

Pleas in law and main arguments

In support of the first head of claim, the applicant essentially submits the following:

1. In the applicant's view, the decision on the approval of flight conditions is not a discretionary decision. It is submitted in that regard, *inter alia*, that the burden of proof as to the fact that the aircraft in question can fly safely under specified conditions is on the defendant, not the applicant.
2. Further, the applicant submits that, in the event that the defendant's decision on the approval of flight conditions is a discretionary decision, the defendant failed to exercise its discretion, or in any event exercised it erroneously. In the applicant's view, the defendant exercises its discretion erroneously when it relies on safety information obtained during the type-certification process, to which the applicant was not a party. In addition, the applicant complains that the defendant has failed sufficiently to particularise the alleged safety concerns in the present proceedings. In that context, the applicant submits that it was given no opportunity to comment on specific alleged sources of risk. The applicant also claims that the defendant's reasoning is manifestly contradictory.
3. In the alternative, the applicant submits that it has produced proof that the aircraft in question can be flown safely under specified conditions.
4. Finally, in relation to its application for annulment the applicant pleads breaches of the duty of good administration on the part of the defendant. According to the applicant, the defendant failed to fulfil its obligation to investigate, wrongly relied on confidentiality in connection with the type-certification process, infringed the applicant's right to be heard and infringed the obligation to state reasons.

Action brought on 19 February 2013 — Cadbury Holdings/OHIM — Société des produits Nestlé (Shape of a four-finger chocolate bar)

(Case T-112/13)

(2013/C 123/32)

Language in which the application was lodged: English

Parties

Applicant: Cadbury Holdings Ltd (Uxbridge, United Kingdom) (represented by: T. Mitcheson, Barrister, P. Walsh and S. Dunstan, Solicitors)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Other party to the proceedings before the Board of Appeal: Société des produits Nestlé SA (Vevey, Switzerland)

Form of order sought

The applicant claims that the Court should:

- Annul the Decision of the Second Board of Appeal in Case R 513/2011-2 dated 11 December 2012, except insofar as the Board of Appeal determined that the mark is devoid of inherent distinctive character under Article 7(1)(b); and
- Order OHIM to pay the costs of this application and order the intervener to pay the costs of the proceedings before the Cancellation Division and the Board of Appeal.

Pleas in law and main arguments

Registered Community trade mark in respect of which a declaration of invalidity has been sought: The three-dimensional mark representing a shape of a four-finger chocolate bar for goods in class 30 — Community trade mark registration No 2 632 529

Proprietor of the Community trade mark: The other party to the proceedings before the Board of Appeal

Applicant for the declaration of invalidity of the Community trade mark: The applicant

Grounds for the application for a declaration of invalidity: The grounds of the request for a declaration of invalidity were those laid down in Article 52(1)(a) in conjunction with Article 7(1)(b), (c), (d) and (e)(ii) of Council Regulation No 207/2009

Decision of the Cancellation Division: Declared the Community trade mark invalid

Decision of the Board of Appeal: Annulled the contested decision

Pleas in law: Infringement of Article 52(1)(a) in conjunction with Article 7(1)(b), (c), (d) and (e)(ii) of Council Regulation No 207/2009.
