

JUDGMENT OF THE GENERAL COURT (Ninth Chamber, Extended Composition)

19 June 2019 (*)

(EU trade mark — Invalidity proceedings — EU figurative mark representing three parallel stripes — Absolute grounds for invalidity — No distinctive character acquired through use — Article 7(3) and Article 52(2) of Regulation (EC) No 207/2009 (now Article 7(3) and Article 59(2) of Regulation (EU) 2017/1001) — Form of use unable to be taken into account — Form that differs from the form under which the mark has been registered by significant variations — Inversion of the colour scheme)

In Case T-307/17,

adidas AG, established in Herzogenaurach (Germany), represented by I. Fowler and I. Junkar, Solicitors,
applicant,
supported by:

Marques, established in Leicester (United Kingdom), represented by M. Treis, lawyer,
intervener,

v

European Union Intellectual Property Office (EUIPO), represented by M. Rajh and H. O'Neill, acting
as Agents,
defendant,

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

Shoe Branding Europe BVBA, established in Oudenaarde (Belgium), represented by J. Løje, lawyer,

ACTION brought against the decision of the Second Board of Appeal of EUIPO of 7 March 2017 (Case R 1515/2016-2), relating to invalidity proceedings between Shoe Branding Europe and adidas,

THE GENERAL COURT (Ninth Chamber, Extended Composition),

composed of S. Gervasoni, President, L. Madise, R. da Silva Passos, K. Kowalik-Bańczyk (Rapporteur) and C. Mac Eochaidh, Judges,

Registrar: E. Hendrix, Administrator,

having regard to the application lodged at the Court Registry on 18 May 2017,

having regard to the response of EUIPO lodged at the Court Registry on 10 August 2017,

having regard to the response of the intervener lodged at the Court Registry on 12 July 2017,

having regard to the order of 5 December 2017 granting Marques leave to intervene in support of the form of order sought by the applicant,

having regard to the intervention of Marques lodged at the Court Registry on 22 January 2018,
having regard to the observations of the applicant lodged at the Court Registry on 19 February 2018,
having regard to the observations of EUIPO lodged at the Court Registry on 28 February 2018,
having regard to the observations of the intervener lodged at the Court Registry on 28 February 2018,
further to the hearing on 24 January 2019,
gives the following

Judgment

I. Background to the dispute

- 1 On 18 December 2013, the applicant, adidas AG, filed an application for registration of an EU trade mark with the European Union Intellectual Property Office (EUIPO) pursuant to Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended (replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trademark (OJ 2017 L 154, p. 1)).
- 2 The trade mark in respect of which registration was sought is reproduced below:



- 3 In the application for registration, the mark is identified as a figurative mark and corresponds to the following description:

‘The mark consists of three parallel equidistant stripes of identical width, applied on the product in any direction.’
- 4 The goods in respect of which registration was applied for are in Class 25 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: ‘Clothing; footwear; headgear’.
- 5 The mark was registered on 21 May 2014 under the number 12442166.
- 6 On 16 December 2014, the intervener, Shoe Branding Europe BVBA, filed an application for declaration of invalidity of the mark at issue pursuant to Article 52(1)(a) of Regulation No 207/2009 (now

Article 59(1)(a) of Regulation 2017/1001) in conjunction with Article 7(1)(b) of Regulation No 207/2009 (now Article 7(1)(b) of Regulation 2017/1001).

