

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

16 May 2019 (*)

(EU trade mark — Opposition proceedings — Application for EU word mark SKYFi — Earlier national and EU word marks SKY — Relative ground for refusal — Likelihood of confusion — Similarity of signs — Identity of goods and services — Article 8(1)(b) of Regulation (EU) 2017/1001 — Obligation to state reasons — Article 94 of Regulation 2017/1001 — Genuine use of the earlier mark — Article 47(2) and (3) of Regulation 2017/1001 — Suspension of the administrative procedure — Rule 20(7)(c) of Regulation (EC) No 2868/95 (now Article 71(1) of Delegated Regulation (EU) 2018/625) — Misuse of powers — Right to a fair trial — Article 47 of the Charter of Fundamental Rights — Oral proceedings before the Board of Appeal — Article 96 of Regulation 2017/1001)

In Case T-354/18,

KID-Systeme GmbH, established in Buxtehude (Germany), represented by R. Kunze, G. Würtenberger and T. Wittmann, lawyers,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by E. Markakis 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

Sky Ltd, formerly Sky plc, established in Isleworth (United Kingdom), represented by K. Saliger, Solicitor, and P. Roberts QC,

ACTION brought against the decision of the Fourth Board of Appeal of EUIPO of 15 March 2018 (Case R 106/2017-4) relating to opposition proceedings between Sky and KID-Systeme,

THE GENERAL COURT (Sixth Chamber),

composed of G. Berardis, President, S. Papasavvas (Rapporteur) and O. Spineanu-Matei, Judges,

Registrar: I. Dragan, Administrator,

having regard to the application lodged at the Court Registry on 6 June 2018,

having regard to the response of EUIPO lodged at the Court Registry on 17 September 2018,

having regard to the response of the intervener lodged at the Court Registry on 4 September 2018,

further to the hearing on 13 February 2019,
gives the following

Judgment

Background to the dispute

- 1 On 2 October 2013, the applicant, KID-Systeme GmbH, 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 trade mark (OJ 2017 L 154, p. 1)).
- 2 Registration as a trade mark was sought for the word sign SKYFi.
- 3 The goods and services in respect of which registration was sought, after the restrictions made during the proceedings before EUIPO, fall within Classes 9 and 37 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, in respect of each of those classes, to the following description:
 - Class 9: ‘Scientific, nautical, surveying, photographic, cinematographic, optical, signalling and checking (supervision) apparatus and instruments; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; compact discs, DVDs and other digital recording media; calculating machines, data processing equipment, computers; computer software’;
 - Class 37: ‘Repair of vehicles and apparatus for locomotion by land, air or water, scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments, apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity, apparatus for recording, transmission or reproduction of sound or images, magnetic data carriers, recording discs, compact discs, DVDs and other digital data carriers, mechanisms for coin-operated apparatus, cash registers, calculating machines, data processing equipment and computers and fire-extinguishing apparatus; installation services’.
- 4 The trade mark application was published in *Community Trade Marks Bulletin* No 220/2013 of 19 November 2013.
- 5 On 18 February 2014, British Sky Broadcasting Group, which was succeeded by Sky plc on 21 November 2014 and then by the intervener, Sky Ltd, on 19 December 2018, filed, pursuant to Article 41 of Regulation No 207/2009 (now Article 46 of Regulation 2017/1001), a notice of opposition to registration of the mark applied for in respect inter alia of the services listed in paragraph 3 above.
- 6 The opposition was based on, inter alia, the following marks:
 - the EU word mark SKY registered on 22 May 2014 under No 8178436 (‘trade mark No 8178436’) covering, inter alia, goods and services in Classes 9 and 37 and corresponding, for each of those classes, to the following description:

