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.

(1) 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'), (1) as established in the landmark rulings in *Technische Glaswerke Ilmenau*, (2) *API*, (3) and *Bavarian Lager*, (4) and recently confirmed in *Agrofert* (5) and *Odile Jacob*, (6) 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.

The General Court erred in law in its interpretation of the exception designed to protect the purpose of investigations, under the third indent of Article 4(2) of the Transparency Regulation. It wrongly limited the scope of application of that exception to the completion of specific inspections. It failed to have regard to the fact that the purpose of investigations extends not only to the effectiveness of individual inspections (at any rate until the decision closing the particular proceedings becomes final), but also to the effectiveness of the Commission's enforcement powers in the field of cartel law generally (including the safeguards associated with the rule of law that are applicable here).

The General Court erred in law in its interpretation of the exception designed to protect commercial interests, under the first indent of Article 4(2) of the Transparency Regulation. It wrongly limited the scope of application essentially to the protection of business secrets. It failed to have regard to the fact that such protection extends also to confidential information submitted to the Commission solely in the context of investigations of particular undertakings and which would not otherwise have been made available to third parties.

The General Court erred in law in its interpretation and application of the exception designed to protect the Commission's decision-making process, under the second subparagraph of Article 4(3) of the Transparency Regulation. It failed to have regard to the fact that the Commission is empowered to refuse to grant access to internal documents containing opinions for internal use as part of deliberations and preliminary consultations on the ground that their publication might restrict the Commission's scope for taking decisions in the event of a resumption of the proceedings. In finding that the Commission should not have refused access to internal documents, the General Court also failed to have regard to the fact that internal documents are in any event also covered by the exceptions in Article 4 of the Transparency Regulation, and by the presumption — which to that extent is recognised by the General Court — that they merit protection.

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(1) OJ 2001 L 145, p. 43.
(2) Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885.
(3) Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* [2010] ECR I-8533.
(4) Case C-28/08 P *Commission* v *Bavarian Lager* [2010] ECR I-6055.
(5) Judgment of the Court of Justice of 28 June 2012 in Case C-477/10 P *Agrofert Holding* v *Commission*.
(6) Judgment of the Court of Justice of 28 June 2012 in Case C-404/10 P *Commission* v *Éditions Odile Jacob*.