- 7 On 30 June 2016, the Cancellation Division granted the application for declaration of invalidity filed by the intervener, on the ground that the mark at issue was devoid of any distinctive character, both inherent and acquired through use.
- 8 On 18 August 2016, 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. In that appeal, it did not dispute the lack of inherent distinctive character of the mark at issue, but, on the other hand, the applicant claimed that that mark had acquired distinctive character through use within the meaning of Article 7(3) and Article 52(2) of Regulation No 207/2009 (now Article 7(3) and Article 59(2) of Regulation 2017/1001).
- 9 By decision of 7 March 2017 ('the contested decision'), the Second Board of Appeal of EUIPO dismissed the appeal.
- 10 The Board of Appeal stated, first, that the mark at issue had been validly registered as a figurative mark (paragraph 20 of the contested decision). Next, it confirmed the Cancellation Division's assessment that the mark was inherently devoid of distinctive character (paragraph 22 of the contested decision). Finally, it examined the evidence adduced by the applicant and found that the applicant had failed to establish that the mark had acquired distinctive character through use throughout the European Union (paragraph 69 of the contested decision). Consequently, the Board of Appeal found that the mark at issue had been registered in breach of Article 7(1)(b) of Regulation No 207/2009 and that it should therefore be declared invalid (paragraph 72 of the contested decision).

II. Forms of order sought

- 11 The applicant, supported by the association Marques ('the intervening association'), claims that the Court should:
 - annul the contested decision;
 - order EUIPO and the intervener to pay the costs.
- 12 EUIPO contends that the Court should:
 - dismiss the action;
 - order the applicant to pay the costs;
 - order the intervening association to bear its own costs.
- 13 The intervener contends that the Court should:
 - dismiss the action;
 - order the applicant to pay the costs.

III. Law

- 14 In support of its action, the applicant, supported by the intervening association, puts forward a single plea in law, alleging infringement of Article 52(2) of Regulation No 207/2009, read in conjunction with

Article 7(3) of that regulation and with the principles of the protection of legitimate expectations and proportionality.

- 15 That plea can be regarded as comprising two parts, in so far as the applicant submits, in essence, first, that the Board of Appeal wrongly dismissed numerous items of evidence on the ground that that evidence related to signs other than the mark at issue and, secondly, that the Board of Appeal made an error of assessment in holding that it was not established that the mark at issue had acquired distinctive character following the use which has been made of it within the European Union.

A. Preliminary observations

- 16 First, under Article 7(1)(b) of Regulation No 207/2009, trade marks which are devoid of any distinctive character may not be registered. Pursuant to Article 7(2) of that regulation (now Article 7(2) of Regulation 2017/1001), that absolute ground for refusal applies even if it obtains in only part of the European Union. However, under Article 7(3) of Regulation No 207/2009, that ground does not preclude registration of a trade mark if that mark has become distinctive in relation to the goods or services for which it was registered following the use which has been made of it.
- 17 Secondly, under Article 52(1)(a) of Regulation No 207/2009, the invalidity of an EU trade mark is to be declared, on application to EUIPO, where the EU trade mark has been registered contrary to the provisions of Article 7 of that regulation. However, under Article 52(2) of Regulation No 207/2009, where an EU trade mark has been registered in breach of the provisions of Article 7(1)(b) of that regulation, it may nevertheless not be declared invalid if, in consequence of the use that has been made of it, it has after registration acquired distinctive character in relation to the goods or services for which it is registered.
- 18 Thus, it follows from Article 7(3) and Article 52(2) of Regulation No 207/2009 that, in the context of invalidity proceedings, the lack of inherent distinctive character of a registered trade mark does not mean that the trade mark is invalid where that trade mark has acquired distinctive character through use which has been made of it, either before it was registered or in the period between being registered and the date on which a declaration of invalidity was sought (see, to that effect, judgment of 14 December 2017, *bet365 Group v EUIPO – Hansen (BET 365)*, T-304/16, EU:T:2017:912, paragraph 23 and the case-law cited).
- 19 It should also be noted that the distinctive character of a trade mark, whether it is inherent or acquired through use, means that that mark serves to identify the product in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish that product from goods of other undertakings (see, to that effect and by analogy, judgments of 4 May 1999, *Windsurfing Chiemsee*, C-108/97 and C-109/97, EU:C:1999:230, paragraph 46, and of 18 June 2002, *Philips*, C-299/99, EU:C:2002:377, paragraph 35).
- 20 That distinctive character, whether inherent or acquired through use, must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception which the relevant public has of those goods or services (see, by analogy, judgments of 18 June 2002, *Philips*, C-299/99, EU:C:2002:377, paragraphs 59 and 63, and of 12 February 2004, *Koninklijke KPN Nederland*, C-363/99, EU:C:2004:86, paragraphs 34 and 75).
- 21 In the present case, the relevant public for the goods for which the mark at issue has been registered, namely clothing, footwear and headgear, consists of all potential consumers of those goods in the European Union, that is to say, both the general public and the specialised public.
- 22 It is in the light of those considerations that the two parts of the applicant's single plea, referred to in paragraph 15 of the present judgment, should be examined.

