

JUDGMENT OF THE GENERAL COURT (Second Chamber)

13 November 2024 (*)

(EU trade mark – Invalidity proceedings – EU figurative mark representing a blue and yellow oval – Absolute ground for invalidity – No distinctive character – Article 7(1)(b) of Regulation (EC) No 40/94 (now Article 7(1)(b) of Regulation (EU) 2017/1001) – No distinctive character acquired through use – Article 7(3) of Regulation No 40/94 (now Article 7(3) of Regulation 2017/1001))

In Case T-426/23,

Chiquita Brands LLC, established in Fort Lauderdale, Florida (United States), represented by R. Dissmann and L. Jones, lawyers,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by J. Ivanauskas and V. Ruzek, acting as Agents,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO, intervener before the General Court, being

Compagnie financière de participation, established in Marseilles (France), represented by B. Fontaine, lawyer,

THE GENERAL COURT (Second Chamber),

composed of A. Marcoulli, President, W. Valasidis (Rapporteur) and L. Spangsberg Grønfeldt, Judges,

Registrar: A. Juhász-Tóth, Administrator,

having regard to the written part of the procedure,

further to the hearing on 8 May 2024,

gives the following

Judgment

- 1 By its action under Article 263 TFEU, the applicant, Chiquita Brands LLC, seeks the annulment in part of the decision of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 23 May 2023 (Case R 2243/2021-1) ('the contested decision').

Background to the dispute

- 2 On 14 May 2020, the intervener, Compagnie financière de participation, filed with EUIPO an application for a declaration of invalidity of the EU trade mark that had been registered following an application filed by the applicant on 29 December 2008 in respect of the following figurative sign:



3 The goods covered by the contested mark in respect of which a declaration of invalidity was sought were in Classes 29, 30, 31 and 32 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and corresponded, for each of those classes, to the following description:

- Class 29: ‘Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables, including packed salads; jellies, jams; eggs, milk and milk products; edible oils and fats’;
- Class 30: ‘Confectionery, ices and ice; fruit sauces’;
- Class 31: ‘Fresh fruits and vegetables’;
- Class 32: ‘Fruit juices’.

4 The ground relied on in support of the application for a declaration of invalidity was that set out in Article 59(1)(a) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1), read in conjunction with Article 7(1)(b) of that regulation.

5 On 19 November 2021, the Cancellation Division granted the application for a declaration of invalidity in its entirety.

6 On 30 December 2021, the applicant filed a notice of appeal with EUIPO against the decision of the Cancellation Division.

7 By the contested decision, the Board of Appeal, first, dismissed the appeal in respect of ‘fresh fruits’ in Class 31, finding that the contested mark was devoid of any distinctive character for those goods within the meaning of Article 7(1)(b) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), and that it had not been established that that mark had acquired distinctive character through use for the purposes of Article 7(3) of that regulation.

8 With regard to the remainder of the goods referred to in paragraph 3 above, the Board of Appeal, secondly, annulled the decision of the Cancellation Division to the extent that the contested mark had been declared invalid, on the ground that the intervener had not put forward any argument nor produced any evidence to call into question the validity of the contested mark in designating those goods.

Forms of order sought

9 The applicant claims that the Court should:

- annul the contested decision in so far as it dismissed the appeal against the decision of the Cancellation Division as regards ‘fresh fruits’ in Class 31;

- reject the application for a declaration of invalidity of the contested mark for ‘fresh fruits’ in Class 31;
 - order EUIPO to pay the costs, including those incurred in the proceedings before EUIPO.
- 10 EUIPO contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs if there is a hearing.
- 11 The intervener contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.

Law

The applicable law ratione temporis

- 12 Given the date on which the application for registration of the contested mark was filed, namely 29 December 2008, which is decisive for the purposes of identifying the applicable substantive law, the facts of the case are governed by the substantive provisions of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) (see, to that effect, order of 5 October 2004, *Alcon v OHIM*, C-192/03 P, EU:C:2004:587, paragraphs 39 and 40, and judgment of 23 April 2020, *Gugler France v Gugler and EUIPO*, C-736/18 P, not published, EU:C:2020:308, paragraph 3 and the case-law cited).
- 13 Consequently, in the present case, so far as concerns the substantive rules, the references made by the applicant and the intervener, in their written pleadings, to Article 4, to Article 7(1)(b) and to Article 59(1)(a) of Regulation 2017/1001 must be understood as referring, respectively, to Article 4, Article 7(1)(b) and Article 51(1)(a) of Regulation No 40/94, the wording of which is identical. Similarly, the references to Article 7(1)(b) and to Article 52(1)(a) of Regulation No 207/2009 made by the Board of Appeal in the contested decision must be understood as referring, respectively, to Article 7(1)(b) and Article 51(1)(a) of Regulation No 40/94, the wording of which is identical.
- 14 Moreover, in so far as, according to settled case-law, procedural rules are generally held to apply on the date on which they enter into force (see judgment of 11 December 2012, *Commission v Spain*, C-610/10, EU:C:2012:781, paragraph 45 and the case-law cited), the dispute is governed by the procedural provisions of Regulation 2017/1001.

