

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

4 October 2018 (*)

(European Union trade mark — Invalidity proceedings — European Union word mark FLÜGEL — Earlier national word marks ...VERLEIHT FLÜGEL and RED BULL VERLEIHT FLÜÜÜGEL — Relative grounds for refusal — Extinction of rights due to acquiescence — Article 54(2) of Regulation (EC) No 207/2009 (now Article 61(2) of Regulation (EU) 2017/1001) — Absence of likelihood of confusion — Absence of similarity between the goods — Article 53(1)(a) of Regulation No 207/2009 (now Article 60(1)(a) of Regulation 2017/1001) — Article 8(1) of Regulation No 207/2009 (now Article 8(1) of Regulation 2017/1001))

In Case T-150/17,

Asolo Ltd, established in Limassol (Cyprus), represented by W. Pors and N. Dorenbosch, lawyers,

applicant,

v

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

defendant,

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

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

ACTION brought against the decision of the Fifth Board of Appeal of EUIPO of 17 November 2016 (Case R 282/2015-5), relating to invalidity proceedings between Red Bull and Asolo,

THE GENERAL COURT (Fifth Chamber),

composed of D. Gratsias (Rapporteur), President, A. Dittrich and P.G. Xuereb, Judges,

Registrar: X. Lopez Bancalari, Administrator,

having regard to the application lodged at the Registry of the General Court on 8 March 2017,

having regard to the response of EUIPO lodged at the Court Registry on 23 May 2017,

having regard to the response of the intervener lodged at the Court Registry on 6 June 2017,

having regard to the written questions that were put by the Court to the parties and their answers to those questions, which were lodged at the Court Registry on 6 March 2018,

further to the hearing on 12 April 2018,

gives the following

Judgment

Background to the dispute

1 On 24 September 1997, International Licensing Services, one of the predecessors in title to the applicant, Asolo Ltd, filed an application for registration of a European Union trade mark with the European Union Intellectual Property Office (EUIPO), pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended, itself replaced by 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)).

2 Registration as a mark was sought for the word sign FLÜGEL.

3 The goods in respect of which registration was sought are in Classes 32 and 33 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, for each of those classes, to the following description:

- Class 32: ‘Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for the preparation of drinks’;
- Class 33: ‘Alcoholic drinks (except beers)’.

4 The trade mark application was published in the *Community Trade Marks Bulletin* No 1998/45 of 22 June 1998 and the mark was registered on 1 February 1999.

5 On 7 September 2006, EUIPO recorded the transfer of the contested mark to the applicant.

6 On 5 December 2011, the intervener, Red Bull GmbH, filed an application for a declaration of invalidity on the basis of Article 53(1)(a) of Regulation No 207/2009 (now Article 60(1)(a) of Regulation 2017/1001), read in conjunction with Article 8(1)(b) and (5) of that regulation (now Article 8(1)(b) and (5) of Regulation 2017/1001).

7 The application for a declaration of invalidity was based on the following earlier rights:

- the word sign ...VERLEIHT FLÜGEL, registered as a mark in Austria under number 175793;
- the word sign RED BULL VERLEIHT FLÜÜÜGEL, registered as a mark in Austria under number 161298.

8 The two earlier national marks were registered for ‘energy drinks’ in Class 32.

9 By decision of 2 December 2014, the Cancellation Division, invoking Communication No 2/12 of the President of EUIPO of 20 June 2012 concerning the use of class headings in the lists of goods and services for Community trade mark applications and registrations (OJ OHIM 7/2012), held that ‘alcoholic essences; alcoholic extracts; alcoholic fruit extracts’ should be analysed, in the present case, in the same way as ‘alcoholic drinks’ covered by Class 33.

10 The Cancellation Division considered, in light of the repute of the earlier mark ...VERLEIHT FLÜGEL (‘the earlier mark’), that, for reasons of procedural economy, it was necessary to base its conclusions on the repute of that mark. Thus, in light of the repute of that mark, the link that could be made in the mind of the public between the earlier mark and the contested mark, and in light of the possibility that the proprietor of the contested mark could take unfair advantage of the earlier mark, the Cancellation Division, on the basis of Article 53(1)(a) of Regulation No 207/2009, read in conjunction with Article 8(5) of that regulation, accepted the request for a declaration of invalidity for all of the goods covered by the contested mark. Furthermore, with respect to the claim of acquiescence asserted by the applicant, the Cancellation Division concluded that, in the present case, it was not necessary to apply Article 54 of Regulation 207/2009 (now Article 61 of Regulation 2017/1001) since, although the intervener was aware of the existence of the contested mark, it had not been demonstrated that the intervener had acquiesced in its use in Austria and was aware of it during the relevant period in this case, namely from 5 December 2006 to 5 December 2011.

11 On 29 January 2015, the applicant filed an appeal with EUIPO pursuant to Articles 58 to 64 of Regulation No 207/2009 (now Articles 66 to 71 of Regulation 2017/1001) against the decision of the Cancellation Division granting the application for a declaration of invalidity brought by the intervener.