- Class 9: ‘Scientific, nautical, surveying, photographic, cinematographic, optical, signalling and checking (supervision) apparatus and instruments; apparatus for recording, transmission or reproduction of sound or images; compact discs, computer software; DVD discs; data carriers; computers; computer software’;
 - Class 37: ‘Repair services; installation services’.
- the United Kingdom word mark SKY registered on 7 September 2012 under No 2500604 (‘trade mark No 2500604’) covering goods and services in Classes 9 and 37 and corresponding, for each of those classes, to the following description:
- Class 9: ‘Scientific, nautical, surveying, photographic, cinematographic, optical, signalling and checking (supervision) apparatus and instruments; Apparatus for recording, transmission or reproduction of sound or images; compact discs, computer software; DVD discs; data carriers; computers’;
 - Class 37: ‘Repair services; installation services’.
- 7 The grounds put forward in support of the opposition were inter alia those referred to in Article 8(1)(b) of Regulation No 207/2009 (now Article 8(1)(b) of Regulation No 2017/1001).
- 8 On 16 November 2016, the Opposition Division held that there was a likelihood of confusion, on the part of the relevant public, as regards the origin of the goods and services covered by the mark applied for and those covered by trade mark No 8178436 and upheld the opposition on the basis of Article 8(1)(b) of Regulation 207/2009.
- 9 On 16 January 2017, the applicant filed a notice of 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 Opposition Division.
- 10 By decision of 15 March 2018 (‘the contested decision’), the Fourth Board of Appeal of EUIPO inter alia dismissed the appeal brought against the decision of the Opposition Division for all the goods and services referred to, ordered the applicant to bear the costs incurred in the opposition and appeal proceedings and fixed the total amount of those costs.
- 11 In particular, the Board of Appeal considered that the intervener was entitled to file the opposition on the basis of all the earlier rights it had invoked. It stated that although the applicant had requested proof of use of all the registered marks on which the opposition was based, none of those marks had been registered for more than five years at the time of publication of the trade mark application so that the Opposition Division had quite rightly not taken the proof of use request into account. It considered that, since there was a likelihood of confusion, on the part of the relevant public, as regards the origin of the goods and services covered by the mark applied for, on the one hand, and by trade mark No 8178436 and trade mark No 2500604, on the other, there was no need to examine either the other earlier rights or the other grounds on which the opposition was based. The Board of Appeal added that there was no reason to accept the requests for suspension made by the applicant during the proceedings before EUIPO and that it was not necessary to hold oral proceedings.

Forms of order sought

- 12 The applicant claims that the Court should:

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

13 At the hearing, the applicant claimed, in the alternative, that the Court should stay the proceedings pending delivery of the judgment in Case C-371/18 *Sky and Others*.

14 EUIPO contends that the Court should:

- dismiss the application;
- order the applicant to pay the costs.

15 The intervener claims that the Court should:

- dismiss the application;
- order the applicant to pay the costs incurred in these proceedings and before the Opposition Division and the Board of Appeal.

Law

The claims for annulment

16 In support of its application, the applicant relies, in essence, on the following eight pleas in law:

- the first alleges infringement of Articles 46 and 94 of Regulation 2017/1001 and 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), as amended (replaced by Commission Delegated Regulation (EU) 2017/1430 of 18 May 2017 supplementing Regulation No 207/2009 and repealing Regulations (EC) No 2868/95 and (EC) No 216/96 (OJ 2017 L 205, p. 1) and subsequently by Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Delegated Regulation 2017/1430 (OJ 2018, L 104, p. 1)) and, more particularly, of Rule 19(2) thereof (now Article 7(2) of Delegated Regulation 2018/625) with regard to the lack of evidence of the intervener's entitlement to file the opposition,
- the second alleges infringement of Article 67, Article 71(1) and Article 95 of Regulation 2017/1001 and of the obligation to state reasons with regard to the failure to respect the order of examination of the marks relied on in support of the opposition,
- the third alleges infringement of Articles 94 and 95 of Regulation 2017/1001 and of the principle of impartiality with regard to the request for proof of use of the marks relied on in support of the opposition,
- the fourth alleges infringement of Article 95 of Regulation 2017/1001, of Rule 20(7) (c) of Regulation No 2868/95 (now Article 71(1) of Delegated Regulation (EU) No 2018/625) and of Rule 50(1) of that regulation, and of the principles of equality and impartiality with regard to the request for suspension of the proceedings,
- the fifth alleges misuse of powers,

- the sixth alleges infringement of Article 8(1)(b), Article 94 and Article 95 of Regulation 2017/1001, and of the right to be heard and the right to a fair trial with regard to the assessment of the existence of a likelihood of confusion,
- the seventh alleges multiple infringements of the right to a fair trial with regard to the repeated failure to take into account the applicant's observations relating to the amendments to the list of goods and services covered by the application for registration,
- the eighth alleges infringement of Article 96 of Regulation 2017/1001 with regard to the refusal of the Board of Appeal to take into consideration its request for an oral hearing.

