

the fact that the goods 'computer software' in Class 9 were to be used only 'in particular' to obtain and process business data was disregarded. Software with other uses could therefore also be the subject of the mark applied for. In addition, engineers and other persons who had no knowledge of specialist management science-related terminology also worked with the applicant's software. The Court's assessment was therefore based on incorrect factual assumptions.

Furthermore, the Court was of the opinion, again proceeding on an incorrect factual basis, that, while the element 'ROI' admittedly had different meanings in different languages, consumers would in connection with the word 'ANALYZER', always interpret the element 'ROI' to mean 'Return on Investment'. The Court was wrong to find that the consumers targeted would then without further consideration understand the mark applied for as describing 'an instrument for analysing the rate of return on investments'.

The Court also misinterpreted the underlying goods and services when assuming the existence of obstacles to the protection of computer hardware. Following division of the application, the sign was already registered with final legal effect with regard to those goods and services belonging to Classes 35 and 42.

Finally, the argument based on earlier registrations in the EU, namely as Community trade marks, was rejected on the basis that national marks could not be taken into account. In that instance also an incorrect factual basis was used.

Action brought on 17 November 2010 — European Commission v Republic of Poland

(Case C-542/10)

(2011/C 30/41)

Language of the case: Polish

Parties

Applicant: European Commission (represented by: Ł. Habiak and S. La Pergola, acting as Agents)

Defendant: Republic of Poland

Form of order sought

— declare that, by not adopting all the laws, regulations and administrative provisions necessary to comply fully with Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, ⁽¹⁾ and in any event by not informing the Commission of those provisions, the Republic of Poland has failed to fulfil its obligations under Article 94(1) of that directive;

— order the Republic of Poland to pay the costs.

Pleas in law and main arguments

The time-limit for transposition of Directive 2007/64 expired on 1 November 2009.

⁽¹⁾ OJ L 319, 5.12.2007, p. 1.

Appeal brought on 23 November 2010 by Hans-Peter Wilfer against the judgment of the General Court (Fourth Chamber) delivered on 8 September 2010 in Case T-458/08 Wilfer v Office for Harmonization in the Internal Market (Trade marks and Designs)

(Case C-546/10 P)

(2011/C 30/42)

Language of the case: German

Parties

Appellant: Hans-Peter Wilfer (represented by: W. Prinz, Rechtsanwalt)

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

Forms of order sought

The appellant claims that the Court should:

— set aside in full the judgment of the General Court of 8 September 2010 in Case T-458/08;

— order OHIM to pay the costs.

Pleas in law and main arguments

The present appeal is brought against the judgment of the General Court, by which that court dismissed the appellant's action for annulment of the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market of 25 July 2008 rejecting its application for registration of the figurative mark representing the head of a guitar using the colours silver, grey and brown.

The appellant raises four pleas in support of the appeal.

The Court did not take documents into consideration, which had first been submitted with the application. The appellant considers that they should have been taken into consideration as they were merely additional to the existing application.

The appellant alleges that the Court breached Article 7(1)(b) of Regulation (EC) No 40/94 in failing to take account of the fact that, in the case of three-dimensional product form marks, a distinction must be made between, on the one hand, mass products and, on the other hand, special products. Special products are characterised by the fact that the relevant public generally considers that they contain parts which serve the purpose of indicating origin. Accordingly, the demonstration of distinctiveness is not subject to special requirements. In this context, with regard to such product parts, a minimum degree of distinctive character is sufficient. Furthermore, the issue of distinctiveness was not addressed taking account of the knowledge of the relevant public (professional or hobby musicians), who are aware of that it is common practice that string musical instruments, including violins, such as a Stradivari, are labelled by a particular form of headstock. The Court also did not take account of the fact that a minimum degree of distinctive character is sufficient in the case of a figurative mark, which only reproduces a part of the goods, which is commonly used to label the goods, such as the headstock of a guitar.

The Court breached the principle of examination of the facts by OHIM of its own motion under Article 74(1) of Regulation No 40/94, in misinterpreting the general rule/exception relationship, in relation to the question as to the extent to which the headstock can indicate the origin of a guitar.

Finally, the Court also breached the principle of equal treatment by not taking account of the fact that other Community and national trade marks also exist, which likewise reproduce only the headstock of a guitar.

Appeal brought on 23 November 2010 by Schweizerische Eidgenossenschaft against the judgment delivered on 9 September 2010 in Case T-319/05 Schweizerische Eidgenossenschaft v European Commission, other parties to the proceedings: European Commission, Federal Republic of Germany, Landkreis Waldshut

(Case C-547/10 P)

(2011/C 30/43)

Language of the case: German

Parties

Appellant: Schweizerische Eidgenossenschaft (represented by: S. Hirsbrunner, Rechtsanwalt)

Other parties to the proceedings: European Commission, Federal Republic of Germany, Landkreis Waldshut

Forms of order sought

The appellant claims that the Court should:

- set aside the judgment of the General Court of 9 September 2010 in Case T-319/05, in accordance with Article 61 of the Statute of the Court of Justice;
- should the Court decide that the state of the proceedings permits a decision by the Court, annul Commission Decision 2004/12/EC of 5 December 2003, and order the European Commission to pay the costs of the whole proceedings, including the costs of the proceedings at first instance, pursuant to the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice;
- should the Court decide that the state of the proceedings does not permit a decision by the Court, remit the case to the General Court for a decision on the basis of its legal assessment and reserve the issue of the costs of the appeal for a decision by that court.

Pleas in law and main arguments

The appeal is against the judgment of the General Court of 9 September 2010 in Case T-319/05 ('the judgment under appeal'). In the judgment under appeal, the General Court dismissed the action for annulment brought by the appellant against Commission Decision 2004/12/EC of 5 December 2003 ('the contested decision') the 213th regulation for the implementation of German air traffic regulations establishing procedures for instrument-guided landings and take-offs at Zurich airport ('the 213th Regulation'), as amended by the first amending regulation 1 April 2003 ('the disputed German measure').