12 By decision of 17 November 2016 (‘the contested decision’), the Fifth Board of Appeal of EUIPO dismissed the appeal.

13 More specifically, in the first place, the Board of Appeal confirmed the decision of the Cancellation Division to reject the claim of the acquiescence by the intervener. In that regard, it considered that the evidence submitted by the applicant to the Cancellation Division was not sufficient to conclude that the intervener was aware or could reasonably be presumed to have been aware of the use of the contested mark. With regard to the evidence that the applicant submitted for the first time to the Board of Appeal, the latter considered that the evidence could not be considered to be additional or supplementary evidence within the meaning of the case-law. In any case, according to the Board of Appeal, even if it took into account that evidence, its conclusion would remain unchanged, in light of the probative value and intensity of the use shown. The Board of Appeal also took the view that the fact that the intervener was aware or could have been aware of the registration of the contested mark, as a result of litigation between it and the applicant in Germany, could not suffice to establish that it was aware of the use of the mark in Austria.

14 In the second place, the Board of Appeal was of the view that, for reasons of procedural economy, the application for a declaration of invalidity should be assessed on the basis of Article (8)(1)(b) of Regulation No 207/2009. In that regard, first, it held that, in the present case, the relevant public was made up of average Austrian consumers, while noting that

‘energy drinks’ were targeted more at a young public. Second, with regard to the goods covered by the signs at issue, the Board of Appeal noted that the ‘energy drinks’, covered by the earlier mark, were in part identical and in part similar to an average degree to the goods covered by the contested mark. More specifically, the Board of Appeal considered that, since ‘other non-alcoholic drinks’ included ‘energy drinks’, those goods were identical. The ‘beers; mineral and aerated waters; fruit drinks and fruit juices’ covered by the contested mark, all being drinks and all with the same purpose as ‘energy drinks’, covered by the earlier mark, namely ‘to quench thirst’, were in competition with ‘energy drinks’, and could be purchased at the same points of sale and should, therefore, be considered similar to an average degree to ‘energy drinks’. The same was true of ‘syrups and other preparations for the preparation of drinks’. As regards, finally, ‘alcoholic drinks’, the Board of Appeal considered that they had a certain connection with ‘energy drinks’. Citing, in that regard, the judgment of 9 March 2005, *Osotspa v OHIM — Distribution & Marketing (Hai)* (T-33/03, EU:T:2005:89), the Board of Appeal noted that the Cancellation Division had been right to observe that alcoholic drinks were often mixed with energy drinks ‘and/or consumed together’. The same was true with regard to ‘alcoholic essences; alcoholic extracts; fruits extracts (alcoholic)’.

15 Third, as regards the comparison of the signs at issue, the Board of Appeal found that the signs were visually and phonetically similar to an average degree, since they coincided, at the very least, in the two syllables ‘flü’ and ‘gel’. The same was also true conceptually because both signs referred to the concept of ‘wing’.

16 Fourth, the Board of Appeal considered that the element ‘flügel’ was the dominant element of the earlier mark. Fifth, it also considered that, for reasons of procedural economy, it was not necessary to examine evidence submitted to show that the earlier mark had enhanced distinctiveness and it based its analysis on the inherent distinctiveness of that mark.

17 As part of its global assessment of the likelihood of confusion between the signs at issue, the Board of Appeal concluded that, in view of its findings as set out in paragraphs 14 to 16 above, in view of the ‘principle of imperfect recollection’ and the interdependence of the factors, the similarities between the signs at issue were sufficient to lead to a likelihood of confusion for the goods covered by those signs.

18 Finally, the Board of Appeal considered that the Cancellation Division had erred in its reasoning as regards Article 8(5) of Regulation No 207/2009. For that reason, it annulled, by point 2 of the operative part of the contested decision, the decision of the Cancellation Division ‘to the extent that the examination under Article 8(5) of the regulation was not necessary in the present case’.

Forms of order sought

19 The applicant claims that the Court should:

- annul the contested decision;
- order EUIPO and the intervener to pay the costs.

20 EUIPO and the intervener contend that the Court should:

- dismiss the action;

- order the applicant to pay the costs.

Law

21 In support of the action, the applicant relies on two pleas in law, alleging, first, infringement of Article 54(2) of Regulation No 207/2009 (now Article 61(2) of Regulation 2017/1001) and, second, infringement of Article 53(1)(a) of that regulation, read in conjunction with Article 8(1)(b) of that regulation.

22 Before examining the pleas in law relied on by the applicant, the scope of the contested decision should be clarified.

The scope of the contested decision

23 In that regard, it should be stated that, according to point 2 of the operative part of the contested decision, the decision of the Cancellation Division was annulled ‘in so far the examination under Article 8(5) of [Regulation No 207/2009] was not necessary’. The Board of Appeal indicated, in paragraph 82 of the contested decision, that the Cancellation Division had ‘erred in its reasoning to the extent that the examination under Article 8(5) of [Regulation 207/2009] was not necessary in the present case’.

24 In the light of the contested decision as a whole, it should be considered, as did the parties when questioned on that point at the hearing, that point 2 of the operative part of the contested decision must be interpreted as meaning that the Board of Appeal only substituted its own assessment for that of the Cancellation Division, by basing the invalidity of the contested mark on a ground different from that favoured by the Cancellation Division, by exercising its powers under Article 64 of Regulation No 207/2009.

