to be no justification, in order to defend the Community's rights, for ruling out the possibility of the guarantee being issued by the said bank and requiring it to be issued by a bank with long-term 'AA' rating.

— Furthermore, the public is aware of the current situation in which the ratings of Portuguese banks have been recently affected by the change in the rating of the Portuguese Republic. Thus, at the moment, there is no bank based in Portugal that fulfils the rating criteria (long-term 'AA') required in the Commission Decision.

— Accordingly, the Commission Decision therefore does not fulfil the criterion of necessity (which constitutes an important dimension of the principle of proportionality) since, of the possible measures, the Commission opted for the one that, in the current circumstances, is most prejudicial to the interests of the applicants.

— Thus, there is a clear lack of proportionality between the requirement imposed by the Commission (guarantee issued by a European bank with long-term 'AA' rating) and the objective sought (protection of the right of the Commission to receipt of the amounts), so that the Decision of the Commission should, in this part, be annulled.

Action brought on 21 December 2010 — ThyssenKrupp Steel Europe v OHIM (Highprotect)

(Case T-565/10)

(2011/C 55/47)

Language in which the application was lodged: German

Parties

Applicant: ThyssenKrupp Steel Europe AG (Duisburg, Germany) (represented by U. Ulrich, lawyer)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Form of order sought

The applicant claims that the Court should:

— Annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 30 September 2010 in Case R 1038/2010-1;

— Order OHIM to pay the costs of the proceedings, including those incurred in the appeal proceedings.

Pleas in law and main arguments

Community trade mark concerned: Word mark 'Highprotect' for goods in Class 6.

Decision of the Examiner: Registration refused.

Decision of the Board of Appeal: Dismissal of the appeal.

Pleas in law: Infringement of Article 7(1)(b) and (c) of Regulation No 207/2009, ⁽¹⁾ since the trade mark concerned is not devoid of distinctive character and is not descriptive.

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