Fourth, by its reference to alternative regulatory measures, the Court erred in its interpretation of the concepts of the internal market and the effect on trading conditions in Article 107(3) TFEU, in that it failed to recognise that regulatory measures also affect competition. The broad assumption that any regulatory measure would have a lesser effect on such legal interests than aid means that an unlawfully stringent standard is imposed.

Fifth, the Federal Republic of Germany objects to the fact that the Court adopted the principle of technological neutrality developed by the Commission without recognising that its effect is to dismiss the purpose of the measure pursued by the German authorities in this case. Technological neutrality is an appropriate criterion against which to review compatibility only if the switch-over to digital broadcasting is, by itself, the purpose of the support. In the case of support for the switch-over to DVB-T in Berlin-Brandenburg, however, it was that platform specifically which, for various reasons, was intended to be supported, no support being required for cable or satellite. Member States have a degree of discretion in setting the legitimate objective of aid measures.

Appeal brought on 23 December 2009 by BCS SpA against the judgment of the Court of First Instance (Eighth Chamber) delivered on 28 October 2009 in Case T-137/08: BCS SpA v Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case C-553/09 P)

(2010/C 51/42)

Language of the case: English

Parties

Appellant: BCS SpA (represented by: M. Franzosi, V. Jandoli, F. Santonocito, avvocati)

Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs), Deere & Company

Form of order sought

The appellant claims that the Court should:

— annul the contested decisions;

— declare the nullity of CTM '289;

— order the counterpart to pay the costs.

Pleas in law and main arguments

The appellant submits that the contested judgment is vitiated by following errors in law:

I. the Court of First Instance wrongfully interpreted Article 7 (1) (b) and 7 (3) CTMR ([1]), by claiming that the acquisition of distinctive character in a sign does not depend on its past and present exclusive use (moreover, said use has not been proven; rather, in the same decision, it is held to be denied in some countries);

II. the CFI wrongfully applied the criteria set forth in the Community case-law for ascertaining the acquisition of distinctiveness, in violation of Article 7 (3) CTMR.

Under I. the lack of exclusive use in other parts of the Community is proven by the statements made by third-parties in Denmark and Ireland. Indeed the lack of a univocal association between the green and yellow color combination and Deere is incompatible with the acknowledgement of distinctiveness acquired by the sign in these countries.

Under II. BCS challenge the legal criteria applied by the CFI in relation to the evidence of secondary meaning, because they clash with the principles set forth in the longstanding case law of the Court of Justice. Indeed, the duration of use of the Deere trade mark, the market shares and the volume of sales cannot be regarded as elements sufficient — when taken individually — to prove the acquired secondary meaning. And in particular they cannot compensate for the lack of an opinion poll (or a contradictory result from third party declarations), as these are evidentiary parameters of a different nature.

There the CFI erred in disregarding the direct proof of the absence of a distinctive character of CTM '289 in Ireland and Denmark.

([1]) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ L 11, p. 1), replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version)
OJ L 78, p. 1