Court of Justice EU, 10 april 2019, The Green Effort v EUIPO

LITIGATION

The General Court did not err in law in deciding that the time limit for bringing an action against the contested decision had expired:

- **article 4(4) of the decision concerning electronic communication with and by the Office must be interpreted as meaning that notification will be deemed to have taken place on the fifth calendar day following the day on which EUIPO placed the document in the user's inbox, unless the actual date of notification can be accurately established as a different date within that period of time**

Therefore, since it is common ground that the representative of The Green Effort requested access to the contested decision on 19 September 2017, that he downloaded it and became aware of it on that same day, the General Court did not err in law in deciding that the time limit for bringing an action against the contested decision expired on 29 November 2017, that decision having been notified on 19 September 2017. Therefore, the ground of appeal alleging that the starting point of the time limit prescribed for bringing an action was wrongly determined must be rejected as unfounded.

Source: **curia.europa.eu**

Court of Justice EU, 31 March 2010
(C. Toader, L. Bay Larsen, M. Safjan)
In Case C‑282/18 P,
APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 23 April 2018,
The Green Effort Limited, established in London (United Kingdom), represented by A. Ziehm, Rechtsanwalt,
appellant,
the other parties to the proceedings being:
European Union Intellectual Property Office (EUIPO), represented by A. Folliard-Monguiral, acting as Agent,
defendant at first instance,
Fédération internationale de l'automobile (FIA), established in Vernier (Switzerland), represented by M. Hawkins, Solicitor, T. Dolde, Rechtsanwalt, and K. Lüder, Rechtsanwältin,
intervener at first instance,
THE COURT (Sixth Chamber),
composed of C. Toader (Rapporteur), President of the Chamber, L. Bay Larsen and M. Safjan, Judges,
Advocate General: M. Campos Sánchez-Bordona,
Registrar: A. Calot Escobar,
having regard to the written procedure,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

1 By its appeal, The Green Effort Limited seeks to have set aside the order of the General Court of the European Union of 23 February 2018, The Green Effort v EUIPO — Fédération Internationale de l'Automobile (Formula E) (T‑794/17, not published, EU:T:2018:115) ('the order under appeal'), by which it dismissed its action brought against the decision of the Second Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 11 September 2017 (Case R 1827/2016-2), relating to revocation proceedings between The Green Effort and Fédération internationale de l'automobile ('the contested decision').

Legal context

Regulation (EC) No 207/2009

2 Council Regulation (EC) No 207/2009 of 26 February 2009 on the [European Union] trade mark (OJ 2009 L 78, p. 1) was later codified by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1), applicable, pursuant to Article 212 thereof, from 1 October 2017.

3 Article 65(5) of Regulation No 207/2009, entitled 'Actions before the Court of Justice', now Article 72(5) of Regulation 2017/1001, provides:

'The action shall be brought before the Court of Justice within two months of the date of notification of the decision of the Board of Appeal.'

4 Article 79 of Regulation No 207/2009, entitled 'Notification', now Article 98 of Regulation 2017/1001, states:

'The Office shall, as a matter of course, notify those concerned of decisions and summonses and of any notice or other communication from which a time limit is reckoned, or of which those concerned must be notified under other provisions of this Regulation or of the Implementing Regulation, or of which notification has been ordered by the President of the Office.'

Regulation (EC) No 2868/95

5 Under Rule 65(2) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1):

'Details of notification by other technical means of communication shall be determined by the President of the Office.'

The decision of 26 November 2013

6 Article 3 of Decision No EX-13-2 of the President of the Office of 26 November 2013 concerning electronic communication with and by the Office ('the decision of 26 November 2013'), which is entitled 'User Area and other restricted systems', is worded as follows:

'(1) The Office will make available an electronic communications platform that will enable users to receive, view, print and save all electronically available documents and notifications sent to them by

the Office as well as reply to such notifications and file requests and other documents. This electronic platform is a restricted system and will be referred to as the "User Area".

...