The first plea in law, alleging infringement of Article 54(2) of Regulation No 207/2009

25 First, the applicant maintains that the Board of Appeal was wrong to find that the evidence that it submitted for the first time in its appeal before the Board of Appeal in order to prove that the conditions for the application of Article 54(2) of Regulation No 207/2009 had been met, was inadmissible. More specifically, it submits that, according to the case-law, additional evidence may be taken into account on appeal when the initial evidence was, as in the present case, held to be insufficient. According to the applicant, it is clear that the new evidence was intended to strengthen or clarify the evidence initially submitted to the departments of EUIPO. The applicant also claims that, according to the case-law, it is not necessary to provide either a justification for the late submission of evidence, or an explanation about the connection between the new evidence and the evidence which was provided at first instance. Finally, the applicant submits that the Board of Appeal did not exercise its discretion as regards admitting evidence submitted late, in an objective, reasoned manner and thus failed to meet the requirement to state reasons which it is required to do, according to the case-law.

26 Second, the applicant maintains that the Board of Appeal wrongly considered that, in any event, even if the new evidence were deemed to be admissible, it was not sufficient to prove that the intervener had actual awareness of the use of the contested mark.

27 More specifically, according to the applicant, first, the Board of Appeal wrongly considered that the statement of the organiser of the Westendorf festival (Austria), Mr S., who had declared that, at that festival, he had talked about the ‘Flügel drink’ with representatives of the intervener, was ‘of little probative value’, which the Board of Appeal also did not substantiate to the sufficient legal standard. That statement should, however, have sufficed to demonstrate that the intervener had actual awareness of the use of the contested mark in Austria. Second, according to the applicant, the Board of Appeal wrongly failed to take into account the fact that the drink protected by the contested mark was offered for sale in 19 bars in Austria, as was the product of the intervener. The applicant maintains that, contrary to the conclusions of the Board of Appeal, the number of those establishments, per se, is not relevant in the present case, since the offering for sale of the products protected by the signs at issue in the same establishments is sufficient to prove that representatives of the intervener were aware of the use of the contested mark.

28 In any case, even without taking into account that additional evidence, the applicant submits that it had produced sufficient evidence to prove that the conditions laid down in Article 54(2) of Regulation No 207/2009 were satisfied in this case. Thus, as regards the invoices submitted to the Cancellation Division for 2005 and 2006, the Board of Appeal wrongly confirmed that the quantitative requirements were relevant to find a minimum level of use of the contested mark. The applicant submits, in that regard, that the word ‘use’ under Article 54(2) of Regulation No 207/2009 does not correspond to the concept of ‘genuine use’ and it is merely necessary, in the present case, to show that the intervener was aware, or could reasonably have been presumed to be aware of that use. The applicant further argues that the Board of Appeal was wrong in failing to take into account the litigation between the applicant and its affiliated company, on the one hand, and the intervener, on the other hand, since 2001, concerning the use of the contested mark in the Netherlands and Benelux. The Board of Appeal also excluded the statement of an Austrian singer provided by the applicant on the ground that it did not constitute an objective third party assessment, without substantiating its conclusion.

29 Finally, according to the applicant, the Board of Appeal concluded that ‘each piece of evidence in itself [was] not sufficient’, when it should not have assessed that evidence in isolation but should have considered it as a whole.

30 EUIPO and the intervener dispute those arguments.

31 In accordance with settled case-law, four conditions must be satisfied to cause the start of the limitation period in consequence of acquiescence for the use of a later trade mark identical to the earlier trade mark, or so similar as to cause confusion. First, the later trade mark must be registered; second, the application must have been made in good faith by its proprietor; third, it must be used in the Member State where the earlier trade mark is protected and, finally, fourth, the proprietor of the earlier trade mark must be aware of the use of that trade mark after its registration (see judgment of 20 April 2016, *Tronios Group International v EUIPO — Sky (SkyTec)*, T-77/15, EU:T:2016:226, paragraph 30 and the case-law cited).

32 It is also clear from that case-law that the purpose of Article 54(2) of Regulation No 207/2009 is to penalise the proprietors of earlier marks who have acquiesced in the use of a later European Union trade mark for five successive years, while being aware of that use, by precluding them from seeking a declaration of invalidity or from bringing opposition

proceedings in respect of that trade mark. That provision is thus intended to strike a balance between the interests of the proprietor of a mark in safeguarding its essential function and the interests of other economic operators in having signs capable of denoting their goods and services. That objective implies that, in order to safeguard that essential function, the proprietor of an earlier trade mark must be in a position to oppose the use of a later mark identical or similar to his own. It is only once the proprietor of the earlier trade mark becomes aware of the use of the later European Union trade mark that it has the option of not acquiescing in its use and, therefore, opposing it or seeking a declaration of invalidity of the later trade mark and that, consequently, the period of limitation in consequence of acquiescence starts running. (see judgment of 20 April 2016, *SkyTec*, T-77/15, EU:T:2016:226, paragraph 31 and the case-law cited).

33 It follows from a teleological interpretation of Article 54(2) of Regulation No 207/2009 that the relevant date from which the period of limitation in consequence of acquiescence starts running is when the proprietor becomes aware of the use of the later mark (see judgment of 20 April 2016, *SkyTec*, T-77/15, EU:T:2016:226, paragraph 32 and the case-law cited).