Substance

- 15 The applicant puts forward, in essence, three pleas in law, the first alleging infringement of Article 4 of Regulation No 40/94, the second alleging infringement of Article 51(1)(a) of Regulation No 40/94, read in conjunction with Article 7(1)(b) of that regulation, and the third alleging infringement of Article 51(2) of Regulation No 40/94, read in conjunction with Article 7(3) of that same regulation.

The first plea, alleging infringement of Article 4 of Regulation No 40/94

- 16 The intervener disputes the admissibility of the first plea alleging infringement of Article 4 of Regulation No 40/94, on the grounds that that provision did not form the basis of the application for a declaration of invalidity and was not relied on by the Board of Appeal in the contested decision.
- 17 In the present case, it is apparent from the contested decision that the Board of Appeal, in dismissing the action in so far as it was directed against the declaration of invalidity of the contested mark in respect of ‘fresh fruits’ in Class 31, relied solely on Article 51(1)(a) of Regulation No 40/94, read in conjunction with Article 7(1)(b) thereof, and on Article 51(2) of Regulation No 40/94, read in

conjunction with Article 7(3) thereof. By contrast, in the contested decision, Article 4 of Regulation No 40/94 was not mentioned and did not constitute a ground for declaring the contested mark invalid in respect of ‘fresh fruits’ in Class 31.

18 The first plea, alleging infringement of Article 4 of Regulation No 40/94, must therefore be rejected as ineffective.

The second plea, alleging infringement of Article 51(1)(a) of Regulation No 40/94, read in conjunction with Article 7(1)(b) thereof

19 The applicant submits that the Board of Appeal infringed Article 51(1)(a) of Regulation No 40/94, read in conjunction with Article 7(1)(b) thereof. It submits, in essence, that the Board of Appeal incorrectly found that the contested mark lacked inherent distinctive character for ‘fresh fruits’ in Class 31.

20 The applicant divides its plea into two main complaints. It submits that the Board of Appeal made errors of assessment in finding that the contested mark was devoid of any distinctive character on account, first, of its shape and, secondly, of its colour scheme.

21 As a preliminary point, it should be recalled that, under Article 7(1)(b) of Regulation No 40/94, trade marks which are devoid of any distinctive character are not to be registered.

22 It is settled case-law that for a trade mark to possess distinctive character, for the purposes of that provision, it must serve to identify the goods in respect of which registration is sought as originating from a particular undertaking, and thus to distinguish those goods from those of other undertakings (see judgment of 7 May 2015, *Voss of Norway v OHIM*, C-445/13 P, EU:C:2015:303, paragraph 88 and the case-law cited).

23 That distinctive character must be assessed, first, by reference to the goods or services in respect of which registration is sought and, secondly, by reference to the perception of the relevant public, which consists of average consumers of those goods or services, who are reasonably well informed and reasonably observant and circumspect (see judgment of 7 May 2015, *Voss of Norway v OHIM*, C-445/13 P, EU:C:2015:303, paragraph 89 and the case-law cited).

24 As regards the relevant public, it should be noted that the applicant does not dispute the Board of Appeal’s findings, set out in paragraph 32 of the contested decision, that, first, ‘fresh fruits’ are aimed at the public at large throughout the European Union and, secondly, the average consumer of fresh fruits, including ‘bananas’, is deemed to be reasonably well informed and reasonably observant and circumspect with an average degree of attention. There is no need to call those assessments into question.

– *The shape of the contested mark*

25 The Board of Appeal found that the contested mark was a figurative sign representing a blue rounded shape framed by a yellow and a blue line. In particular, it noted that the shape of that mark, consisting of a slight variation of a basic geometric shape, that of an oval, was not sufficient, in itself, to confer distinctive character on the contested mark, notwithstanding the question whether that shape had to be described as an ‘ovaloid’.

