

2. Are Articles 2 and 3(1) of the Directive to be interpreted as meaning that a sign representing the layout in which the service is incorporated is capable of being registered as a trade mark?
3. Is Article 2 of the Directive to be interpreted as meaning that the requirement of graphic representability is satisfied by a drawn representation alone or with such additions as a description of the layout or indications of absolute dimensions in metres or of relative dimensions with indications as to proportions?
4. Is Article 2 of the Directive to be interpreted as meaning that the scale of the protection afforded by a trade mark for retail services also extends to the goods produced by the retailer itself?

(<sup>1</sup>) Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25).

**Request for a preliminary ruling from the Consiglio di Stato/Italy lodged on 26 July 2013 — Ministero dell'Economia e delle Finanze, Amministrazione Autonoma dei Monopoli di Stato (AAMS) v Yesmoke Tobacco SpA**

(Case C-428/13)

(2013/C 313/16)

*Language of the case: Italian*

#### Referring court

Consiglio di Stato

#### Parties to the main proceedings

*Applicants:* Ministero dell'Economia e delle Finanze, Amministrazione Autonoma dei Monopoli di Stato (AAMS)

*Defendant:* Yesmoke Tobacco SpA

#### Question referred

Do Article 8(2) of Directive 95/59/EC (<sup>1</sup>) of 27 December 1995 and Article 7(2) of Directive 2011/64/EU (<sup>2</sup>) of 21 June 2011, by providing, respectively, that the proportional rate and ad valorem rate, and the amount of the specific excise duty, 'must be the same for all cigarettes', preclude a provision of national law such as Article 39g(4) of Legislative Decree No 504 of 26 October 1995 (as amended by Article 55(2a)[(c)] of Decree-Law No 78 of 31 May 2010, converted, with amendments, in Law No 122 of 30 July 2010), which provides that

the excise duty payable on cigarettes with a retail selling price less than that of cigarettes in the most popular price category is to be 115 % of the basic amount, thereby establishing an excise duty at a fixed minimum rate specific to cigarettes with a lower selling price and not a minimum amount of excise duty for all price categories of cigarettes, as permitted by Article 16(7) of Directive 95/59/EC and Article 14(2) of Directive 2011/64/EU?

(<sup>1</sup>) Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1995 L 291, p. 40).

(<sup>2</sup>) Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (OJ 2011 L 176, p. 24).

**Appeal brought on 1 August 2013 by European Commission against the judgment of the General Court (First Chamber) delivered on 17 May 2013 in Case T-146/09: Parker ITR Srl and Parker-Hannifin Corp v Commission**

(Case C-434/13 P)

(2013/C 313/17)

*Language of the case: English*

#### Parties

*Appellant:* European Commission (represented by: S. Noë, V. Bottka, R. Sauer, Agents)

*Other parties to the proceedings:* Parker ITR Srl, Parker-Hannifin Corp.

#### Form of order sought

The appellant claims that the Court should:

- set aside the Judgment insofar as it annuls the Decision and adjusts the fine;
- dismiss the action before the General Court in its entirety;
- require the Applicants to bear the entirety of the costs of these proceedings and those of the proceedings at first instance.

#### Pleas in law and main arguments

The Commission raises two grounds of appeal, and requests the Judgment to be partially set aside insofar as it annuls the Decision in Case COMP/39406 — Marine Hoses and adjusts the fine.

In the first ground of appeal it is submitted that the General Court erred in law by ignoring or incorrectly applying the case law on intra-group economic succession on the one hand and the case law on the transfer of liability between consecutive undertakings on the other hand. By treating the asset transfer from ITR to Parker ITR (at the time called ITR Rubber) (within the Saiag group) and the subsequent share deal (transfer of the shares in Parker ITR from Saiag to Parker-Hannifin) together, the General Court incorrectly assumes an *inter-group transfer of the infringing business* from Saiag to Parker-Hannifin. The General Court errs by assessing economic continuity only as a possible transfer of liability between the independent undertakings Saiag and Parker-Hannifin, because this ignores the already accomplished *intra-group economic succession* to Parker ITR. In doing so, the Judgment relies on subjective intentions, namely the fact that the incorporation of the marine hoses business into Parker ITR was part of an objective of selling that subsidiary's shares to a third party. However, such intentions of the parties are not an obstacle to applying the case-law on intra-group economic succession (C-204/00 P *Aalborg*, C-280/06 *ETI*, C-511/11 P *Versalis*, T-43/02 *Jungbunzlauer* and T-405/06 and Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal*), according to which economic succession takes place at the time of an *intra-group transfer* insofar as there are 'structural links' between the transferor (here: Saiag/ITR) and the receiving entity (here: Parker ITR). Moreover, there is a difference in law between a transfer of assets and the transfer of a legal person. In the latter case, the transferred entity will carry its own liability for any infringement prior to the transfer, and this may include liability as economic successor for assets transferred to the entity at a time when it was still part of the infringing undertaking. The fact that other legal entities in the undertaking could also have been held liable (although not fined in this case) is not a valid reason to exclude holding liable as economic successor the transferred subsidiary Parker ITR.

The second ground of appeal is that, in the context of the exercise of its unlimited jurisdiction, the General Court acted *ultra petita* and unlawfully reduced the uplift for duration in the fine corresponding to EUR 100 000 for the parent company Parker Hannifin. Neither the actual duration of its participation in the infringement nor the corresponding duration factor in the calculation of the fine was challenged by Parker-Hannifin (or Parker ITR). While Parker-Hannifin successfully challenged the aggravating circumstance for leadership, for which the General Court adjusted the fine, this should not open the possibility for the General Court, even when it exercises its unlimited jurisdiction, to modify other aspects of the fine (here: the factor for duration) against which the applicant did not raise a plea.

**Request for a preliminary ruling from the Handelsgericht Wien (Austria) lodged on 5 August 2013 — Pez Hejduk v EnergieAgentur.NRW GmbH**

(Case C-441/13)

(2013/C 313/18)

Language of the case: German

**Referring court**

Handelsgericht Wien

**Parties to the main proceedings**

Applicant: Pez Hejduk

Defendant: EnergieAgentur.NRW GmbH

**Question referred**

Is Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>(1)</sup> to be interpreted as meaning that, in a dispute concerning an infringement of rights related to copyright which is alleged to have been committed in that a photograph was kept accessible on a website, the website being operated under the top-level domain of a Member State other than that in which the proprietor of the right is domiciled, there is jurisdiction only

— in the Member State in which the alleged infringer is established; and

— in the Member State(s) to which the website, according to its content, is directed?

<sup>(1)</sup> OJ 2001 L 12, p. 1.

**Appeal brought on 7 August 2013 by Delphi Technologies, Inc. against the judgment of the General Court (Sixth Chamber) delivered on 6 June 2013 in Case T-515/11: Delphi Technologies, Inc. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)**

(Case C-448/13 P)

(2013/C 313/19)

Language of the case: English

**Parties**

Appellant: Delphi Technologies, Inc. (represented by: C. Albrecht, J. Heumann, Rechtsanwälte)