B. The first part of the applicant's plea in law, alleging the unjustified dismissal of some of the evidence

23 In the context of the first part of its plea, the applicant, supported by the intervening association, criticises the Board of Appeal for having dismissed numerous items of evidence on the ground that that evidence was related to signs other than the mark at issue. That ground is based, first, on a misinterpretation of the mark at issue and, secondly, a misapplication of the ‘law of permissible variations’. Those two claims should be examined in turn.

1. The first claim, alleging misinterpretation of the mark at issue

24 By its first claim, the applicant, supported by the intervening association, submits that, by considering that the mark at issue was claimed only in specific dimensions and, in particular, in a specific ratio of height to width, the Board of Appeal misinterpreted that mark. According to the applicant, the mark represents a ‘surface pattern’ that may be reproduced in different dimensions and proportions depending on the goods on which it is applied. In particular, the three parallel equidistant stripes constituting the mark at issue could be extended or cut in different ways, including cut at a slanted angle. The applicant adds, relying on the EUIPO’s examination guidelines and the legitimate expectations which follow from them, that it is able to rely on the fact that that mark at issue constitutes a pattern mark, although that mark has been registered as a figurative mark.

25 EUIPO and the intervener dispute the arguments of the applicant and the intervening association.

26 In order to respond to the arguments of the applicant and the intervening association, in the first place, it should be recalled that, under Article 4 of Regulation No 207/2009 (now Article 4 of Regulation 2017/1001), an EU trade mark may consist of any signs which may be represented graphically, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.

27 In the second place, it should be recalled that registration can take effect only on the basis of, and within the limits of, the application for registration filed by the applicant with EUIPO. It follows that EUIPO may not take into account characteristics of the mark applied for that are not set out in the application for registration or in the accompanying documents (see judgment of 25 November 2015, *Jaguar Land Rover v OHIM (Shape of a car)*, T-629/14, not published, EU:T:2015:878, paragraph 34 and the case-law cited).

28 In that regard, the characteristics of a trade mark must be assessed in the light of a number of factors.

29 First, under Rule 1(1)(d) and Rule 3(2) and (5) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1) (now Article 2(1)(d), Article 3(6) to (8) as well as Article 3(3)(b) and (f) of Implementing Regulation (EU) 2018/626 of 5 March 2018 laying down detailed rules for implementing certain provisions of Regulation 2017/1001 and repealing Implementing Regulation (EU) 2017/1431 (OJ 2018 L 104, p. 37)), where a graphic representation or a particular colour is claimed, the application for an EU trade mark must contain the graphic representation, where appropriate in colour, of the mark.

30 The requirement of graphic representation is intended, in particular, to define the mark itself in order to determine the precise subject of the protection afforded by the registered mark to its proprietor (see, by analogy, judgments of 12 December 2002, *Sieckmann*, C-273/00, EU:C:2002:748, paragraph 48, and of 24 June 2004, *Heidelberger Bauchemie*, C-49/02, EU:C:2004:384, paragraph 27). Therefore, it is for the trade mark applicant to file a graphic representation of the mark corresponding precisely to the subject matter of the protection he wishes to secure. Once a trade mark is registered, the proprietor is not entitled to a broader protection than that afforded by that graphic representation (see, to that effect, judgment of 30 November 2017, *Red Bull v EUIPO – Optimum Mark (Combination of the colours blue and silver)*, T-101/15 and T-102/15, under appeal, EU:T:2017:852, paragraph 71).

