

The fact that the assumption made by the General Court, that the mark has no inherent distinctive character throughout the European Union, is unfounded also becomes clear from the fact that the mark in question is registered as a trade mark in 15 Member States of the European Union.

The second ground of appeal concerns the ruling of the General Court that the mark must have acquired distinctive character through use throughout the European Union, which is incorrect for two reasons.

First, the General Court misses the point that distinctive character must be acquired by use only in those places where the mark has no inherent distinctive character. In the 15 Member States where the mark in question has inherent distinctive character, there is no need to require the acquisition of distinctive character through use. If the view were to be accepted that, as part of the assessment, distinctive character had to be ascertained again in the individual Member States, the factual circumstances pertaining there would have to be established. Since, pursuant to Article 74 of the regulation, distinctive character is to be assessed by OHIM of its own motion, OHIM should thus have made specific findings for each individual Member State of the European Union. OHIM and the General Court failed to do so.

Second, the considerations of the General Court cannot be reconciled with the principle of homogeneity of Community trade marks. In an assessment of registrability and, specifically in this case, distinctive character, the European Union is to be regarded as a common homogeneous market. If, as regards a significant part of the total population of the European Union, there is inherent distinctive character, that must also be sufficient for protection throughout the European market.

Appeal brought on 2 March 2011 by Helena Rubinstein, L'Oréal against the judgment of the General Court (Third Chamber) delivered on 16 December 2010 in Case T-345/08: Helena Rubinstein SNC, L'Oréal SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs), Allergan, Inc.

(Case C-100/11 P)

(2011/C 145/17)

Language of the case: English

Parties

Appellants: Helena Rubinstein SNC, L'Oréal SA (represented by: A. von Mühlendahl, Rechtsanwalt)

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

Form of order sought

The appellants claim that the Court should:

- annul the judgment of the General Court of 16 November 2010 in joined cases T-345/08 and T-357/08;
- to dismiss the appeals filed by Allergan, Inc. against the decisions of the Office's Cancellation Division of 28 March 2007 in Case 1118 C (Helena Rubinstein SNC, BOTOLIST) and 4 April 2007 in Case 1120 C (L'Oréal SA, BOTOCYL);
- to order the Office to bear the costs of the proceedings before the Court of Justice and before the General Court, as well as the costs of the proceedings before the Office's Board of Appeal.

Pleas in law and main arguments

The appellants submit that the contested judgment should be annulled on the following grounds:

That the General Court violated Article 52 (1)CTMR⁽¹⁾ in conjunction with Article 8 (5) CTMR in deciding that the Office was justified in finding that the earlier marks relied on by Allergan, Inc. had reputation and that the use of the contested registrations would take unfair advantage of or be detrimental to the distinctiveness or the reputation of the earlier marks.

That the General Court violated Article 115 CTMR in conjunction with Article 1 Rule 38 (2) of Commission Regulation (EC) No 2868/95⁽²⁾ of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark, as amended (referred to hereafter as 'Rule 38' and 'CTMIR'), in taking into account evidence which was not submitted in the language of the proceedings.

That the General Court violated Article 63 CTMR in reviewing and confirming the contested decisions according to erroneous legal standards.

That the General Court violated Articles 73 CTMR in deciding that the contested decisions were not vitiated by absence of sufficient reasons.

⁽¹⁾ OJ L 011, p. 1.

⁽²⁾ OJ L 303, p. 1