

## JUDGMENT OF THE COURT (Tenth Chamber)

29 July 2019 (\*)

(Appeal — EU trade mark — Regulation (EC) No 207/2009 — Article 4 and Article 7(1)  
(a) — Absolute ground for refusal — Invalidity proceedings — Combination of two colours  
per se — No systematic arrangement associating the colours in a predetermined and uniform  
way)

In Case C-124/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union,  
brought on 15 February 2018,

**Red Bull GmbH**, established in Fuschl am See (Austria), represented by A. Renck,  
Rechtsanwalt, and S. Petivlasova, abogada,

appellant,

the other parties to the proceedings being:

**European Union Intellectual Property Office (EUIPO)**, represented by A. Folliard-  
Monguiral and D. Botis, acting as Agents,

defendant at first instance,

**Marques**, established in Leicester (United Kingdom), represented by R. Mallinson,  
Solicitor, and T. Müller, Rechtsanwalt,

**Optimum Mark sp. z o.o.**, established in Warsaw (Poland), represented by R. Skubisz,  
J. Dudzik and M. Mazurek, adwokaci, and E. Jaroszyńska-Kozłowska, advocate,

interveners at first instance,

THE COURT (Tenth Chamber),

composed of C. Lycourgos, President of the Chamber, E. Juhász (Rapporteur) and M. Ilešič,  
Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an  
Opinion,

gives the following

**Judgment**

- 1 By its appeal, Red Bull GmbH seeks to have set aside the judgment of the General Court of the European Union of 30 November 2017, *Red Bull v EUIPO — Optimum mark (Combination of the colours blue and silver)* (T-101/15 and T-102/15, ‘the judgment under appeal’, EU:T:2017:852), by which the General Court dismissed its actions for annulment of two decisions of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 2 December 2014 (Case R 2036/2013-1 and Case R 2037/2013-1) relating to invalidity proceedings between Optimum Mark sp. z o.o. and Red Bull.

### **Legal context**

#### ***Regulation (EC) No 40/94***

- 2 Article 4 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), entitled ‘Signs of which a Community trade mark may consist’, provides:

‘A Community trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.’

- 3 Article 7 of that regulation, entitled ‘Absolute grounds for refusal’, states:

‘1. The following shall not be registered:

- (a) signs which do not conform to the requirements of Article 4;
- (b) trade marks which are devoid of any distinctive character;

...

3. Paragraph 1(b), (c) and (d) shall 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.’

- 4 Article 15 of Regulation No 40/94, entitled ‘Use of Community trade marks’, provides:

‘1. If, within a period of 5 years following registration, the proprietor has not put the Community trade mark to genuine use in the Community in connection with the goods or services in respect of which it is registered, or if such use has been suspended during an uninterrupted period of 5 years, the Community trade mark shall be subject to the sanctions provided for in this Regulation, unless there are proper reasons for non-use.

2. The following shall also constitute use within the meaning of paragraph 1:

- (a) use of the Community trade mark in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered;

...’

- 5 Article 51 of that regulation, entitled ‘Absolute grounds for invalidity’, is worded as follows:

‘1. A Community trade mark shall be declared invalid on application to [EUIPO] or on the basis of a counterclaim in infringement proceedings:

- (a) where the Community trade mark has been registered in breach of the provisions of Article 5 or of Article 7;
- (b) where the applicant was acting in bad faith when he filed the application for the trade mark.

2. Where the Community trade mark has been registered in breach of the provisions of Article 7(1)(b), (c) or (d), 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.

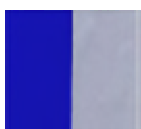
...’

### ***Regulation (EC) No 207/2009***

- 6 Council Regulation (EC) No 207/2009 of 26 February 2009 on the [European Union] trade mark (OJ 2009 L 78, p. 1), which came into force on 13 April 2009, repealed and replaced Regulation No 40/94.
- 7 Article 4, Article 7, Article 15(1) and Article 52 of Regulation No 207/2009 reproduce, in essence, the content of Article 4, Article 7, Article 15(1) and (2), and Article 51 of Regulation No 40/94 respectively.

