

### Questions referred

1. Can Article 2(2)(c) of Directive 2004/38 <sup>(1)</sup> be interpreted as meaning that a Member State, on certain conditions, can require a direct descendant who is 21 years old or older — in order to be regarded as dependent and thus come within the definition of a family member under Article 2(2)(c) of Directive 2004/38 — to have tried to obtain employment, help with supporting himself from the authorities of his country of origin and/or otherwise support himself but that that has not been possible?
2. In interpreting the term ‘dependent’ in Article 2(2)(c) of Directive 2004/38, does any significance attach to the fact that a relative — due to personal circumstances such as age, education and health — is deemed to be well placed to obtain employment and in addition intends to start work in the Member State, which would mean that the conditions for him to be regarded as a relative who is a dependant under the provision are no longer met?

<sup>(1)</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) (OJ 2004 L 158, p. 77).

### Action brought on 19 September 2012 — European Commission v European Parliament, Council of the European Union

(Case C-427/12)

(2012/C 355/20)

*Language of the case: French*

#### Parties

*Applicant:* European Commission (represented by: B. Smulders, C. Zadra and E. Manhaeve, acting as Agents)

*Defendants:* European Parliament, Council of the European Union

#### Form of order sought

- Annul Article 80(1) of Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products <sup>(1)</sup> insofar as it provides for the adoption of measures establishing the fees payable to the European Chemicals Agency (ECHA) by an implementing act under Article 291 TFEU and not by a delegated act in accordance with Article 290 TFEU;
- Maintain the effects of the provision annulled and of all acts adopted on the basis thereof until the entry into force, within a reasonable period, of a new provision intended to replace it;

— Order the defendants to pay the costs.

In the alternative, in the event that the Court were to consider that this application for partial annulment is not admissible,

— Annul that regulation in its entirety;

— Maintain the effects of the abovementioned regulation and of all acts adopted on the basis thereof until the entry into force, within a reasonable period, of a new regulation intended to replace it;

— Order the defendants to pay the costs.

### Pleas in law and main arguments

The Commission raises a single plea in law in support of its action, alleging infringement of the Treaty and, in particular, of the system of attribution of the regulatory powers which the European Union legislature may attribute to the Commission pursuant to Article 290 and 291 TFEU.

The Commission submits that the Council and the Parliament erred in deciding to confer on the Commission implementing powers on the basis of Article 291 TFEU in order to establish the fees payable to the European Chemicals Agency. In the Commission's opinion, the act which it is called upon to adopt on the basis of Article 80(1) of Regulation (EU) No 528/2012 is in fact a delegated act within the meaning of Article 290 TFEU, in as much as it seeks to supplement certain non-essential elements of the legislative act. Having regard to the nature of the attribution of powers made to the Commission but also to the purpose of the act to be adopted under those powers, such an act ought therefore to be adopted in accordance with the procedure laid down in Article 290 TFEU and not the procedures laid down in Article 291 TFEU.

<sup>(1)</sup> OJ 2012 L 167, p. 1.

### Appeal brought on 24 September 2012 by Leifheit AG against the judgment of the General Court (Sixth Chamber) delivered on 12 July 2012 in Case T-334/10 Leifheit AG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case C-432/12 P)

(2012/C 355/21)

*Language of the case: German*

#### Parties

*Appellant:* Leifheit AG (represented by: V. Töbelmann and G. Hasselblatt, Rechtsanwälte)

*Other parties to the proceedings:* Office for Harmonisation in the Internal Market (Trade Marks and Designs), Vermop Salmon GmbH

**Form of order sought**

The appellant claims that the Court of Justice should:

- set aside the judgment of the General Court of 12 July 2012 in Case T-334/10;
  - annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 12 May 2010 in Case R 924/2009-1;
  - order OHIM to pay the costs of the proceedings before the Court of Justice, before the General Court and before the Board of Appeal, together with the costs incurred by the appellant;
- in the event that Vermop Salmon GmbH intervenes in the proceedings before it, the appellant further claims that the Court of Justice should:
- order the intervener to pay its own costs.

**Grounds of appeal and main arguments**

The judgment of the General Court of 12 July 2012 should be set aside, since the General Court erred in law by misconstruing the scope of the examination to be made by the Board of Appeal in appeal proceedings pursuant to Article 63(1) and Article 64(1) of Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark. <sup>(1)</sup>

The General Court failed to take account of the principle of functional continuity between the different instances of OHIM and wrongly found that complaints brought expressly can also not relieve the Board of Appeal of its duty to examine in full the findings of fact and law in the contested decision.

The General Court ultimately based its judgment on the finding that the issue of genuine use of the earlier mark was a specific preliminary issue which it was not necessary for the Board of Appeal to examine. In doing so, the General Court wrongly overlooked the fact that the issue of requiring evidence of lawful use forms part of opposition proceedings and, as such, falls within the scope of the examination to be made by the Board of Appeal.

In addition, the General Court infringed Article 8(1)(b) of Council Regulation (EC) No 207/2009 on the Community trade mark by misapplying the general principles for assessing the likelihood of confusion. In particular, in its assessment of the similarity of the signs, the General Court based its findings on the empirical rule that consumers place more emphasis on the beginning of words than on the other parts of marks,

without assessing whether that rule was applicable in this case. Furthermore, the General Court did not sufficiently assess the appellant's claim relating to the similarity of the goods. Moreover, it adopted the findings of the Board of Appeal without first assessing their accuracy.

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<sup>(1)</sup> OJ 2009 L 78, p. 1

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**Appeal brought on 26 September 2012 by Luigi Marcuccio against the order of the General Court (Second Chamber) delivered on 3 July 2012 in Case T-27/12 Marcuccio v Court of Justice**

**(Case C-433/12 P)**

(2012/C 355/22)

*Language of the case: Italian*

**Parties**

*Appellant:* Luigi Marcuccio (represented by: G. Cipressa, lawyer)

*Other party to the proceedings:* Court of Justice of the European Union

**Form of order sought**

- Set aside in its entirety and without any exception the order of the General Court of 3 July 2012 in Case T-27/12;
- order the Court of Justice to pay the costs incurred by the appellant relating to the proceedings at first instance and the appeal proceedings and allow in its entirety and without any exception whatsoever the relief sought in the main body of the application at first instance;
- in the alternative, refer the case back to the General Court for a fresh decision on the substance.

**Pleas in law and main arguments**

The order under appeal is clearly defective on account of a total failure to state reasons, unreasonableness, illogicality and distortion of the facts. The General Court erred in classifying certain letters sent by the appellant to the First Advocate General of the Court of Justice as requests for review within the meaning of Article 256(2) TFEU.