

Thirdly, the Commission claims that, under Article 13 et seq. of the First Directive (in particular, Articles 16, 16a and 17) and Articles 15 and 20 to 22 of the Third Directive, the mutual companies must establish sufficient technical reserves in relation to their supplementary sickness insurance activities as well as a sufficient solvency margin in relation to all of their activities. However, in Belgium, the solvency margin for supplementary insurance provided by mutual companies was established only in 2002 and the method of calculating that margin differed from that provided for by the First Directive.

⁽¹⁾ First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance.

⁽²⁾ Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive).

Reference for a preliminary ruling from the Højesteret (Denmark), lodged on 28 January 2010 — Viking Gas A/S v BP Gas A/S

(Case C-46/10)

(2010/C 80/35)

Language of the case: Danish

Referring court

Højesteret

Parties to the main proceedings

Appellant: Viking Gas A/S

Respondent: BP Gas A/S

Questions referred

1. Is Article 5, in conjunction with Article 7, of First Council Directive 89/104/EEC ⁽¹⁾ of 21 December 1988 to approximate the laws of the Member States relating to trade marks to be interpreted in such a way that company B is guilty of an infringement of a trade mark if

it fills gas bottles which originate from company A with gas which it then sells, where the following circumstances apply:

1. A sells gas in so-called composite bottles with a special shape, which is registered as such, that is to say, as a shape trade mark, under a Danish trade mark and an EC trade mark. A is not the proprietor of those shape trade marks but has an exclusive licence to use them in Denmark and has the right to take legal proceedings in respect of infringements in Denmark.
 2. On first purchase of a composite bottle filled with gas from one of A's dealers the consumer also pays for the bottle, which thus becomes the consumer's property.
 3. A refills the composite bottles by a procedure under which the consumer goes to one of A's dealers and, on payment for the gas, has an empty composite bottle exchanged for a similar one filled by A.
 4. B's business consists in filling gas into bottles, including composite bottles covered by the shape trade mark referred to in 1., by a procedure under which consumers go to a dealer associated with B and, on payment for the gas, can have an empty composite bottle exchanged for a similar one filled by B.
 5. When the composite bottles in question are filled with gas by B, adhesive labels are attached to the bottles indicating that the filling was undertaken by B?
2. If it may be assumed that consumers will generally receive the impression that there is an association between B and A, is this to be regarded as significant for the purpose of answering Question 1?
3. If Question 1 is answered in the negative, may the outcome be different if the composite bottles — apart from being covered by the shape trade mark referred to — also feature (are imprinted with) the registered figurative and/or word mark of A, which is still visible irrespective of any adhesive labels affixed by B?
4. If either Question 1 or Question 3 is answered in the affirmative, may the outcome be different if it is assumed that, with regard to other types of bottle which are not covered by the shape trade mark referred to but which feature A's word and/or figurative mark, A has for many years accepted, and continues to accept, the refilling of the bottles by other companies?

5. If either Question 1 or Question 3 is answered in the affirmative, may the outcome be different if the consumer himself goes to B directly and there:

(a) on payment for the gas, obtains, in exchange for an empty composite bottle, a similar one filled by B, or

(b) on payment, has a composite bottle which he has brought filled with gas?

(¹) OJ 1989 L 40, p. 1.

Appeal by the Republic of Austria brought on 28 January 2010 against the judgment of the Court of First Instance (Sixth Chamber) of 18 November 2009 in Case T-375/04 Scheucher-Fleisch GmbH and Others v Commission of the European Communities

(Case C-47/10 P)

(2010/C 80/36)

Language of the case: German

Parties

Appellant: Republic of Austria (represented by: E. Riedel, acting as Agent; M. Núñez-Müller and J. Dammann, lawyers)

Other parties to the proceedings: Scheucher-Fleisch GmbH, Tauernfleisch Vertriebs GmbH, Wech-Kärntner Truthahnverarbeitung GmbH, Wech-Geflügel GmbH, Johann Zsifkovics, European Commission

Forms of order sought

The Republic of Austria claims that the Court should:

— set aside the judgment of the Court of First Instance of 18 November 2009 in Case T-375/04 (*Scheucher and Others v Commission*);

— give final judgment in the case and dismiss the application as inadmissible or, in the alternative, as unfounded;

— order the applicants in the original proceedings to pay the costs on appeal and the costs of the first instance proceedings in Case T-375/04.

Pleas in law and main arguments

The appellant argues that the contested judgment infringes Article 263(4) TFEU. The Court overlooked the fact that the applicants in the original proceedings were not individually or directly affected by the Commission decision in dispute. The contested decision did not lead to any noticeable prejudice to their market position, and the general sectoral aid rules of the Republic of Austria, approved by the Commission, did not lead to any distortions of competition since the granting of aid was dependent in each case on an individual decision by the relevant authorities. Finally, the applicants in the original proceedings do not have the necessary legal interest in bringing proceedings, as the contested decision of the Commission does not affect them themselves.

The appellant further argues that the contested judgment infringes Article 108(2) TFEU. The Court erred in law by assuming that, during the preliminary investigation procedure, the Commission encountered serious difficulties in assessing the disputed measures and was therefore obliged to initiate the formal investigation procedure.

The appellant also takes the view that the contested judgment infringes the rules on the burden of proof. The Court obliged the Commission to initiate the formal investigation procedure, even though the applicants had not produced the necessary evidence that they were affected.

In the appellant's submission, the contested judgment also infringes Article 81 of the Rules of Procedure of the Court for contradictory reasoning.

Finally, the appellant argues that the contested decision infringes Article 64 of the Rules of Procedure, because the Court failed to verify circumstances that were relevant for the decision by measures of organisation of procedure.