### **Background to the dispute**

- 8 The background to the dispute, as set out in paragraphs 1 to 26 of the judgment under appeal, may, for the purposes of the present proceedings, be summarised as follows.
- 9 As regards Case T-101/15, on 15 January 2002 Red Bull filed an application for registration in respect of the combination of two colours per se reproduced below:



- 10 By a communication dated 30 June 2003, the appellant submitted additional documents to prove the distinctive character acquired through use of that mark. On 11 October 2004 the appellant submitted a description of the mark that was worded as follows:  

‘Protection is claimed for the colours blue (RAL 5002) and silver (RAL 9006). The ratio of the colours is approximately 50%–50%.’
- 11 The goods in respect of which registration was sought are in Class 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 correspond to the following description: ‘Energy drinks’.
- 12 The Community trade mark application was published in *Community Trade Marks Bulletin* No 10/2005 of 7 March 2005. The trade mark was registered on 25 July 2005 under number

002534774, with an indication that it had acquired distinctive character through use and the description referred to in paragraph 10 above.

- 13 On 20 September 2013 Optimum Mark filed an application with EUIPO for a declaration that the trade mark was invalid.
- 14 In support of its application, Optimum Mark contended, first, that the trade mark did not meet the requirements of Article 7(1)(a) of Regulation No 207/2009 since its graphic representation did not systematically arrange the colours by associating them in a predetermined and uniform way and, secondly, that the description of the trade mark, according to which the ratio of the two colours of which the mark was composed was ‘approximately 50%–50%’, allowed for numerous combinations, with the result that consumers would not be able to make further purchases with certainty.
- 15 As regards Case T–102/15, on 1 October 2010 the appellant filed a second application for registration of an EU trade mark with EUIPO relating to a combination of colours per se, as reproduced in paragraph 9 above, in respect of the same goods as those referred to in paragraph 11 above.
- 16 The EU trade mark application was published in *Community Trade Marks Bulletin* No 48/2011 of 29 November 2010.
- 17 On 22 December 2010 the examiner issued a notice that the formal requirements had not been met and consequently requested that the appellant specify ‘in which proportion the two colours will be applied (for example, in equal proportion) and how they will appear’.
- 18 On 10 February 2011 the appellant indicated to the examiner that ‘in compliance with [the examiner’s] notification dated 22 December 2010, [the appellant] herewith informed [EUIPO] that the two colours will be applied in equal proportion and juxtaposed to each other’.
- 19 On 8 March 2011 the second trade mark was registered on the basis of distinctive character acquired through use, with the colours being given as ‘blue (Pantone 2747C), silver (Pantone 877C)’ and the following description: ‘The two colours will be applied in equal proportion and juxtaposed to each other’.
- 20 On 27 September 2011 Optimum Mark filed an application with EUIPO for a declaration that that mark was invalid, contending, first, that it did not meet the requirements of Article 7(1)(a) of Regulation No 207/2009 and, secondly, that, on account of the fact that the term ‘juxtaposed’ might have several meanings, the description of the trade mark did not indicate the type of arrangement in which the two colours would be applied to the goods and was therefore not self-contained, clear and precise.
- 21 By two decisions of 9 October 2013, the Cancellation Division of EUIPO declared the two marks in question (‘the marks at issue’) invalid, inter alia on the ground that they were not sufficiently precise. The Cancellation Division relied on the fact that they allowed numerous different combinations which would not permit the consumer to perceive and recall a particular combination, thereby enabling him to make further purchases with certainty.
- 22 Red Bull filed notices of appeal against those two decisions before the Board of Appeal of EUIPO.
- 23 By two decisions of 2 December 2014 (‘the decisions at issue’), the First Board of Appeal of EUIPO dismissed both appeals, considering, in essence, that the graphic representation of

the marks at issue, evaluated in conjunction with the accompanying description, did not satisfy the requirements of precision and durability laid down in the judgment of 24 June 2004, *Heidelberger Bauchemie*, (C-49/02, EU:C:2004:384), according to which marks consisting of a combination of colours must be systematically arranged in such a way that the colours concerned are associated in a predetermined and uniform way. According to the First Board of Appeal of EUIPO, the marks at issue allowed for the arrangement of the two colours in numerous different combinations, producing a very different overall impression.

