

## DECISION

No. 9218

SOFIA, 10.11.2004

### IN THE NAME OF THE PEOPLE

**The Supreme Administrative Court of the Republic of Bulgaria – composed of five members**, in a court session on September the seventeenth, two thousand and four, with members:

**Chair:** TSVETANKA TABANDZHOVA

**MEMBERS:** IVAN TRENDAFILOV

MINA ATANASOVA

ZDRAVKA SHUMENSKA

SVETLOZARA ANCHEVA

with secretary

Magdalena Mihaylova

with the participation of

the prosecutor

heard the reported

by the magistrate

SVETLOZARA ANCHEVA

as per adm. case No. 2623/2004.

The proceeding follows the regulations of article 5, item 1, in relation to article 23 of the Law of the Supreme Administrative Court. The proceeding had been initiated as per complaint of “Guinness United Distillers and Vintners Amsterdam BV” – The Netherlands, “Justerini and Brooks Limited” – England and “R and A Bailey & Co” – Ireland, all three companies from the Diageo Group, against article 1, paragraph 5, offer 1 of the Regulation for border measures for protection of intellectual property rights, adopted by means of Decree of the Ministerial Council No. 249/27.11.2000, (published, SG, issue 98/01.12.2000, amendment and addition, issue 88/07.10.2003), as this regulation is contradictory to article 79 of the Legislation for brands and geographical indications /LBGI/. According to the complaint lodgers, the decree is issued based on a legal delegation pursuant article 80 of the LBGI, but the issuing body had exceeded the authority, delegated by means of said decree, namely to solely determine the regulation and means of implementation of measures of border control, provisioned in section III of LBGI, but not the subject of the measures. The complains states that upon issuing the regulation, the Ministerial Council had not conformed to article 79 of the Law of Border Security that does not provision restrictions of the types of violations of LBGI, in which the customs authorities are eligible to implement the provisioned detention of commodities,

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aforsaid restriction introduced by means of article 1, paragraph 5 of the regulation that is appealed against. Furthermore, the complaint lodgers indicate the texts of article 13, paragraph 1 and article 2, item 2 and 3 and article 15, paragraph 1 of the LBGI, by means of which they adduce the standpoint of importing commodities to the country, indicated by a registered trademark by an entity without the consent of the trademark holder for said import, constituting a violation of the rights of the trademark holder, even in case the commodities had been marked in said means by the trademark holder. Written notes had been presented. The complaint defendant, Ministerial Council of the Republic of Bulgaria, through its procedural representative, pleads non-granting of said complaint, as the published normative act is in conformity with the European legislation in this particular field and more specifically article 1, item 4 of the enacting Regulations No. 3295/1994 and article 3 of the Regulation 01383/2003. The concerned party – "Customs" agency – through its procedural representative, litigates the complaint and pleads non-granting of the complaint as irrelevant. Similar considerations had been exposed in the presented written notes. The Supreme Administrative Court, of five members, following a consideration of claims, included in the complaints, the standpoints of the complaint defendant and the concerned party and the evidence, collected for the case, determined the following:

With regards to the warranty of the complaint. The normative acts regulate a broad specter of social relations and therefore have no specific addressees, but an unspecified field of legal subjects, as a result of which any and all legal entities are eligible to exercise their rights with regards to a complaint against a normative act. To that extend exists the regulations of article 120, paragraph 2, Constitution of the Republic of Bulgaria. By means of this regulation, the so-called general clause of appealing against all normative acts had been adopted, as this general term includes normative, general and individual acts, exceptions of this clause are explicitly and legally specified. In conformity to the legal regulations of article 125, paragraph 2, Constitution of the Republic of Bulgaria and article 5, item 1, the Law of the Supreme Administrative Court /LSAC/ on disputes of legality of the acts of the Ministerial Council, the Supreme Administrative Court is competent to rule. Typical for said complaints is lack of term limitation, pursuant article 13, paragraph 1, LSAC. With regards to the above-stated considerations, the complaint is deemed procedurally permissible and should be reviewed by the membership of five members of the Supreme Administrative Court.

