Appeal brought on 12 December 2008 by Agrar-Invest-Tatschl GmbH against the judgment delivered by the Court of First Instance (Eighth Chamber) on 8 October 2008 in Case T-51/07 Agrar-Invest-Tatschl GmbH v Commission of the European Communities

(Case C-552/08 P)

(2009/C 55/16)

Language of the case: German

Parties

Appellant: Agrar-Invest-Tatschl GmbH (represented by: U. Schrömbges and O. Wenzlaff, Rechtsanwälte)

Other party to the proceedings: Commission of the European Communities

Form of order sought

— set aside the contested judgment delivered by the Court of First Instance of the European Communities on 8 October 2008 in Case T-51/07 *Agrar-Invest-Tatschl GmbH* v *Commission*;

— in accordance with the first claim set out in the application of 22 February 2007 in Case T-51/07 before the Court of First Instance of the European Communities, annul Article 1(2) and Article 1(3) of Commission Decision C(2006) 5789 final (REC 05/05) of 4 December 2006.

Pleas in law and main arguments

This appeal contests the judgment of the Court of First Instance which dismissed the appellant's action challenging Commission Decision C(2006) 5789 final of 4 December 2006 on the subsequent entering in the accounts of import duties owed by the appellant for the import of sugar from Croatia.

The Court of First Instance's basis for dismissing the appellant's action was the absence of good faith, one of the four requirements that must all be met if import duties are not to be subsequently entered in the accounts. The Court stated that, under the fifth subparagraph of Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ('the Customs Code'), the person liable cannot plead his good faith if the European Commission, as in the case in point, has published in the Official Journal a notice to importers stating that there are grounds for doubt concerning the proper application of the preferential arrangements by the beneficiary country. Nor, according to the Court of First Instance, is it material that the appellant acted in good faith with regard to the subsequent confirmation of the authenticity and accuracy of the movement certificates, since it in any event did not act in good faith when the imports took place.

The appellant bases its appeal on an incorrect interpretation by the Court of First Instance of the fifth subparagraph of Article 220(2)(b) of the Customs Code. It submits that the Court's interpretation is wrong in law in that, according to the Court, the Commission notice published in the Official Journal concerning doubt as to the proper application of the preferential arrangements by the beneficiary country has the effect of excluding good faith even where, as in the present case, the relevant certificates issued in connection with the securing of preferential treatment were subject after publication of the warning notice to a verification procedure that confirmed their authenticity and accuracy.

The Court of First Instance fails to recognise that the effect of a warning notice that is laid down in the fifth subparagraph of Article 220(2)(b) of the Customs Code is restricted by the principle under which decisions of third-country customs authorities within the framework of a system of administrative cooperation should be recognised. The provision of the Customs Code at issue involves a legal fiction of bad faith which is rebuttable, indeed — as in the present case — precisely by carrying out a verification procedure. The appellant's good faith is therefore restored by the subsequent confirmation of the authenticity and accuracy of the movement certificates, that is to say, the appellant could rely on the fact that the grounds for doubt on the basis of which the Commission's warning notice was published were removed in the course of the verification procedure. The appellant's good faith is therefore dependent not on proper issue of the movement certificates at issue by the Croatian authorities but on the proper verification of those certificates by the customs authorities on the basis of the doubts, disclosed by the Commission's warning notice, as to whether they were properly issued.

Reference for a preliminary ruling from the Hoge Raad der Nederlanden lodged on 17 December 2008 — Portakabin Limited and Portakabin BV v Primakabin BV

(Case C-558/08)

(2009/C 55/17)

Language of the case: Dutch

Referring court

Hoge Raad der Nederlanden

Parties to the main proceedings

Appellants in cassation: Portakabin Limited and Portakabin BV

Respondent in cassation: Primakabin BV

Questions referred

1 (a) Where a trader in certain goods or services ('the advertiser') avails himself of the possibility of submitting to the provider of an internet search engine an adword [when advertising via the internet, it is possible to pay to use 'adwords' on search engines such as Google. When such an adword is keyed into the search engine, a reference to the advertiser's website appears either in the list of webpages found, or as an advertisement on the right-hand side of the page showing the results of the search, under the heading 'Sponsored links'] which is identical to a trade mark registered by another person ('the proprietor') in respect of similar goods or services, and the adword submitted — without this being visible to the search engine user — results in the internet user who enters that word finding a reference to the advertiser's website in the search engine provider's list of search results, is the advertiser 'using' the registered trade mark within the meaning of Article 5(1)(a) of Directive 89/104/EEC ([1])?

(b) Does it make a difference in that regard whether the reference is displayed

— in the ordinary list of webpages found; or

— in an advertising section identified as such?

(c) Does it make a difference in that regard

— whether, even within the reference notification on the search engine provider's webpage, the advertiser is actually offering goods or services that are identical to the goods or services covered by the registered trade mark; or

— whether the advertiser is in fact offering goods or services which are identical to the goods or services covered by the registered trade mark on a webpage of his own, which internet users (as referred to in Question 1(a)) can access via a hyperlink in the reference on the search engine provider's webpage?

2. If and in so far as the answer to Question 1 is in the affirmative, can Article 6 of Directive 89/104, in particular Article 6(1)(b) and (c), result in the proprietor being precluded from prohibiting the use described in Question 1 and, if so, under what circumstances?

3. In so far as the answer to Question 1 is in the affirmative, is Article 7 of Directive 89/104 applicable where an offer by the advertiser, as indicated in Question 1, relates to goods which have been marketed in the European Community under the proprietor's trade mark referred to in Question 1 or with his permission?

4. Do the answers to the foregoing questions apply also in the case of adwords, as referred to in Question 1, submitted by the advertiser, in which the trade mark is deliberately reproduced with minor spelling mistakes, making searches by the internet-using public more effective, assuming that the trade mark is reproduced correctly on the advertiser's website?

5. If and in so far as the answers to the foregoing questions mean that the trade mark is not being used within the meaning of Article 5(1) of Directive 89/104, are the Member States entitled, in relation to the use of adwords such as those at issue in this case, simply to grant protection — under Article 5(5) of that directive, in accordance with provisions in force in those States relating to the protection against the use of a sign other than for the purposes of distinguishing goods or services — against use of that sign which, in the opinion of the courts of those Member States, without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark, or do Community-law parameters associated with the answers to the foregoing questions apply to national courts?

([1]) First Council Directive of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

Action brought on 17 December 2008 — Commission of the European Communities v Kingdom of Spain

(Case C-560/08)

(2009/C 55/18)

Language of the case: Spanish

Parties

Applicant: Commission of the European Communities (represented by: S. Pardo Quintillán, D. Recchia and J.-B. Laignelot, acting as Agents)

Defendant: Kingdom of Spain

Form of order sought

— declare that the Kingdom of Spain has failed to fulfil its obligations,

— in accordance with Article 2(1), Article 3(1) and (2) as the case may be, Article 4 and Article 5 of Council Directive 85/337/EEC ([1]) of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment in relation to separate projects for widening and/or upgrading the M-501 road corresponding to sections 1, 2 and 4; in accordance with Article 6(2) and Article 8 of Council Directive 85/337/EEC in relation to separate projects for widening and/or upgrading the M-501 road corresponding to sections 2 and 4; and in accordance with Article 9 of Directive 85/337/EEC in relation to separate projects for widening and/or upgrading the M-501 road corresponding to sections 1, 2 and 4;