The first plea in law, alleging infringement of Articles 46 and 94 of Regulation 2017/1001 and of Rule 19(2) of Regulation No 2868/95 with regard to the lack of evidence of the intervener's entitlement to file an opposition

- 17 In the first place, as regards the alleged breach of the duty to state reasons, it is sufficient to note that the Board of Appeal stated sufficiently clearly in the contested decision that, given that the legality of its decisions had to be assessed solely on the basis of the EU trade mark regulations and that, in the present case, the intervener had, in the Board of Appeal's view, complied with the conditions laid down in Rule 15(2)(h)(iii) of Regulation No 2868/95 (now Article 2(2)(h)(iii) of Delegated Regulation 2018/625) and Rule 19(2) of Regulation No 2868/95, the application of the Guidelines concerning proceedings before EUIPO had to be rejected. It follows that the statement of reasons for the contested decision is sufficient with regard to that point.
- 18 In the second place, the applicant submits that the Board of Appeal ought to have rejected the opposition as being manifestly unfounded, since the intervener had not produced, in support of the opposition, evidence establishing that it was entitled to bring actions to defend trade mark No 8178436.
- 19 EUIPO submits, primarily, that that plea is ineffective, since the applicant's arguments concern only trade mark No 8178436 and the contested decision is also based on trade mark No 2500604, the proprietor of which is the intervener. In the alternative, it adds that, during the administrative procedure, the intervener did not submit any evidence to establish that it was entitled to file a notice of opposition on the basis of trade mark No 8178436. It therefore concludes that, since the registration of a trade mark licence does not automatically give rise to an entitlement to file a notice of opposition on the basis of that mark, the intervener has not proved that it was entitled to file a notice of opposition on the basis of trade mark No 8178436.
- 20 The intervener submits that the applicant does not take into account the fact that it is the proprietor of trade mark No 2500604. It submits that it has provided sufficient evidence of its capacity to file a notice of opposition.
- 21 In that respect, it must be borne in mind that, under Article 46(1)(a) of Regulation No 2017/1001, notice of opposition to registration of a trade mark may be given within a period of three months following the publication of an EU trade mark application, on the grounds that the trade mark may not be registered under Article 8 of that regulation. In respect of Article 8(1) and (5) of Regulation No 2017/1001, notice of opposition may be given by the proprietors of earlier trade marks referred to in Article 8(2) of that regulation as well as licensees authorised by the proprietors of those trade marks.

- 22 In addition, it should be noted that, under Rule 15(2)(h)(iii) of Regulation No 2868/95, where the opposition is entered by a licensee or by a person who is entitled under the relevant national law to exercise an earlier right, the notice of opposition is to contain a statement to that effect and indications concerning the authorisation or entitlement to file the opposition. Further, Rule 19(2) of Regulation No 2868/95 stipulates that, within the period set by EUIPO, the opposing party is to file proof of the existence, validity and scope of protection of his earlier mark or earlier right, as well as evidence proving his entitlement to file the opposition. Lastly, Rule 20(1) of that regulation (now Article 8(1) and (7) of Delegated Regulation 2018/625) provides that if, before the expiry of the period set by EUIPO under Rule 19(1) of that regulation (now Article 7(1) of Delegated Regulation 2018/625) the opposing party has not proven the existence, validity and scope of protection of his earlier mark or earlier right, as well as his entitlement to file the opposition, the opposition shall be rejected as unfounded.
- 23 It follows from those provisions that a licensee who brings opposition proceedings against an EU trade mark must adduce evidence in order to establish that he possesses the authorisation or entitlement to file the opposition.
- 24 In the present case, the Board of Appeal — before which the applicant had raised the present plea, as is apparent from paragraph 11 of the contested decision and as the intervener acknowledged at the hearing — held that the intervener was entitled to file the opposition on the basis of all the earlier rights relied on. As regards trade mark No 8178436, it found that the intervener, as an authorised licensee, was entitled to file the present opposition and to pursue the opposition proceedings on the basis of that mark in that capacity, in accordance with Article 46(1) of Regulation No 2017/1001.
- 25 However, it is not apparent from the documents in the file that, as regards trade mark No 8178436, the intervener submitted evidence of its entitlement to file the opposition pursuant to the provisions referred to in paragraphs 21 and 22 above either within the prescribed period or, moreover, at any time during the proceedings before the Opposition Division and then before the Board of Appeal, even though it had been clearly informed by EUIPO that it had to submit documents in order to prove, on the one hand, that it was a licensee and, on the other hand, that it was authorised by the proprietor of the earlier marks, in this case trade mark No 8178436, to file the opposition.
- 26 The applicant is therefore justified in submitting that the intervener has not proved that it was entitled to file the opposition at issue on the basis of trade mark No 8178436. Accordingly, the Board of Appeal infringed both Article 46(1)(a) of Regulation 2017/1001 and Rule 15(2)(h)(iii) and Rule 19(2) of Regulation No 2868/95, as set out in paragraphs 21 and 22 above.
- 27 Nevertheless, it must be borne in mind that the intervener had filed a notice of opposition against the mark applied for based on a number of earlier rights and, in particular, on trade mark No 2500604. It is common ground that the intervener is the proprietor of trade mark No 2500604 and that it could, in that capacity, file an opposition against the mark applied for. The Board of Appeal was therefore right to find that the intervener was entitled to file an opposition on the basis of trade mark No 2500604. Consequently, the applicant is not justified in arguing that the Board of Appeal should have rejected the opposition as ‘manifestly unfounded due to the failure of the [intervener] to furnish the required documents’.
- 28 It follows from all the foregoing that the first plea must be rejected.

