In the appeal, the appellant takes the view that the order under appeal is vitiated by an error of law when it states that the action is inadmissible because the appellant company has no direct interest in the annulment of the decision. Contrary to the findings in the order, Decision 2006/613 requires Member States, in any event, per se and automatically to make sites classified as Sites of Community Importance (SCI), including the farm 'Las Cuerdas', to a protection scheme which necessarily limits the uses to which it may be put, reducing their profitability and sale value. The Member States have discretion to determine the specific content of those measures, but not to decide whether or not to submit the farms to measures of that type, so that the existence of that discretion is not contrary to the direct effect of the decision on the legal status of the appellant undertaking.

(1) OJ 2006 L 259, p. 1.

Appeal brought on 14 November 2008 by the Kingdom of Sweden against the judgment of the Court of First Instance (Third Chamber, Extended Composition) delivered on 9 September 2008 in Case T-403/05 MyTravel Group plc v Commission of the European Communities

(Case C-506/08 P)

(2009/C 55/09)

Language of the case: English

Parties

Appellant: Kingdom of Sweden (represented by: K. Petkovska, A. Falk, and S. Johannesson, Agents)

Other parties to the proceedings: MyTravel Group plc, Commission of the European Communities

Form of order sought

The appellant claims that the Court should:

— set aside paragraph 2 of the operative part of the judgment of the Court of First Instance of 9 September 2008 (1) in Case T-403/05,

— annul the Commission Decision of 5 September 2005 (D(2005) 8461), in accordance with the form of order sought by MyTravel Group plc in the Court of First Instance, in so far as concerns the refusal of access to the Commission's report and other working documents,

— annul the Commission Decision of 12 October 2005 (D(2005) 9763), in accordance with the form of order sought by MyTravel Group plc in the Court of First Instance, in so far as concerns the refusal of access to the Commission's other internal documents, and

— order the Commission to reimburse the Kingdom of Sweden with its legal costs at the Court of Justice.

Pleas in law and main arguments

1. The principle of openness and access to the institutions' documents is of great importance in *all* the institutions' activities, and thus also in the administrative procedure within an institution. Article 2(3) of the transparency regulation also provides that the regulation is to apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union. However, the reasoning of the Court of First Instance on the main issues implies that there should be a general requirement of confidentiality in respect of internal documents in administrative matters. That is not consistent with the principle of the greatest possible openness.

2. In the appellant's view, the reasoning of the Court of First Instance in the matter of the first Decision — regarding the report and the documents relating to it — implies that it was not necessary for the Commission to examine the question of disclosure in relation to the content of each individual document and to assess the sensitivity of the information in the report and the other documents but that, on the contrary, it was correct to refuse disclosure on the ground that officials would otherwise not be able to present their opinions freely. On the basis of the general reasoning of the Court of First Instance as regards the protection of document authors' freedom of opinion, it is not possible to decide when internal documents could be disclosed at all.

3. The appellant considers that the Court of First Instance also fails in the second decision — regarding other documents in the file — to uphold the fundamental requirement of an examination to determine whether the content of each individual document is so sensitive that disclosure would seriously undermine the decision-making process. The general reasoning of the Court of First Instance is essentially that it would be impossible for officials in the Commission to communicate freely if information not appearing in the final decision were to become public. On the basis of such reasoning, no examination is necessary to determine whether the content of the documents in question is so sensitive that disclosure would prejudice the decision-making process.

4. The appellant questions whether the hearing officer's report and the note from the Directorate-General for Competition to the advisory committee can really be regarded as documents prepared for internal use which can therefore be kept confidential under the provisions on the protection of the internal decision-making procedure.

5. In the appellant's view, the reasoning of the Court of First Instance in the matter of opinions of the legal service is at variance with the judgment of the Court in the Turco case. Even if the present case does not concern legislation, clearly an examination must also take place in this instance on the basis of the content of the opinions. The fact that the lawfulness of a previous decision could be called into question does not of itself constitute a reason for not disclosing the document — rather the contrary. The absence of information can in itself give rise to doubt as to the lawfulness of a certain decision and the legitimacy of the decision-making process as a whole. The risk of doubt could also be averted if the Commission clearly stated in the decision the reasons why it had opted for a solution which the legal service had advised against. The claim that the legal service would be more reticent and cautious lacks any basis, in the same way as the Court's reasoning regarding other documents. Besides, the appellant considers that the argument that it would be difficult for the legal service to defend a different position in court is stated in terms which are too general to show that there is a risk which is reasonably foreseeable and not purely hypothetical.

6. The appellant does not question that a large part of the content of the documents in question may be so sensitive and that it must remain confidential. Such a conclusion must, however, be based, according to case-law, on a specific and individual examination to determine whether disclosure of the content of the document would result in the interest to be protected being seriously undermined.

7. As regards the freedom of opinion of officials, the appellant wishes to point out that it is incumbent on an official to perform the duties which arise from the service and in accordance with the staff regulations of officials employed in the Community institutions. The fact that the public have a legal right to scrutinise the activity does not constitute an acceptable reason for him to neglect the proper performance of his duties.

8. An undertaking which is party to a concentration of undertakings, in common with any Union citizen or business with its seat in the European Union whatsoever, has a right to be informed about a document even if the information in the document is confidential in order to protect the internal decision-making procedure, if there is nevertheless an overriding public interest in the disclosure of the document. The considerations which MyTravel has put forward could, in the appellant's view, quite plausibly constitute such a public interest and cannot be dismissed without further examination — as the Court of First Instance has done — solely with reference to the applicant's private interests. The applicant is under no obligation either to plead or to prove anything in that regard; rather, it is for the institutions to ascertain whether there is an overriding public interest.

9. The appellant submits that, by its decision, the Court of First Instance has disregarded Community law and failed to apply the second indent of Article 4(2) and the second subparagraph of Article 4(3) of the transparency regulation correctly.

10. In any event there are probably parts of the documents which it should be possible to disclose pursuant to the provisions on partial disclosure in Article 4(6) of the transparency regulation.

([1]) OJ C 272, p. 18.

Appeal brought on 27 November 2008 by HUP Uslugi Polska sp. z o.o. (formerly HP Temporärpersonalgesellschaft mbH) against the judgment of the Court of First Instance (Fifth Chamber) delivered on 24 September 2008 in Case T-248/05 HUP Uslugi Polska sp. z o.o. (formerly HP Temporärpersonalgesellschaft mbH) v Office for Harmonisation in the Internal Market (Trade Marks and Designs), Manpower, Inc.

(Case C-520/08 P)

(2009/C 55/10)

Language of the case: English

Parties

Appellant: HUP Uslugi Polska sp. z o.o. (formerly HP Temporärpersonalgesellschaft mbH) (represented by: M. Ciresa, Rechtsanwalt)

Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs), Manpower, Inc.

Form of order sought

The appellant claims that the Court should:

— annul the judgment under appeal

— order OHIM to pay the costs

Pleas in law and main arguments

The appellant submits that the judgment of the Court of First Instance infringes Articles 51(1)(a) in conjunction with Article 7(1)(b), 7(1)(c), 7(1)(d) and 7(1)(g) of Council Regulation No 40/94 on the Community trademark.