

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