The second plea in law, alleging infringement of Article 67, Article 71(1) and Article 95 of Regulation 2017/1001 and of the obligation to state reasons with respect to the failure to follow the order of examination of the marks relied on in support of the opposition

- 29 The applicant submits that the Board of Appeal was wrong to take EU trade mark No 8178436 as a basis for examining the opposition since, by doing so, it failed to follow the order of marks on which the opposition was based as determined by the intervener. More specifically, the applicant complains that the Board of Appeal did not rely on EU trade mark No 6870992, SKY, in respect of which the period of five years from registration expired on 8 August 2017, but rather on trade mark No 8178436, in respect of which that period is to expire on 22 May 2019. It states that, by virtue of Article 95 of Regulation No 2017/1001, the order chosen by the intervener was binding and should have been followed by EUIPO. It adds that the Board of Appeal did not state reasons for its decision to begin its examination of the opposition with trade mark No 8178436.
- 30 EUIPO and the intervener dispute those arguments.
- 31 In the present case, the Board of Appeal noted that the opposition was based on several earlier rights and considered that it was for it to decide on the basis of which earlier mark it would assess whether there was a likelihood of confusion. It examined the opposition on the basis of trade mark No 8178436 and trade mark No 2500604.
- 32 In that regard, as regards infringement of Article 95(1) of Regulation No 2017/1001, it must be borne in mind that, in accordance with that provision, EUIPO is to examine the facts of its own motion, but that, in proceedings relating to relative grounds for refusal of registration, the examination is to be restricted to the facts, evidence and arguments provided by the parties and the relief sought. Article 95(2) of that regulation provides that EUIPO may disregard facts or evidence which are not submitted in due time by the parties concerned.
- 33 However, neither Article 95 of Regulation No 2017/1001 nor Article 67 and Article 71(1) of that regulation — which were also relied on in support of the present plea and which relate, respectively, to the persons authorised to bring an appeal before the Board of Appeal and to be parties to the proceedings, on the one hand, and to the decisions of the Board of Appeal in respect of appeals, on the other hand — require EUIPO to examine the earlier marks on which the opposition is based in the order chosen by the party which filed the opposition. Moreover, it has been held, to the same effect, that EUIPO was not required to base the rejection of the trade mark application on all the grounds for refusal of registration put forward in support of the opposition, on the basis of which a trade mark application could be rejected (order of 11 May 2006, *TeleTech Holdings v OHIM — Teletech International (TELETECH INTERNATIONAL)*, T-194/05, EU:T:2006:124, paragraph 27).
- 34 In those circumstances, the complaint alleging infringement of Article 67, Article 71(1) and Article 95 of Regulation No 2017/1001 must be rejected.
- 35 Furthermore, as regards infringement of the obligation to state reasons, it must be noted that the Board of Appeal stated, in essence, that, since trade mark No 8178436 was not, when the Opposition Division ruled on the matter, the subject matter of invalidity or revocation proceedings and since that mark was registered for goods and services in Classes 9 and 37, namely the same classes as those designated in the trade mark application, the Opposition Division had correctly decided to examine the opposition on the basis of that mark. On the same grounds, the Board of Appeal therefore decided to begin the examination of the opposition with that mark and to examine trade mark No 2500604 subsequently. That statement of reasons is sufficient to enable the applicant to know the reasons why the Board

of Appeal examined the opposition inter alia in the light of trade mark No 8178436 and the Court to exercise its power of review.