### **The procedure before the General Court and the judgment under appeal**

- 24 By applications lodged at the Registry of the General Court on 26 February 2015, the appellant brought two actions for annulment of the decisions at issue.
- 25 In support of its actions, Red Bull raised two pleas in law, alleging, first, infringement of Article 4 and Article 7(1)(a) of Regulation No 207/2009 and breach of the principles of proportionality and equal treatment; and, second, breach of the principle of protection of legitimate expectations.
- 26 By the judgment under appeal, the General Court dismissed the actions in their entirety.

### **Forms of order sought by the parties before the Court**

- 27 The appellant, supported by Marques, claims that the Court should:
- set aside the judgment under appeal;
  - annul the decisions at issue; and
  - order EUIPO to pay the costs of the proceedings.
- 28 EUIPO contends that the Court should:
- dismiss the appeal; and
  - order Red Bull to pay the costs.
- 29 Optimum Mark contends that the Court should:
- dismiss the appeal; and
  - order Red Bull to pay the costs.

### **The appeal**

- 30 The appellant puts forward five grounds in support of its appeal, alleging, first, breach of the principles of equal treatment and proportionality in connection with Article 4 and Article 7(1)(a) of Regulation No 207/2009; second, infringement of Article 4 and Article 7(1)(a) of Regulation No 207/2009; third, breach of the principle of legitimate expectations; fourth, breach of the principle of proportionality; and, lastly, fifth, infringement of Article 134(1) and Article 135 of the Rules of Procedure of the General Court.

### ***The second ground of appeal***

*Arguments of the parties*

- 31 By its second ground of appeal, which it is appropriate to examine first, the appellant submits that the General Court misinterpreted the judgment of 24 June 2004, *Heidelberger Bauchemie* (C-49/02, EU:C:2004:384), and infringed Article 4 and Article 7(1)(a) of Regulation No 207/2009, by holding that marks consisting of a combination of colours must systematically specify the spatial arrangement of the colours in question and, consequently, concluding that, in the present case, the graphic representation of the marks at issue was insufficiently precise without such an arrangement.
- 32 By the first part of its second ground of appeal, the appellant claims that the judgment of 24 June 2004, *Heidelberger Bauchemie* (C-49/02, EU:C:2004:384), specifically paragraph 34 thereof, should, contrary to the what the General Court held in paragraphs 55, 64, 96, 114 and 119 of the judgment under appeal, be interpreted in the specific context of the case which gave rise to that judgment, which concerned a trade mark consisting of a combination of colours and whose description stated that those colours were to be used ‘in every conceivable form’. In the present case, by considering that the mere juxtaposition of colours was not sufficient to constitute a precise and uniform graphic representation, the General Court infringed the rule that a trade mark must be viewed as filed, as held by the Court of Justice in the judgment of 10 July 2014, *Apple* (C-421/13, EU:C:2014:2070), and thus failed to have regard to the specific feature of marks consisting of a combination of colours, which is not to have contours.
- 33 By the second part of its second ground of appeal, the appellant takes issue with paragraphs 78 and 89 of the judgment under appeal, in so far as the General Court stated that marks consisting of a combination of colours must include a description of the graphic representation, whereas such a description has always been left to the discretion of the parties. In any event, the marks at issue each included a description which was not inconsistent with the graphic representation and which did not therefore justify the marks being declared invalid.
- 34 By the third part of its second ground of appeal, the appellant criticises the General Court for taking into account, in paragraphs 65, 66, 69, 71, 72 and 90 of the judgment under appeal, the actual use that was made of the marks at issue to establish that their graphic representation allowed a multitude of arrangements, thereby conflating the analysis of the graphic representation with that of the distinctive character of the sign in question, even though, under Article 7(3) and Article 15(1) of Regulation No 207/2009, the proprietor of a mark is entitled to use such a mark in different variations and, accordingly, marks consisting of a combination of colours should not be reduced to a single figurative arrangement reflecting the way in which they are actually used.
- 35 EUIPO and Optimum Mark contend that that ground of appeal should be rejected.

