

## V

(Announcements)

## COURT PROCEEDINGS

## COURT OF JUSTICE

**Judgment of the Court (First Chamber) of 22 September 2011 — Kingdom of Belgium v Deutsche Post AG, DHL International, European Commission**

(Case C-148/09 P) <sup>(1)</sup>

*(Appeal — Action for annulment — State aid — Article 88(3) EC — Regulation (EC) No 659/1999 — Commission decision not to raise objections — Concept of ‘doubts’ — Services of general economic interest)*

(2011/C 331/02)

Language of the case: German

**Parties**

*Appellant:* Kingdom of Belgium (represented by: C. Pochet and T. Materne, Agents, and J. Meyers, advocaat)

*Other parties to the proceedings:* Deutsche Post AG (represented by: T. Lübbig and J. Sedemund, Rechtsanwälte), DHL International (represented by: T. Lübbig and J. Sedemund, Rechtsanwälte), European Commission (B. Martenczuk and D. Grespan, Agents)

**Re:**

Appeal brought against the judgment of the Court of First Instance (Second Chamber) of 10 February 2009 in Case T-388/03 *Deutsche Post and DHL International v Commission*, by which the Court annulled Commission Decision C(2003) 2508 final of 23 July 2003 not to raise objections, following the preliminary examination procedure provided for in Article 88(3) EC, to several measures adopted by the Belgian authorities in favour of La Poste SA — Compensation of net costs of services of general economic interest — Certain circumstances wrongly classified as evidence of serious difficulties necessitating the initiation of the formal investigation procedure — Inadmissible pleas taken into consideration — Breach of the principle of legal certainty

**Operative part of the judgment***The Court:*

1. *Dismisses the appeal;*

2. *Orders the Kingdom of Belgium and the European Commission to pay the costs.*

<sup>(1)</sup> OJ C 167, 18.7.2009.

**Judgment of the Court (First Chamber) of 22 September 2011 (reference for a preliminary ruling from the High Court of Justice (England and Wales) (Chancery Division)) — Interflora Inc, Interflora British Unit v Marks & Spencer plc, Flowers Direct Online Ltd**

(Case C-323/09) <sup>(1)</sup>

*(Trade marks — Keyword advertising on the internet — Selection by the advertiser of a keyword corresponding to a competitor’s trade mark with a reputation — Directive 89/104/EEC — Article 5(1)(a) and (2) — Regulation (EC) No 40/94 — Article 9(1)(a) and (c) — Condition that one of the trade mark’s functions be adversely affected — Detriment to the distinctive character of a trade mark with a reputation (‘dilution’) — Unfair advantage taken of the distinctive character or repute of that trade mark (‘free-riding’))*

(2011/C 331/03)

Language of the case: English

**Referring court**

High Court of Justice (Chancery Division)

**Parties to the main proceedings***Applicants:* Interflora Inc, Interflora British Unit*Defendants:* Marks & Spencer plc, Flowers Direct Online Ltd**Re:**

Reference for a preliminary ruling — Interpretation of Article 5(1)(a) and (2) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), Article

9(1)(a) and (c) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) and Articles 12(1), 13(1) and 14(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1) — Meaning of 'use' of a mark — Registration by a trader with a service provider which operates an Internet search engine of a sign identical to a trade mark in order to have displayed automatically on the screen, following the entry of that sign as a search term, the URL of that trader's website offering goods and services identical to those covered by the trade mark ('AdWords') — Flower delivery service

### Operative part of the judgment

1. Article 5(1)(a) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks and Article 9(1)(a) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark must be interpreted as meaning that the proprietor of a trade mark is entitled to prevent a competitor from advertising — on the basis of a keyword which is identical with the trade mark and which has been selected in an internet referencing service by the competitor without the proprietor's consent — goods or services identical with those for which that mark is registered, where that use is liable to have an adverse effect on one of the functions of the trade mark. Such use:

— adversely affects the trade mark's function of indicating origin where the advertising displayed on the basis of that keyword does not enable reasonably well-informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether the goods or services concerned by the advertisement originate from the proprietor of the trade mark or an undertaking economically linked to that proprietor or, on the contrary, originate from a third party;

— does not adversely affect, in the context of an internet referencing service having the characteristics of the service at issue in the main proceedings, the trade mark's advertising function; and

— adversely affects the trade mark's investment function if it substantially interferes with the proprietor's use of its trade mark to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty.

2. Article 5(2) of Directive 89/104 and Article 9(1)(c) of Regulation No 40/94 must be interpreted as meaning that the proprietor of a trade mark with a reputation is entitled to prevent a competitor from advertising on the basis of a keyword corresponding to that trade mark, which the competitor has, without the proprietor's consent, selected in an internet referencing service, where the competitor thereby takes unfair advantage of the distinctive character or repute of the trade mark (free-riding) or where the advertising is detrimental to that distinctive character (dilution) or to that repute (tarnishment).

Advertising on the basis of such a keyword is detrimental to the distinctive character of a trade mark with a reputation (dilution) if, for example, it contributes to turning that trade mark into a generic term.

By contrast, the proprietor of a trade mark with a reputation is not entitled to prevent, *inter alia*, advertisements displayed by competitors on the basis of keywords corresponding to that trade mark, which put forward — without offering a mere imitation of the goods or services of the proprietor of that trade mark, without causing dilution or tarnishment and without, moreover, adversely affecting the functions of the trade mark with a reputation — an alternative to the goods or services of the proprietor of that mark.

(<sup>1</sup>) OJ C 282, 21.11.2009.

**Judgment of the Court (First Chamber) of 22 September 2011 (reference for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division) — United Kingdom) — Budějovický Budvar, národní podnik v Anheuser-Busch Inc.**

(Case C-482/09) (<sup>1</sup>)

**(Trade marks — Directive 89/104/EEC — Article 9(1) — Concept of acquiescence — Limitation in consequence of acquiescence — Starting point for limitation period — Prerequisites for the limitation period to run — Article 4(1)(a) — Registration of two identical marks designating identical goods — Functions of the trade mark — Honest concurrent use)**

(2011/C 331/04)

Language of the case: English

### Referring court

Court of Appeal (England & Wales) (Civil Division)

### Parties to the main proceedings

Applicant: Budějovický Budvar, národní podnik

Defendant: Anheuser-Busch Inc.

### Re:

Reference for a preliminary ruling — Court of Appeal (England & Wales) (Civil Division) — Interpretation of Articles 4(1)(a) and 9(1) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1) — Limitation in consequence of acquiescence — Concept of acquiescence — Concept of Community law? — Possibility of proceedings under relevant national law, including rules relating to honest concurrent use of two identical marks