34 Similarly, that interpretation requires the proprietor of the later mark to prove the actual awareness of the use of that mark by the proprietor of the earlier mark, failing which the latter would not be able to oppose the use of the later mark. In that respect, it is necessary to take into account the similar rule on limitation in consequence of acquiescence referred to in Article 9(1) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), replaced by Article 9(1) of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25). As regards that rule, the 11th recital of First Directive 89/104 and recital 12 of Directive 2008/95 state that the claim of limitation in consequence of acquiescence is applicable where the proprietor of the earlier trade mark ‘has knowingly tolerated the use for a substantial length of time’, which means ‘intentionally’ or ‘in full knowledge of the facts’. That assessment applies *mutatis mutandis* to Article 54(2) of Regulation No 207/2009, the wording of which corresponds to that of Article 9(1) of First Directive 89/104 and Directive 2008/95 (see judgment of 20 April 2016, *SkyTec*, T-77/15, EU:T:2016:226, paragraph 33 and the case-law cited).

35 Therefore, the proprietor of a trade mark which is contested by way of an application for a declaration of invalidity cannot merely prove the potential awareness of the use of his trade mark by the proprietor of an earlier trade mark or establish consistent evidence giving rise to the presumption of the existence of such awareness (see, to that effect and by analogy, judgment of 20 April 2016, *SkyTec*, T-77/15, EU:T:2016:226, paragraph 34).

36 Since the Board of Appeal found that actual awareness of the use of the contested mark had not been established in the present case, taking into account all of the evidence submitted by the applicant, including that which had been submitted late by the applicant, it is necessary to examine, first, in the light of the case-law cited in paragraphs 31 to 35 above, the arguments put forward by the applicant as regards the content and probative value of the evidence which it submitted to the departments of EUIPO.

37 In that respect, as regards, first, the applicant’s argument that the Board of Appeal assessed each piece of evidence in isolation and thus did not take into account that evidence

as a whole (see paragraph 29 above), it must be held that it is based on an incorrect reading of the contested decision.

38 The Board of Appeal did not take into account each piece of evidence in isolation. It did, indeed, examine the content and individual probative value of each of those pieces of evidence but, as is apparent from paragraph 21 of the contested decision, it explicitly considered, whilst referring to the decision of the Cancellation Division which it upheld on that point, that the evidence was not, as a whole, sufficient to establish the actual awareness of the use of the contested mark by the intervener.

39 As is apparent from paragraphs 27 and 28 of the contested decision, the same is true as regards the evidence which the applicant submitted late to the departments of EUIPO.

40 Next, it is appropriate to examine the arguments put forward by the applicant regarding the content and the probative value of the evidence which it submitted to the departments of EUIPO.

41 First, as regards the invoices submitted to the Cancellation Division for 2005 and 2006 (see paragraph 28 above), it must be held that the Board of Appeal was correct to conclude that they did not demonstrate to a sufficient degree the use of the contested mark in order to establish the intervener's actual awareness of that use.

42 In that regard, as has been held, although a relatively low volume of sales is capable of showing a certain use of a mark, that volume may, as in the present case, be insufficient to establish that the applicant for a declaration of invalidity was actually aware of that use (see, to that effect, judgment of 20 April 2016, *SkyTec*, T-77/15, EU:T:2016:226, paragraph 44) or, in any event, to suggest, without any possible doubt, that the latter was aware of the use claimed. Therefore, and contrary to the applicant's argument, the Board of Appeal did not introduce quantitative requirements regarding the use of the contested mark in the present case which are not set by Article 54(2) of Regulation No 207/2009. In the light of that finding and given that the applicant does not provide any specific element establishing that the representatives of the intervener were actually aware of the use of the contested mark, but merely makes general statements as regards the goods covered by the marks at issue being offered for sale in the same establishments, the applicant's argument in that regard set out in paragraph 27 above must be rejected.

43 Second, as regards the declaration of an Austrian singer, Mr R., it must be held, as was held by EUIPO, that the mere statement by that singer that, before December 2006, alcoholic drinks marketed under the contested mark had been sold in an establishment in Austria and that he himself had been sponsored by the applicant since 2005 did not prove the intervener's awareness of the use of the contested mark. That statement is not corroborated by any concrete information proving the sponsorship of Mr R. by the applicant nor the publicity which was supposedly given to that commercial operation, let alone evidence regarding the sale or demonstration of the drinks marketed under the contested mark in the establishment to which he refers. Similarly, that declaration does not contain any concrete information identifying the representatives of the intervener who supposedly 'regularly' visited the establishment to which Mr R. refers.

44 Third, as regards the advertising leaflet concerning the 'Feestweek' festival organised in March 2005 in Westendorf in Tyrol (Austria), containing the expression 'Mmv FLÜGEL

Events', apart from the fact that that expression appears on it in small characters and, therefore, does not necessarily attract attention, it must be held that that expression cannot be perceived as necessarily referring to a mark such as the contested mark.

45 As regards, fourth, the declaration of Mr S. (see paragraph 27 above), it should be held that it does not contain any specific information concerning the claimed visits of the intervener's representatives to his establishment and, more specifically, there is no information identifying the commercial representative to whom Mr S. refers. In that regard, the fact that Mr S. declares that he 'is prepared to give this statement in court' cannot, by itself, increase the probative value of his words.