*Findings of the Court*

- 36 As regards the first part of the second ground of appeal, it must be noted that, according to the Court’s settled case-law on Regulation No 40/94 and Regulation No 207/2009, a sign may be registered as a mark only if the applicant for the mark provides a graphic representation in accordance with the requirement in Article 4 of those regulations, to the effect that the subject matter and scope of the protection sought are clearly and precisely determined (see, to that effect, judgment of 27 March 2019, *Hartwall*, C-578/17, EU:C:2019:261, paragraph 38 and the case-law cited).

- 37 Where the application is accompanied by a verbal description of the sign, that description must serve to clarify the subject matter and scope of the protection sought under trade mark law and such a description cannot be inconsistent with the graphic representation of a trade mark or give rise to doubts as to the subject matter and scope of that graphic representation (see, to that effect, judgment of 27 March 2019, *Hartwall*, C-578/17, EU:C:2019:261, paragraphs 39 and 40).
- 38 Moreover, in paragraph 33 of judgment of 24 June 2004, *Heidelberger Bauchemie* (C-49/02, EU:C:2004:384), the Court held that a graphic representation of two or more colours, designated in the abstract and without contours, must be systematically arranged in such a way that the colours concerned are associated in a predetermined and uniform way and noted, in paragraph 34 of that judgment, that the mere juxtaposition of two or more colours, without shape or contours, or a reference to two or more colours ‘in every conceivable form’, will not exhibit the qualities of precision and uniformity required by Article 4 of Regulation No 40/94 (now Article 4 of Regulation No 207/2009). As the Court explained in paragraph 35 of that judgment, such representations would allow numerous different combinations, which would not permit the consumer to perceive and recall a particular combination, thereby enabling him to make further purchases with certainty, any more than they would allow the competent authorities and economic operators to know the scope of the protection afforded to the proprietor of the trade mark.
- 39 In the present case, it is common ground that the applications for registration filed by Red Bull both concerned a combination of the colours blue and silver per se.
- 40 The two signs in respect of which protection was sought under trade mark law were reproduced graphically in the form of two vertical parallel blocks set side by side, each having an equal surface, one of the colour blue and the other of the colour silver.
- 41 Those graphic representations were also accompanied by two descriptions, the first indicating that the ratio of each of the two colours was ‘approximately 50% — 50%’ and the second that the two colours were juxtaposed to each other and would be applied in equal proportion.
- 42 In paragraph 89 of the judgment under appeal, endorsing the Board of Appeal’s findings, the General Court found that the mere indication of the ratio of the two colours blue and silver allowed for the arrangement of those colours in numerous different combinations and did not therefore constitute a systematic arrangement associating the colours in a predetermined and uniform way, and concluded that the graphic representation supplied in the present case, accompanied by a description indicating only the proportions of the two colours, could not be considered sufficiently precise and that the contested mark had not been registered in accordance with Article 7(1)(a) of Regulation No 207/2009.
- 43 With regard to the first application for registration, the General Court noted, in paragraph 90 of the judgment under appeal, that the word ‘approximately’ in the description merely reinforces the lack of precision of the graphic presentation, which allows for different arrangements of the colours at issue.
- 44 As regards the second application for registration, while the appellant had indicated that ‘the two colours [would be] applied in equal proportion and juxtaposed to each other’, the General Court found, in paragraph 62 of the judgment under appeal, that that juxtaposition can take different forms, giving rise to different images or layouts, while still being in equal proportion.