31 Next, Rule 3(3) of Regulation No 2868/95 provides that the application for registration ‘may contain a description of the mark’. Therefore, if a description is included in the application for registration, that description must be considered together with the graphic representation (see, to that effect and by analogy,

judgment of 30 November 2017, *Combination of the colours blue and silver*, T-101/15 and T-102/15, under appeal, EU:T:2017:852, paragraph 79).

32 Lastly, EUIPO must also examine the distinctive character of the mark for which registration is sought in the light of the type of mark chosen by the applicant in its application for registration (see, to that effect, order of 21 January 2016, *Enercon v OHIM*, C-170/15 P, not published, EU:C:2016:53, paragraphs 29, 30 and 32).

33 In the third place, it should be noted that, contrary to Commission Implementing Regulation (EU) 2017/1431 of 18 May 2017 laying down detailed rules for implementing certain provisions of Regulation No 207/2009 (OJ 2017 L 205, p. 39) (replaced by Implementing Regulation 2018/626), neither Regulation No 207/2009 nor Regulation No 2868/95, applicable at the filing date of the application for a declaration of invalidity, refer to ‘pattern marks’ nor, moreover, ‘figurative marks’ as specific types of marks.

34 Nevertheless, even before Implementing Regulation 2017/1431 came into force, the Court acknowledged that a sign designated as a figurative mark could be composed of a series of regularly repetitive elements (see, to that effect, judgment of 9 November 2016, *Birkenstock Sales v EUIPO (Representation of a pattern of wavy, crisscrossing lines)*, T-579/14, EU:T:2016:650, paragraphs 43, 49, 53 and 62). Thus, until the entry into force of Implementing Regulation 2017/1431, a pattern mark could be registered as a figurative mark, where it consisted of an image (see, to that effect, judgment of 19 September 2012, *Fraas v OHIM (Tartan pattern in light grey, dark grey, beige, dark red and brown)*, T-326/10, not published, EU:T:2012:436, paragraph 56).

35 In the present case, according to the application for registration, the mark at issue has been registered as a figurative mark and on the basis of the graphic representation and the description set out in paragraphs 2 and 3 of the present judgment.

36 In paragraph 38 of the contested decision, the Board of Appeal interpreted the mark at issue as follows:

‘It consists of three vertical, parallel, thin black stripes against a white background, whose height is approximately five times the width. The characteristics which it manifests are relatively few in number, consisting of the ratio of height to width (approximately 5:1), the equidistant white space between the black stripes, and the fact that the stripes are parallel.’

37 It must be held that that interpretation of the mark at issue closely corresponds to the graphic representation on the basis of which that mark has been registered. In particular, the Board of Appeal correctly found that there was a ratio of around 5 to 1 between the total height and width of the mark at issue. Furthermore, the Board of Appeal correctly took into account the equal thickness of the three parallel black stripes and the two white spaces between those stripes.

38 The applicant nevertheless criticises that interpretation of the mark at issue by arguing, first, that a figurative mark may be registered without indicating its scale or proportions (see, to that effect and by analogy, judgment of 10 July 2014, *Apple*, C-421/13, EU:C:2014:2070, paragraphs 19 and 27) and, secondly, that the mark at issue is a pattern mark. In those circumstances, the sole function of the graphic representation of the mark at issue is to show a design consisting of three parallel equidistant stripes, regardless of the length of those stripes or the way in which they are cut.

39 Those arguments cannot be accepted.

40 First, it must be held that, although in the contested decision the Board of Appeal characterised the mark at issue by taking into account the relative proportions of the different elements making up the mark, such as had been shown in the application for registration, the Board of Appeal did not, however, define the mark at issue by referring to the dimensions in which that mark, viewed as a whole, could be reproduced on the goods at issue. It follows that, contrary to what the applicant claims, the interpretation of the mark at

issue by the Board of Appeal does not call into question the fact that that mark was not claimed in specific dimensions.

