Decision of the Board of Appeal: Dismissed the appeal

Pleas in law: Infringement of Article 43 of Council Regulation No 207/2009 as the Board of Appeal failed to recognise that its decision is without object because of the fact that the parties have reached an agreement relating to the coexistence of the trade marks in question and the subsequent request of withdrawal; infringement of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms as the Board of Appeal refused to admit new evidence presented by the applicant; infringement of Article 57(2) of Council Regulation No 207/2009 as the Board of Appeal erred in its assessment of the meaning of evidence transmitted and failed to provide reasons with regard to the proof of acquiescence by the other party to the proceedings before the Board of Appeal of the registered Community trade mark subject of the application for revocation.

Action brought on 23 March 2010 — Pieno žvaigždės v OHIM — Fattoria Scaldasole (Iogurt.)

(Case T-135/10)

(2010/C 134/76)

Language in which the application was lodged: English

Parties

Applicant: AB 'Pieno žvaigždės' (Vilnius, Lithuania) (represented by: I. Lukauskienė and R. Žabolienė, lawyers)

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

Other party to the proceedings before the Board of Appeal: Fattoria Scaldasole Srl (Monguzzo, Italy)

Form of order sought

— Annul the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 18 January 2010 in case R 1070/2009-2; and

— Order the defendant to pay the costs of the proceedings.

Pleas in law and main arguments

Applicant for the Community trade mark: The other party to the proceedings before the Board of Appeal

Community trade mark concerned: The figurative mark 'Iogurt.', for goods in class 29

Proprietor of the mark or sign cited in the opposition proceedings: The applicant

Mark or sign cited: Lithuanian trade mark registration of the figurative mark 'jogurtas', for goods in class 29; Community trade mark registration of the figurative mark 'jogurt', for goods in class 29

Decision of the Opposition Division: Rejected the opposition in its entirety

Decision of the Board of Appeal: Deemed the appeal not to have been filed

Pleas in law: Infringement of Article 60 of Council Regulation No 207/2009 in conjunction with Article 8 of Commission Regulation No 2869/95 [1] as the Board of Appeal wrongly concluded that the fee for appeal was not paid within the prescribed time-limit of two months from the date of notification of the appealed decision.

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[1] Commission Regulation (EC) No 2869/95 of 13 December 1995 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OJ L 303, p. 33)

Action brought on 24 March 2010 — Spain v Commission

(Case T-138/10)

(2010/C 134/77)

Language of the case: Spanish

Parties

Applicant: Kingdom of Spain (represented by: J. Rodríguez Cárcamo)

Defendant: European Commission

Form of order sought

— Annulment of Commission Decision No 337 of 28 January 2010 reducing the assistance from the European Regional Development Fund (ERDF) for the Comunidad Valenciana operational programme Objective 1 (1994-1999) in Spain pursuant to Decision C(1994) 3043/6, ERDF No 94.11.09.011, and

— an order that the Commission should pay the costs.

Pleas in law and main arguments

By Decision C(94) 30346 of 25 November 1994, the Commission granted assistance from the European Regional Development Fund (ERDF) for an operational programme in the Valencia region, forming part of the Community support framework for action by the structural funds in the Spanish regions concerned by Objective No 1 in the period 1994-1999, for a maximum amount of ECU 1 207 941 000. The decision contested in these proceedings maintains that irregularities occurred in 23 of the 38 projects audited, and reduces the assistance originally granted by EUR 115 612 377,25.

In support of its claims the applicant puts forward the following pleas in law:

— infringement of Article 24 of Council Regulation (EEC) No 4253/88 of 19 December 1988, ([1]) in that the extrapolation method was used in the contested decision, given that that article does not provide for it to be possible to extrapolate irregularities found in specific actions to the whole body of actions included in the operational programmes financed by ERDF funds. The applicant maintains that the correction applied by the Commission in the contested decision has no basis in law, because the Commission's internal guidelines of 15 October 1997 concerning net financial corrections in the context of the application of Article 24 of Council Regulation (EEC) No 4253/88 cannot, in accordance with the judgment of the Court of Justice in Case C-443/97 *Spain* v *Commission*, ([2]) be considered to produce legal effects vis-à-vis the Member States, and because that provision envisages the reduction of assistance only when examination of that assistance reveals an irregularity, a principle breached by the application of corrections by extrapolation;

— as a subsidiary plea, infringement of Article 24 of Council Regulation (EEC) No 4253/88 of 19 December 1988 read in conjunction with the present Article 4(3) TEU (principle of sincere cooperation), for the correction was applied by extrapolation although no deficiency had been revealed in the management, supervision or audit systems regarding the amended contracts, given that the management bodies applied the Spanish legislation which has not been declared by the Court to be contrary to the law of the European Union. The Kingdom of Spain takes the view that the management bodies' observance of national law, even though it may lead to a finding by the Commission of irregularities or of actual infringements of European Union law, cannot serve as a basis for extrapolation on the ground of failings in the system of management, when the law applied by those bodies has not been declared contrary to European Union law by the Court of Justice and when the Commission has not brought an action against the Member State under Article 258 TFEU;

— as a subsidiary plea, infringement of Article 24 of Regulation (EEC) No 4253/88, in that the sample used for the application of the financial correction by extrapolation was unrepresentative. The Commission formed the sample for the application of extrapolation with a very limited number of projects (38 out of 7 862), without taking into consideration all the essential parts of the operational programme, including expenditure withdrawn beforehand by the Spanish authorities, taking as the starting point the expenditure declared and not the assistance granted and by using an IT programme which offered a level of reliability of less than 85 %. The Kingdom of Spain considers, therefore, that the sample does not satisfy the conditions of representativity required in order for it to serve as a basis for extrapolation;

— expiry of the limitation period for proceedings pursuant to Article 3 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995. Finally, the Kingdom of Spain considers that the communication of irregularities to the Spanish authorities (which took place in July 2004, in most cases concerning irregularities committed during the years 1997, 1998 and 1999) must determine the moment from which the period of four years laid down in Article 3 of Regulation No 2988/95 ([3]) started to run with regard to those irregularities.

([1]) Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1).

([2]) Case C-443/97 *Spain* v *Commission* [2000] ECR I-2415.

([3]) Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1).

Action brought on 30 March 2010 — Ben Ri Electrónica v OHIM — Sacopa (LT LIGHT-THECNO)

(Case T-143/10)

(2010/C 134/78)

Language in which the application was lodged: Spanish

Parties

Applicant: Ben Ri Electrónica SA (Madrid, Spain) (represented by: A. Alejos Cutuli, lawyer)

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