46 Moreover, it must be held that, in its application, the applicant does not in any way specifically dispute the Board of Appeal's assessment of the other evidence which it had submitted to the departments of EUIPO.

47 Finally, it is necessary to uphold the conclusions of the Board of Appeal as regards the court proceedings between the applicant and the intervener in Member States other than Austria. First, in that regard, it must be held that the applicant, on that point, merely makes general statements concerning, for example, the personal involvement of the founder of the intervener in the proceedings in question, but does not provide concrete evidence which could substantiate its claims.

48 Second, it is apparent from the parties' written pleadings that the proceedings referred to in the present case did not concern the use of the contested trade mark, but the use of other signs. According to EUIPO (see paragraph 53 of the response), only the registration of the contested mark was mentioned in the context of those proceedings and not its use in the territory of the European Union, let alone, in Austria. Thus, as found by EUIPO, it must be held that any awareness, by the intervener, of the use of other marks, national or international, similar to the contested mark, is not sufficient to establish its actual awareness of the use of the mark, let alone of its use in the relevant territory, namely in Austria (see, to that effect, judgments of 23 October 2013, *SFC Jardibric v OHIM — Aqua Center Europa (AQUA FLOW)*, T-417/12, not published, EU:T:2013:550, paragraph 41, and of 20 April 2016, *SkyTec*, T-77/15, EU:T:2016:226, paragraph 45).

49 As regards, moreover, the court proceedings, in Austria, between the applicant and the intervener, the applicant indicated, in its response of 6 March 2018 to the questions which the Court had put to it, that those were infringement proceedings, brought by the intervener on 4 October 2010 in that regard, and which gave rise to the judgment of the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) of 25 May 2012 and to the judgment of the Oberster Gerichtshof (Supreme Court, Austria) of 18 September 2012, which it had submitted to the Cancellation Division in Annexes 14 and 15 to its observations of 1 September 2014. According to the applicant, those judgments include several analyses that are of relevance in the present case.

50 Even if those judgments constituted evidence of the intervener's actual awareness of the use of the contested mark in Austria, that awareness can be established, on the basis of those judgments, only from 2010, namely from the date on which the proceedings in question were initiated. Therefore, given that the intervener submitted its application for a declaration of invalidity of the contested mark on 5 December 2011, such an awareness, if it were established, would not be sufficient to prove that it had acquiesced in the use of the contested

mark for five successive years, within the meaning of Article 54(2) of Regulation No 207/2009 (see paragraph 32 above).

51 In the light of the foregoing, it must be held that the Board of Appeal rightly upheld, on the basis of all of the information in the file, the Cancellation Division's decision on whether the applicant had adduced evidence of the intervener's actual knowledge of the use of the contested mark in Austria and, therefore, the first plea in law must be rejected. It is therefore not necessary to examine the applicant's arguments seeking to challenge the findings of the Board of Appeal regarding the admissibility of certain evidence which it had submitted for the first time to that last instance of EUIPO.

The second plea in law, alleging infringement of Article 53(1)(a) of Regulation No 207/2009, read in conjunction with Article 8(1)(b) thereof

52 Under Article 53(1)(a) of Regulation No 207/2009, read in conjunction with Article 8(1)(b) thereof, on application by the proprietor of an earlier mark, a registered EU trade mark may be declared invalid if, because of its identity with, or similarity to, an earlier trade mark and because of the identity or similarity of the goods or services covered by the two trade marks, there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected.

53 According to settled case-law, the risk that the public might believe that the goods or services in question come from the same undertaking or from economically linked undertakings constitutes a likelihood of confusion. According to the same case-law, the likelihood of confusion must be assessed globally, according to the relevant public's perception of the signs and goods or services in question, and taking into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs and that of the goods or services covered (see judgment of 9 February 2017, *International Gaming Projects v EUIPO — adp Gauselmann (TRIPLE EVOLUTION)*, T-82/16, not published, EU:T:2017:66, paragraph 25 and the case-law cited).

54 For the purposes of applying Article 8(1)(b) of Regulation No 207/2009, a likelihood of confusion presupposes both that the marks at issue are identical or similar and that the goods or services which they cover are identical or similar. Those conditions are cumulative (see judgment of 9 February 2017, *TRIPLE EVOLUTION*, T-82/16, not published, EU:T:2017:66, paragraph 26 and the case-law cited).

55 In the present case, the second plea in law relied on by the applicant must be examined in the light of those considerations.

56 The applicant claims that there is no likelihood of confusion between the signs at issue. As regards, more specifically, the comparison between the goods covered by those signs, it submits that the 'goods for which the slogans are used in Class 32, namely energy drinks, are not similar to the goods for which the [contested] mark is registered in Class 33'. According to the applicant, the grounds on which the assessment of the Board of Appeal on that point is based 'do not meet the required standard of motivation under Article 75 [of Regulation No 207/2009]'. It considers that the Board of Appeal wrongly and without giving any reasons assumed that the alcoholic drinks in Class 33 had a certain connection with energy drinks.