41 Secondly, the applicant acknowledges that the mark at issue was validly registered as a figurative mark. It follows from the case-law, referred to in paragraph 30 of the present judgment, that a figurative mark is, in principle, registered in the proportions shown in its graphic representation. That finding cannot be called into question by the judgment of 10 July 2014, *Apple* (C-421/13, EU:C:2014:2070, paragraphs 19 and 27), which is relied on by the applicant. That judgment merely states that a design may be registered as a trade mark, even though it bears no indication of the size and proportions of the object which it represents. However, that judgment does not imply that a mark may be registered without defining the proportions of the sign itself.

42 Thirdly, the applicant submits to no avail that the mark is not an ordinary figurative mark, but a pattern mark whose proportions are not fixed.

43 In that regard, first, it is not apparent either from the graphic representation of the mark at issue or from the description of that mark that it is composed of a series of regularly repetitive elements.

44 Next, the applicant's assertion whereby the object of the protection conferred by the mark at issue consists of the use of three parallel equidistant stripes, irrespective of their length or the way in which they are cut, is not supported by any concrete evidence. First, that assertion contradicts the graphic representation of the mark at issue, which shows a sign characterised by a ratio of around 5 to 1 between the total height and width and its rectangular shape, the three stripes composing it being cut at a right angle. In the second place, that assertion is not supported by the description of the mark at issue, since it merely refers to the fact that the mark consists of 'three parallel equidistant stripes of identical width' and specifies that those stripes may be 'applied on the product in any direction', without stating that the length of the stripes could be modified or that the stripes could be cut at a slanted angle.

45 Lastly, while it is true that, before the entry into force of Implementing Regulation 2017/1431, EUIPO's examination guidelines stated that the 'marks depicting a pattern are "figurative" marks in accordance with [EUIPO's] practice', those guidelines did not attribute a different definition to pattern marks from that which stems from the case-law referred to in paragraph 34 of the present judgment. Those guidelines stated that a 'figurative trade mark [could] be considered as a "pattern" mark when it [consisted] exclusively of a set of elements that [were] repeated regularly'.

46 In those circumstances, it must be concluded that the mark at issue is an ordinary figurative mark and not a pattern mark. Consequently, first, the Board of Appeal did not err in interpreting the mark at issue and, secondly, the applicant is not justified, in any event, to rely on the principle of protection of legitimate expectations in order to challenge that interpretation.

47 It follows that the first claim must be rejected.

2. The second claim, alleging misapplication of the 'law of permissible variations'

48 In the context of its second claim, the applicant, supported by the intervening association, submits that the Board of Appeal misapplied the 'law of permissible variations'. The applicant submits that, according to that law, the use of a mark in a form differing in elements which do not alter the distinctive character of that mark in the form under which it was registered is also considered as use of that mark. The applicant argues that, contrary to what the Board of Appeal held, all the documents which it produced relate to forms of use of the mark at issue for which the distinctive character of that mark is not affected. Accordingly, those forms of use are relevant for the purposes of assessing whether the mark at issue has acquired distinctive character.

49 Before examining the merits of that claim, it is necessary, at the outset, to define the concept of 'use' of the trade mark within the meaning of Article 7(3) and Article 52(2) of Regulation No 207/2009.

