

2. Contrary to the assessment of the Court of First Instance the Defendant incorrectly examined the evidence provided in respect of the acquired distinctiveness for each member state separately as this apparently contradicts Article 7(3) CTMR requiring an acquired distinctiveness through use throughout the Community. What the Defendant would have been required to do — instead of assessing the number of member states — is to look at the provided evidence as a whole and to assess whether it builds a coherent picture of sustained use in a sufficiently large geographical area over a sufficiently long period of time before the filing date.

(¹) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community Trade Mark (OJ L 11, 14.1.1994, p. 1).

Appeal brought on 22 November 2007 by the Kingdom of Sweden to the Court of Justice against the judgment delivered on 12 September 2007 in Case T-36/04: Association de la presse internationale a.s.b.l. (API) v Commission of the European Communities

(Case C-514/07 P)

(2008/C 51/54)

Language of the case: Swedish

Parties

Appellant: Kingdom of Sweden (represented by: A. Falk and S. Johannesson, Legal Advisers)

Other party to the proceedings: Association de la presse internationale a.s.b.l. (API) by the European Commission

Form of order sought

- Set aside paragraph 2 of the operative part of the judgment of the Court of First Instance of 12 September 2007 in Case T-36/04;
- annul the Commission's decision of 20 November 2003 in its entirety, in accordance with the forms of order sought by API before the Court of First Instance, and thus also in respect of the refused access to the pleadings submitted by the Commission in Case T-209/01 *Honeywell v Commission*, Case T-210/01 *General Electric v Commission* and Case C-203/03 *Commission v Austria*, and
- order the Commission to pay the costs.

Pleas in law and main arguments

1. By the judgment under appeal, the Court of First Instance incorrectly applied Community law by failing to annul the Commission's decision in its entirety.

2. On the one hand, the Court of First Instance found that, in accordance with Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (¹), the institutions are obliged to assess whether disclosure would specifically and in a concrete manner harm an interest protected by an exception. Only if that is the case can an exception form the basis of a refusal to disclose a document. That examination must be made in respect of each individual document. The applicant supports that conclusion.

3. Nevertheless, on the other hand, the Court of First Instance concluded that in precisely that case the Commission was not obliged to carry out such an examination, by reference to the fact that there is a general requirement of confidentiality for documents lodged in pending cases until the oral procedure has taken place in the case. That general requirement for confidentiality is based in part on the right to a fair hearing before an impartial tribunal, in part on the fact that the Commission is to be able to uphold its interests as a party to the case. In that regard, the Court of First Instance found that the Commission did not make an incorrect assessment when it refused access to the documents lodged.

4. In the view of the applicant the later ruling is incompatible with the obligation to examine the question of disclosure by reference to the contents of the specific document. By its judgment, the Court of First Instance thus incorrectly applied Community law.

(¹) OJ L 145, p. 43.

Action brought on 30 November 2007 — Commission of the European Communities v Republic of Austria

(Case C-535/07)

(2008/C 51/55)

Language of the case: German

Parties

Applicant: Commission of the European Communities (represented by: R. Sauer and D. Recchia, Agents)

Defendant: Republic of Austria

Form of order sought

- Declare that, by failing
 - (a) in accordance with ornithological criteria correctly to designate or delimit ('Hansag' in the Province of Burgenland and 'Niedere Tauern' in the Province of Steiermark respectively) the most suitable areas in

Austria in terms of numbers and size as special protection areas under Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, ⁽¹⁾ and

- (b) to provide legal protection, in accordance with the requirements of Article 4(1) and (2) of Directive 79/409/EEC or Article 6(2) in conjunction with Article 7 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, ⁽²⁾ for part of the special protection areas already designated,

the Republic of Austria has failed to fulfil its obligations under Article 4(1) and (2) of Directive 79/409/EEC and Article 6(2) in conjunction with Article 7 of Directive 92/43/EEC;

— order Republic of Austria to pay the costs.

Pleas in law and main arguments

Article 4(1) and (2) of Council Directive 79/409/EEC (bird protection directive) requires the Member States to declare as special protection areas (SPAs) all those areas which are the most suitable territories in number and size for the conservation of the species listed in Annex I and to take similar measures for the conservation of regularly occurring migratory species not listed in Annex I to the Directive. An SPA is to be given a legal protection status that is appropriate, inter alia, to secure the survival and reproduction of the species listed in Annex I to the Directive and the breeding, moulting and wintering of regularly occurring migratory species not listed in Annex I to the Directive. Since, under Article 7 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (fauna and flora directive), obligations arising, inter alia, under Article 6(2) of that directive in respect of special areas of conservation are to replace the obligations under the first sentence of Article 4(1) of the bird protection directive, the legal protection status of those areas must also ensure that there is no deterioration of the natural habitats of the species for which the areas have been designated and no significant disturbance of those species.

The Republic of Austria has infringed its obligations under those Community law provisions by failing to designate the 'Hansag' area as an SPA, delimit the 'Niedere Tauern' special protection area in accordance with the requirements of the bird protection directive, and provide part of the existing special protection areas with the legal protection required by the above provisions.

Although the Republic of Austria has recognised the need to designate 'Hansag' as an SPA and has, on several occasions, confirmed its intention to do so, it has not complied with its designation obligation within the period laid down in the reasoned opinion.

The failure to delimit the 'Niedere Tauern' area in accordance with the requirements of the bird protection directive relates to the

failure to have sufficient regard to the necessary habitat of the dotterel and the inadequate inclusion of the established habitats of certain woodland bird species, namely the grey-headed woodpecker (*picus canus*) and the hazel hen (*Bonasa bonasia*). Although the Member States enjoy some latitude in the selection and delimitation of SPAs, it is limited by the requirement that the delimitation of those areas must comply with particular ornithological criteria laid down in the Directive. In particular, when selecting and delimiting an SPA, a Member State is not entitled to take into account the economic requirements referred to in Article 2 of the bird protection directive or Article 6(4) of the fauna and flora directive.

As regards the legal protection status of the protection areas already designated in Austria, *special conservation measures* are necessary for each bird fauna designated in an area that satisfies the criteria for designation as an SPA, and it is also necessary to establish with precision the necessary conservation measures and adapt them to the specific features and environmental conditions of the BSG and the species living there. The specific conservation aims contained in the legal protection instruments for the purposes of Article 4(1) and (2) of the bird protection directive and Article 6(2) of the fauna and flora directive for each bird species in question, together with the necessary concrete measures and conditions (prohibitions and requirements) for the area should also be binding and given adequate publicity. After an examination of the rules existing in the individual provinces, it has been found that the legal protection status does not comply with the above requirements and thus can not be regarded as adequate when measured against the provisions of the bird protection directive and the fauna and flora directive.

⁽¹⁾ OJ 1979 L 103, p. 1.

⁽²⁾ OJ 1992 L 206, p. 7.

Action brought on 30 November 2007 — Commission of the European Communities v Federal Republic of Germany

(Case C-536/07)

(2008/C 51/56)

Language of the case: German

Parties

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

Defendant: Federal Republic of Germany