26 The applicant submits that the shape of the contested mark is ‘significantly more detailed’ than a basic geometric shape and is not a minor variation thereof. First, the contested mark consists of an ‘ovaloid’ shape made up of three Bézier curves with very specific coordinates and, secondly, that it consists not of one single shape but of three different shape elements, namely an ‘inner blue ovaloid’, framed by a ‘thin yellow ovaloid’, which in turn is framed by a ‘thin blue ovaloid’. In addition, it asserts that the particular combination of those three shape elements resembles a racetrack, which enhances the distinctive character of the contested mark. Lastly, the applicant submits that even a basic geometric shape could be registered as a trade mark and criticises the Board of Appeal for failing to examine whether, in the present case, the shape of the contested mark was actually devoid of the required minimum degree of distinctiveness.

- 27 EUIPO and the intervener dispute the applicant's arguments.
- 28 It is settled case-law that a sign which is excessively simple and is constituted by a basic geometrical figure, such as a circle, a line, a rectangle or a conventional pentagon, is not, in itself, capable of conveying a message which consumers will be able to remember, with the result that they will not regard it as a trade mark unless it has acquired distinctive character through use (see judgment of 29 September 2009, *The Smiley Company v OHIM (Representation of half a smiley smile)*, T-139/08, EU:T:2009:364, paragraph 26 and the case-law cited).
- 29 A representation of a basic geometrical figure can therefore fulfil an identifying function only if it includes elements capable of differentiating it from other representations of that figure and attracting the consumer's attention (see, to that effect, judgment of 12 September 2007, *Cain Cellars v OHIM (Representation of a pentagon)*, T-304/05, not published, EU:T:2007:271, paragraph 23).
- 30 In the present case, the contested mark can be described as a purely figurative sign representing a rounded blue shape surrounded by two curved lines in yellow and blue. That mark represents a minor variation of an oval, that is to say a basic geometric shape.
- 31 First of all, although the applicant claims that the contested mark has an 'ovaloid' shape, it must be pointed out, as the Board of Appeal correctly found in paragraph 36 of the contested decision, that the precise name of the geometric shape of that mark is irrelevant for the purposes of assessing its inherent distinctive character.
- 32 Next, it must be pointed out that the shape of the contested mark does not contain any specific or characteristic element that the relevant public might perceive as distinctive and that would thus be capable of serving as an indication of commercial origin. The overall impression produced by the shape of the contested mark corresponds to that of a simple geometric figure, namely a variation of an oval with no easily and instantly memorable characteristics. Consequently, in the absence of elements capable of distinguishing it in such a way that it does not appear as a simple geometric figure, the shape of the contested mark does not possess the minimum degree of distinctive character required to enable it to fulfil a function of identifying the fresh fruit covered by that mark.
- 33 Furthermore, although the relevant public is likely, as the applicant submits, to perceive the three figurative elements in the contested mark, those elements have an identical shape, differing only in size, and are not combined in an unexpected way. They simply overlap in such a way that the two outer blue and yellow lines appear to be of the same thickness. Therefore, as has already been stated in paragraph 32 above, the shape of that mark does not contain any notable variation in relation to the conventional representation of an oval, even though it is composed of three overlapping ovals. Therefore, it will be perceived as a simple geometric shape.
- 34 Furthermore, as the intervener submitted, in the sector of bananas, oval labels are commonly used as they are easy to stick onto curved fruit. In those circumstances, the shape of the contested mark, affixed to fresh fruits, such as bananas, will not be capable of attracting the attention of the relevant public and of differentiating those goods from other goods on the market, but will simply be perceived as a decorative element.
- 35 Lastly, it is not apparent from the file that the relevant public, which displays only an average level of attention, even if it had basic knowledge of geometry, would be able to identify in the shape of the contested mark three Bézier curves, which consist of a graphic representation of curves based on a mathematical analysis. Even if, as the applicant submits, an expert had been able to make such an identification, the opinion of a professional could not, in any event, reflect that of the general public. Similarly, the fact that the applicant describes in its marketing strategy the shape of the contested mark as a racetrack is not sufficient to establish that such a shape actually has such a meaning in the mind of the relevant public and the applicant has not submitted any evidence in support of such a conclusion.
- 36 In the light of the foregoing, the Board of Appeal was right to find that the relevant public would perceive the shape of the contested mark as a simple shape that does not have any easily and instantly memorable appearance which would enable that public immediately to perceive it as an indication of

the commercial origin of the goods in question and, therefore, to conclude that that shape was devoid of any inherent distinctive character.