(a) *The concept of ‘use’ of the mark within the meaning of Articles 7(3) and 52(2) of Regulation No 207/2009*

- 50 The applicant, supported by the intervening association, maintains that the concept of ‘use’ of the mark within the meaning of Article 7(3) and Article 52(2) of Regulation No 207/2009 must be interpreted in the same way as the concept of genuine use of a mark, referred to in Article 15(1) of that regulation (now Article 18(1) of Regulation 2017/1001), which includes, in some cases, the use of that mark in a form which differs from the form in which that mark was registered.
- 51 EUIPO and the intervener dispute that interpretation. They argue that the concept of ‘use’ in Article 7(3) and Article 52(2) of Regulation No 207/2009 is narrower than that of ‘genuine use’ in Article 15(1) of that regulation. They submit that, in order to establish that a trade mark has acquired distinctive character, the trade mark proprietor can only rely on the use of the mark such as it was registered. Only insignificant changes can be accepted.
- 52 It must be determined whether, as regards the forms of use of a mark which may be taken into account, the concept of ‘use’ of the trade mark, within the meaning of Article 7(3) and Article 52(2) of Regulation No 207/2009, must be interpreted in the same way as the concept of ‘genuine use’ in Article 15(1) of that regulation.
- 53 In that regard, it is appropriate to observe that point (a) of the second subparagraph of Article 15(1) of Regulation No 207/2009 (now point (a) of the second subparagraph of Article 18(1) of Regulation 2017/1001), provides that the genuine use of a registered trade mark also includes ‘use of [that] trade mark in a form differing in elements which do not alter the distinctive character of [that] mark in the form in which it was registered’. It follows from that provision that a registered trade mark must be regarded as being put to genuine use where proof is provided of use of that mark in a slightly different form from that in which it was registered (judgment of 13 September 2007, *Il Ponte Finanziaria v OHIM*, C-234/06 P, EU:C:2007:514, paragraph 86).
- 54 It must be noted that, by avoiding imposing a requirement for strict conformity between the form used in trade and the form in which it was registered, point (a) of the second subparagraph of Article 15(1) of Regulation No 207/2009 is intended to allow the proprietor of the mark, in the commercial exploitation of the sign, to make variations in the sign, which, without altering its distinctive character, enable it to be better adapted to the marketing and promotion requirements of the goods or services concerned (judgments of 25 October 2012, *Rintisch*, C-553/11, EU:C:2012:671, paragraph 21, and of 18 July 2013, *Specsavers International Healthcare and Others*, C-252/12, EU:C:2013:497, paragraph 29).
- 55 By contrast, unlike point (a) of the second subparagraph of Article 15(1) of Regulation No 207/2009, Article 7(3) and Article 52(2) of that regulation do not explicitly provide for the use of the mark in forms which differ from the form in which that mark was submitted for registration and, where relevant, registered.
- 56 That difference in wording is explained by the fact that the provisions referred to in paragraph 55 of the present judgment are based on a different rationale. Point (a) of the second subparagraph of Article 15(1) of Regulation No 207/2009 only applies to a mark which has already been registered and whose distinctive character is not disputed. That article thus enables preserving the protection of the mark by evidence of its use, where appropriate, under some forms that differ from the form in which it was registered. By contrast, Article 7(3) and Article 52(2) of that regulation are based on the assumption that use of an inherently non-distinctive sign and of a trade mark which has been erroneously registered despite its lack of distinctive character, respectively, may in some cases, allow that sign or mark to be registered or to remain registered. In other words, point (a) of the second subparagraph of Article 15(1) of Regulation No 207/2009 has the registration of the mark as its starting point and, subsequently, the examination of its use, whereas Article 7(3) and Article 52(2) of that regulation have the use of a sign as their starting point, in order to proceed to, where appropriate, its registration or to maintain its registration.