- 45 In that regard, the General Court noted, in particular, in paragraph 65 of the judgment under appeal, that the lack of precision of the two graphic representations, together with their description, is confirmed by the fact that the appellant's applications for registration, filed on the basis of the acquired distinctiveness through use of the marks at issue, were accompanied by evidence which reproduced those marks very differently in comparison with the vertical juxtaposition of the two colours shown in the graphic representation included in those applications.
- 46 Even assuming that the graphic representations at issue were more precise than those at issue in the judgment of 24 June 2004, *Heidelberger Bauchemie* (C-49/02, EU:C:2004:384), the appellant is not, in any event, justified in claiming that, by its factual assessment that there was no systematic arrangement associating the colours concerned in a predetermined and uniform way, the General Court has incorrectly applied the principles stemming from that judgment.
- 47 In particular, the General Court did not err in law in concluding, in the judgment under appeal, that the registration of a mark which allows for a plurality of reproductions that are neither determined in advance nor uniform is incompatible with Article 4 of Regulation No 207/2009 and the judgment of 24 June 2004, *Heidelberger Bauchemie* (C-49/02, EU:C:2004:384).
- 48 Moreover, and contrary to what the appellant claims, requiring a mark consisting of a combination of colours to exhibit a systematic arrangement associating the colours in a predetermined and uniform way cannot transform that type of mark into a figurative mark, since that requirement does not mean that the colours must be defined by contours.
- 49 Lastly, the appellant cannot rely on the judgment of 10 July 2014, *Apple* (C-421/13, EU:C:2014:2070), in support of its claim that the General Court erred in holding that the graphic representation of the marks at issue was insufficiently precise.
- 50 The case which gave rise to that judgment concerned a trade mark relating to a graphic representation of 'a collection of lines, curves and shapes', which is not the case as regards the marks at issue, with the result that the solution adopted in that judgment cannot be applied to the present case.
- 51 It follows from the foregoing considerations that the first part of the second ground of appeal must be rejected as unfounded.
- 52 As regards the second part of the second ground of appeal, the argument that the General Court erroneously held, in paragraphs 78 and 89 of the judgment under appeal, that the graphic representation of a mark consisting of a combination of colours must systematically be accompanied by a description relating to the arrangement of each of the colours must be rejected as ineffective.
- 53 It is common ground that the marks at issue were each accompanied by a description.
- 54 Therefore, even if the Court were to uphold that argument, that would have no effect on the assessment of the present appeal.
- 55 As regards the third part of the second ground of appeal, it must be noted that, under Article 4 of Regulation No 207/2009, an EU trade mark may consist of any signs capable of being represented graphically, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.



- 56 Accordingly, a sign must, in order to be registered as an EU trade mark, have distinctive character, so that the goods or services of the undertaking in question may be distinguished from those of other undertakings.
- 57 In the present case, the marks at issue were registered on the basis of distinctive character acquired through use.
- 58 In that situation, EUIPO and then the General Court were entitled to examine whether the marks at issue met the requirements of Article 4 of Regulation No 207/2009 and, in that examination, to take into account the various manifestations of that use, in particular the actual use of those marks.
- 59 In the light of the foregoing, the third part of the second ground of appeal must be rejected as unfounded and, consequently, the second ground of appeal must be rejected in its entirety.

### ***The first ground of appeal***

#### *Arguments of the parties*

- 60 By its first ground of appeal, the appellant claims that the General Court infringed the principles of equal treatment and proportionality in connection with Article 4 and Article 7 (1)(a) of Regulation No 207/2009.
- 61 The appellant takes issue with paragraphs 85, 96 and 114 of the judgment under appeal, in that the General Court wrongly took account of the ‘intrinsically less precise nature of colour per se marks’, their limited ability to convey some precise meaning, and competition considerations for the purposes of the requirement that a mark consisting of a combination of colours exhibit a systematic arrangement of those colours.
- 62 According to the appellant, such considerations have no bearing on the analysis of the graphic representation of a trade mark, with the result that, by taking them into account, the General Court has treated marks consisting of a combination of colours unequally and disproportionately, vis-à-vis other types of marks, and has reduced them to mere figurative, pattern or position marks in colour.
- 63 EUIPO and Optimum Mark contend that that ground of appeal should be rejected.

#### *Findings of the Court*

- 64 It must be noted that, in paragraphs 85 to 87 of the judgment under appeal, the General Court in essence recalled that marks consisting of a combination of colours must exhibit a systematic arrangement associating the colours in a predetermined and uniform way.
- 65 By referring in that regard to ‘the requirement of the colours’ availability’ in the course of trade, the General Court correctly applied the Court’s settled case-law to the effect that, in the examination that occurs when registering a sign consisting of a combination of colours, particular attention must be paid not to unduly restrict the availability of colours for the other traders who offer for sale goods or services of the same type as those in respect of which registration is sought (see, to that effect, judgments of 6 May 2003, *Libertel*, C-104/01, EU:C:2003:244, paragraphs 54 to 56, and of 24 June 2004, *Heidelberger Bauchemie*, C-49/02, EU:C:2004:384, paragraph 41).
- 66 Moreover, as follows from the preceding paragraphs, the requirement for an application for a mark consisting of a combination of colours to exhibit a systematic arrangement

associating the colours in a predetermined and uniform way is clearly necessary to meet the condition of clarity and precision that a trade mark must fulfil.