– *The colour scheme of the contested mark*

- 37 The Board of Appeal found that the blue and yellow colour scheme of the contested mark, namely the blue colour of the ‘ovaloid’ and the yellow and blue lines encircling that shape, was not sufficient to confer distinctive character on that mark on the ground, in essence, that such a combination of primary colours was frequently used in the marketing of fresh fruits.
- 38 The applicant submits that the variety in the three colour elements – ‘blue (thin)-yellow (thin)-blue (wide)’ – in a specific geometric shape reinforces the inherent distinctive character of the contested mark. It states that the frequent use of the colours yellow and blue in relation to fresh fruits cannot suffice to prevent registration of the contested mark since that mark also consists of a specific shape.
- 39 In that regard, the applicant criticises the Board of Appeal for finding that the colour scheme of the contested mark lacked distinctive character and, in particular, complains that it misapplied the judgment of 6 May 2003, *Libertel* (C-104/01, EU:C:2003:244).
- 40 The applicant also relies on a market survey that shows that the relevant public will perceive the contested mark as an indication of commercial origin.
- 41 EUIPO and the intervener dispute the applicant’s arguments.
- 42 It must be borne in mind that, whilst colours are capable of conveying certain associations of ideas and of arousing feelings, they possess little inherent capacity for conveying specific information, especially since they are commonly and widely used, because of their appeal, in order to advertise and market goods or services, without any specific message (see, by analogy, judgment of 6 May 2003, *Libertel*, C-104/01, EU:C:2003:244, paragraph 40).
- 43 According to the case-law, colours and abstract combinations thereof cannot therefore be regarded as intrinsically distinctive save in exceptional circumstances, since these are indistinguishable from the appearance of the goods designated and are not, in principle, used as a means of identifying commercial origin (see, to that effect and by analogy, judgments of 6 May 2003, *Libertel*, C-104/01, EU:C:2003:244, paragraphs 65 and 66, and of 24 June 2004, *Heidelberger Bauchemie*, C-49/02, EU:C:2004:384, paragraph 39).
- 44 Consumers are not in the habit of making assumptions about the origin of goods based on their colour or the colour of their packaging, in the absence of any graphic or word element, because as a rule a colour per se is not, in current commercial practice, used as a means of identification. A colour is not normally inherently capable of distinguishing the goods of a particular undertaking (see, by analogy, judgment of 6 May 2003, *Libertel*, C-104/01, EU:C:2003:244, paragraph 65).
- 45 In the present case, the Board of Appeal was right to point out that the colours blue and yellow are primary colours and that their combination is a simple element which is not likely to be remembered by the relevant public. The use of the colour blue in the shape of an ‘ovaloid’ or that of the colours yellow and blue in the two lines encircling that shape do not display any particular complexity that would make that combination particularly characteristic or striking. It follows that that combination of colours must be regarded, contrary to what the applicant claims, as basic, since it does not dispute, moreover, that those colours are primary colours.
- 46 In that regard, the Board of Appeal, by examining the fruit labels produced by both parties during the administrative proceedings, found that the colours blue and yellow were frequently used in connection with ‘fresh fruits’. In those circumstances, the Board of Appeal was also right to find that those colours did not depart from the customs of the sector and concluded that they were not capable of distinguishing the goods at issue.
- 47 The applicant’s arguments do not call that finding into question.

