

Finally, by its third ground of appeal, A2A submits, in the further alternative, that the judgment should be set aside on the ground that it infringes Community law and Community law principles, in so far as it finds that the order for recovery in the Decision is lawful. According to the appellant, the judgment should be set aside in that, in contrast with previous decisions of the Community judicature, it upholds the lawfulness of the general order for recovery in the Decision and, essentially, finds that the national authorities do not have any discretion whatsoever in the matter.

⁽¹⁾ Commission Decision 2003/193/EC of 5 June 2002 on State aid granted by Italy in the form of tax incentives and subsidised loans to public utilities with a majority public capital holding (OJ 2003 L 77, p. 21).

Reference for a preliminary ruling from High Court of Justice (England and Wales), Chancery Division, made on 12 August 2009 — L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Limited v eBay International AG, eBay Europe SARL, eBay (UK) Limited, Stephan Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi

(Case C-324/09)

(2009/C 267/71)

Language of the case: English

Referring court

High Court of Justice (England and Wales), Chancery Division

Parties to the main proceedings

Applicants: L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Limited

Defendants: eBay International AG, eBay Europe SARL, eBay (UK) Limited, Stephan Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi

Questions referred

1. Where perfume and cosmetic testers (i.e. samples for use in demonstrating products to consumers in retail outlets) and dramming bottles (i.e. containers from which small aliquots can be taken for supply to consumers as free samples) which are not intended for sale to consumers (and are often marked 'not for sale' or 'not for individual sale') are supplied without charge to the trade mark proprietor's authorised distributors, are such goods 'put on the market' within the meaning of Article 7(1) of First Council Directive 89/104/EEC ⁽¹⁾ of 21 December 1988 ('the Trade Marks Directive') and Article 13(1) of Council Regulation 40/94 ⁽²⁾ of 20 December 1993 on the Community trade mark ('the CTM Regulation')?
 2. Where the boxes (or other outer packaging) have been removed from perfumes and cosmetics without the consent of the trade mark proprietor, does this constitute a 'legitimate reason' for the trade mark proprietor to oppose further commercialization of the unboxed products within the meaning of Article 7(2) of the Trade Mark Directive and Article 13(2) of the CTM Regulation?
 3. Does it make a difference to the answer to question 2 above if:
 - (a) as a result of the removal of the boxes (or other outer packaging), the unboxed products do not bear the information required by Article 6(1) of Council Directive 76/768/EEC ⁽³⁾ of 27 July 1976 ('the Cosmetics Products Directive'), and in particular do not bear a list of ingredients or a 'best before date'?
 - (b) as a result of the absence of such information, the offer for sale or sale of the unboxed products constitutes a criminal offence according to the law of the member state of the Community in which they are offered for sale or sold by third parties?
 4. Does it make a difference to the answer to question 2 above if the further commercialization damages, or is likely to damage, the image of the goods and hence the reputation of the trademark? If so, is that effect to be presumed, or is it required to be proved by the trade mark proprietor?
 5. Where a trader which operates an online marketplace purchases the use of a sign which is identical to a registered trade mark as a keyword from a search engine operator so that the sign is displayed to a user by the search engine in a sponsored link to the website of the operator of the online marketplace, does the display of the sign in the sponsored link constitute 'use' of the sign within the meaning of Article 5(l)(a) of the Trade Marks Directive and Article 9(l)(a) of the CTM Regulation?
 6. Where clicking on the sponsored link referred to in question 5 above leads the user directly to advertisements or offers for sale of goods identical to those for which the trade mark is registered under the sign placed on the website by other parties, some of which infringe the trade mark and some which do not infringe the trade

- mark by virtue of the differing statuses of the respective goods, does that constitute use of the sign by the operator of the online marketplace 'in relation to' the infringing goods within the meaning of 5(l)(a) of the Trade Marks Directive and Article 9(l)(a) of the CTM Regulation?
7. Where the goods advertised and offered for sale on the website referred to in question 6 above include goods which have not been put on the market within the EEA by or with the consent of the trade mark proprietor, is it sufficient for such use to fall within the scope of Article 5(l)(a) of the Trade Marks Directive and Article 9(l)(a) of the CTM Regulation and outside Article 7(1) of the Trade Mark Directive and Article 13(1) of the CTM Regulation that the advertisement or offer for sale is targeted at consumers in the territory covered by the trade mark or must the trade mark proprietor show that the advertisement or offer for sale necessarily entails putting the goods in question on the market within the territory covered by the trade mark?
8. Does it make any difference to the answers to questions 5-7 above if the use complained of by the trade mark proprietor consists of the display of the sign on the website of the operator of the online marketplace itself rather than in a sponsored link?
9. If it is sufficient for such use to fall within the scope of Article 5(l)(a) of the Trade Marks Directive and Article 9(l)(a) of the CTM Regulation and outside Article 7(1) of the Trade Mark Directive and Article 13(1) of the CTM Regulation that the advertisement or offer for sale is targeted at consumers in the territory covered by the trade mark:
- (a) does such use consist of or include 'the storage of information provided by a recipient of the service' within the meaning of Article 14(1) of the E-Commerce Directive?
- (b) if the use does not consist exclusively of activities falling within the scope of Article 14(1) of the E-Commerce Directive, but includes such activities, is the operator of the online marketplace exempted from liability to the extent that the use consists of such activities and if so may damages or other financial remedies be granted in respect of such use to the extent that it is not exempted from liability?
- (c) in circumstances where the operator of the online marketplace has knowledge that goods have been advertised, offered for sale and sold on its website in infringement of registered trade marks, and that infringements of such registered trade marks are likely to continue to occur through the advertisement, offer for sale and sale of the same or similar goods by the same or different users of the website, does this constitute 'actual knowledge' or 'awareness' within the meaning of Article 14(1) of the E-Commerce Directive?
10. Where the services of an intermediary such as an operator of a website have been used by a third party to infringe a registered trade mark, does Article 11 of European Parliament and Council Directive 2004/48 (*) of 29 April 2004 on the enforcement of intellectual property rights ('the Enforcement Directive') require Member States to ensure that the trade mark proprietor can obtain an injunction against the intermediary to prevent further infringements of the said trade mark, as opposed to continuation of that specific act of infringement, and if so what is the scope of the injunction that shall be made available?

(1) First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks
OJ L 40, p. 1

(2) OJ L 11, p. 1

(3) Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products
OJ L 262, p. 169

(4) OJ L 157, p. 45

Appeal brought on 17 August 2009 by Iride SpA, formerly AMGA SpA, against the judgment of the Court of First Instance (Eighth Chamber, extended Composition) delivered on 11 June 2009 in Case T-300/02 AMGA v Commission

(Case C-329/09 P)

(2009/C 267/72)

Language of the case: Italian

Parties

Appellant: Iride SpA, formerly AMGA SpA (represented by L. Radicati di Brozolo and T. Ubaldi, avvocati)

Other party to the proceedings: Commission of the European Communities

Form of order sought

— setting aside of the judgment in Case T-300/02 for distortion of the evidence in the file and error in the legal conclusions drawn by the Court of First Instance from that evidence in so far as it declares that the contested decision (1) is not of individual concern to Azienda Mediterranea Gas e Acqua S.p.A. (AMGA) and that the action brought by the latter in Case T300/02 is inadmissible;