

It is submitted that the General Court wrongly held that the earlier trade mark upon which the Opponent relied had, as a matter of law, been put to genuine use. It is not disputed that the mark in question had actually been used in the course of trade by or with the consent of the Opponent in relation to the services for which it was registered. However, that use was in relation to the provision of services for which no charge was levied. Accordingly, as a matter of law, such use cannot be invoked to establish that the mark had been put to genuine use. This point has been the subject of some case law, which the Appellant submits (a) was mis-applied by the General Court, and (b) is inconsistent in any event. Accordingly, the matter of the legal consequences that ought to be drawn in such a factual scenario needs to be resolved by this Court.

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- (¹) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark
OJ L 78, p. 1
- (²) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark
OJ L 11, p. 1

Appeal brought on 24 November 2011 by Omnicare, Inc. against the judgment of the General Court (First Chamber) delivered on 9 September 2011 in Case T-290/09: Omnicare, Inc. v Office for Harmonisation in the Internal Market (Trade Marks and Designs), Astellas Pharma GmbH

(Case C-588/11 P)

(2012/C 25/77)

Language of the case: English

Parties

Appellant: Omnicare, Inc. (represented by: M. Edenborough QC)

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

Form of order sought

The appellant seeks an Order that the judgment under appeal be annulled. Further, the Appellant seeks an Order for its costs of this appeal and before the General Court.

Pleas in law and main arguments

The Appellant relies upon a single plea in law, namely that the General Court wrongly applied Article 8(1)(b) of Council Regulation (EC) No 207/2009 (¹) (the 'New Regulation'). This case involves an opposition brought by Astellas Pharma GmbH (formerly Yamanouchi Pharma GmbH) (the 'Opponent') based upon the Opponent's German trade mark registration No 394 01348 and an allegation of the existence of confusion pursuant to Article 8(1)(b) of the Council Regulation (EC) No 40/94 (²) ('the Old Regulation') (but which is identical to the pertinent parts of the New Regulation). As the earlier mark had been registered for more than five years before the Opposition was

commenced, it was necessary for the Opponent to prove that the mark has been put to genuine use in order for it to be used as a basis for the Opposition.

It is submitted that the General Court wrongly held that the earlier trade mark upon which the Opponent relied had, as a matter of law, been put to genuine use. It is not disputed that the mark in question had actually been used in the course of trade by or with the consent of the Opponent in relation to the services for which it was registered. However, that use was in relation to the provision of services for which no charge was levied. Accordingly, as a matter of law, such use cannot be invoked to establish that the mark had been put to genuine use. This point has been the subject of some case law, which the Appellant submits (a) was mis-applied by the General Court, and (b) is inconsistent in any event. Accordingly, the matter of the legal consequences that ought to be drawn in such a factual scenario needs to be resolved by this Court.

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- (¹) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark
OJ L 78, p. 1
- (²) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark
OJ L 11, p. 1

Appeal brought on 25 November 2011 by Alliance One International, Inc. against the judgment of the General Court (Third Chamber) delivered on 9 September 2011 in Case T-25/06: Alliance One International, Inc. v European Commission

(Case C-593/11 P)

(2012/C 25/78)

Language of the case: English

Parties

Appellant: Alliance One International, Inc. (represented by: C. Osti, A. Prastaro, G. Mastrantonio, avvocati)

Other party to the proceedings: European Commission

Form of order sought

The appellant claims that the Court should:

- set aside, in its entirety, the judgment of the General Court of 9 September 2011 in case T-25/06 Alliance One v. Commission; and, in case the state of the proceedings so permits,
- annul Article 1(1) of the Contested Decision, in so far it relates to SCC, Dimon and Alliance One; and accordingly
- reduce the fines imposed on Transcatab and Dimon Italia (Mindo) so that the fines do not exceed 10 % of their turnover in the last fiscal year; and
- reduce the fine imposed on Transcatab and Dimon Italia (Mindo) as the multiplying factor is not applicable anymore since it was based on the group size;

— in any event, order the Commission to pay all the costs, including those incurred by Alliance One before the General Court.