(4) The User Area will offer the option to receive all communications from the Office electronically. If the user chooses this option the Office will send all notifications electronically via this electronic platform, unless this is impossible for technical reasons.

...'

7 Article 4(1) to (4) of the decision, entitled 'Communication by the Office through the User Area', provides:

'(1) Once the user has activated the option that the Office communicates with him electronically, all electronically available official notifications from the Office to the user will in principle be made via the electronic platform.

(2) Users have the option of additionally receiving an alert for each notification sent to them through the platform. The alert serves only to inform the parties that a document has been placed in their inbox and does not constitute a notification or has any other legal value whatsoever.

(3) The date on which the document is placed in a user's Inbox will be recorded by the Office and mentioned in the User Area.

(4) Without prejudice to accurately establishing the date of notification, notification will be deemed to have taken place on the fifth calendar day following the day on which the Office placed the document in the user's Inbox.'

8 According to Article 11 of the decision, the latter entered into force on 2 December 2013.

9 The decision of 26 November 2013 was repealed by Decision No EX-17-4 of the Executive Director of the Office of 16 August 2017 concerning communication by electronic means as amended by Decision EX-18-1 of 15 May 2018, which entered into force on 1 October 2017, Article 3(4) of which reproduces the wording of Article 4(4) of the decision of 26 November 2013.

Background to the dispute

10 The Green Effort acquired rights over the word mark Formula E ('the contested mark'), the application for registration of which was filed on 17 November 2010 pursuant to Regulation No 207/2009.

11 The goods and services in respect of which registration was sought are in Classes 25, 38 and 41 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond, for each of those classes, to the following description:

– Class 25: 'Clothing';

– Class 38: 'Broadcasting by radio, television and satellite';

– Class 41: 'Organization of sporting events'.

12 The EU trade mark application was published on 3 December 2010 and the trade mark applied for was registered on 14 March 2011.

13 On 15 March 2016, Fédération internationale de l'automobile (FIA) filed an application for revocation of the contested mark for all the goods and services, pursuant to Article 51(1)(a) of Regulation No 207/2009, now Article 58(1)(a) of Regulation 2017/1001, on the ground that it had not been put to genuine use within a continuous period of five years.

14 On 21 March 2016, the Cancellation Division of EUIPO invited The Green Effort to submit, by 21 June 2016, proof of genuine use of the contested mark. Since that proof was submitted on 22 June 2016, in disregard of the time limit prescribed, it was not taken into account.

15 On 27 July 2016, The Green Effort filed an application for restitutio in integrum with the Cancellation Division of EUIPO in order have its rights to submit that proof re-established.

16 By decision of 8 September 2016, the Cancellation Division rejected the application and revoked the contested mark in its entirety.

17 On 5 October 2016, the applicant filed a notice of appeal with EUIPO against the decision of the Cancellation Division.

18 By the contested decision, the Second Board of Appeal of EUIPO ('the Board of Appeal') dismissed the appeal.

19 In support of its decision, the Board of Appeal considered that neither the proprietor of the contested mark nor its representative showed that they had actually taken the utmost care to observe the time limit prescribed for submitting the documents proving genuine use of the contested mark. It took the view that, while there is evidence in the file of repeated attempts to send electronic communications and fax communications from The Green Effort to EUIPO, with respect to Spanish local time all communications were received on 22 June 2016, that is to say after the time limit prescribed had expired, since the explanations provided in that regard could not be regarded as 'exceptional'.

20 Therefore, the Board of Appeal upheld the decision of the Cancellation Division to reject the application for restitutio in integrum, and, with regard to the application for revocation of the contested mark, it considered that, in the absence of any proof of genuine use in the European Union during the relevant period or of any indications of proper reasons for non-use, the rights acquired by The Green Effort had to be revoked in their entirety and deemed not to have had any effect as from 15 March 2016.

The proceedings before the General Court and the order under appeal

21 By application lodged at the General Court Registry on 4 December 2017, The Green Effort brought an action against the contested decision, alleging that its application for restitutio in integrum had been wrongly rejected, since it had been unable to send the documents proving genuine use of the contested mark due to technical failures in EUIPO's communication system. The Green Effort also claimed that FIA had

acted in bad faith in filing the application for revocation.