67 In those circumstances, the General Court, in referring to that requirement, infringed neither the principle of proportionality nor the principle of equal treatment.

68 The first ground of appeal must therefore be rejected as unfounded.

### ***The third ground of appeal***

#### *Arguments of the parties*

69 By its third ground of appeal, the appellant claims that the General Court infringed the principle of protection of legitimate expectations.

70 By the first part of its third ground of appeal, the appellant submits that, following the delivery of the judgment of 19 June 2012, *Chartered Institute of Patent Attorneys* (C-307/10, EU:C:2012:361), which dealt with the issue of clarity and precision in the identification of goods and services when registering trade marks, the judgment of 16 February 2017, *Brandconcern v EUIPO and Scooters India* (C-577/14 P, EU:C:2017:122), and subsequently the judgment of 11 October 2017, *EUIPO v Cactus* (C-501/15 P, EU:C:2017:750), ensured that the effects of the first judgment, which went against settled EUIPO practice, do not apply retroactively and do not affect trade marks registered before the delivery of that judgment, so that the principle of legitimate expectations continues to be observed.

71 The appellant contends that, as the marks at issue were considered valid by EUIPO before the delivery of the judgment of 24 June 2004, *Heidelberger Bauchemie* (C-49/02, EU:C:2004:384), the requirements stemming from that judgment should apply only to trade marks registered after the delivery of that judgment.

72 By the second part of its third ground of appeal, the appellant takes issue with paragraphs 100 and 129 to 144 of the judgment under appeal, in that the General Court failed to carry out an overall assessment of whether EUIPO's stance had given rise to a legitimate expectation on the appellant's part as to the validity of the marks at issue, whose distinctive character had been established on the basis of their use.

73 In that regard, the appellant claims that the General Court took the view that no legitimate expectations could arise on the basis of assurances given by EUIPO that were not consistent with legislation, even though, at that time, only the judgment of 24 June 2004, *Heidelberger Bauchemie* (C-49/02, EU:C:2004:384), concerned colour combinations 'in every conceivable form' and the only guidance available to the appellant was EUIPO's consistent guidelines, under which the marks at issue were considered valid. Moreover, according to the appellant, the General Court erred, in paragraph 100 of the judgment under appeal, in referring only to post-2016 EUIPO guidelines, whereas the content of the earlier guidelines suggested that the marks at issue could be considered valid, and, in paragraphs 141 and 142 of the judgment under appeal, in holding that the appellant could not rely on judgments of the EU judicature based solely on Article 7(1)(b) of Regulation No 207/2009. The appellant also takes issue with paragraphs 126, 134, 135 and 138 of the judgment under appeal, in that the General Court found that EUIPO's practice relating to marks consisting of a combination of colours was unlawful.

74 EUIPO contends that the ground of appeal under consideration is inadmissible. As regards the first part of the ground of appeal, the appellant did not, in the proceedings before the

General Court, rely on the judgment of 16 February 2017, *Brandconcern v EUIPO and Scooters India* (C-577/14 P, EU:C:2017:122). As to the second part of the ground of appeal, relating to the principle of legitimate expectations, the arguments put forward by the appellant are mere assertions.

75 Optimum Mark contends that that ground of appeal is unfounded.

*Findings of the Court*

– *Admissibility of the ground of appeal*

76 As regards the first part of the third ground of appeal, it must be noted that, in its application before the General Court, the appellant put forward, in paragraph 85 thereof, a line of arguments based, in essence, on the case-law stemming from the judgment of 16 February 2017, *Brandconcern v EUIPO and Scooters India* (C-577/14 P, EU:C:2017:122). In those circumstances, the appellant cannot be regarded as relying on any new evidence which was not submitted to the General Court for appraisal.

77 As to the second part of that ground of appeal, all the arguments put forward by the appellant are intended to substantiate the claim that it is entitled to rely on a breach of the principle of legitimate expectations, which, per se, does not constitute a ground for inadmissibility.