Pleas in law and main arguments

Alliance One seeks: (i) the annulment, in its entirety, of the Contested Judgment; and, in addition, (ii) the annulment of Article 1(1) of the decision of the Commission of 20 October 2005 in case COMP/C.38.281/B.2 — Raw tobacco — Italy, in so far it relates to Standard Commercial Corp. ('SCC'), Dimon Inc. ('Dimon') and Alliance One; and accordingly (iii) a reduction of the fines imposed on Transcatab S.p.A. ('Transcatab') and Dimon Italia S.r.l. ('Dimon Italia'; now Mindo) so that the fines do not exceed 10 % of their turnover in the last financial year; or alternatively (iv) a reduction of the fine imposed on Transcatab and Dimon Italia (now Mindo) as the multiplying factor is not applicable; (v) in any event, to order the Commission to pay all the costs, including those incurred by Alliance One before the General Court.

Alliance One submits that the contested judgment should be set aside on the following grounds:

- Firstly the General Court infringed Article 296 TFEU and Articles 48 and 49 of the Charter of Fundamental Rights of the EU. The failure to conduct a concrete and full analysis of the relevant evidence produced by the Appellant in order to rebut the presumption of decisive influence and, consequently, to adequately substantiate its reasoning for the rejecting that evidence made the presumption of exercise of control all but rebuttable and this amounted to a breach of the principles of presumption of innocence, legality and individual liability.
- Secondly, the General Court, by rejecting the evidence offered by Alliance One, misapplied the general principles relating to the burden of proof and the procedural rules of evidence and, in any event, breached the Appellant's right of defence.

Appeal brought on 25 November 2011 by Evropaiki Dynamiki — Proigmena Systemata Tilepikoinonion Pliroforikis kai Tilematikis AE against the judgment of the General Court (First Chamber) delivered on 9 September 2011 in Case T-232/06: Evropaiki Dynamiki — Proigmena Systemata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission

(Case C-597/11 P)

(2012/C 25/79)

Language of the case: English

Parties

Appellant: Evropaiki Dynamiki — Proigmena Systemata Tilepikoinonion Pliroforikis kai Tilematikis AE (represented by: N. Korogiannakis and M. Dermitzakis, Δικηγόροι)

Other party to the proceedings: European Commission

Form of order sought

The appellant claim that the Court should:

- Set aside the decision of the General Court.
- Exercise its full Jurisdiction and annul the decision of the Commission (DG Taxation and Customs Union) to reject the bid of the Appellant, filed in response to the Call for Tender (the 'CfT') TAXUD/2005/AO-001 for specification, development, maintenance and support of customs IT services relating to IT projects of the DG-TAXUD 'CUST-DEV' (OJ 2005/S 187-183846) and to award the same Call for Tender to another bidder, communicated to the applicant by letter dated 19 June 2006 and award the requested Damages
- Alternatively Refer to the General Court the case in order to rule on the substance of the case.
- Order the Commission to pay the Appellant's legal and other costs including those incurred in connection with the initial procedure.

Pleas in law and main arguments

The Appellant submits that the contested judgment should be set aside on the following grounds:

First, the Appellant submits that he General Court committed an error in law adopting an erroneous interpretation of Article 89 (1) and 98 (1) of the Financial Regulation, and of Article 140 (1) and (2) and Article 141 (2) of the Implementing Rules, of the principles of equality of treatment, non-discrimination, transparency and freedom of competition.

Second, the Appellant submits that the General Court erred in law misinterpreting, and distorting the submitted evidence.

Furthermore, the Appellant submits that the General Court erred in law by interpreting erroneously the amendment of the Selection Criteria as well as by not examining the existence of numerous manifest errors of assessment in the evaluation of the tender and by providing insufficient motivation of the attacked Judgment.