36 The second plea must therefore be rejected.

The third plea in law, alleging infringement of Articles 94 and 95 of Regulation 2017/1001 and of the principle of impartiality with regard to the request for proof of use of trade mark No 8178436 and trade mark No 2500604

37 The applicant submits that, when the Board of Appeal rejected the applicant's request for proof of use of EU trade mark No 8178436 on the ground that, at the date on which the trade mark application was lodged, the intervener's trade marks had not been registered for more than five years, it ruled on matters exclusive to the invalidity proceedings which the applicant had initiated at the same time and which were pending before EUIPO. It states that the Board of Appeal should not have dealt with those matters in opposition proceedings. It concludes that the Board of Appeal acted *ultra vires* and that, by doing so, it prejudiced the applicant's position in the invalidity proceedings. The applicant adds that the Board of Appeal infringed its rights of defence and Article 94 of Regulation 2017/1001 and that it made a manifest error of assessment in the contested decision when assessing the validity of trade mark No 8178436.

38 EUIPO and the intervener dispute that line of argument.

39 In that respect, it must be noted that Article 47(2) of Regulation No 2017/1001 provides that, if the applicant so requests, the proprietor of an earlier EU trade mark who has given notice of opposition shall furnish proof that, during the five-year period preceding the date of filing or the date of priority of the EU trade mark application, the earlier EU trade mark has been put to genuine use in the European Union in connection with the goods or services in respect of which it is registered and which he cites as justification for his opposition, or that there are proper reasons for non-use, provided the earlier EU trade mark has at that date been registered for not less than five years. In the absence of proof to this effect, the opposition is to be rejected. If the earlier EU trade mark has been used in relation to part only of the goods or services for which it is registered it shall, for the purposes of the examination of the opposition, be deemed to be registered in respect only of that part of the goods or services. Under Article 47(3) of Regulation No 2017/1001, paragraph 2 of that article applies to the earlier national trade marks referred to in Article 8(2)(a) of that regulation, by substituting use in the Member State in which the earlier national mark is protected for use in the European Union.

40 Under Article 47(2) of Regulation No 2017/1001, the opposing party is obliged to provide, at the applicant's request, proof of genuine use of the earlier mark only provided the earlier trade mark has, at the date of filing or the date of priority of the EU trade mark application, been registered for not less than five years. Consequently, according to settled case-law, where the earlier mark relied on in support of an opposition is registered for less than five years before the date of filing or the date of priority of the EU trade mark application, proof of genuine use cannot still be required (see judgment of 19 October 2017, *Aldi v EUIPO — Sky (SKYLITE)*, T-736/15, not published, EU:T:2017:729, paragraph 20 and the case-law cited).

41 In the present case, it must be borne in mind that the Board of Appeal found that, at the date of publication of the mark applied for, none of the earlier marks had been registered for more than five years and concluded that the Opposition Division had been right not to take account of the applicant's request for proof of use of those marks.

- 42 It is common ground that, at the date of filing of the mark applied for, namely 2 October 2013, trade mark No 8178436 had not been registered for at least five years. The Board of Appeal therefore rightly concluded that proof of genuine use of that mark could not be required and that the applicant's request to that effect was not admissible.
- 43 However, the applicant had argued before the Board of Appeal that such a rule could not be applied in the present case, since the intervener's earlier marks were merely identical re-filings of marks previously filed. It therefore argued that that special situation rendered the provisions of Article 47(2) and (3) of Regulation 2017/1001 applicable.
- 44 Thus, it was in response to that line of argument that the Board of Appeal indicated that, in the present case, the earlier marks had not been filed with the aim of artificially prolonging the five-year period laid down in Article 47(2) of Regulation No 2017/1001; rather, as the intervener had argued and as was apparent from the numerous items of evidence it had produced, it was a reflection of the dynamic nature of the intervener's business and the need to protect a new and evolving range of business services and media.
- 45 The applicant therefore claims that, in doing so, the Board of Appeal acted *ultra vires* and carried out an assessment which it was not for it to carry out in the context of opposition proceedings.
- 46 In that respect, it should be noted that, by contrast with the invalidity procedure, which allows the applicant for an EU mark to contest the validity of an earlier mark, and as follows unambiguously from Article 46(1) of Regulation No 2017/1001, the aim of the opposition procedure is to give proprietors of rights the possibility of contesting an application for an EU mark on the basis of earlier rights which conflict with it. More specifically, according to the case-law, in the context of an opposition procedure, EUIPO is even required to presume that the earlier mark is valid (see judgment of 19 October 2017, *SKYLITE*, T-736/15, not published, EU:T:2017:729, paragraph 26 and the case-law cited).
- 47 Accordingly, in the opposition procedure, EUIPO cannot examine whether the criteria that constitute a ground of invalidity, such as those referred to in Article 59(1)(b) of Regulation No 2017/1001 are fulfilled, as regards the mark relied on in support of the opposition. Neither Article 46 nor Article 47 of Regulation No 2017/1001 provide a procedural mechanism that allows the validity of an earlier mark to be contested in view of the bad faith of the opposing party.
- 48 In the present case, the Board of Appeal rightly pointed out that, under Article 47(2) of Regulation No 2017/1001, the applicant's request for proof of use was inadmissible, since none of the earlier marks had been registered for more than five years. It was therefore only after declaring that application inadmissible and in response to an argument of the applicant submitting that, in view of the intervener's bad faith when filing the applications for registration of the earlier marks, Article 47(2) of Regulation No 2017/1001 was applicable, that the Board of Appeal stated the reasons why that was not the case and referred to the intervener's statements and to the numerous documents it had produced. In any event, the applicant has not established that that line of argument adversely affected its rights in the invalidity proceedings. Nor has it established that the Board of Appeal acted *ultra vires*, infringed its rights of defence and Article 94 of Regulation 2017/1001 or vitiated the contested decision by a manifest error of assessment in assessing the validity of the earlier mark.
- 49 Consequently, the third plea must be rejected.