**Essentially:** The regulation of the border measures for protection of intellectual property rights /hereinafter for short referred to in the text as the Regulation/ had

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been issued by the Ministerial Council of the Republic of Bulgaria with provisions of the delegated legal authority pursuant the regulations of article 80 of the LBGI, by means of which this authority determines with a separate regulation the order and means of execution of section III of said legislation, regulating the measures of border control. Respectively the regulation is issued by a legally authorized body, by regulations of an explicit legal delegation, said issue not discussed in this legal proceeding. This section of the law contains the protective measures of the copyright holder, thus implementing the protection of intellectual property rights, providing the trademark ownership right, pursuant article 10, paragraph 3 of the LBGI is an exclusive right. By means of article 13 of LGBI, the trademark holder not only is eligible to use, but also control its use, as well as the right of forbidding third parties to use it as a symbol with regards to said parties commercial activity, or limit its use to the consent of the trademark legal holder. "Use", pursuant article 13, paragraph 2, item 3 of LGBI, includes the import or export of respective goods, bearing said symbol. The decree of article 1, paragraph 5, offer 1 of the Regulation indicates non-application with regards to commodities, bearing the registered trademark in case said commodities had been manufactured with the consent of the legal right holder. This implies no customs authorities can detain commodities, even in cases where the legal holder of a specific brand had not granted consent to a third party for use to implement an import in the Republic of Bulgaria. Therefore in said cases, even if a violation of the right of intellectual property had occurred, the customs authorities hold no obligation to implement the protective measures, provisioned in the Regulation. This is the case, as the regulation is issued based on delegation of legal norm of article 80 of the LBGI. In this legislation, in section III, related to the measures for border control, the application range of said measures is explicitly specified, as in the decree of article 78, paragraph 1 of the LBGI explicitly provisions for goods, transferred through the state border of the Republic of Bulgaria, bearing the registered trademark or an imitation of this, without the consent of the holder, will be detained by the customs authorities based on a petition in writing of the holder. Respectively, the legislator wanted to protect the trademarks and preserve the rights of their holders in case of use of said trademarks without the consent of their holder. It means that the legislator meant to protect the legal holders of trademarks from unconscientious actions of third parties, using the respective trademark without the consent of its holder. There is no explicit legal regulation with regards to the applicable field of measures for border control and with regards to parties using the trademark with the consent of the legal holder, however the latter had not granted its explicit consent for import or export. As the special legislation holds no explicit regulation, applicable with regards to the specified cases from the complaint lodgers, their complaint with regards to the legal non-conformity of article 1, paragraph 5, offer 1 of the regulation, is

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unfounded, as said decree had not been issued in violation of the law. To that purpose the court accepts the standpoint of the representative of the “Customs” Agency, constituted as a concerned party on the case, that the scope of the border measures is defined by article 78 of the LBGI, and not, as the complaint lodgers declared, by article 79 of said legislation.

The complaint of the complaint lodgers regarding the inconformity of the procedural decree of the regulation with the European regulations is unfounded. Evident from the case data upon issuing of the regulation, an explicit reference to the issuing authority of regulation No. 3295/22.12.1994 of the European Council, where an exception of application of the commodity regulation, bearing a commercial trademark with the consent of the holder of said trademark – article 1, item 4 and establishes that the appealed article 1, paragraph 5, offer 1 of the appealed by means of this legal proceeding regulation, reproduces the legal norm of said regulations. The complaint lodgers reply and substantiate on another regulation – No. 1383/2003, but specify that as a normative deed, acting 7 days following its publishing, it had been operating since July 2004, i.e. after establishing paragraph 5 of article 1 of the regulation /SG, issue 88/07.10.2003/, due to which substantiation of the complaint lodgers on a regulation, that had not been an enacting legislation to the moment of establishing of the appealed regulation is unfounded. In view of the detailed, said court members consider the complaint to be unfounded, and the appealed regulation of article 1, paragraph 5, offer 1 of the Regulation of border measures for protection of intellectual property rights, issued by the Ministerial Council, is legal. Actuated by the above-stated and to this purport, the Supreme Administrative Court, commission of five members

## **DECIDED:**

REPUDIATES as unfounded the complaint of “Guinness United Distillers and Vintners Amsterdam BV” – The Netherlands, “Justerini and Brooks Limited” – England and “R and A Bailey and Co” – Ireland, all three companies members of the Diageo Group for revoking of article 1, paragraph 5, offer 1 of the Regulation for border measures for protection of intellectual property rights, adopted by means of Decree of the Ministerial Council No. 249/27.11.2000, published, SG, issue 98/01.12.2000, amendment and addition, issue 88/07.10.2003.

**THE DECISION** is final and is not liable to appeal.

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