

Reference for a preliminary ruling from the College van Beroep voor het bedrijfsleven lodged on 16 November 2009 — 1. IMC Securities BV, 2. Stichting Autoriteit Financiële Markten

(Case C-445/09)

(2010/C 24/53)

Language of the case: Dutch

Referring court

College van Beroep voor het bedrijfsleven

Parties to the main proceedings

Applicants: 1. IMC Securities BV 2. Stichting Autoriteit Financiële Markten

Question referred

Must the second indent of Article 1(2)(a) of the Market Abuse Directive⁽¹⁾ be interpreted as meaning that the bringing about of price changes in a time span such as that at issue through the commission of a combination of acts with a financial instrument, namely transactions and orders to trade as described ..., should be regarded as the 'securing' of such an instrument at an abnormal or artificial level?

⁽¹⁾ Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16)

Reference for a preliminary ruling from the Rechtbank van eerste aanleg te Antwerpen (Belgium), lodged on 17 November 2009 — Koninklijke Philips Electronics NV v Lucheng Meijing Industrial Company Ltd and Others

(Case C-446/09)

(2010/C 24/54)

Language of the case: Dutch

Referring court

Rechtbank van eerste aanleg te Antwerpen

Parties to the main proceedings

Claimant: Koninklijke Philips Electronics NV

Defendants: Lucheng Meijing Industrial Company Ltd and Others

Question referred

Does Article 6(2)(b) of Regulation (EC) No 3295/94⁽¹⁾ of 22 December 1994 (the old Customs Regulation) constitute a uniform rule of Community law which must be taken into account by the court of the Member State which, in accordance with Article 7 of the Regulation, has been approached by the holder of an intellectual-property right, and does that rule imply that, in making its decision, the court may not take into account the temporary storage status/transit status and must apply the fiction that the goods were manufactured in that same Member State, and must then decide, by applying the law of that Member State, whether those goods infringe the intellectual-property right in question?

⁽¹⁾ Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods (OJ 1994 L 341, p. 8).

Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany), lodged on 18 November 2009 — Reinhard Prigge, Michael Fromm and Volker Lambach v Deutsche Lufthansa AG

(Case C-447/09)

(2010/C 24/55)

Language of the case: German

Referring court

Bundesarbeitsgericht

Parties to the main proceedings

Appellants: Reinhard Prigge, Michael Fromm and Volker Lambach

Respondent: Deutsche Lufthansa AG

Question referred

Must Article 2(5), Article 4(1) and/or Article 6(1), first sentence, of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation⁽¹⁾ and/or the general Community-law principle

which prohibits discrimination on grounds of age be interpreted as precluding rules of national law which recognise an age-limit of 60 for pilots established by collective agreement for the purposes of ensuring air safety?

(¹) OJ 2000 L 303, p. 16.

Appeal brought on 18 November 2009 by Royal Appliance International GmbH against the judgment of the Court of First Instance (First Chamber) delivered on 15 September 2009 in Case T-446/07 Royal Appliance International GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs); the other party to the proceedings being BSH Bosch and Siemens Hausgeräte GmbH

(Case C-448/09 P)

(2010/C 24/56)

Language of the case: German

Parties

Appellant: Royal Appliance International GmbH (represented by: K.-J. Michaeli, Rechtsanwalt, M. Schork, Rechtsanwältin)

Other parties to the proceedings:

- Office for Harmonisation in the Internal Market (Trade Marks and Designs)
- BSH Bosch and Siemens Hausgeräte GmbH

Form of order sought

- Set aside the judgment of the Court of First Instance of 15 September 2009 in Case T-446/07;
- Annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market of 3 October 2007 in Case R 572/2006-4;
- Order the Office for Harmonisation in the Internal Market and BSH Bosch and Siemens Hausgeräte GmbH to bear their own costs and to pay the appellant's costs both at first instance and in the appeal proceedings.

Pleas in law and main arguments

The appeal is brought against the judgment of the Court of First Instance by which the decision of the Board of Appeal of the Office for Harmonisation in the Internal Market of 3 October 2007 was confirmed. The Court of First Instance and the Board

of Appeal are of the opinion that there is a likelihood of confusion between the German mark cited in opposition 'sensixx' ('the opposing mark') and the mark applied for 'Centrixx' in relation to the product 'vacuum cleaner'. The day after the Board of Appeal's decision and before the Court hearing began, the opposing mark was revoked with final and binding effect with regard to the product 'vacuum cleaner'. The Court of First Instance rejected the request which was initially submitted to stay proceedings and treated the revocation of the opposing mark as legally irrelevant, since it is not part of the factual or legal context of the dispute which was before the Board of Appeal, and was therefore also not to be taken into account by the Court of First Instance.

The appellant is of the opinion that the Court of First Instance disregarded the legal conditions applicable to the stay of proceedings under Article 77 of its Rules of Procedure, by not taking the revocation of the opposing mark into account. The change in the factual basis which is decisive for the dispute in this case concerns the validity of the opposing mark, over which the appellant has no influence. That change defeats the ground of opposition to the trade mark registration and there was an obligation to take it into account. That is clear from the appellant's right to property, which comprises the registration of the trade mark. As a result of its refusal to take into account the pending decision of the Oberlandesgericht (Higher Regional Court) Munich with regard to the opposing mark, the Court of First Instance assessed the similarity of the lists of goods in relation to two marks, one of which had been almost completely revoked at the time of the decision. The Court thereby infringed Article 45 of the Community trade mark Regulation because there were no longer any third party rights in existence at the time of the decision of the Court of First Instance, since the revocation of the opposing mark was already largely established. The Courts of the European Communities have themselves allowed exceptions to the prohibition on the taking into account of new facts, by deciding that decisions of national courts can also be taken into account where they are brought to the attention of the court first in the proceedings before it. That must in particular be the case where the appellant has no influence on the timing of the decision of the Board of Appeal which, as in this case, was taken shortly before the expiry of the period during which there is no obligation to put the mark to use, since the timing of that decision falls within the discretion of the Board of Appeal alone. A decision on the registration of the mark taken on such an arbitrary basis is counter to the objective of Community trade mark law.

The appellant complains in addition about the erroneous application of Article 8(1)(b) of the Community trade mark Regulation. The assessment and reasoning of the Court of First Instance did not sufficiently comply with the required standard. It failed namely to take into account facts relevant to the goods at issue in the present case and their consequences for the consumer and thus used incorrect criteria of assessment regarding the degree of attention and the similarity of the goods. The Court of First Instance did not give equal weight to common features of and differences between the marks when assessing the similarities between them, and in particular, when assessing visual similarity, relied on irrelevant common features. It did not take into account the pronunciation by the relevant German public of the mark applied for and only reinforced the contradictory nature — complained of in the application — of the assessment of phonetic and conceptual similarity, by