22 In the course of the proceedings before the General Court, following a request for regularisation from the Registry concerning the indication of the date on which the contested decision was notified, The Green Effort replied that it had been notified on 19 September 2017.

23 By the order under appeal, the General Court, therefore, found as a fact that the contested decision had been notified to The Green Effort on 19 September 2017, with the result that, in accordance with Article 58 of its Rules of Procedure, the time limit for bringing an action under Article 65(5) of Regulation No 207/2009 had expired on 29 November 2017. Given that the application was lodged at the General Court Registry on 4 December 2017, the General Court held that the action was brought out of time.

24 In addition, the General Court also noted that The Green Effort had not established or even pleaded the existence of unforeseeable circumstances or of force majeure that would make it possible to derogate from the time limit in question on the basis of the second paragraph of Article 45 of the Statute of the Court of Justice of the European Union, which applies to the procedure before the General Court by virtue of Article 53 thereof.

25 In the light of the foregoing, the General Court dismissed the action in its entirety as manifestly inadmissible.

Forms of order sought by the parties before the Court of Justice

26 The Green Effort claims that the Court should:

– set aside the order under appeal and the contested decision;

– grant the forms of order sought in its action at first instance; and

– order EUIPO and FIA to pay the costs.

27 EUIPO and FIA contend that the Court should:

– dismiss the appeal; and

– order The Green Effort to pay the costs.

The appeal

Admissibility

28 FIA submits that the appeal is manifestly inadmissible since The Green Effort is seeking to have set aside a factual finding by the General Court relating to the date on which the contested decision was notified. Appeals to the Court of Justice being limited to points of law, the General Court has exclusive jurisdiction to find and assess the facts.

29 In that respect, it should be noted that The Green Effort does not dispute the date on which the contested decision was notified, as accepted by the General Court, but criticises the General Court for erring in law with regard to the calculation of the time limit for bringing an action against that decision.

30 It follows that the appeal is admissible.

Substance

31 In support of its appeal, The Green Effort puts forward, first of all, a ground of appeal alleging that the General Court wrongly determined the starting point of the time limit laid down in Article 65 of Regulation No 207/2009, read in conjunction with Article 4(4) of the decision of 26 November 2013. It claims, secondly, with regard to the merits of the application for revocation, that FIA acted in bad faith in lodging that application and that proof of genuine use of the contested mark was submitted to EUIPO within the requisite time limit. If EUIPO did not receive such proof, it was due to technical failures in EUIPO's communication system, with the result that its application for restitutio in integrum should have been accepted.

Arguments of the parties

32 With regard to the ground of appeal alleging that the starting point of the prescribed time limit was wrongly determined, The Green Effort submits that the General Court wrongly calculated the time limit for bringing an action against the contested decision, in so far as it failed to take account of the fact that, under Article 4(4) of the decision of 26 November 2013, notification is deemed to have taken place on the fifth calendar day following the day on which the document was created by EUIPO's system.

33 Given that the contested decision was placed in the inbox of its representative's electronic account on 19 September 2017, The Green Effort claims that notification is deemed to have taken place on 25 September 2017, since 24 September 2017 was a Sunday. Therefore, the two-month time limit for bringing an action against the contested decision, extended by 10 days on account of distance, expired on 5 December 2017. Since the application was lodged at the General Court Registry on 4 December 2017, the order under appeal should be set aside.

34 EUIPO acknowledges that the wording of Article 4(4) of the decision of 26 November 2013 is not devoid of ambiguity. It contends that, according to the interpretation it has adopted for calculating time limits for its own administrative proceedings, the expression 'without prejudice to accurately establishing the date of notification' is construed as meaning 'regardless of any other date on which notification might be accurately established' or 'notwithstanding any other date on which notification might be accurately established'. Thus, when a document is notified electronically by EUIPO, an automatic extension of five calendar days following the day on which the document is placed in the User Area is included in the time limit set for any response or procedural step to be taken.