- 48 It must, first of all, be pointed out that, contrary to what the applicant claims, the Board of Appeal carried out a specific examination of the factors specific to the present case. The Board of Appeal did not confine itself to finding that the contested mark was, merely because it was composed of a combination of colours, incapable of having distinctive character. It came to the conclusion that the contested mark could not be perceived as an indication of the commercial origin of the goods which it designates after observing, first, that the colour scheme at issue consisted of basic colours frequently used in the marketing of fresh fruits and, secondly, that it was associated, in the contested mark, with an equally basic element, namely a basic geometric shape.
- 49 In those circumstances, the Board of Appeal, after observing that the contested mark consisted of two simple elements, namely a basic geometric shape coloured according to a basic colour scheme, was entitled to find that that mark was devoid of inherent distinctive character on the ground that it would not be perceived as an indication of the commercial origin of the goods covered by that mark.
- 50 As regards, next, the applicant's argument concerning the application to the present case of the solution adopted by EUIPO in the 'Device of a rhombus' cases (R 2089/2020-4 and R 2090/2020-4), it should be borne in mind that the legality of the decisions of the Boards of Appeal must be assessed solely on the basis of Regulation No 40/94, as interpreted by the EU judicature, and not on the basis of a previous decision-making practice (see judgment of 26 April 2007, *Alcon v OHIM*, C-412/05 P, EU:C:2007:252, paragraph 65 and the case-law cited).
- 51 However, EUIPO must take into account the decisions already taken in respect of similar applications and consider with especial care whether it should decide in the same way or not. The way in which those principles are applied must be consistent with respect for the principle of legality (judgment of 10 March 2011, *Agencja Wydawnicza Technopol v OHIM*, C-51/10 P, EU:C:2011:139, paragraphs 74 and 75).
- 52 In that regard, as part of its analysis, the Board of Appeal examined the previous decisions concerning the 'Device of a rhombus' cases relied on by the applicant, correctly finding, in paragraph 42 of the contested decision, that the figurative sign referred to in those decisions differed from the contested mark. It noted that that sign, which was considered to have distinctive character, was represented in three colours and designated goods different from those at issue in the present dispute.
- 53 Contrary to the applicant's claims, the Board of Appeal therefore took into consideration the decisions that it had provided and considered with particular care whether or not it was appropriate to decide in the same way.
- 54 Lastly, the applicant relies on a market survey, carried out on 17 September 2020, which shows, in its view, that the contested mark is memorised by consumers in Belgium, Germany, Italy, Sweden and the United Kingdom and is associated with the undertaking that owns it. Irrespective of the merits of such an argument, the applicant cannot usefully rely on such a survey, carried out in 2020, in order to assess the inherent distinctive character of a mark, which was registered in 2010, that is to say, its capacity to distinguish *ab initio* the goods that it designates from those of other undertakings.
- 55 Consequently, it must be concluded that the Board of Appeal was right to find that the blue and yellow colour scheme of the contested mark was devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94.

- 56 In the light of the foregoing, the second plea must be dismissed as unfounded.

The third plea, alleging infringement of Article 51(2) of Regulation No 40/94, read in conjunction with Article 7(3) thereof

- 57 By its third plea, the applicant complains that the Board of Appeal infringed Article 51(2) of Regulation No 40/94 and Article 7(3) thereof. In essence, it submits that the Board of Appeal erred in finding that the evidence that it submitted during the proceedings was not sufficient to establish that the contested mark, as registered, has acquired distinctive character throughout the territory of the European Union for fresh fruits in consequence of the use which has been made of it among the relevant public.