- 57 The fact remains that the need, referred to in paragraph 54 of the present judgment, to make certain changes to a trade mark for the purposes of its commercial exploitation is also valid for the period during which that mark acquired, where relevant, distinctive character following its use, within the meaning of Article 7(3) and Article 52(2) of Regulation No 207/2009.
- 58 Therefore, the criterion of use cannot be judged by the yardstick of different considerations according to whether that criterion is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of that sign, that same form of use must also be capable of ensuring that such protection is preserved. Therefore, as regards the forms of use, the requirements that apply to verification of the genuine use of a mark are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration (judgment of 18 April 2013, *Colloseum Holding*, C-12/12, EU:C:2013:253, paragraphs 33 and 34; see also, to that effect and by analogy, the Opinion of Advocate General Kokott in *Nestlé*, C-353/03, EU:C:2005:61, paragraph 24).
- 59 It follows that the forms of use of a mark referred to in Article 15(1) of Regulation No 207/2009, including those which differ only by ‘elements which do not alter the distinctive character of [that] mark’, must be taken into account not only in order to determine whether that trade mark has been put to genuine use within the meaning of that provision, but also for the purpose of determining whether that mark has acquired distinctive character through the use which has been made of it within the meaning of Article 7(3) and Article 52(2) of Regulation No 207/2009.
- 60 It is true that in the context of Article 7(3) and Article 52(2) of Regulation No 207/2009 it would be inappropriate to speak of a change in distinctive character even before having determined whether the mark has acquired such a character.
- 61 It has been held that point (a) of the second subparagraph of Article 15(1) of Regulation No 207/2009 covers situations where the form of the sign used in trade differs from the form in which that sign was registered only in insignificant respects, and the forms can therefore be regarded as broadly equivalent (see, to that effect, judgments of 15 December 2015, *LTJ Diffusion v OHIM — Arthur et Aston (ARTHUR & ASTON)*, T-83/14, EU:T:2015:974, paragraph 18 and the case-law cited, and of 13 September 2016, *hyphen v EUIPO — Skylotec (Representation of a polygon)*, T-146/15, EU:T:2016:469, paragraph 27).
- 62 In those circumstances and as the applicant rightly claims, the concept of use of a trade mark, within the meaning of Article 7(3) and Article 52(2) of Regulation No 207/2009, must be interpreted as referring not only to use of the mark in the form in which it was submitted for registration and, where relevant, registered, but also to the use of the trade mark in forms which differ from that form solely by insignificant variations and that are able, therefore, to be regarded as broadly equivalent to that form.
- 63 In the present case, it is relevant that the Board of Appeal, in essence, implemented the criterion set out in point 61 of the present judgment. Indeed, the Board of Appeal referred to point (a) of the second subparagraph of Article 15(1) of Regulation No 207/2009 (paragraph 30 of the contested decision) and stated that that provision made it possible to take into account the use of a sign which differed from the form in which a sign was registered only in insignificant respects, so that the two signs could be regarded as broadly equivalent (paragraph 32 of the contested decision). The Board of Appeal also stated that, in principle, it was not necessary, in the context of Article 7(3) of that regulation, that the trade mark be reproduced in the evidence exactly as it had been registered (paragraph 69 of the contested decision).

(b) Application of the ‘law of permissible variations’

- 64 The applicant criticises the Board of Appeal for having misinterpreted the ‘law of permissible variations’ in incorrectly finding that: (i) where a trade mark is extremely simple, even a slight difference could lead to a significant alteration to the characteristics of the mark as it had been registered; (ii) use of the mark at issue in the form where the colour scheme is reversed necessarily alters the distinctive character of that

mark; (iii) some of the evidence showed a sign with two instead of three stripes and; (iv) the use of sloping stripes altered the distinctive character of that mark.

65 EUIPO and the intervener dispute the applicant's arguments.

66 As a preliminary point, it should be pointed out that the applicant's arguments in essence seek to challenge the part of the contested decision in which the Board of Appeal examined whether the mark at issue was or was not shown in the evidence adduced by the applicant (paragraphs 29 to 45 of the contested decision). That evidence consists mainly of images, from catalogues or other promotional material, which show goods bearing different signs.

67 Following its assessment, the Board of Appeal found, as did the Cancellation Division before it, that the vast majority of the evidence produced by the applicant did not relate to the mark at issue itself, but to other signs which differed from that mark significantly (see, *inter alia*, paragraphs 33, 42 and 69 of the contested decision).

68 In particular, in paragraphs 39, 40 and 43 of the contested decision, the Board of Appeal reproduced the following examples of evidence, which, according to it, were not such as to show genuine use of the mark at issue:



