

Request for a preliminary ruling from the Cour d'appel de Liège (Belgium) lodged on 9 November 2015 — État belge v Oxycure Belgium SA

(Case C-573/15)

(2016/C 038/39)

Language of the case: French

Referring court

Cour d'appel de Liège

Parties to the main proceedings

Appellant: État belge

Respondent: Oxycure Belgium SA

Question referred

Does Article 98(1) and (2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, ⁽¹⁾ read in conjunction with Annex III, points 3 et 4 of the VAT Directive, having regard to, in particular, the principle of neutrality, preclude a national provision which prescribes a reduced rate of VAT for oxygen treatment by means of oxygen cylinders, whereas oxygen treatment by means of an oxygen concentrator is subject to the standard rate of VAT?

⁽¹⁾ OJ 2006 L 347, p. 1.

Appeal brought on 9 November 2015 by Industria de Diseño Textil, S.A. (Inditex) against the judgment of the General Court (Third Chamber) delivered on 9 September 2015 in Case T-584/14 INDITEX v OHIM — ANSELL (ZARA)

(Case C-575/15 P)

(2016/C 038/40)

Language of the case: Spanish

Parties

Appellant: Industria de Diseño Textil, S.A. (Inditex) (represented by: C. Duch Fonoll, lawyer)

Other party to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

Form of order sought

The appellant claims that the Court should:

- set aside the judgment of the General Court of the European Union dismissing the action brought by the appellant against the decision of the Second Board of Appeal of OHIM of 19 May 2014 (Case R 1118/2013-2) and, consequently, annul the contested decision and the earlier decision of the Cancellation Division of OHIM of 30 April 2013 granting the application for revocation of the Community trade mark ZARA No 112 755 for services in Class 39;
- order OHIM to pay the costs.

Grounds of appeal and main arguments

1. By its appeal, which comprises six grounds of appeal, Inditex contests the grounds set out in paragraphs 32 to 37 of the judgment under appeal.

2. In the first ground of appeal, Inditex argues that the General Court infringed Article 65(3) CTMR⁽¹⁾ in that, in paragraph 37 of the judgment under appeal, it went beyond the limits of the action before it by calling into question the use in itself of the trade mark ZARA No 112 755 for services in Class 39, whereas that was an undisputed issue which did not form part of the action.
3. The subject matter of the action before the Board of Appeal was limited to determining whether or not Inditex's use of the trade mark ZARA for the services of transport and product distribution provided by that company to its franchisees could be regarded as external use, as opposed to internal use within the company, and, consequently, whether or not it could be regarded as genuine use. Accordingly, the use in itself of the trade mark ZARA in respect of the transport and distribution services provided by the holder of the mark was an undisputed fact and was not in question before OHIM.
4. By the second ground of appeal, Inditex argues that General Court, in paragraphs 32 and 33 of the judgment under appeal, committed an error of law in the application of Article 51(1)(a) CTMR by confusing the concepts of 'commercial integration', which is characteristic of a franchisee company integrated in the commercial system of the franchisor, with the concept of 'economic integration' or 'economic unity', in the sense of the level of economic dependence.
5. The General Court considered, in paragraph 33 of the judgment under appeal, that because the franchisees of Inditex follow a business model that is integrated in the business model of the franchisor, those franchisees lose their status as independent economic units, that is to say, as third parties separated from the internal organisation of the franchisor. According to Inditex, that assessment is incorrect because it is inconsistent with the law.
6. By the third ground of appeal, Inditex submits that the General Court, in paragraph 33 of the judgment under appeal, distorted the terms of the sworn declaration of 7 May 2012 of Mr Antonio Abril (Annex 4 to the appeal), by partially transcribing part of the declarations actually made by the latter, which led the General Court to interpret that document incorrectly and affected the General Court's conclusion as regards the external use of the trade mark ZARA.
7. By the fourth ground of appeal Inditex submits that the General Court erred in law in the application of Article 51(1)(a) CTMR in that it infringed, in paragraph 35 of the judgment under appeal, the rules according to which the assessment of whether the use of a mark is genuine must take into consideration all of the relevant facts and circumstances in order to determine the reality of its commercial exploitation. Specifically, the General Court considered that Inditex was not present on the market for freight transport services under its trade mark ZARA because that company did not have turnover generated by the provision of the services in Class 39.
8. The General Court considered that Inditex offered freight transport services to third parties separate from its economic unit because it is a company whose business consists of the manufacture and sale of fashion products and not a transport company. According to Inditex, the General Court's position is incorrect and infringes EU law and case-law as cited in the ground of appeal.
9. In the fifth ground of appeal, Inditex submits that the General Court, in paragraph 35 of the judgment under appeal, distorted the terms of the sworn declaration of 7 May 2012 of Mr Antonio Abril, by interpreting the figures in paragraph 18 of the declaration as attesting to the reality of the commercial exploitation of the mark at issue for the marketing of the products, whereas, in reality, the figures set out in that document refer solely to the amounts received by Inditex from its franchisees for the provision of transport services by Inditex to those franchisees.
10. Lastly, the sixth ground of appeal alleges an error of law resulting from the infringement of Article 51(1)(a) CTMR, in conjunction with Rule 22 of Regulation No 2868/1995,⁽²⁾ in that, in paragraph 36 of the judgment under appeal, the General Court required Inditex to produce a *probatio diabolica* by denying that evidence on the turnover had been submitted to it because no invoices had been produced, despite the fact that the General Court was aware that Inditex could not produce such invoices since no such documents existed for the reasons set out in the ground of appeal.

⁽¹⁾ Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version) (OJ 2009 L 78, p. 1)

⁽²⁾ Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1)