

Pleas in law: Infringement of Article 8(1)(b) of Regulation (EC) No 40/94 ⁽¹⁾ as there is no likelihood of confusion between the opposing trade marks, and infringement of Rule 22 of Regulation (EC) No 2868/95 ⁽²⁾ inasmuch as use preserving the right to use the trade mark cited in opposition has not been sufficiently proven.

⁽¹⁾ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

⁽²⁾ Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1).

Action brought on 26 January 2009 — Portuguese Republic v Commission of the European Communities

(Case T-33/09)

(2009/C 82/53)

Language of the case: Portuguese

Parties

Applicant: Portuguese Republic (represented by: L. Inez Fernandes and J. A. de Oliveira, Agents)

Defendant: Commission of the European Communities

Forms of order sought

- as the main plea, annul Decision C(2008) 7419 of 25 November 2008, by which the Commission required the Portuguese Republic to make the penalty payment imposed on it by the judgment of the Court of Justice in Case C-70/06 with effect from 10 January 2008;
- in the alternative, annul the decision referred to in so far as its effects extend beyond 29 January 2008;
- order the Commission of the European Communities to pay all the costs or, if the amount of the penalty payment is merely reduced by the Court of Justice, order each party to bear its own costs.

Pleas in law and main arguments

The applicant seeks annulment of the decision at issue, pursuant to Article 230 EC, on the ground that the Commission has infringed the EC Treaty or the legal rules relating to its application.

The Commission infringed the EC Treaty or the legal rules relating to its application by requiring the applicant to make the daily penalty payment imposed on it by the Court of Justice in Case C-70/06 in respect of the period between 10 January and 17 July 2008, when the applicant had already fully complied with its obligation to transpose Directive 89/665/EEC ⁽¹⁾.

When the Court of Justice delivered its judgment in Case C-70/06 on 10 January 2008, ordering the applicant to make a penalty payment for every day of delay in implementing the measures necessary to comply with its judgment in Case C-275/03 *Commission v Portugal* [2004] ECR I-0000 — requiring the repeal of Decree-Law No 48051 of 21 November 1967 which makes the award of damages to persons injured by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or fraud — the Portuguese Republic had already approved Law No 67/2007. That law repeals the decree-law referred to and approves the new system for the non-contractual liability of the State and other public bodies, and had been published by the Portuguese Republic on 31 December 2007 in the *Diário da República* (The Portuguese Official Journal), First Series, No 251. That law entered into force 30 days after its publication, that is to say on 30 January 2008.

On 4 January 2008, the applicant notified that fact to the Court of Justice and requested that a copy of Law No 67/2007 be added to the file in Case C-70/06. However, due to the advanced stage of the proceedings, the Court of Justice could no longer take the fact in question into account, and delivered its judgment on 10 January 2008.

Accordingly, the applicant submits that the penalty payment claimed may only relate to the period until 9 January 2008 or, in the worst case until 29 January 2008, as the date on which Law No 67/2007 entered into force does not coincide with the date of its publication. The Commission's claim is therefore completely unfounded in so far as it relates to subsequent periods.

⁽¹⁾ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

Action brought on 23 January 2009 — dm-drogerie markt v OHIM — Distribuciones Mylar (dm)

(Case T-36/09)

(2009/C 82/54)

Language in which the application was lodged: English

Parties

Applicant: dm-drogerie markt GmbH + Co. KG (Karlsruhe, Germany) (represented by: O. Bludovsky and C. Mellein, lawyers)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Other party to the proceedings before the Board of Appeal: Distribuciones Mylar, SA (Gelves, Spain)