- 58 EUIPO and the intervener dispute the applicant's arguments.
- 59 In the present case, the Board of Appeal noted that the evidence that the applicant had submitted was not sufficient to demonstrate the existence of distinctive character acquired through use of the contested mark for the entire territory of the European Union. It pointed out, in essence, that the majority of that evidence concerned, for the most part, only four Member States, namely Belgium, Germany, Italy and Sweden. In particular, the applicant failed to explain why the market situation was the same in the other Member States.
- 60 Furthermore, the Board of Appeal found that the evidence provided by the applicant, with the exception of the market survey, did not refer to the contested mark as registered. Thus, the evidence does not concern the contested mark as such, but includes additional figurative or word elements, in particular the word 'chiquita'.
- 61 According to Article 51(2) of Regulation No 40/94, where an EU trade mark has been registered in breach of, in particular, Article 7(1)(b) thereof, which provides that trade marks which are devoid of any inherent distinctive character are not to be registered, it may nevertheless not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered. Under Article 7(3) of Regulation No 40/94, paragraph 1(b) of that article does not apply if the trade mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it.
- 62 For a mark to have acquired distinctiveness through use, it is necessary that at least a significant proportion of the relevant public, by virtue of that mark, identifies the goods or services concerned as originating from a particular undertaking (see judgment of 20 November 2019, *Rezon v EUIPO (imot.bg)*, T-101/19, not published, EU:T:2019:793, paragraph 46 and the case-law cited).
- 63 The burden of proof of distinctive character acquired through use, pursuant to Article 51(2) of Regulation No 40/94 and Article 7(3) thereof, rests with the proprietor of the contested mark (see, to that effect, judgment of 4 April 2019, *Stada Arzneimittel v EUIPO (Representation of two facing arches)*, T-804/17, not published, EU:T:2019:218, paragraph 49 and the case-law cited).
- 64 According to the case-law, in order to determine whether a mark has acquired distinctive character in consequence of the use which has been made of it, the competent authority must carry out an examination by reference to the actual situation, taking into account all the circumstances of the case and in particular the use which has been made of the mark (see, by analogy, judgment of 6 May 2003, *Libertel*, C-104/01, EU:C:2003:244, paragraph 77) and make an overall assessment of the evidence that that mark has come to identify the goods or services concerned as originating from a particular undertaking (see, by analogy, judgment of 19 June 2014, *Oberbank and Others*, C-217/13 and C-218/13, EU:C:2014:2012, paragraph 40 and the case-law cited).
- 65 In order to determine whether a mark has acquired distinctive character, account must be taken, inter alia, of the market share held by the mark, how intensive, geographically widespread and long-standing use of the mark has been, the amount invested by the undertaking in promoting the mark, the proportion of the relevant class of persons who, because of the mark, identify the product as originating from a particular undertaking, statements from chambers of commerce and industry or other trade and professional associations as well as opinion polls (see judgment of 21 April 2015, *Louis Vuitton Malletier v OHIM – Nanu-Nana (Representation of a grey chequerboard pattern)*, T-360/12, not published, EU:T:2015:214, paragraph 90 and the case-law cited).
- 66 As regards the geographical scope of the proof of distinctive character acquired through use, it must be recalled that a sign may be registered as an EU trade mark under Article 7(3) of Regulation No 40/94 only if evidence is provided that it has acquired, in consequence of the use which has been made of it, distinctive character in the part of the European Union in which it did not, *ab initio*, have such character for the purposes of Article 7(1)(b). It follows that, with regard to a mark that is, *ab initio*, devoid of distinctive character across all Member States, such a mark can be registered pursuant to that provision only if it is proved that it has acquired distinctive character through use throughout the

territory of the European Union (see judgment of 25 July 2018, *Société des produits Nestlé and Others v Mondelez UK Holdings & Services*, C-84/17 P, C-85/17 P and C-95/17 P, EU:C:2018:596, paragraphs 75 and 76 and the case-law cited).

67 In that regard, the Court of Justice has stated that it would be unreasonable to require proof of such acquisition for each individual Member State (see, to that effect, judgment of 24 May 2012, *Chocoladefabriken Lindt & Sprüngli v OHIM*, C-98/11 P, EU:C:2012:307, paragraph 62).

68 No provision of Regulation No 40/94 requires that the acquisition of distinctive character through use be established by separate evidence in each individual Member State. Therefore, it is not inconceivable that the evidence provided to establish that a particular sign has acquired distinctive character through use is relevant with regard to several Member States, or even to the whole of the European Union (judgment of 25 July 2018, *Société des produits Nestlé and Others v Mondelez UK Holdings & Services*, C-84/17 P, C-85/17 P and C-95/17 P, EU:C:2018:596, paragraph 80).

69 In particular, it is possible that, for certain goods or services, the economic operators have grouped several Member States together in the same distribution network and have treated those Member States, especially for marketing strategy purposes, as if they were one and the same national market. In such circumstances, the evidence for the use of a sign within such a cross-border market is likely to be relevant for all Member States concerned. The same is true when, due to a geographic, cultural or linguistic proximity between two Member States, the relevant public of the first has a sufficient knowledge of the products and services that are present on the national market of the second (judgment of 25 July 2018, *Société des produits Nestlé and Others v Mondelez UK Holdings & Services*, C-84/17 P, C-85/17 P and C-95/17 P, EU:C:2018:596, paragraphs 81 and 82).

70 The present plea in law must be examined in the light of those considerations.

– *The assessment of the evidence submitted by the applicant*

71 The applicant disputes, in the first place, the examination carried out by the Board of Appeal of a market survey of 17 September 2020 aimed at measuring knowledge of the contested mark in Belgium, Germany, Italy, Sweden and the United Kingdom (Annex 46 to the file relating to the proceedings before EUIPO; ‘the administrative file’). The applicant claims, in essence, that between 58% and 80% of the persons questioned in that survey would spontaneously associate the contested mark with the applicant. That confirms that the relevant public would perceive the contested mark as an indicator of its undertaking as the commercial origin of the goods in question.

