

Appeal brought on 7 June 2017 by Alcohol Countermeasure Systems (International) Inc. against the judgment of the General Court (First Chamber) delivered on 29 March 2017 in Case T-638/15: Alcohol Countermeasure Systems (International) v EUIPO

(Case C-340/17 P)

(2017/C 347/03)

Language of the case: English

Parties

Appellant: Alcohol Countermeasure Systems (International) Inc. (represented by: E. Baud and P. Marchiset, *avocats*)

Other party to the proceedings: European Union Intellectual Property Office

Form of order sought

The appellant claims that the Court should:

- as a preliminary ruling and absent EUIPO's written approval to suspend enforcement of the judgment, suspend the application of the judgment;
- cancel and set aside the judgment on the grounds laid down in this Petition [...];
- cancel EUIPO's First Board of Appeal decision R 1323/2014-1 dated August 11, 2015;
- alternatively cancel the judgment and order a stay on proceedings until the end of the Brexit process or at the earliest May 31, 2019 corresponding to the deadline set forth in article 50 of the Treaty;
- order Lion Laboratories and the European Union Intellectual Property Office to bear their own costs and to pay the costs of ACS relating both to the proceedings at first instance in Case T-638/15 and to the appeal.

Pleas in law and main arguments

- 1) the first ground lies on distortion of ACS' statements in its petition in paragraph 86 of the judgment by stating that 64 devices were sold 'during the relevant periods', while such (undisputed) figure related to the First Period only (from October 5, 2004 to October 4, 2009).
- 2) the second ground also lies on distortion of a letter dated March 21, 2013 sent by Lion Laboratories' counsel to EUIPO and also a violation of Regulation 207/2009 ⁽¹⁾ and article 57(2) and Regulation 2868/95 ⁽²⁾ (articles 22(2) and 40(5)). Such letter did not mention the registration number of the earlier mark (UK trade mark No. 2040518), but instead two references to UK trade mark No. 2371210, implying that Lion Laboratories (i) did not fulfil its obligation to provide evidence of use to the effect of evidencing use of UK trade mark No. 2040518 or of the opposing trade mark, and/or (ii) substituted the trade mark on which the proceedings were based.
- 3) The third ground addresses how the General Court (i) violated the notion of 'genuine use', as provided in Regulation 207/2009, interpreted in the Ansul case (C-40/01, 11 March 2003) and (ii) applied a wrong methodology. The General Court failed to analyze the First Period solely and to take into account the projected sales figures agreed upon in an exclusive licence agreement. Besides, and in light of the very low and time limited quantitative use during First Period, genuine use was not established by reference to several factors not analyzed by the General Court (such as (i) the Parties' projected sales figures in the licence agreement, (ii) the characteristics of the market (comprising 30 million customers), (iii) the nature of the goods (including breathalyzers) and (iv) the existence of UK trade mark No.2371210 filed in 2004). The General Court gave disproportionate consideration to some documents, including elements relating to services while the earlier mark was opposed for goods in class 9 only.

- 4) The fourth ground analyzes how the General Court also violated the notion of ‘genuine use’ by applying an improper standard while determining if the earlier mark was used as a trade mark. Besides, the Céline case from this Court (C-17/06, 11 September 2007) cannot be applied when (i) other marks are affixed on the products, (ii) such products had other names and (iii) the mark was also perceived as a common name by some customers. These circumstances further prevent a link to be established in the mind of the customer between the earlier mark and the sign used as a common name or a corporate name.
- 5) The fifth ground raises a public order issue: a UK earlier right shall not permit the cancellation of a EU mark in light of the Brexit process and article 50 of the European Union Treaty notification sent by the United Kingdom. Permitting such a cancellation would increase expenses and create unnecessary and disproportionate obstacles to unitary trade mark protection, while in 2 years or less, the United Kingdom will no longer be part of the EU unitary trade mark system. The General Court therefore violated the territoriality principle recognized by the 1883 Paris Convention and Article 17 of the Charter of Fundamental Rights of the European Union.

⁽¹⁾ Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (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).

Appeal brought on 20 June 2017 by Agria Polska sp. z o.o., Agria Chemicals Poland sp. z o.o., Star Agro Analyse und Handels GmbH, and Agria Beteiligungsgesellschaft mbH against the judgment of the General Court of 16 May 2017 in Case T-480/15, Agria Polska and Others v Commission

(Case C-373/17 P)

(2017/C 347/04)

Language of the case: Polish

Parties

Appellants: Agria Polska sp. z o.o., Agria Chemicals Poland sp. z o.o., Star Agro Analyse und Handels GmbH, and Agria Beteiligungsgesellschaft mbH (represented by: P. Graczyk and W. Roclawski)

Other party to the proceedings: European Commission

Form of order sought

The appellants claim that the Court should:

- set aside in full the judgment of the General Court of 16 May 2017 in Case T-480/15;
- give a final ruling in the dispute, that is to say, annul the Commission’s decision;
- order the Commission to pay the costs.

Grounds of appeal and main arguments

The first ground of appeal alleges that the General Court infringed Article 101 TFEU and Article 102 TFEU, read in conjunction with the second sentence of Article 17(1) TEU, Article 7(2) of Commission Regulation (EC) No 773/2004, and Article 7(1) and (2) of Council Regulation (EC) No 1/2003, through its disregarding of obvious errors made by the Commission in its assessment of the likelihood of infringement of Article 101 TFEU or Article 102 TFEU, whether there was any EU interest in opening an investigation, and the scope of the necessary measures of inquiry.