

Decision of the Board of Appeal: appeal dismissed

Pleas in law: misapplication of Article 7(1)(b) of Regulation No 207/2009⁽¹⁾, on the ground that the trade mark concerned has the requisite distinctive character

⁽¹⁾ Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

Action brought on 7 December 2009 — Italy v Commission

(Case T-500/09)

(2010/C 37/66)

Language of the case: Italian

Parties

Applicant: Italian Republic (represented by: L. Ventrella, avvocato dello Stato)

Defendant: European Commission

Form of order sought

— Annul in part Decision C (2009) 7044 of 24 September 2009, notified on 25 September 2009, excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), insofar as it applied to Italy, for the financial years 2005 and 2006:

- fixed-rate financial corrections (5 %) on account of various alleged weaknesses in controls in the fruit and vegetables sector — citrus processing — totalling EUR 3 539 679,81.

Pleas in law and main arguments

In support of its challenge, the Italian Republic pleads breach of an essential procedural requirement (Article 253 EC), on account of a failure to state adequate reasons, and breach of the principle of proportionality.

The applicant submits in that connection that the Commission corrected certain aid for citrus processing and, in implementing

those corrections, failed to ensure that adequate checks had been carried out as to whether the product delivered to the producers' organisations tallied with the product delivered to the processors and as to whether the product delivered for processing tallied with the finished product. According to the Italian Government, in the course of the procedure it had emerged that the checks had been carried out satisfactorily, in particular as regards both administrative/accounting checks and physical checks, at both the Organizzazione di Produttori (Producers' Organisation) and the processors; the checks were unannounced (without prior notice to the industry as to the date of the checks) and, in any event, were greater in number than that provided for in the relevant legislation. The essential point which the Commission should have addressed by stating adequate reasons in its decision was therefore whether the risk of loss to the Fund was 'significant', such as to justify a fixed-rate correction of 5 %, which appears, in any event, to be disproportionate.

Action brought on 8 December 2009 — PhysioNova v OHIM — Flex Equipos de Descanso (FLEX)

(Case T-501/09)

(2010/C 37/67)

Language in which the application was lodged: German

Parties

Applicant: PhysioNova GmbH (Erlangen, Germany) (represented by: J. Klinik, lawyer)

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

Other party to the proceedings before the Board of Appeal of OHIM: Flex Equipos de Descanso, SA (Madrid, Spain)

Form of order sought

— Annul the contested decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 30 September 2009 in Case R 1/2009-1;

— amend the contested decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) in Case R 1/2009-1 so as to overrule the decision of the Cancellation Division of 27 October 2008 in Case 2237 C;

— order OHIM to pay the costs of the proceedings, including those incurred during the appeal proceedings.

Pleas in law and main arguments

Registered Community trade mark in respect of which a declaration of invalidity has been sought: the Community figurative mark 'FLEX' No 2 275 220 for goods and services in classes 6, 10, 17 and 20

Proprietor of the Community trade mark: Flex Equipos de Descanso, SA

Applicant for the declaration of invalidity: PhysioNova GmbH

Trade mark right of applicant for the declaration: the German trade mark No 39 903 314 'PhysioFlex' and the German trade mark No 39 644 431 'Rotoflex'

Decision of the Cancellation Division: Rejection of the application for declaration of invalidity

Decision of the Board of Appeal: Dismissal of the appeal

Pleas in law: Infringement of Article 8(1)(b) of Regulation (EC) No 207/2009⁽¹⁾, since there is a likelihood of confusion between the trade marks at issue

⁽¹⁾ Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

Action brought on 16 December 2009 — Vökl v OHIM-Marker Vökl (VÖKL)

(Case T -504/09)

(2010/C 37/68)

Language in which the application was lodged: German

Parties

Applicant: Vökl GmbH & Co. KG (Erding, Germany) (represented by: C. Raßmann, lawyer)

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

Other party to the proceedings before the Board of Appeal of OHIM: Marker Vökl International GmbH (Baar, Switzerland)

Form of order sought

— Annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 30 September 2009 in Case R 1387/2008-1;

— Annul the decision of the Opposition Division of the Office for Harmonisation in the Internal Market of 31 July 2008 on the opposition proceedings No B 1 003 153, in so far as the opposition was upheld;

— Refusal of the opposition;

— Order the defendant to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: Vökl GmbH & Co. KG

Community trade mark concerned: the word mark 'VÖKL' for goods in classes 3, 9, 18 and 25 (Application No 4 403 705)

Proprietor of the mark or sign cited in the opposition proceedings: Marker Vökl International GmbH

Mark or sign cited in opposition: the word mark 'VÖKL' (international trade mark No 571 440) for goods in classes 18, 25 and 28

Decision of the Opposition Division: Opposition upheld in part

Decision of the Board of Appeal: Annulment of the decision given by the Opposition Division concerning the determination of a likelihood of confusion of the signs which are compared and the referral back to the Opposition Division for further action; Dismissal of the appeal in relation to the decision on proof of use preserving the rights held