57 In that regard, the applicant relies on the judgment of 15 February 2005, *Lidl Stiftung v OHIM — REWE-Zentral (LINDENHOF)* (T-296/02, EU:T:2005:49, paragraph 57), according to which many alcoholic and non-alcoholic drinks may be consumed one after the other or even mixed without, however, being similar, as well as the judgment of 18 June 2008, *Coca-Cola v OHIM — San Polo (MEZZOPANE)* (T-175/06, EU:T:2008:212).

58 The applicant also submits that the intervener has always denied any connection between energy drinks and alcoholic drinks. In that respect, the intervener printed a sentence on the cans containing the product marketed under the earlier mark which may be translated into English by ‘do not mix with alcohol’. According to the applicant, the intervener has always claimed that its product makes its consumers more energetic and alert, the opposite effect of consuming alcoholic drinks, so that a consumer wishing to remain alert, such as a driver, would not consider substituting an alcoholic drink for a non-alcoholic energy drink.

59 For its part, EUIPO considers that, although the goods in question are of a different nature, a certain similarity between them cannot be excluded. There is, indeed, settled case-law on the existence of a low degree of similarity between alcoholic drinks and non-alcoholic drinks. In that regard, EUIPO relies on the judgments of 5 October 2011, *Cooperativa Vitivinícola Arousana v OHIM — Sotelo Ares (ROSALIA DE CASTRO)* (T-421/10, not published, EU:T:2011:565), of 21 September 2012, *Wesergold Getränkeindustrie v OHIM — Lidl Stiftung (WESTERN GOLD)* (T-278/10, EU:T:2012:459, paragraphs 31 to 41), of 11 September 2014, *Aroa Bodegas v OHIM — Bodegas Muga (aroa)* (T-536/12, not published, EU:T:2014:770, paragraph 32), and of 1 March 2016, *BrandGroup v OHIM — Brauerei S. Riegele, Inh.Riegele (SPEZOOMIX)* (T-557/14, not published, EU:T:2016:116, paragraphs 26 and 27). Since the Board of Appeal did not expressly define the degree of similarity between the goods in question but, however, stated that there was ‘a certain connection’ between them, it should be considered that its intention was to conclude that the degree of similarity between those goods was lower than average.

60 As regards the case-law cited by the applicant, EUIPO considers that the judgment of 18 June 2008, *MEZZOPANE* (T-175/06, EU:T:2008:212) is not relevant in the present case, since the comparison concerned non-alcoholic drinks, on the one hand, and sparkling wines on the other hand, whereas in the present case, the energy drinks have to be compared to the broader category of alcoholic drinks. The same is true with regard to the judgment of 15 February 2005, *LINDENHOF* (T-296/02, EU:T:2005:49) because of the very different circumstances involved in the comparison of the goods in that case. EUIPO also relies on the judgment of 9 March 2005, *Hai* (T-33/03, EU:T:2005:89), in which the Court indicated that energy drinks are currently often marketed and consumed with alcoholic drinks.

61 As regards the comparison of the goods at issue in the present case, the intervener observes that the applicant does not contest the conclusions of the Board of Appeal regarding the comparison between ‘energy drinks’ and the goods in Class 32.

62 Moreover, as regards the goods in Class 33, in the first place, the intervener observes that the product marketed under the contested mark ‘was developed as a mix of vodka and energy drink’. The intervener points out, in that regard, that, according to certain evidence provided by the applicant, third parties refer to that product as ‘Flügel Vodka Energy Drink’. Moreover, it is red coloured, which alludes to the product marketed by the intervener.

63 The intervener endorses the conclusions of the Board of Appeal on the relevant public in the present case and considers that it is made up of young Austrian consumers.

64 The intervener also endorses the conclusion of the Board of Appeal concerning the similarity between alcoholic drinks and energy drinks. The intervener submits that, contrary to what the applicant seems to claim, the practice of mixing energy drinks and alcoholic drinks is very common among young people in Austria, which also follows from the evidence submitted by the applicant connected with the mixed drink called 'FLÜGERL', which is made of vodka and Red Bull.

65 The intervener considers, in particular, that the case-law relied on by the applicant is not relevant in the present case. As regards, more specifically, the judgment of 18 June 2008, *MEZZOPANE*, (T-175/06, EU:T:2008:212), this is an isolated case and, according to the majority of the case-law, there is at least a low degree of similarity between the goods in, respectively, Classes 32 and 33.

66 Since the drink marketed by the applicant is an alcoholic energy drink, it displays a high level of similarity with the drink marketed by the intervener. Since both products can be described as 'party drinks', the only thing that differentiates them is the presence of alcohol, since they are consumed by the same consumers, at the same locations, are interchangeable and in competition with each other, can be mixed, have a very similar stimulating and energising nature, and can be made by the same undertakings.

67 Finally, according to the intervener, the contested mark covers 'alcoholic energy drinks', since that term is encompassed in the broader term 'alcoholic drinks'. The intervener cites, in that regard, *mutatis mutandis*, the case-law according to which, when the goods covered by the more recent mark include the goods covered by the earlier mark, those goods are considered identical.

