

- Article 5(b) and (d) of Directive 2009/147, as amended by Directive 2013/17, by failing to guarantee the protection of the species of birds referred to in Article 1 of that directive, including, in particular, the pygmy owl (*Glaucidium passerinum*), the boreal owl (*Aegolius funereus*), the white-backed woodpecker (*Dendrocopos leucotos*) and the three-toed woodpecker (*Picoides tridactylus*), that is to say, by failing to ensure that they will not be killed or disturbed during the period of breeding and rearing and that their nests or eggs will not be deliberately destroyed, damaged or removed in the Białowieża Forest District;

2. Orders the Republic of Poland to pay the costs.

⁽¹⁾ OJ C 338, 9.10.2017.

Appeal brought on 15 February 2018 by Red Bull GmbH against the judgment of the General Court (Second Chamber) delivered on 30 November 2017 in joined cases T-101/15 and T-102/15: Red Bull GmbH v European Union Intellectual Property Office

(Case C-124/18 P)

(2018/C 200/27)

Language of the case: English

Parties

Appellant: Red Bull GmbH (represented by: A. Renck, Rechtsanwalt, S. Petivlasova, abogada)

Other parties to the proceedings: European Union Intellectual Property Office, Marques, Optimum Mark sp. z o.o.

Form of order sought

The appellant claims that the Court should:

- set aside the contested decision of 30 November 2017 in joined cases T-101/15 and T-102/15,
- annul the decisions of the First Board of Appeal of the defendant of 2 December 2014 in Cases R 2037/2013-1 and R 2036/2013-1, and
- order that the costs of the proceedings be borne by the defendant.

Pleas in law and main arguments

In its first plea, the appellant submits that the General Court's (GC) interpretation of Article 7(1)(a) and 4 CTMR ⁽¹⁾, in the context of colour combination marks, infringed the principles of equal treatment and proportionality. The GC improperly imposed a new and disproportionate requirement for the graphic representation of colour combination marks based on the erroneous premise that such marks are intrinsically less precise in nature. First, this premise is without any legal basis and does not correspond to any of the objects set forth in the legislation, and has the effect that it unlawfully and disproportionately discriminates against colour combination marks vis-à-vis all other types of trade marks, such as single colour marks, word marks, design marks and others. Second, the criteria set out in the contested decision goes against the nature of colour combination marks per se, which, as clearly accepted by this Court in *Libertel* ⁽²⁾, are not spatially delimited. The contested decision effectively limits colour combination marks per se to figurative, position or pattern marks in colour. Third, the contested decision potentially renders more than 85 % of colour combination marks of the type of the contested marks on the defendant's register invalid.

In its second plea, the appellant submits that the GC infringed Article 7(1)(a) and 4 CTMR due to an incorrect and impermissible interpretation of the *Heidelberger Bauchemie* ⁽³⁾ judgment in that it imposed three cumulative requirements for the graphic representation of colour combination marks, namely (i) the precise shades of the colours in question, (ii) the ratios of the colours in question and (iii) the spatial arrangement of the colours. These requirements were not essential to that decision, and have a disproportionately harsh effect solely on the category or class of marks or signs consisting of colour combination or colour, per se, signs. Moreover, the third, and newly imposed, cumulative requirement is said to be justified by the alleged 'limited intrinsic ability of colours to convey precise meaning'. However, the latter was until now reviewed under the distinctiveness limb of the registerability test of a mark and not under the graphic representation requirement, which means that from the outset it results in the invalidity of a registration without an option to show acquired distinctiveness or otherwise cure it. The contested decision also infringes Article 4 CTMR by requiring an 'explicit' description for the type of marks at issue and by unlawfully reducing the effective definition of such marks only to those having one spatial (in other words figurative) arrangement corresponding to the supposed actual subsequent use of the mark.

In its third plea, the appellant submits that the GC infringed the principle of the protection of legitimate expectation by failing to appreciate and take into account in its decision that the first contested mark was filed prior to the *Heidelberger Bauchemie* judgment and thus disregarding the potential application of the principles set out by the Court's rulings in *Lambretta* ⁽⁴⁾ and *Cactus* ⁽⁵⁾. It also infringed this principle by not carrying out an overall assessment of authorised and reliable sources, applicable rules and provisions, case law of the EU and the defendant's Guidelines to determine if all the relevant circumstances of the present case could cumulatively give rise to the finding that the defendant gave the appellant precise, unconditional and consistent assurances, which the appellant relied upon by complying with their terms, which led to the entertaining of a valid legitimate expectation on the appellant's part.

In its fourth plea, the appellant submits that the GC infringed the principle of proportionality by not considering the disproportionality of the cancellation of both contested marks in the exceptional circumstances of the present case. In particular, the GC failed to consider that the objectives of precision and clarity, as well as legal certainty, could legitimately be met if the appellant was invited and permitted to clarify the description of both marks so that they remained on the register, rather than cancelling both registrations.

In its fifth plea, the appellant submits that the GC breached its rules of procedure by incorrectly applying Article 134(1) of the rules and ordering the appellant to pay the costs of the proceedings. The exceptional circumstances of the present case and the principle of equity require, according to Article 135(1) of the rules of procedure, that the appellant should not be ordered to bear the costs of the proceedings (and that the costs of the proceedings be borne by the defendant).

⁽¹⁾ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017, L 154, p. 1).

⁽²⁾ Judgment of 6 May 2003, *Libertel*, C-104/01, EU:C:2003:244.

⁽³⁾ Judgment of 24 June 2004, *Heidelberger Bauchemie*, C-49/02, EU:C:2004:384.

⁽⁴⁾ Judgment of 16 February 2017, *Brandconcern BV v. EUIPO and Scooters India (Lambretta)*, C-577/14 P, EU:C:2017:122.

⁽⁵⁾ Judgment of 11 October 2017, *EUIPO v. Cactus SA (Cactus)*, C-501/15 P, EU:C:2017:750.

Action brought on 22 March 2018 — European Commission v Kingdom of Spain

(Case C-207/18)

(2018/C 200/28)

Language of the case: Spanish

Parties

Applicant: European Commission (represented by: É. Gippini Fournier, G. von Rintelen and J. Samnadda, acting as Agents)