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

Other party to the proceedings before the Board of Appeal: O2 Holdings Ltd (Slough, United Kingdom)

Form of order sought

— Annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 10 January 2011 in Case R 246/2009-4;

— Order the defendant and, if appropriate, the other party to the proceedings to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: O2 Holdings Ltd.

Community trade mark concerned: Word mark 'can do' for goods and services in Classes 9, 16, 25, 35, 36, 38 and 43.

Proprietor of the mark or sign cited in the opposition proceedings: The applicant.

Mark or sign cited in opposition: National figurative mark, including the word element 'CANDA', for goods in Class 25.

Decision of the Opposition Division: Rejection of the opposition.

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

Pleas in law: Infringement of Article 15 and Article 42(2) of Regulation (EC) No 207/2009 ([1]) and of Rule 22 of Regulation (EC) No 2868/95, ([2]) in that the Board of Appeal applied criteria which are too narrow in assessing the proof of use sufficient to maintain the right and failed to have sufficient regard to the particular distribution situation in the applicant's undertaking. Further, infringement of Article 76(2) of Regulation (EC) No 207/2009, in that the Board of Appeal wrongly failed to have regard to various documents submitted as proof of use sufficient to maintain the right in the opposing mark. Finally, infringement of Article 75(2) of Regulation (EC) No 207/2009, in that the Board of Appeal did not inform the applicant that it regarded the proof of use submitted as insufficient and did not provide the applicant with an opportunity of submitting further proof in oral proceedings.

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

([2]) Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 2009 L 303, p. 1).

Action brought on 18 March 2011 — Modelo Continente Hipermercados v Commission

(Case T-174/11)

(2011/C 139/53)

Language of the case: Spanish

Parties

Applicant: Modelo Continente Hipermercados, SA (Alcorcón, Spain) (represented by: J.Buendía Sierra, E. Abad Valdenebro, M. Muñoz de Juan, R. Calvo Salinero, lawyers)

Defendant: European Commission

Form of order sought

— Admit and uphold the pleas in support of annulment put forward in this application and accordingly annul Article 1(1) [of the contested decision], in so far as it declares that Article 12(5) of the Texto Refundido de la Ley del Impuesto sobre Sociedades ('TRLIS') (Consolidated version of the Law on Corporation Tax) contains elements of State aid;

— in the alternative, annul Article 1(1) of the contested decision in so far as it declares that Article 12(5) TRLIS contains elements of State aid when it applies to acquisitions of shareholdings entailing acquisition of control;

— in the further alternative, annul the contested decision on account of a procedural irregularity;

— order the Commission to pay the costs.

Pleas in law and main arguments

This action is brought against the Commission's Decision of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions (C 45/07, ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48).

In support of its action, the applicant puts forward three pleas in law.

1. First plea, alleging that the contested decision infringes Article 107(1) TFEU in finding the measure to constitute State aid

   — The Commission has not shown that the tax measure at issue favours 'certain undertakings or the production of certain goods'. The Commission merely assumes that the measure is selective because it applies only to the acquisition of shareholdings in foreign companies and not in domestic companies. The applicant submits that such reasoning is erroneous and circular. The fact that the application of the measure examined (as for any other tax rule) depends on the fulfilment of certain objective requirements does not render it, in law or in fact, a selective measure. The Commission's reasoning would result in every tax rule being considered to be *prima facie* selective.

— In the second place, the *prima facie* different treatment under Article 12(5) TRLIS, far from constituting a selective advantage, serves to place all transactions for the acquisitions of shares on an equal tax footing, whether they be national or foreign: owing to the impossibility of cross-border mergers, the amortisation of goodwill can be effected only in the national sphere, and therefore the tax system includes rules which allow that. In that regard, Article 12(5) TRLIS does no more than extend such a possibility to the purchase of assets in foreign companies, a transaction which represents the closest functional equivalent to domestic mergers and is thus integral to the scheme and broad logic of the Spanish system.

— In the alternative, the Commission's decision is disproportionate given that its application to cases in which control of foreign companies is taken should at least be equivalent to cases of domestic mergers and therefore justified by the scheme and broad logic of the Spanish system.

2. Second plea in law, alleging a procedural irregularity since the procedure applicable to existing aid was not complied with

— The contested decision rejects the arguments concerning the fact that the measure plays an equivalent role, since it does not accept that intra-EU cross-border mergers are in practice impossible. In the Commission's view, the subsequent adoption of EU Directives in this sphere, all of them later than the entry into force of the measure at issue, removed all barriers or obstacles which may have existed. The applicant submits in that regard that, if the Commission's argument were accepted and if the EU Directives had actually removed the obstacles to cross-border mergers, which is not the case, there would in any event be existing aid. The procedure for reviewing existing aid differs significantly from the procedure followed in this case and thus a fundamental procedural irregularity has been committed.

3. Third plea in law, alleging infringement of Article 107(1) TFEU resulting from an error of law in determining the beneficiary of the measure

— Even if the view is taken that Article 12(5) TRLIS contains elements of State aid, the Commission should have carried out a comprehensive economic analysis in order to determine who the beneficiaries of any possible aid were. The applicant submits that, in any event, the beneficiaries of the aid (in the form of an inflated purchase price for the shares) are those selling the shares and not, as the Commission alleges, Spanish firms which have applied that measure.

Order of the General Court of 14 March 2011 — Global Digital Disc v Commission

(Case T-259/08) [1]

(2011/C 139/54)

Language of the case: German

The President of the Second Chamber has ordered that the case be removed from the register.

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[1] OJ C 272, 25.10.2008.