

Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs) Torrefacção Camelo L^{da}

Form of order sought

- set aside the judgment of the Court of First Instance of the European Communities of 30 January 2008 delivered in Case T-128/06 and deliver a judgment amending the judgment of the Court of First Instance and declaring it necessary to apply the prohibition contained in Article 8(5) of the Community Trade Mark Regulation ⁽¹⁾ to this case and, consequently, in considering the arguments submitted by Japan Tobacco, decide to refuse the registration of Community trade mark No 1 469 121;
- order OHIM to pay the costs of these proceedings.

Pleas in law and main arguments

By its appeal, the appellant claims that the Court of First Instance infringed the Community Trade Mark Regulation and, more specifically, Article 8(5) thereof. Despite the fact that the Court of First Instance recognised the reputation of the earlier mark, the similarity between the marks in question and the connection between the goods designated by the marks, it required actual, real and current evidence of harm to the earlier mark, whilst Article 8(5) requires a mere likelihood of harm to that mark, of unfair advantage being taken of its distinctive character or of detriment to it.

⁽¹⁾ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

Action brought on 16 April 2008 — Commission of the European Communities v Federal Republic of Germany

(Case C-160/08)

(2008/C 209/27)

Language of the case: German

Parties

Applicant: Commission of the European Communities (represented by M. Kellerbauer and D. Kukovec, Agents)

Defendant: Federal Republic of Germany

Form of order sought

- declare that, by failing to publish notices of contracts awarded and by failing to make a public call for tenders or failing transparently to award service contracts in the field of public ambulance services, the Federal Republic of Germany has failed to fulfil its obligations under Directives 92/50/EEC ⁽¹⁾ and 2004/18/EC ⁽²⁾ and infringed the principles of freedom of establishment and freedom to provide services (Articles 43 EC and 49 EC);
- order the Federal Republic of Germany to pay the costs.

Pleas in law and main arguments

The Commission states that its attention has been drawn by several complaints to the procurement practice for service contracts in the field of public ambulance services in the Federal Republic of Germany. Those complaints objected to the fact that contracts in that field were, as a rule, not the subject of a call for tenders and not awarded transparently. In the Commission's view, the generally small number of Europe-wide calls for tenders for ambulance services by local authorities as bodies responsible for the public ambulance service (13 contract notices in a period of six years, by only 11 out of the 400-plus German districts and cities with district status) is evidence of a widespread practice in Germany of not awarding those ambulance services in accordance with the requirements of the European procurement directives and the fundamental principles of Community law. Moreover, those contracts were awarded without measures to ensure the appropriate transparency and to avoid discrimination.

It says that by that award practice the Federal Republic of Germany has failed to fulfil its obligations under Directives 92/50/EEC and 2004/18/EC and infringed the principles of freedom of establishment and freedom to provide services laid down in Articles 43 EC and 49 EC, in particular the prohibition of discrimination contained in those principles.

Local authorities as bodies responsible for the ambulance service are contracting authorities within the meaning of Article 1(b) of Directive 92/50/EEC or Article 1(9) of Directive 2004/18/EC. It should also be undisputed that contracts awarded in the field of public ambulance services constitute public contracts for consideration that are caught by those directives and clearly exceed the relevant threshold value for the directives to be applicable. It follows from all those circumstances that the contracts for services in question should have been awarded in the procedures laid down by the directives and in compliance with their general provisions on equal treatment and non-discrimination.

Since the present case concerns contracts of obvious cross-border interest, in addition to the obligations under Directives 92/50/EEC and 2004/18/EC the general principles of freedom of establishment and freedom to provide services under the EC Treaty were also infringed by the awards that were made without transparency.

Ambulance services, like transport services and medical services in the context of the public ambulance service, do not fall within the exceptions in Article 45 EC in conjunction with Article 55 EC, under which activities which in a given Member State are connected, even occasionally, with the exercise of official authority are excluded, as far as that State is concerned, from the chapter of the EC Treaty on freedom of establishment and freedom to provide services. The exception in Article 45 EC, which as an exception to the fundamental freedoms must be interpreted strictly, is strictly limited to those activities which constitute as such a direct and specific participation in the exercise of public power. The question of whether public power is being exercised is not to be answered by reference to the public-law nature of the activity in question; rather, what is decisive is the possibility of making use, as against the citizen, of public powers and powers of coercion.

The Commission is convinced that the award practice in the field of the ambulance service could, even if foreign providers of services take part, be designed in such a way that a comprehensive, rapid and high-quality ambulance service is ensured throughout the country.

⁽¹⁾ OJ 1992 L 209, p. 1.

⁽²⁾ OJ 2004 L 134, p. 114.

Appeal brought on 29 April 2008 by the Commission of the European Communities against the judgment delivered on 14 February 2008 in Case T-351/05, Provincia di Imperia v Commission of the European Communities

(Case C-183/08 P)

(2008/C 209/28)

Language of the case: French

Parties

Appellant: Commission of the European Communities (represented by: D. Martin and L. Flynn, Agents)

Other party to the proceedings: Provincia di Imperia

Form of order sought

- annul the judgment of the Court of First Instance of 14 February 2008 in Case T-351/05;
- declare that the action brought by the Provincia di Imperia in that case was inadmissible;
- order the Provincia di Imperia to pay the Commission's costs in the present case.

Pleas in law and main arguments

By its appeal, the Commission complains that the judgment under appeal failed to apply the conditions governing the admissibility of an action for annulment brought under Article 230 EC, in particular by considering that the applicant at first instance had an interest in bringing an action. An action for annulment brought by a natural or legal person is only admissible in so far as the outcome of the action is likely to produce a benefit for the applicant. In the present case, the action brought by the applicant is manifestly inadmissible since a judgment annulling the contested act would, in itself, in no way produce a 'benefit' for that applicant. The granting of a subsidy is effectively a concession agreed to by the Commission and a party responding to a call for proposals consequently has no right to such a subsidy.

Alternatively, the Commission submits that, even if the applicant at first instance did have an interest in bringing an action on the day it brought its action, that interest would in any event have disappeared by the time the judgment under appeal was delivered, since the entire budget set aside for the call for proposals had been used up and the programming had come to an end.

Appeal brought on 16 May 2008 by American Clothing Associates SA against the judgment delivered on 28 February 2008 by the Court of First Instance (Fifth Chamber) in Case T-215/06, American Clothing Associates SA v OHIM

(Case C-202/08 P)

(2008/C 209/29)

Language of the case: French

Parties

Appellant: American Clothing Associates SA (represented by: P. Maeyaert, N. Clarembeaux and C. De Keersmaecker, lawyers)