68 According to the case-law, in order to compare the goods covered by the signs at issue, all the relevant factors relating to those goods should be taken into account. Those factors include, in particular, their nature, their intended purpose, their use and whether they are in competition with each other or are complementary. Other factors may also be taken into account, such as the distribution channels of the goods concerned, or indeed the fact that the goods are often sold in the same specialist sales outlets, which is likely to facilitate the perception by the relevant consumer of the close connections between them and strengthen the perception that the same undertaking is responsible for the production of those goods (see judgment of 2 October 2015, *The Tea Board v OHIM — Delta Lingerie (Darjeeling)*, T-627/13, not published, EU:T:2015:740, paragraph 37 and the case-law cited).

69 In the present case, it should be noted that the Board of Appeal was right to define the relevant public as being the Austrian public, made up, for the most part, of young people.

70 In the second place, in view of the arguments put forward by the applicant (see paragraph 56 above), it should be recalled that, under Article 41(2)(c) of the Charter of Fundamental Rights of the European Union, the administration has an obligation to give reasons for its decisions. That obligation to give reasons, which is repeated in the first sentence of Article 75 of Regulation No 207/2009 (now first sentence of Article 94(1) of Regulation 2017/1001), implies that the reasoning of the author of the act must be shown clearly and unequivocally; it has two purposes, first, to allow interested parties to know the

justification for the measure taken so as to enable them to protect their rights and, second, to enable the European Union Courts to exercise their power to review the legality of the decision (see judgment of 26 September 2017, *La Rocca v EUIPO (Take your time Pay After)*, T-755/16, not published, EU:T:2017:663, paragraph 37 and the case-law cited).

71 Whether a statement of reasons for a decision satisfies those requirements must be assessed with reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question (see judgment of 26 September 2017, *Take your time Pay After*, T-755/16, not published, EU:T:2017:663, paragraph 38 and the case-law cited).

72 Finally, it must also be observed that the obligation to state reasons constitutes an essential procedural requirement which must be distinguished from the question of the merits of those reasons, which concern the substantive legality of the contested measure. The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. If those grounds are vitiated by errors, those errors will vitiate the substantive legality of the decision, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect (see judgment of 26 September 2017, *Take your time Pay After*, T-755/16, not published, EU:T:2017:663, paragraph 42 and the case-law cited).

73 As a preliminary point, it must be noted that, as is apparent from all of the applicant's arguments and as it confirmed at the hearing, its action does not, in reality, concern the findings of the Board of Appeal regarding the similarity between the 'energy drinks' covered by the earlier mark and in Class 32, and the goods in Class 32 in respect of which the contested mark was registered. Therefore, it must be held that the applicant does not dispute that the finding of the Board of Appeal as regards the existence of a likelihood of confusion between the signs at issue inasmuch as they cover the goods 'alcoholic beverages (except beers)' and 'alcoholic essences; alcoholic extracts; fruits extracts (alcoholic)', in Class 33, and the goods 'energy drinks', in Class 32.

74 In that regard, it must be held that the Board of Appeal clearly indicated, in paragraphs 48 and 49 of the contested decision, the grounds on which it concluded that the goods 'energy drinks', in Class 32, and the goods 'alcoholic drinks (except beers)', in Class 33, were similar. More specifically, it found that there was a certain connection between those two categories of goods because alcoholic drinks and energy drinks are often mixed and consumed together. It also considered that the same findings were valid for 'alcoholic essences; alcoholic extracts; fruits extracts (alcoholic)' (see paragraph 9 above).

75 In light of all of the arguments put forward by the applicant, who challenges precisely those findings of the Board of Appeal, it must therefore be held that the reasoning of the contested decision was, on that point, sufficiently clear to enable both the applicant to protect its rights before the Court and to enable the Court to exercise its power of review, within the meaning of the case-law cited in paragraph 70 above. Therefore, the applicant's arguments should be rejected in so far as they are based on the first sentence of Article 75 of Regulation No 207/2009.

76 In the third place, as regards the similarity between the goods covered by the signs at issue, as is apparent from paragraph 48 of the contested decision, the Board of Appeal based its conclusion on the fact that those goods were 'often mixed and/or consumed together'. It is apparent from that wording and, in particular, from the alternative use of the two words 'and'

and ‘or’ that, according to the Board of Appeal, its conclusion was based either on the consideration that it was common practice to mix the goods in question, or on the consideration that those goods were consumed together, or, in any event, on those two considerations taken together.

77 It must be held, at the outset, that that consideration in paragraph 48 of the contested decision is not sufficient to establish the existence of a similarity between the goods at issue in the present case.

78 In that regard, it should be noted that the Board of Appeal, in paragraph 48 of the contested decision, referred to the findings of the Cancellation Division and approved them. The Cancellation Division had indicated that there was a certain connection between the goods covered by the contested mark and those covered by the earlier mark, in respect of which a certain repute had been established, since it is common experience that alcoholic goods are often mixed and/or consumed with energy drinks.

79 Those findings were, however, made in a different context from that of the contested decision, namely in the context of an assessment carried out by the Cancellation Division not on the basis of Article 8(1) of Regulation No 207/2009, but on the basis of Article 8(5) thereof. In that regard, it should be recalled that the similarity between the goods covered by the signs at issue does not constitute a condition for the application of Article 8(5) of Regulation No 207/2009, whereas it does constitute one of the cumulative conditions for the application of Article 8(1) of Regulation No 207/2009. Therefore, the Cancellation Division, which had, for its part, carried out an assessment of the repute of the earlier marks, was not intending, unlike the Board of Appeal, to state that there was a similarity between the goods at issue, but was indicating that a simple connection could be established, on the part of the relevant public, between those goods.