72 EUIPO and the intervener dispute the applicant’s arguments.

73 It should be remembered that, according to the case-law, opinion polls or market studies seeking to determine which part of the relevant public associates the mark at issue with the undertaking concerned constitute ‘direct’ evidence of acquisition of distinctiveness through use, in particular where they contain non-leading questions and are based on a representative sample (see judgment of 19 October 2022, *Louis Vuitton Malletier v EUIPO – Wisniewski (Representation of a chequerboard pattern II)*, T-275/21, not published, EU:T:2022:654, paragraph 111 and the case-law cited).

74 First, the applicant submits that the first question asked in the context of the market survey referred to in paragraph 71 above, namely: ‘To which fruit brand would you associate this logo with?’, was not, contrary to what the Board of Appeal held, a leading question, but open, since it left the interviewees plenty of scope to answer it. However, it must be stated, as the Board of Appeal pointed out in paragraph 54 of the contested decision, that, by its wording, such a question implied that the shape at issue corresponded to the logo of a specific fruit brand. The Board of Appeal was therefore right to consider, in essence, that the answer was suggested by that question.

75 Secondly, it must be observed that the market survey relied on by the applicant concerned only four Member States and the United Kingdom and was limited to a sample of 7 327 persons, which is neither established nor even alleged to be representative of the relevant public.

- 76 In the second place, according to the applicant, extracts from its website ‘www.chiquita.com’ (Annex 3 to the administrative file), available in English, German, Greek and Italian, contain various examples of use of the contested mark for bananas, which demonstrates use in the European Union. The applicant adds that the references on its website to the ‘Chiquita Blue Stickers’ refer to the shape of the contested mark, so it did not have to prove extensive use of that mark as such.
- 77 EUIPO and the intervener dispute the applicant’s arguments.
- 78 It should be noted that, where a trade mark for which registration is sought may have been used as part of a registered trade mark or in conjunction with such a mark, the fact remains that, for the purposes of the registration of the mark itself, the trade mark applicant must, in any event, prove that that mark alone, as opposed to any other trade mark which may also be present, identifies the particular undertaking from which the goods originate (see, by analogy, judgment of 16 September 2015, *Société des Produits Nestlé*, C-215/14, EU:C:2015:604, paragraph 66).
- 79 In the present case, as the Board of Appeal correctly observed in paragraph 54 of the contested decision, although the extracts from the applicant’s website contain various examples of blue stickers, bearing, inter alia, the term ‘chiquita’ and other figurative elements on bananas, they do not present any illustration of the contested mark as such. Moreover, the applicant has not adduced any evidence or put forward any argument capable of demonstrating that such extracts proved that the contested mark alone indicates, without the word and graphic elements contained in the ‘Chiquita Blue Sticker’, the commercial origin of the fresh fruits which that mark designates.
- 80 Furthermore, even if the applicant’s website, available in the languages mentioned in paragraph 76 above, concerns all the Member States, it is common ground that that website does not reproduce the contested mark, but rather other trade marks of the applicant.
- 81 In the third place, the applicant claims that the statements made by wholesalers operating on the fresh fruit market in Belgium, Germany, Greece, Italy, Sweden and the United Kingdom (Annexes 40 to 45 to the administrative file) confirm the intensive use of the contested mark in those countries and also demonstrate the perception of the contested mark by the general public.
- 82 EUIPO and the intervener dispute the applicant’s arguments.
- 83 In that regard, contrary to what the applicant claims, and in so far as the statements referred to in paragraph 81 above did not come from the general public and did not relate, in any event, to the perception of the contested mark by that public, the Board of Appeal was entitled, at the very least, to find that they had very limited evidential value as regards the existence of distinctive character acquired by the contested mark as a result of its use by the relevant public.
- 84 In the fourth and last place, the applicant criticises the Board of Appeal’s finding, set out in paragraph 52 of the contested decision, that, in essence, in order to establish the distinctive character acquired by the contested mark throughout the European Union, the affidavit of its president, indicating the total annual sales figures and total annual advertising expenditure incurred in the sale of ‘Chiquita’ products in the territory of the European Union between 2015 and 2020 in connection with fresh fruits (Annex 7 to the administrative file), should make a distinction between the different Member States where the turnover was generated or the advertising launched.
- 85 EUIPO and the intervener dispute the applicant’s arguments.
- 86 In that regard, it must be held, as did the Board of Appeal, that the affidavit referred to in paragraph 84 above is not sufficient to establish that the contested mark has acquired distinctive character throughout the territory of the European Union through the use which has been made of it among the relevant public. That statement does not make it possible to make any specific finding relating to the factors referred to in paragraph 65 above, given that the amounts of sales and advertising expenditure are not allocated by Member State, but are presented globally. Even if, as has been recalled in paragraph 68 above, it would be unreasonable to require proof of acquisition of distinctive character through use to be adduced for each Member State separately, such information does not make it possible, in the present case, to assess the intensity or geographical extent of the use of the contested mark.

