— annual State income from games of chance exceeds EUR 500 million (= 0,4 % of the overall State budget); and

— the advertising measures undertaken by licensees also seek principally to entice persons who have not previously played games of chance to do so?

2. If Question 1 is answered in the affirmative: is such a scheme, which does not explicitly establish in law the objectives that it pursues and does not require the State to prove that those objectives have in fact been achieved, but which shifts the task of preparing and verifying the essential criteria of coherence onto the national courts, in such a way that the requirement of a fair trial under Article 6(1) of the ECHR and Article 47 of the Charter of Fundamental Rights of the European Union is ultimately not guaranteed with certainty, to be viewed as coherent within the meaning of Article 56 TFEU et seq.?

3. If Question 1 and/or Question 2 is/are answered in the affirmative: is such a scheme to be regarded as proportionate within the meaning of Article 56 TFEU et seq. in light of the broad, statutorily regulated, powers of intervention enjoyed by the authorities, which are not subject to any prior authorisation or review by a judicial body?

4. If Questions 1, 2 and 3 are answered in the affirmative: is such a scheme to be regarded as proportionate within the meaning of Article 56 TFEU et seq. in view of the fact that the mere definition of strict conditions of access which do not, at the same time, restrict the number of licences to be granted would result in comparatively less interference with the freedom to provide services?

5. If one of the preceding questions is answered in the negative: must a national court, which has ruled that the monopoly scheme of the GSpG (Glücksspielgesetz; the Law on Gambling) is not in accordance with EU law, not only find, on that basis, that the interventionist measures taken in the proceedings before it are unlawful, but also, of its own motion, in the exercise of its own jurisdictional powers (for example, by reopening the proceedings), reverse the legal sanctions (such as, for instance, administrative penalties) which have already become final?

Appeal brought on 15 February 2017 by Société des produits Nestlé SA against the judgment of the General Court (Fifth Chamber) delivered on 15 December 2016 in Case T-112/13: Mondelez UK Holdings & Services Ltd v European Union Intellectual Property Office

(Case C-84/17 P)

(2017/C 178/04)

Language of the case: English

Parties

Appellant: Société des produits Nestlé SA (represented by: G.S.P. Vos, advocaat)

Other parties to the proceedings: Mondelez UK Holdings & Services Ltd, European Union Intellectual Property Office (EUIPO)

Form of order sought

The appellant claims that the Court should:

— annul the contested judgment of the General Court of the European Union of 15 December 2016, case T-112/13, on that basis that the General Court infringed article 7(3) and 52(2) of the European Union Trade Mark Regulation (‘EUTMR’) ([1]); and

— order the respondent, applicant before the General Court, Mondelez UK Holdings & Services Ltd, to pay the costs.

Pleas in law and main arguments

Nestlé appeals the General Court’s judgment on the ground that the General Court infringed article 7(3) and article 52(2) of Regulation (EU) No. 207/2009 amended by Regulation (EU) No. 2015/2424 ([2]), also known as EUTMR.

More specifically, Nestlé's appeal is directed against the decision of the General Court that concerning the extent of the territory in which it is necessary to establish distinctive character acquired through use of a mark, the distinctive character acquired through use of that mark must be shown throughout the territory of the European Union, that is, in all the Member States concerned.

(1) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009, L 78, p. 1).
(2) Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OJ 2015, L 341, p. 21).

Appeal brought on 15 February 2017 by Mondelez UK Holdings & Services Ltd, formerly Cadbury Holdings Ltd against the judgment of the General Court (Fifth Chamber) delivered on 15 December 2016 in Case T-112/13: Mondelez UK Holdings & Services Ltd v European Union Intellectual Property Office, Société des produits Nestlé SA

(Case C-85/17 P)

(2017/C 178/05)

Language of the case: English

Parties

Appellant: Mondelez UK Holdings & Services Ltd, formerly Cadbury Holdings Ltd (represented by: T. Mitcheson QC, Barrister, P. Walsh, J. Blum and S. Dunstan, Solicitors)

Other parties to the proceedings: European Union Intellectual Property Office, Société des produits Nestlé SA

Form of order sought

The appellant claims that the Court should:

— annul the following parts of the General Court's decision in Case T-112/13:

1) The reasoning regarding the second part of the first plea in law set out in paragraphs 37-44;

2) The reasoning regarding the first part of the first plea in law set out in paragraphs 58-64;

3) The reasoning regarding the third part of the first plea in law at paragraphs 78-111; and

4) The reasoning regarding the fourth part at paragraphs 144-169 and the portion of paragraph 177 that reads '*Although it had been established that the contested trade mark had acquired distinctive character through use in Denmark, Germany, Spain, France, Italy, the Netherlands, Austria, Finland, Sweden and the United Kingdom*'.

Pleas in law and main arguments

1) The Court erred in law in relation to its reasoning regarding the second part of the first plea in law set out in paragraphs 37-44. The second part relates to the use of the Mark in respect of all of the goods for which it was registered. The General Court fell into error when it found that use in trade in respect of a chocolate bar consisting of four trapezoid shaped fingers could be classified as a sweet or biscuit.

2) The Court erred in law in relation to its reasoning regarding the first part of the first plea in law set out in paragraphs 58-64. The first part relates to use of the Mark in the form in which it was registered. Mondelez contends the Mark has not been used at all in the form in which it is registered. The General Court applied the wrong legal tests in: (i) not putting sufficient weight on its finding that the bar was a shape which naturally comes into the mind for the goods in question; and (ii) relying on a 'spontaneous and immediate association' made between the shape with the word KIT KAT contrary to the guidance in Case C-215/14 Société des Produits Nestlé, EU:C:2015:604 ('Case C-215/14').