

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.

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

<sup>(2)</sup> 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').

- 3) The Court erred in law in relation to its reasoning regarding the third part of the first plea in law set out in paragraphs 78-111. The third part relates to lack of use of the Mark as an indicator of origin and the evidence provided in that regard. The General Court applied the wrong legal test in relying on the findings of recognition or association. The correct approach is to ask whether the relevant class of persons perceive the goods or services designated exclusively by the mark applied for, as opposed to any other mark which might also be present, as originating from a particular company in accordance with the CJEU's reasoning in Case C-215/14.
- 4) The Court erred in law in relation to its reasoning regarding the fourth part of the first plea in law set out in paragraphs 144-169 and in 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'. The fourth part relates to the lack of proof of distinctive character acquired through use of the Mark throughout the European Union. The General Court was correct to find that Nestlé had not demonstrated that the Mark had acquired distinctive character throughout the whole of the EU and Mondelez does not wish to disturb that decision. However, Mondelez does not accept that Nestlé has at any time established acquired distinctiveness for the Goods in 10 Member States of the EU or at all. The General Court has erred in applying the wrong legal test in respect of each Member State in question as neither recognition, attribution nor association equate to perception by the relevant consumers of the Mark as denoting origin, as required by the test laid down by the CJEU in Case C-215/14.

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**Request for a preliminary ruling from the Cour de cassation (France) lodged on 6 March 2017 —  
Administration des douanes et droits indirects, Établissement national des produits de l'agriculture et  
de la mer (FranceAgriMer) v Hubert Clergeau, Jean-Luc Labrousse, Jean-Jacques Berthelley, Alain  
Bouchet, Jean-Pierre Dubois, Marcel Géry, Jean-Paul Matrat, Jean-Pierre Paziot, Patrice Raillot**

(Case C-115/17)

(2017/C 178/06)

*Language of the case: French*

**Referring court**

Cour de cassation

**Parties to the main proceedings**

*Applicants:* Administration des douanes et droits indirects, Établissement national des produits de l'agriculture et de la mer (FranceAgriMer)

*Defendants:* Hubert Clergeau, Jean-Luc Labrousse, Jean-Jacques Berthelley, Alain Bouchet, Jean-Pierre Dubois, Marcel Géry, Jean-Paul Matrat, Jean-Pierre Paziot, Patrice Raillot

**Question referred**

Is Article 49 of the Charter of Fundamental Rights to be interpreted as precluding a situation in which a person is convicted on the ground that he obtained export refunds, to which he was not entitled, by means of deceitful practices or the making of false declarations as to the nature of the goods in respect of which the refunds were requested, although, as a result of changes in the rules which occurred subsequent to the facts of the case, the goods that were in fact exported by that person have since become eligible for those refunds?

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**Request for a preliminary ruling from the Amtsgericht Hamburg (Germany) lodged on 7 March  
2017 — Reinhard Nagel v Swiss International Air Lines AG**

(Case C-116/17)

(2017/C 178/07)

*Language of the case: German*

**Referring court**

Amtsgericht Hamburg