(see, inter alia, the Court's judgments in *Raso*, *GB-Inno-BM*, *Connect Austria*, *Dusseldorp*, *CBEM* and *MOTOE*). The extension of DEI's dominant position from the primary to the secondary market and its retention on that market, and the undoubted competitive advantage that DEI enjoyed in electricity production because of the low cost of lignite, enabled DEI to feed electricity into the interconnected network in Greece at lower prices, in greater quantities and for a longer period, factors which amount to abusive behaviour (although the Court's case-law does not require proof of behaviour of such kind, having regard to the specific facts of the present case).

— The contested decision adopted by the Commission also found that DEI's competitors needed a diversified spectrum of sources, including access to sufficient quantities of lignite, in order for them to enter the electricity market, viably remain there and effectively participate in competition there. That fact should have been known both to the Hellenic Republic, which failed to grant operating licences for exploitable lignite deposits to DEI's potential competitors, and to DEI when it exercised its quasi-monopolistic rights, using its dominant position on the primary lignite market as leverage to extend its dominant position to the secondary market for the wholesale supply of electricity and to maintain it there, with the result that it *de facto* obstructed or prevented access of the potential new competitors to the secondary market in question.

Appeal brought on 30 November 2012 by the European Commission against the judgment delivered by the General Court (Sixth Chamber) on 20 September 2012 in Case T-421/09 DEI v European Commission

(Case C-554/12 P)

(2013/C 32/15)

Language of the case: Greek

Parties

Appellant: European Commission (represented by: T. Khristoforou and A. Antoniadis, Agents, and A. Ikonomou, dikigoros)

Other parties to the proceedings: Dimosia Epikhirisi Ilektrismou AE (DEI), Hellenic Republic

Form of order sought

— set aside the General Court's judgment of 20 September 2012 in Case T-421/09 in its entirety;

— give final judgment in the matter if it is considered that the state of the proceedings so permits;

— order DEI to pay its own costs, and the Commission's costs at first instance and on appeal.

Pleas in law and main arguments

1. By its judgment in Case T-421/09, the General Court annulled the decision of 4 August 2009 by which the Commission found that the corrective measures proposed by the Hellenic Republic were necessary and proportionate for removing the consequences of the infringement and ensuring compliance with the previous decision of 5 March 2008 ('the decision of 4 August 2009' or 'the contested decision'). The General Court held that the contested decision had to be annulled, basing its assessment solely on the fact that the Commission's previous decision of 5 March 2008, upon which the contested decision was exclusively founded, had in the meantime been annulled by its judgment in Case T-169/08, also delivered on 20 September 2012.

2. Since the Commission considers that the General Court's judgment in Case T-169/08 is based on many errors of law, on defective and insufficient reasoning and on misinterpretation of the evidence and of the basis of the Commission's decision of 5 March 2008, it has already also brought an appeal against that judgment of the General Court. Therefore, if that appeal against the judgment in Case T-169/08 is upheld, the sole basis upon which the judgment under appeal in the present case (T-421/09) was founded will also automatically disappear.

Reference for a preliminary ruling from the Tribunale di Tivoli (Italy) lodged on 3 December 2012 — Claudio Loreti and Others v Comune di Zagarolo

(Case C-555/12)

(2013/C 32/16)

Language of the case: Italian

Referring court

Tribunale di Tivoli

Parties to the main proceedings

Applicants: Claudio Loreti and Others

Defendant: Comune di Zagarolo

Questions referred

It is considered necessary to refer to the European Court of Justice of the European Union questions of interpretation for a preliminary ruling on:

1. the compatibility of Article 7 of the Code of Administrative Procedure in force in the Italian Republic, which, pursuant to Article 103 of the Italian Constitution, provides that

'[t]he administrative courts shall have jurisdiction to hear disputes concerning issues of legitimate interests and, in the specific areas laid down by law, disputes involving individual rights, relating to the exercise of or failure to exercise administrative powers in relation to measures, acts, agreements or conduct involving the exercise of those powers, including indirectly, on the part of public authorities. Acts or measures adopted by the Government in the exercise of political power may not be challenged before the courts',

with Article 6 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms] and Articles 47 and 52(3) of the [Charter of Fundamental Rights of the European Union], as incorporated following the amendment of Article 6 [TEU]:

(a) in so far as it allocates to different judicial bodies the power to rule on individual legal situations which are distinguished in abstracto (legitimate interests and individual rights) but the positive identification of which is in fact difficult or indeed impossible in the absence of provisions specifying their actual content;

(b) in so far as it provides that the courts have jurisdiction to rule on the same matters on the basis of criteria (the identification of different individual legal situations) which no longer reflect factual reality after the introduction of the possibility of bringing an action for compensation in respect of legitimate interests (for which provision is now made as of the year 2000 in order to bring domestic legislation in line with Community principles), with significant differences, including with regard to the procedural rules for bringing actions;

as well as, in general,

2. on the compatibility of Article 103 of the Italian Constitution, in so far as it provides for and affords different forms of protection in respect of individual legal situations (referred to as legitimate interests) for which there is no equivalent under Community law, by conferring competence in this area on different judicial systems, the jurisdiction of which is altered from time to time.

Appeal brought on 4 December 2012 by the Office for Harmonisation in the Internal Market (Trade Marks and Designs) against the judgment of the General Court (First Chamber) delivered on 21 September 2012 in Case T-278/10 Wesergold Getränkeindustrie GmbH & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case C-558/12 P)

(2013/C 32/17)

Language of the case: German

Parties

Appellant: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (represented by: A. Pohlmann, lawyer)

Other parties to the proceedings: Wesergold Getränkeindustrie GmbH & Co. KG, Lidl Stiftung & Co. KG

Form of order sought

The appellant claims that the Court should:

— Set aside the judgment under appeal;

— Order the applicant at first instance to pay the costs of both the proceedings at first instance and the appeal proceedings.

Grounds of appeal and main arguments

The present appeal challenges the judgment of the General Court of 21 September 2012 in Case T-278/10, by which that Court annulled the decision of the First Board of Appeal of OHIM of 24 March 2010 (Case R 770/2009-1).

In support of its appeal the appellant puts forward three grounds of appeal:

First, it pleads infringement of Article 8(1)(b) of Regulation No 207/2009 [1] because the General Court annulled the decision of the Board of Appeal due to the latter's failure to carry out an examination of the enhanced distinctiveness of the earlier marks, although the General Court itself held that the signs at issue are different overall, so that there can, for that reason alone, be no likelihood of confusion.

Secondly, the appellant submits that there is infringement of Article 76(1) of Regulation No 207/2009 in conjunction with Article 64(1) of Regulation No 207/2009 as those provisions presuppose that Wesergold Getränkeindustrie should have pleaded the enhanced distinctiveness of the opposing marks, which however clearly does not correspond to the facts. Wesergold Getränkeindustrie had already abandoned the argument of enhanced distinctiveness acquired through use in the course of the opposition proceedings, at the latest, however, in the appeal proceedings. The General Court's assertion to the contrary, that Wesergold Getränkeindustrie still claimed in the appeal proceedings that there was enhanced distinctiveness acquired through use, is an obvious distortion of the facts, which requires no new evidence.

Thirdly, the judgment is contrary to the settled case-law according to which an error cannot result in the annulment of a decision if that error clearly has no effects on the decision. The issue of enhanced distinctiveness is irrelevant to the decision not only because of the dissimilarity which the General Court expressly found to exist between the signs, but also because Wesergold Getränkeindustrie had already, by the documents submitted in the opposition proceedings, *prima facie* adduced no evidence of enhanced distinctiveness acquired