

Secondly, the Council argues that the General Court erred in law in holding that one of the grounds justifying the imposition of restrictive measures against Kala Naft was not sufficient to satisfy the duty to state reasons and that the Council was required to adduce evidence to support another of those grounds. The Council also submits that the General Court erred in law by holding that the fact that Kala Naft markets equipment for the oil and gas sectors which is liable to be used in the Iranian nuclear programme cannot be regarded as 'supporting' nuclear proliferation, without placing that fact in context with the other justifying grounds.

**Action brought on 25 July 2012 — European Commission v Italian Republic**

(Case C-353/12)

(2012/C 287/54)

*Language of the case: Italian*

**Parties**

*Applicant:* European Commission (represented by: S. Thomas, D. Grespan and B. Stromsky, acting as Agents)

*Defendant:* Italian Republic

**Form of order sought**

The Commission claims that the Court should:

- declare that, by failing to take, within the prescribed period, all the measures necessary to recover the State aid considered unlawful and incompatible with the internal market by Commission Decision C(2009) 8123 of 28 October 2009 on State aid C 59/07 (ex N 127/06 and NN 13/06) implemented by Italy for Ixfin SpA (notified on 29 October 2009 and published in OJ 2010 L 167, p. 39), the Italian Republic has failed to fulfil its obligations under Articles 2, 3 and 4 of that decision and under the Treaty on the Functioning of the European Union;
- order the Italian Republic to pay the costs.

**Pleas in law and main arguments**

The subject of the Commission's action is the non-implementation by the Italian Republic of the Commission's decision on State aid in the form of a guarantee provided by the Ministry of Economic Development for a loan taken out by Ixfin with Banca Apulia SpA.

The Commission points out that the Italian Republic should have ensured fulfilment of its obligation to recover the aid by 1 March 2010 and, in addition, should have informed the Commission by 29 December 2009 of the measures taken to implement the decision.

At the time the present action was brought, the Italian Republic had not yet taken all the measures necessary for discharging those obligations.

**Appeal brought on 27 July 2012 by Harald Wohlfahrt against the judgment of the General Court (Fifth Chamber) delivered on 16 May 2012 in Case T-580/10 Harald Wohlfahrt v Office for Harmonisation in the Internal Market (Trade Marks and Designs)**

(Case C-357/12 P)

(2012/C 287/55)

*Language of the case: German*

**Parties**

*Appellant:* Harald Wohlfahrt (represented by: M. Loschelder and V. Schoene, Rechtsanwälte)

*Other parties to the proceedings:* Office for Harmonisation in the Internal Market (OHIM) (Trade Marks and Designs), Ferrero SpA

**Form of order sought**

The appellant claims that the Court should:

- set aside the judgment of the General Court (Fifth Chamber) of 16 May 2012 in Case T-580/10 and deliver judgment in line with the form of order sought by the appellant before the General Court, which is reproduced on page 4 of the judgment;
- order OHIM to pay the necessary costs incurred by the appellant.

**Pleas in law and main arguments**

OHIM and the General Court refused the registration by the appellant (applicant before the General Court) of the mark 'Kindertraum' for goods in Classes 16 and 28, since the intervener in support of the defendant, proprietor of the earlier Italian word mark 'kinder', inter alia, for goods in those classes, filed an opposition against such registration.

The appellant raises three grounds of appeal.

**First ground of appeal: infringement of Article 42(2) of Regulation No 207/2009 <sup>(1)</sup>**

The General Court took the view that it was not decisive whether the opposing trade mark which had already been registered for eight years was in use or not at the time of the opposition decision. Under Article 42(3) in conjunction with Article 42(2) of Regulation No 207/2009, use of the opposing trade mark must be proven only if it was registered during the period of five years preceding the date of publication of the Community trade mark application. The appellant sees in

that approach a contradiction with the purpose of compulsory usage, which aims to ensure that, after the five-year grace period has expired, no rights can be based on an unused earlier mark. Contrary to the view of the General Court, the loophole in Article 42 of Regulation No 207/2009 must be closed by a teleological interpretation, taking account of German or Italian national trade mark law. Moreover, in relation to Article 42 of Regulation No 207/2009, the situation in relation to use at the time of closure of the opposition proceedings is decisive.

**Second ground of appeal: infringement of Article 75(1) of Regulation No 207/2009, misuse of trade mark law by the opposing trade mark**

The Board of Appeal did not address the appellant's complaint that the registration of the Italian trade mark relied on in opposition constitutes a misuse of law. The appellant accuses the General Court of wrongly having failed to allow that complaint. That complaint is part of Community law and thus also part of Community trade mark law. The appellant submits that, in the present case, the conduct of the opponent as regards registration is aimed at using unused marks, and in defence of no economic interests worthy of protection, to bring about a comprehensive blockage of use of the word 'kinder'.

**Third ground of appeal: misapplication of Article 8(1)(b) of Regulation No 207/2009**

The General Court was wrong to conclude that there was a likelihood of confusion between the intervener's opposing trade mark and the mark applied for. First of all, the General Court wrongly assessed the appellant's submission and wrongly assumed that the appellant had not disputed the Board of Appeal's finding that the conflicting marks were similar. In reality, he did dispute that finding. The marks are not similar, since the component 'kinder' in the opposing trade mark is less distinctive, at the most.

<sup>(1)</sup> Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

**Appeal brought on 31 July 2012 by the European Commission against the judgment of the General Court (Fourth Chamber) delivered on 22 May 2012 in Case T-344/08 EnBW Energie Baden-Württemberg AG v European Commission**

(Case C-365/12 P)

(2012/C 287/56)

Language of the case: German

**Parties**

*Appellant:* European Commission (represented by: B. Smulders, P. Costa de Oliveira and A. Antoniadis, Agents)

*Other parties to the proceedings:* EnBW Energie Baden-Württemberg AG, Kingdom of Sweden, Siemens AG, ABB Ltd

**Form of order sought**

1. Set aside point 1 of the operative part of the judgment of the General Court of 22 May 2012 in Case T-344/08;
2. dismiss the application in Case T-344/08;
3. order the respondent and the applicant to pay the costs of the appeal and of the proceedings at first instance.

**Pleas in law and main arguments**

According to the appellant, the General Court failed to have regard to the need for the harmonious interpretation of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents ('Transparency Regulation'), <sup>(1)</sup> as established in the landmark rulings in *Technische Glaswerke Ilmenau*, <sup>(2)</sup> *API*, <sup>(3)</sup> and *Bavarian Lager*, <sup>(4)</sup> and recently confirmed in *Agrofert* <sup>(5)</sup> and *Odile Jacob*, <sup>(6)</sup> and instead gave priority to the right of access under the Transparency Regulation, thereby erring in law. The General Court's interpretation of the right of access under the Transparency Regulation, or of the relevant exceptions, undermines the system of consultation of the file that exists under cartel law, and the balancing of interests to be found therein, that is the balance between the Commission's interest in the effective implementation of the task conferred on it under Article 108 TFEU, on the one hand, and the interest of undertakings in the effective protection of information submitted by them in the context of cartel proceedings, on the other.

The General Court wrongly declined to apply to the present case the general presumption — established in particular in *Technische Glaswerke Ilmenau* and confirmed in *Odile Jacob* — that documents in the administrative file merit protection. In so doing, the General Court failed to have regard to the fact that such a general presumption is justified by the system of consultation of the file that exists under cartel law, but also by the restriction under cartel law on the use of documents obtained in the course of an investigation.