78 Accordingly, that ground of appeal is admissible in its entirety.

– *Substance*

79 As regards the second part of the third ground of appeal, which it is appropriate to examine first, according to the Court's settled case-law, the right to rely on the principle of legitimate expectations extends to any person with regard to whom an institution has given rise to justified hopes. A person may not plead infringement of the principle unless he has been given precise, unconditional and consistent assurances by a competent authority of the European Union (judgments of 22 September 2011, *Bell & Ross v OHIM*, C-426/10 P, EU:C:2011:612, paragraph 56 and the case-law cited, and of 14 June 2016, *Marchiani v Parliament*, C-566/14 P, EU:C:2016:437, paragraph 77).

80 In the present case, none of the arguments put forward by the appellant can establish a breach of the principle of legitimate expectations by EUIPO or, consequently, an error of law on the part of the General Court.

81 In simply putting forward a 'combination of factors', the overall assessment of which supposedly grants it the opportunity to rely on such a principle, the appellant has not, in fact, relied on any positive act on the part of EUIPO of such a kind as to give it precise, unconditional and consistent assurances that the marks at issue were not liable to be declared invalid.

82 In that regard, it should be noted, first, that the appellant does not rely on any specific part of EUIPO guidelines to the effect that EUIPO informed the public that it considered it unnecessary for a mark consisting of a combination of colours to be systematically arranged by associating those colours in a predetermined and uniform way. Secondly, as noted by the General Court in paragraph 132 of the judgment under appeal, the fact that the examiner of EUIPO sought additional clarifications in respect of the marks at issue cannot be regarded as constituting a precise and unconditional assurance given by EUIPO to the appellant that the graphic representations of those marks were sufficiently precise. On the contrary, the

examiner's conduct indicated instead that, in EUIPO's opinion, those signs were not sufficiently precise to be capable of meeting the requirements of Article 7(1)(a) of Regulation No 207/2009. Thirdly, the fact that the marks at issue were initially registered by EUIPO was not such as to bind EUIPO in future, since, as the General Court noted, in essence, in paragraph 133 of the judgment under appeal, the registration of a mark does not preclude that mark being declared invalid if it was registered in breach of one of the absolute grounds for refusal provided for in Article 7 of that regulation. An interpretation to the contrary would have the effect of depriving the provisions of Article 52 of Regulation No 207/2009 of any effect.

- 83 Accordingly, the General Court did not err in law when it came to the conclusion that EUIPO had not given the appellant precise, unconditional and consistent assurances that the descriptions provided by it met the requirements laid down in Article 4 of Regulation No 207/2009.
- 84 It is therefore only for the sake of completeness that the General Court stated, in paragraph 134 of the judgment under appeal, that, even on the assumption that the information supplied by the examiner of EUIPO may be described as precise and unconditional assurances, such assurances, which did not comply with the applicable provisions, could not give rise to a legitimate expectation. It follows that the complaint directed by the appellant against that argument, which was given only for the sake of completeness, is ineffective.
- 85 It must be added that, contrary to what is submitted by the appellant, nor did the General Court err in law by holding, in paragraph 142 of the judgment under appeal, that the fact that the EU judicature has ruled on the distinctive character of a trade mark, within the meaning of Article 7(1)(b) of Regulation No 207/2009, does not necessarily imply that that mark is deemed to comply with Article 4 of that regulation. Indeed, the examination of distinctive character by EUIPO or by the EU judicature does not mean that the requirement for a trade mark to be clear and precise is already met.
- 86 Since those factors are sufficient in and of themselves to establish that the appellant is not entitled to rely on the principle of legitimate expectations, the argument relating to the General Court's reference to EUIPO's post-2016 guidelines must be rejected as ineffective.
- 87 In those circumstances, the second part of the third ground of appeal must be rejected as unfounded.
- 88 As regards the first part of that ground of appeal, it is sufficient to note that the judgment of 16 February 2017, *Brandconcern v EUIPO and Scooters India* (C-577/14 P, EU:C:2017:122), and the judgment of 11 October 2017, *EUIPO v Cactus* (C-501/15 P, EU:C:2017:750), cannot be applied to the present case, since, as pointed out by EUIPO, first, the cases which gave rise to those judgments did not concern an absolute ground for invalidity and, secondly, those judgments were delivered when the judgment of 19 June 2012, *Chartered Institute of Patent Attorneys* (C-307/10, EU:C:2012:361), had overturned EUIPO practice which had previously been set out in one of its communications.
- 89 The present proceedings relate to a case of absolute invalidity and have arisen, as recalled in paragraph 81 above, without the parties complying with the precise and consistent guidelines set out by EUIPO in one of its communications.
- 90 Accordingly, the first part of the third ground of appeal must be rejected as unfounded and, consequently, that ground of appeal must be rejected in its entirety as unfounded.