35 However, in the present case, EUIPO takes the view that, given that in its response for remedying the deficiencies of its application before the General Court, The Green Effort indicated 19 September 2017 as the date on which the contested decision was notified to it, it was unnecessary for the General Court to request further information on the means of notification, the order under appeal not being vitiated by any irregularity.

36 FIA argues that the General Court was not bound by the decision of 26 November 2013, so that failure to apply the provisions thereof cannot justify setting aside the order under appeal.

Findings of the Court

37 According to Article 65 in conjunction with Article 79 of Regulation No 207/2009, the content of which is reproduced, in essence, in Articles 72 and 98 of Regulation 2017/1001, actions may be brought before the General Court within two months of the date of notification of the decision of the Board of Appeal.

38 Under Rule 65(2) of Regulation No 2868/95, details of notification by technical means of communication, other than by telecopier, are to be determined by the President of the Office, now the Executive Director of EUIPO.

39 Since the decision of 26 November 2013 was adopted by the Executive Director of EUIPO and governs electronic communications with and by EUIPO, in particular the electronic transmission of notifications, that decision is applicable in the present case.

40 As set out in Article 4(4) of that decision, without prejudice to accurately establishing the date of notification, notification will be deemed to have taken place on the fifth calendar day following the day on which EUIPO placed the document in the user's inbox.

41 In that regard, it must be noted that the wording of that provision does not allow the scope to be given to the words 'without prejudice', within the meaning of that provision, to be ascertained unequivocally.

42 However, EUIPO's suggested interpretation of the expression 'without prejudice to accurately establishing the date of notification', contained in Article 4(4) of the decision of 26 November 2013, as meaning 'notwithstanding any other date on which notification might be established' or 'regardless' of it, has no basis in the various language versions of the decision of 26 November 2013, which show no discrepancy regarding the expression 'without prejudice'. That interpretation would render entirely irrelevant the reference in that provision to accurately establishing the date of notification, since the notification would, in all circumstances, be deemed to have taken place on the fifth calendar day following the day on which EUIPO placed the document in the user's inbox.

43 In the light of the foregoing, Article 4(4) of the decision of 26 November 2013 must be interpreted as meaning that notification will be deemed to have taken place on the fifth calendar day following the day on which EUIPO placed the document in the user's inbox, unless the actual date of notification can be accurately established as a different date within that period of time.

44 That interpretation meets the requirements stemming from the principle of legal certainty by preventing a decision of the Board of Appeal from being called into question indefinitely, given that, if no access to the document concerned is requested after it has been placed in the recipient's inbox, the notification is deemed to have taken place on the fifth calendar day after being so placed.

45 Therefore, since it is common ground that the representative of The Green Effort requested access to the contested decision on 19 September 2017, that he downloaded it and became aware of it on that same day, the General Court did not err in law in deciding that the time limit for bringing an action against the contested decision expired on 29 November 2017, that decision having been notified on 19 September 2017. Therefore, the ground of appeal alleging that the starting point of the time limit prescribed for bringing an action was wrongly determined must be rejected as unfounded.

46 In the light of all the foregoing, there is no need to examine the grounds of appeal concerning the merits of the application for revocation or the reasons for the decision to reject the application for restitutio in integrum.

47 Consequently, the appeal must be dismissed in its entirety.

Costs

48 Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since The Green Effort has been unsuccessful, it must be ordered to pay the costs in accordance with the forms of order sought by EUIPO and FIA.

On these grounds, the Court (Sixth Chamber) hereby:

1. Dismisses the appeal;
2. Orders The Green Effort Limited to bear its own costs and to pay the costs incurred by the European Union Intellectual Property Office (EUIPO) and by Fédération internationale de l'automobile (FIA).

Toader, Bay Larsen, Safjan

Delivered in open court in Luxembourg on 10 April 2019.

A. Calot Escobar, Registrar

C. Toader, President of the Sixth Chamber