Third ground: infringement of Article 76(2) of the Community Trade Mark Regulation

It is clear from the provision and from the case-law that the general rule is the admission of allegations and evidence even when submitted out of time. Accordingly, the discretion conferred on EUIPO must be interpreted narrowly and require an explanation justifying refusal. Discretion does not mean arbitrariness or subjectivity.

The new invoices and packaging labels submitted at the end of the appeal procedure, numbered from Document No 1 to Document No 7, were fundamental for, having been issued by other European firms, they were capable of dispelling the doubts raised as regards the invoices issued by the Dutch firm 'Nidera General Merchandise, B.V.'.

When providing proof of use of its mark, the opponent faced chronological difficulties: the evidence had to be gathered three years after such use, and geographical difficulties: the opponent is a Mexican company and its interests are mainly situated in the American continent.

Consideration of the chronological and geographical circumstances, and the fundamental importance of the documents submitted out of time for the resolution of the proceedings, should have led to those documents being admitted, resulting in a finding that there was proof of real and genuine use of the opponent's earlier mark and enabling the required comparison of the marks at issue to be carried out in order to determine the existence of likelihood of confusion on the part of the consumer.

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

(2) Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark
OJ 1995 L 303, p. 1

Request for a preliminary ruling from the Tribunale di Udine (Italy) lodged on 24 February 2016 — Criminal proceedings against Giorgio Fidenato and Others

(Case C-111/16)

(2016/C 191/10)

Language of the case: Italian

Referring court

Tribunale di Udine

Criminal proceedings against:

Giorgio Fidenato, Leandro Taboga and Luciano Taboga

Questions referred

1. When requested to do so by a Member State, is the Commission required, for the purposes of Article 54(1) of Regulation No 178/2002, (1) to adopt emergency measures within the meaning of Article 53 of Regulation No 178/2002, even if in the Commission's assessment in respect of certain food or feed there is no serious, evident risk to human and animal health or to the environment?

2. Where the Commission notifies the Member State which had sought its assessment that its assessment is at odds with the Member State's request — an assessment which in theory precludes the need to adopt emergency measures — and where, accordingly, the Commission does not adopt such emergency measures within the meaning of Article 34 Regulation No 1829/2003 (2) as requested by that Member State, is the Member State which made the request authorised, pursuant to Article 53 of Regulation No 178/2002, to adopt interim emergency measures?

3. May considerations relating to the precautionary principle which go beyond the parameters of serious and evident risk to human or animal health or the environment in the use of food or feed justify the adoption of interim emergency measures by a Member State within the meaning of Article 34 of Regulation No 1829/2003?

4. Where it is clear and obvious that the European Commission has made the assessment that the substantive conditions for the adoption of emergency measures for food or feed are not met, which is later confirmed by an EFSA Scientific Opinion, and where that assessment was notified in writing to the Member State which made the request, may that Member State continue to maintain in force its existing interim emergency measures and/or extend the validity of such interim emergency measures, when the interim period for which they were put in place has expired?

([1]) Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1).

([2]) Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (OJ 2003 L 268, p. 1).

Appeal brought on 26 February 2016 by British Airways plc against the judgment of the General Court (First Chamber) delivered on 16 December 2015 in Case T-48/11: British Airways plc v European Commission

(Case C-122/16 P)

(2016/C 191/11)

Language of the case: English

Parties

Appellant: British Airways plc (represented by: J. Turner QC, R. O'Donoghue, Barristers, A. Lyle-Smythe, Solicitor)

Other party to the proceedings: European Commission

Form of order sought

The appellant claims that the Court should:

— set aside the General Court's judgment in so far as it limits the scope of the annulment of the contested European Commission Decision to the form of order sought by British Airways in its original application for annulment;

— set aside paragraph 1 of the operative part of the General Court's judgment;

— annul the contested European Commission Decision in full; and

— award British Airways the costs of the appeal.

Pleas in law and main arguments

By the present application British Airways plc is seeking to have partially set aside the decision of the General Court rendered on 16 December 2015 in Case T-48/11, British Airways plc v European Commission. The Judgment partly annulled the Commission Decision C(2010) 7694 final of 9 November 2010 in Case COMP/39258 — Airfreight, in so far as it concerns British Airways.

In support of the action, the applicant relies on two pleas in law.

1. First plea in law, that the General Court erred in law by applying the concept of *ultra petita* to constrain its actions even when the General Court had of its own motion found there to be fundamental public policy defects which vitiated the European Commission's Decision entirely. By raising a public policy issue of its own motion, and by deciding the case before it on that basis, the General Court did not rule *ultra petita*; the General Court therefore erred in law in considering itself restricted by *ultra petita* when it came to deciding on the consequences of its ruling in the operative part of its judgment.