### ***The fourth ground of appeal***

#### *Arguments of the parties*

- 91 By its fourth ground of appeal, the appellant claims that the judgment under appeal infringed the principle of proportionality by failing to examine whether the decisions at issue are disproportionate and failing to allow the appellant to clarify the description of the marks at issue in order to prevent them being declared invalid.
- 92 The appellant acknowledges that Articles 43 and 48 of Regulation No 207/2009 do not in principle permit the amendment of a mark or its subject matter once it has been registered. The fact remains that, as regards the marks at issue, the descriptions relating to them were added after the applications for registration had been filed. Thus, in accordance with paragraphs 37 and 38 of the judgment of 6 May 2003, *Libertel* (C-104/01, EU:C:2003:244), that deficiency could be remedied by adding the necessary clarifications, which was in practice permitted by Communication No 6/03 of the President of EUIPO of 10 November 2003.
- 93 EUIPO and Optimum Mark contend that the fourth ground of appeal should be rejected.

#### *Findings of the Court*

- 94 It should be recalled that, according to settled case-law, a plea raised for the first time in an appeal before this Court must be rejected as inadmissible. To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court would be to allow it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that presented before the General Court. In an appeal, the jurisdiction of the Court of Justice is thus confined to a review of the assessment made by the General Court of the pleas and arguments debated before it (order of 13 November 2018, *Toontrack Music v EUIPO*, C-48/18 P, not published, EU:C:2018:895, paragraph 42 and the case-law cited).
- 95 In the present case, and although the appellant bases its ground of appeal on the General Court's alleged breach of the principle of proportionality, it must be noted that, in its application before the General Court, the appellant sought the possibility of amending the marks at issue on the basis not of the principle of proportionality, but the principle of legitimate expectations.
- 96 Since the fourth ground of the appeal constitutes a new plea in law, it must be rejected as inadmissible.

### ***The fifth ground of appeal***

#### *Arguments of the parties*

- 97 By its fifth ground of appeal, the appellant submits that the General Court infringed Articles 134 and 135 of its Rules of Procedure by ordering it to pay the costs of the proceedings.
- 98 In support of its ground of appeal, the appellant claims that, in view of the exceptional nature of the case, the General Court should, on equitable grounds, have ordered EUIPO to pay the costs.
- 99 EUIPO and Optimum Mark contend that that ground of appeal should be rejected.

*Findings of the Court*

- 100 Under the second paragraph of Article 58 of the Statute of the Court of Justice of the European Union, ‘no appeal shall lie regarding only the amount of the costs or the party ordered to pay them’. Where all the other grounds of an appeal have been rejected, any form of order sought concerning the alleged unlawfulness of the General Court’s decision on costs must be rejected as inadmissible pursuant to that provision (see, to that effect, order of 15 October 2012, *Internationaler Hilfsfonds v Commission*, C-554/11 P, not published, EU:C:2012:629, paragraphs 38 and 39).
- 101 In the present case, since the first four grounds of appeal have been rejected, the fifth ground of appeal must be rejected as inadmissible in accordance with the case-law referred to in the previous paragraph.
- 102 It follows from all the foregoing considerations that the appeal must be dismissed as in part unfounded and in part inadmissible.

**Costs**

- 103 Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since EUIPO and Optimum Mark have requested that the appellant be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Tenth Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders Red Bull GmbH to pay the costs.**

Lycourgos

Juhász

Ilešič

Delivered in open court in Luxembourg on 29 July 2019.

A. Calot Escobar

C. Lycourgos

Registrar

President of the Tenth  
Chamber

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\* Language of the case: English.