

Pleas in law and main arguments

The present appeal is against the judgment of the General Court by which that Court dismissed the appellant's action for annulment of the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market of 23 July 2009 relating to the rejection of its application for registration of a figurative mark, which consists of a horizontal combination of the colours grey and red.

The appellant relies on four grounds of appeal in support of its appeal, which is based on infringement of Article 7(1)(b) of Regulation (EC) No 207/2009.

First of all, the General Court based its examination of distinctive character on a sign other than the mark applied for. The General Court did not examine the sign in its entirety, but merely based that examination on a random combination of the colours light grey and traffic-light red. The specific features of the colour system were not taken into account in the present case although the specific arrangement of those colours in the mark at issue is a part of the trade mark application and makes the sign specific.

Secondly, in the course of the assessment of distinctive character, the General Court did not consider for which specific services the trade mark application has been filed and examined its inability to be protected with regard to completely different goods. The alleged lack of distinctive character of the mark was deduced in the judgment from the circumstance that particular items or goods usually bear the colours in question (parts of railway engines and safety enclosures for electrical equipment beside railway lines; traffic signs; level crossing barriers and rail transport traffic signs; trains and the borders of railway platforms). The trade mark application in respect of the mark at issue has not however been filed in respect of those goods. The General Court did not state a reason why the circumstance that the mark at issue may possibly be incapable of being protected in respect of certain goods from the transport or rail transport sector should also provide a reason why the mark applied for in the present case in respect of services should be incapable of being protected.

Thirdly, the General Court based its assessment of the mark's distinctive character on incorrect legal bases in that it assessed the distinctive character of marks in respect of goods and marks in respect of services in the same way. The General Court failed to recognise that the public does not necessarily perceive different categories of signs in the same way. Whereas the consumer may not be accustomed to deducing the origin of the goods from their colour or packaging in the absence of graphical or word elements since goods and packaging are usually coloured, the situation is completely different as regards services. As services are by nature colourless, the consumer's perception of colours for services is totally different from his perception of colours for goods. Consequently, a difference should be made between goods and services in assessing the distinctive character of colours.

Fourthly, in assessing the distinctive character of the mark in question the General Court distorted the relevant facts and did not sufficiently state the reasons for its judgment. The General Court assumed without any grounds that horizontal bands of colour are usually used as decorative elements on trains. In doing so, it failed to recognise that the present case relates to an assessment of the distinctive character of a specific colour mark and not to stripes on railway wagons in general. Likewise, the General Court failed to recognise that the trade mark application in respect of mark at issue was not filed in respect of railway wagons, but in respect of services in Class 39. Lastly, the appellant made extensive submissions on the point that colour elements in the rail transport sector are not understood as decorative elements, but as indications of origin. The General Court did not assess those arguments put forward by the appellant.

Action brought on 15 February 2011 — European Commission v Kingdom of the Netherlands

(Case C-65/11)

(2011/C 130/19)

Language of the case: Dutch

Parties

Applicant: European Commission (represented by: A. Nijenhuis and D. Triantafyllou, acting as Agents)

Defendant: Kingdom of the Netherlands

Form of order sought

— Declare that, by failing to consult the VAT Committee and by allowing non-taxable persons to join a fiscal unit, as is apparent from the resolution of 18 February 1991, No VB91/347, the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 9 and 11 of Council Directive 2006/112/EC ⁽¹⁾ of 28 November 2006 on the common system of value added tax;

— order Kingdom of the Netherlands to pay the costs.

Pleas in law and main arguments

Article 9(1) of Directive 2006/112/EC provides that 'taxable person' means any person who, independently, carries out in any place any economic activity, whatever the results of that activity. Article 11 of the VAT Directive provides that after consulting the advisory committee on value added tax ('the VAT Committee') each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

According to the Commission, the Netherlands has failed to fulfil its obligations under Articles 9 and 11 of Directive 2006/112/EC because it permits non-taxable persons to join a fiscal unit. Furthermore, in failing to consult the VAT Committee, the Netherlands has failed to comply with Article 11.

(¹) OL 2006 L 347, p. 1.

Appeal brought on 16 February 2011 by DTL Corporación, S.L. against the judgment of the General Court (Fourth Chamber) delivered on 15 December 2010 in Case T-188/10, DTL Corporación S.L. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

(Case C-67/11 P)

(2011/C 130/20)

Language of the case: Spanish

Parties

Appellant: DTL Corporación, SL (represented by: A. Zuazo Araluz, abogado)

Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs) and Gestión de Recursos y Soluciones Empresariales, S.L.

Form of order sought

Annulment in its entirety of the judgment of the General Court (Fourth Chamber) of 15 December 2010 in Case T-188/10.

Grant of the following forms of order sought at first instance:

- annulment of the decision of the Second Board of Appeal of OHIM of 17 February 2010 in Case R 767/2009-2;
- replacement of that decision by another rejecting the opposition brought by Gestión de Recursos y Soluciones Empresariales, S.L. against the Community trade figurative mark No 5153325 'SOLARIA', permitting that Community trade mark to be registered for all the services applied for in Classes 37 and 42;
- order OHIM and the other parties to the proceedings which oppose this action to pay the costs thereof.

Pleas in law and main arguments

- Breach of procedure before the General Court which prejudices the interests of the applicant: the application to stay proceedings under Article 77(c) and (d) of the Rules of Procedure of the General Court was totally ignored (Article 58 of the Statute of the Court of Justice of the European Union).
- Infringement of the law of the European Union by the General Court: the judgment infringes Article 8(1)(b) of Council Regulation (EC) No 40/94 (¹) — now Council Regulation (EC) No 207/2009 (²) — on the Community trade mark, by expressly stating:

(a) that the word element of the Community trade mark the subject of the dispute is the dominant feature of the mark;

(b) that that word element is not the dominant feature of the mark, which contradiction decisively influences the assessment of the likelihood of confusion (Article 58 of the Statute of the Court of Justice of the European Union).

(¹) Regulation of 20 December 1993, on the Community trade mark (OJ 1994 L 11, p. 1)

(²) Regulation of 24 March 2009 (OJ 2009 L 78, p. 1)

Reference for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 18 February 2011 — Federal Republic of Germany v Y

(Case C-71/11)

(2011/C 130/21)

Language of the case: German

Referring court

Bundesverwaltungsgericht

Parties to the main proceedings

Applicant: Federal Republic of Germany

Defendant: Y

Other parties: Der Vertreter des Bundesinteresses beim Bundesverwaltungsgericht (The Representative of the Federal Interest before the Bundesverwaltungsgericht); Der Bundesbeauftragte für Asylangelegenheiten beim Bundesamt für Migration und Flüchtlinge (The Federal Commissioner for Asylum Matters at the Federal Office for Migration and Refugees)

Questions referred

- Is Article 9(1)(a) of Directive 2004/83/EC (¹) to be interpreted as meaning that not every interference with religious freedom which breaches Article 9 of the European Convention on Human Rights constitutes an act of persecution within the meaning of Article 9(1)(a) of Directive 2004/83/EC, but that a severe violation of religious freedom as a basic human right arises only if the core area of that religious freedom is adversely affected?
- If Question 1 is to be answered in the affirmative:
 - Is the core area of religious freedom limited to the profession and practice of faith in the areas of the home and neighbourhood, or can there also be an act of persecution, within the meaning of Article 9(1)(a) of Directive 2004/83/EC, in cases where, in the country of origin, the practice of faith in public gives rise to a risk to body, life or physical freedom and the applicant accordingly abstains from such practice?