80 As regards the application of Article 8(1) of Regulation No 207/2009, it should be noted that a very large number of alcoholic and non-alcoholic drinks are generally mixed, consumed, or indeed marketed together, either in the same establishments or as premixed alcoholic drinks. To consider that those goods should, for that reason alone, be described as similar, when they are not intended to be consumed in either the same circumstances, or in the same state of mind, or, as the case may be, by the same consumers, would put a large number of goods which can be described as ‘drinks’ into one and the same category for the purposes of the application of Article 8(1) of Regulation No 207/2009 (see, to that effect, judgment of 3 October 2012, *Yilmaz v OHIM — Tequila Cuervo (TEQUILA MATADOR HECHO EN MEXICO)*, T-584/10, EU:T:2012:518, paragraph 55 and the case-law cited).

81 Thus, it cannot be considered that an alcoholic drink and an energy drink are similar merely because they can be mixed, consumed or marketed together, given that the nature, intended purpose and use of those goods differ, based on the presence of, or absence of alcohol in their composition (see, to that effect, judgment of 18 June 2008, *MEZZOPANE*, T-175/06, EU:T:2008:212, paragraph 79). Furthermore, it must be held that the undertakings which market alcoholic drinks premixed with a non-alcoholic ingredient do not sell that ingredient separately and under the same or similar mark as the premixed alcoholic drink at issue (judgment of 3 October 2012, *TEQUILA MATADOR HECHO EN MEXICO*, T-584/10, EU:T:2012:518, paragraph 70).

82 More specifically, it has already been held that the average German consumer is used to and aware of the distinction between alcoholic and non-alcoholic drinks, which is, moreover, necessary, since some consumers do not wish to, or even cannot consume alcohol (see, to that effect, judgments of 15 February 2005, *LINDENHOF*, T-296/02, EU:T:2005:49, paragraph 54, and of 18 June 2008, *MEZZOPANE*, T-175/06, EU:T:2008:212, paragraph 80).

83 There is no element in the file which would give grounds for stating that that assessment is not also true for the relevant Austrian public in the present case. Thus, it must be considered that the Austrian public is also used to and aware of the distinction between alcoholic and non-alcoholic drinks. It follows that the public will make that distinction when comparing the energy drink of the earlier mark and the alcoholic drink of the mark applied for (see, to that effect, judgments of 18 June 2008, *MEZZOPANE*, T-175/06, EU:T:2008:212, paragraph 81, and of 3 October 2012, *TEQUILA MATADOR HECHO EN MEXICO*, T-584/10, EU:T:2012:518, paragraph 65). The mere fact that energy drinks can be marketed and consumed with alcoholic drinks (see, to that effect, judgment of 9 March 2005, *Hai*, T-33/03, EU:T:2005:89, paragraph 43), even if it were established, is not sufficient to challenge those findings.

84 In that regard, the intervener's arguments that the case-law cited in paragraphs 81 to 83 above is not relevant in the context of the present case must be rejected. In spite of the differences which, admittedly, exist between the goods referred to in the present case and those referred to in the case which gave rise to the judgment of 18 June 2008, *MEZZOPANE* (T-175/06, EU:T:2008:212), the fact remains that the findings of the European Union judicature on the relevant public's perception of drinks according to their alcohol content are undoubtedly valid in a context such as that of the present case.

85 The same is true of the rest of the case-law relied on by EUIPO. Although the Court might have acknowledged, in circumstances which were not identical to those of the present case, a low degree of similarity between alcoholic drinks and non-alcoholic drinks, it cannot be held that that is sufficient to challenge what has been stated in paragraphs 77 to 84 above.

86 Therefore, the second plea in law must be upheld and, consequently, the contested decision must be annulled in part in that, by the latter, the Board of Appeal found that there was a likelihood of confusion between the signs at issue as regards the goods in Class 33 covered by the contested mark and the 'energy drinks' in Class 32 covered by the earlier mark.

Costs

87 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. Since EUIPO and the intervener have, essentially, been unsuccessful, they must, in accordance with the form of order sought by the applicant, be ordered to bear their own costs and the costs incurred by the applicant.

On those grounds,

THE GENERAL COURT (Fifth Chamber),

hereby:

1. **Annuls the decision of the Fifth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 17 November 2016 (Case R 282/2015-5), in so far as it dismisses the appeal against the decision of the Cancellation Division declaring the EU trade mark FLÜGEL invalid for the goods ‘alcoholic beverages (except beers)’ and ‘alcoholic essences; alcoholic extracts; fruits extracts (alcoholic)’ in Class 33 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;**
2. **Dismisses the action as to the remainder;**
3. **Orders EUIPO and Red Bull GmbH to bear, in addition to their own costs, those incurred by Asolo Ltd.**

Gratsias

Dittrich

Xuereb

Delivered in open court in Luxembourg on 4 October 2018.

E. Coulon

D. Gratsias

Registrar

President

* Language of the case: English.