

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;

- in accordance with Article 6(3) and (4) of Council Directive 92/43/EEC ⁽¹⁾ of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, read in conjunction with Article 7 thereof, with respect to the separate projects for widening and/or upgrading the M-501 road corresponding to sections 1, 2 and 4 of the special protection area for birds ES 0000056 'Encinares del río Alberche y río Cofio';
 - in accordance with Directive 92/43/EEC, interpreted by the judgments of the Court of Justice of 13 January 2005 in Case C-117/03 and 14 September 2006 in Case C-244/05, and the obligations resulting from Article 12(1)(b) and (d) of the directive, with respect to separate projects for widening and/or upgrading the M-501 road corresponding to section 1 as regards the site proposed as a site of Community importance ES 3110005 'Cuenca del río Guadarrama', and sections 2 and 4 regarding the proposed site of Community interest ES 3110007 'Cuenca de los ríos Alberche y Cofio';
- order the Kingdom of Spain to pay the costs.

Pleas in law and main arguments

The action brought by the Commission relates to the projects approved or, as the case may be, implemented by the Spanish authorities with respect to the widening and/or upgrading of the local M-501 road (Community of Madrid). The Commission takes the view that the Kingdom of Spain has failed, with respect to those projects, to fulfil its obligations under Directive 85/337, in its original or amended version, and Directive 92/43, as interpreted by the judgments of the Court of Justice of 13 January 2005 in Case C-117/03 and of 14 September 2006 in Case C-244/05.

⁽¹⁾ OJ 1985 L 175, p. 40.

⁽²⁾ OJ 1992 L 206, p. 7.

Action brought on 19 December 2008 — Commission of the European Communities v Italian Republic

(Case C-565/08)

(2009/C 55/19)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: E. Traversa and L. Prete, acting as Agents)

Defendant: Italian Republic

Forms of order sought

- Declare that the Italian Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC by adopting provisions fixing compulsory ceilings for lawyers' fees;
- Order the Italian Republic to pay the costs.

Pleas in law and main arguments

The capping of the fees that may be charged for the court-based and out-of-court services of lawyers constitutes a restriction on the freedom of establishment within the meaning of Article 43 EC, and also a restriction on the freedom to provide services within the meaning of Article 49 EC. Indeed, a compulsory scale of fee ceilings that must be applied, irrespective of the quality of the service provided, the work required and the costs incurred, may make the Italian market in legal services unattractive for foreign professionals. Lawyers established in other Member States are therefore discouraged from establishing themselves in Italy or providing their services there on a temporary basis.

First, having to adapt to a new (and very complex) fee regime entails additional costs that may make it more difficult to exercise the fundamental freedoms recognised by the Treaty.

Secondly, fee ceilings represent a further restriction on the free movement of legal services in the internal market, since they prevent the quality of the activities carried out by lawyers established in Member States other than Italy from being correctly remunerated; this means that some lawyers, who normally ask for higher fees than those established under the Italian legislation on the basis of the Italian market, are deterred from providing their services in Italy on a temporary basis or from establishing themselves in that State.

Lastly, the rigidity of the Italian fee regime prevents lawyers (including those established abroad) from making special offers in specific situations and/or to specific clients: for example, a package of given legal services for a fixed fee, or a number of legal services provided in several Member States at a common rate. The Italian legislation may therefore lead the situation of lawyers established abroad to be less competitive since it deprives them of an effective means of penetrating the Italian legal market.

In addition, the disputed measure appears neither suitable for attaining the general interest objectives referred to by the Italian authorities, nor the least restrictive means of achieving those objectives. In particular, the disputed measure does not appear to be a suitable means of ensuring that the less affluent have access to justice, or that the recipients of legal services are protected, or for ensuring the proper administration of justice. Nor does the measure appear proportionate, since there are other measures which appear to be appreciably less restrictive for lawyers established abroad, and equally (if not more) suitable for achieving the protection objectives relied on by the Italian authorities.