

Question referred

Are Articles 10(1) and 12(1) of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (Trade Mark Directive) ⁽¹⁾ to be interpreted as meaning that a trade mark is being put to genuine use if it is used for goods (here: alcohol-free drinks) which the proprietor of the trade mark gives, free of charge, to purchasers of his other goods (here: textiles) after conclusion of the purchase contract?

⁽¹⁾ OJ 1989 L 40, p. 1.

Appeal brought on 16 November 2007 by Philip Morris Products SA against the judgment of the Court of First Instance (Second Chamber) delivered on 12 September 2007 in Case T-140/06 Philip Morris Products v OHIM

(Case C-497/07 P)

(2008/C 22/52)

Language of the case: French

Parties

Appellant: Philip Morris Products SA (represented by: T. van Innis and C. S. Moreau, lawyers)

Other party to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

Form of order sought

- Set aside the judgment under appeal;
- Order the Office to pay the costs.

Pleas in law and main arguments

By its appeal, the appellant claims that the Court of First Instance infringed Articles 4 and 7(1)(b) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark ⁽¹⁾. In this respect, it complains, first, that the Court of First Instance based its assessment on a bias against the category of marks in which the mark applied for falls. In finding that consumers are not in the habit of making assumptions about the origin of goods on the basis of their shape or of the shape of their packaging, the Court of First Instance made a factual finding which has no scientific foundation whatsoever and misconstrues the human perception of signs in general, and of shapes in particular.

Second, the appellant complains that the Court of First Instance carried out an incorrect legal analysis of the relevant public's

perception of the mark. That error arises, on the one hand, from the fact that the Court envisaged use of the mark only through its incorporation into a packet of cigarettes, although the shape of packaging for a given product can be perceived by the public in a multitude of other forms, such as graphic or three-dimensional representations of the mark in advertising material. The error of assessment arises, on the other hand, from the fact that the Court of First Instance reduced the concept of a mark to its part which is perceptible by a prospective purchaser at the moment immediately prior to his purchase, whilst the public concerned by a mark is composed of all those who may be faced with it in the course of normal use of the mark, which occurs both during the advertising of the product before it has been purchased and during use or consumption of the product after it has been purchased.

The appellant claims, thirdly and lastly, that the grounds of the judgment under appeal are contradictory.

⁽¹⁾ OJ 1994 L 11, p. 1.

Appeal brought on 16 November 2007 by Aceites del Sur-Coosur S.A. formerly Aceites del Sur S.A against the judgment delivered by the Court of First Instance (First Chamber) on 12 September 2007 in Case T-363/04 Koipe Corporacion S.L. v Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case C-498/07 P)

(2008/C 22/53)

Language of the case: Spanish

Parties

Appellant: Aceites del Sur-Coosur S.A., formerly Aceites del Sur S.A. (represented by: J.-M Otero Lastres, lawyer)

Other parties to the proceedings: Koipe Corporacion S.L and Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Form of order sought

- declare that the appeal against the judgment of the Court of First Instance (First Chamber) of 12 September 2007 in Case T-363/04 for infringement of Community law was lodged in good time and in due form;
- uphold the appeal and, accordingly, set aside the judgment of the Court of First Instance in its entirety in accordance with Article 61 of the Statute of the Court of Justice and Article 113 of the Rules of Procedure;