

ECJ tells OHIM and General Court to seek information of their own motion when necessary

In *Office for Harmonisation in the Internal Market v National Lottery Commission* (Case C-530/12 P), the ECJ has clarified the approach that the Office for Harmonisation in the Internal Market (OHIM) and the General Court should follow when applying national law, and highlighted the importance of seeking information of their own motion.

In 2007 the National Lottery Commission obtained registration of its 'crossed fingers' mark. Mediatek Italia Srl and Giuseppe De Gregorio filed an application for a declaration of invalidity of the mark based on earlier copyright in its own sign, as protected by Italian copyright law. The OHIM Cancellation Division ruled in favour of the applicants and the OHIM First Board of Appeal dismissed the appeal, finding that sufficient evidence of the existence of copyright had been provided through the submission of an agreement dating from 1986.



On appeal, the National Lottery Commission argued that the board had not taken into account issues relating to the date of the copyright (a post office stamp was affixed to the agreement on a Sunday, when Italian post offices are closed).

The General Court, when evaluating the board's interpretation of certain provisions of the Italian Civil Code, argued that these provisions had been interpreted by the Italian Supreme Court of Cassation in a judgment of June 14 2007; however, the board's decision made no reference to the fact that, in accordance with the case law of the Italian court, the National Lottery Commission could adduce proof that the 1986 agreement had been drawn up on a date other than that shown on the stamp.

On appeal, the ECJ found that the General Court had not erred in finding that, where OHIM is called on to take account of the national law of a member state in which protection is given to an earlier mark on which an

application for a declaration of invalidity is based, it "must – of its own motion and by whatever means considered appropriate – obtain information about the national law of the member state concerned, where such information is necessary for the purposes of assessing the applicability of a ground for invalidity relied on before it and, in particular, for the purposes of assessing the accuracy of the facts adduced or the probative value of the documents submitted".

Further, the ECJ found that, in applying certain provisions of Italian law not referred to by the parties, the General Court had not exceeded the limits of its power to seek information of its own motion.

However, the ECJ also stated that the right to a fair trial is a fundamental principle of EU law, and that this principle implied a right for the parties to be apprised of the matters raised by the courts of their own motion. As the 2007 judgment was not mentioned during the OHIM proceedings or in the

Case comment

"The ECJ clarified that, in circumstances in which OHIM may be called upon to take account of the national law of a member state, it must obtain information about the relevant national law and its interpretation. Both OHIM and the General Court have a duty to investigate the relevant national law in order to evaluate the accuracy of the facts and evidence submitted by the parties. However, the ECJ observed that the parties in this case had not had the opportunity to be heard with regard to the 2007 Italian Supreme Court decision – which was considered to be crucial to the General Court's line of reasoning."

Marcella Florio, associate at Bagnion SpA



written pleadings before the General Court, the General Court had infringed the principle that the parties should be heard and its decision was set aside.