87 In addition, the figures submitted concern all 'Chiquita' products, including those that are not marketed under the contested mark. As has already been pointed out, information capable of demonstrating use of the contested mark used in combination with other graphic or word elements cannot suffice to justify actual use of the contested mark as such in the absence of evidence proving that, as a result of that use, the product covered by the contested mark is perceived as originating from the applicant.

88 Therefore, the Board of Appeal did not err in finding, as is apparent, in essence, from paragraph 52 of the contested decision, that each of the items of evidence examined above was not sufficient to show that the contested mark, as registered, had acquired distinctive character through use for the whole of the European Union.

– *The overall assessment of the evidence submitted by the applicant*

89 In the first place, as regards the geographical extent of the evidence of distinctive character acquired through use, the applicant did not submit evidence concerning all the Member States and itself admits that the majority of the evidence in the administrative file mentioned only four Member States, namely Belgium, Germany, Italy and Sweden.

90 The applicant submits, however, that the Board of Appeal made an error of assessment in finding, in the context of its overall assessment, as set out in paragraph 53 of the contested decision, that it had not provided any explanation or evidence capable of showing that the situation on the fresh fruit market in those four Member States was the same as in the other Member States.

91 In accordance with the case-law cited in paragraphs 67 to 69 above, evidence of use of a sign in certain Member States is likely to be relevant for all the Member States concerned where, in particular, all those States are grouped together within the same distribution network and are treated as one and the same market, for example, in the light of their marketing strategies, or because of their geographical, cultural or linguistic proximity.

92 However, the applicant has not provided any information on those various points. In particular, contrary to what the applicant claims, the situation of the fresh fruit market, including with regard to distribution networks and commercial strategies, cannot be the same throughout the European Union on the sole ground that such products are groceries for everyday use. Although the applicant states, moreover, that it explained its commercial strategy to the Board of Appeal by providing numerous examples from other Member States and disclosing its marketing expenditure throughout the European Union, it did not refer in its application to any evidence capable of establishing it, nor refer on that point to evidence annexed to its application capable of supporting such an assertion.

93 Therefore, the Board of Appeal was entitled, without making an error of assessment, to find, in paragraph 53 of the contested decision, that the applicant had not provided any evidence capable of showing that the market situation in those Member States was the same by reason of the same distribution network, the same marketing strategy or the geographical or cultural proximity.

94 In those circumstances, even if, as the applicant submits, the Board of Appeal cannot validly criticise it for failing to demonstrate the existence of linguistic proximity between the Member States in respect of which evidence has been provided and the other Member States, such a circumstance, in so far as the case-law on which the Board of Appeal relied, and reproduced in paragraph 69 above, makes the existence of linguistic proximity only one reason among others for the existence of a cross-border market for the goods concerned, cannot, in itself, '[show] a superficial rejection' of the evidence submitted by the applicant.

95 In the second place, the Board of Appeal correctly found that there was insufficient evidence to establish that the contested mark is perceived by the relevant public as such, that is to say, without additional elements, as identifying the commercial origin of the goods in question. The applicant has not adduced any evidence or put forward any argument capable of demonstrating that the evidence submitted, considered as a whole, establishes that the contested mark, as registered, has acquired distinctive character.

- 96 In those circumstances, the evidence, assessed as a whole, does not provide sufficient data to establish that the contested mark has acquired distinctive character for fresh fruits in consequence of the use which has been made of it among the relevant public.
- 97 Accordingly, the third plea in law must be rejected as unfounded and, consequently, the action must be dismissed in its entirety.

Costs

- 98 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 99 Since a hearing has taken place and the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by EUIPO and the intervener.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Chiquita Brands LLC to pay the costs.**

Marcoulli

Valasidis

Spangsberg Grønfeldt

Delivered in open court in Luxembourg on 13 November 2024.

V. Di Bucci

M. van der Woude

Registrar

President

* Language of the case: English.