The fourth plea in law, alleging infringement of Article 95 of Regulation No 2017/1001, Rule 20(7)(c) and Rule 50(1) of Regulation No 2868/95 and of the principles of equality and impartiality with regard to the request for suspension of the proceedings

- 50 The applicant submits that the Board of Appeal failed to take proper account of the request for suspension of the opposition proceedings submitted by the applicant on 14 August 2017. First, it argues that it did not have the opportunity to reply to the statement dated 2 October 2017 submitted by the intervener in response to its request for suspension. Secondly, it states that the Board of Appeal made a manifest error of assessment by refusing to suspend the opposition proceedings on the ground that the invalidity proceedings constituted a delaying tactic and that the opposition was based on other rights.
- 51 EUIPO and the intervener dispute those arguments.
- 52 In the first place, as regards the complaint that it was not given the opportunity to reply to the statement of 2 October 2017 produced by the intervener in response to its request for suspension of the opposition proceedings, the applicant stated, at the hearing, that, by that argument, it alleged infringement of its right to be heard as it results, in EU trade mark law, from Article 70(2) of Regulation No 2017/1001.
- 53 It is settled case law that Article 94 of Regulation 2017/1001 lays down, in EU trade mark law, the general principle of the protection of rights of the defence. In so far as Article 70(2) of Regulation No 2017/1001 lays down the right of parties to be heard on the observations, facts and evidence adduced before the Board of Appeal, that article also enshrines, in EU trade mark law, the general principle of protection of rights of the defence (see judgment of 1 February 2017, *Gómez Echevarría v EUIPO — M and M Direct (wax by Yuli's)*, T-19/15, not published, EU:T:2017:46, paragraph 26 and the case-law cited).
- 54 In the present case, it is common ground that, on 14 August 2017, the applicant lodged an application for suspension of the opposition proceedings pending a decision in the invalidity proceedings which it had brought on 10 July 2017 against trade mark No 8178436. By letter of 1 September 2017, the Board of Appeal invited the intervener to submit its observations. Thus, by letter of 2 October 2017, the intervener set out the reasons why it was not in favour of a suspension of the proceedings.
- 55 First of all, it follows from the foregoing that, in its letter of 2 October 2017, the intervener confines itself to adopting a position on the applicant's request for the suspension of the opposition proceedings. Next, it should be noted that no provision laid down the possibility for the applicant to be able to lodge a reply. Lastly, it must be stated that the applicant has not established, nor even alleges, that the letter of 2 October 2017 contained new matters of fact or of law which the Board of Appeal took into account in the contested decision and on which it could not submit observations. In those circumstances, the Board of Appeal did not infringe the applicant's right to be heard in taking the view that it was not necessary to give the applicant an opportunity to reply to the intervener's letter of 2 October 2017. Accordingly, that argument must be rejected.
- 56 In the second place, the applicant submits that the Board of Appeal made a manifest error of assessment by refusing to suspend the opposition proceedings on the ground that the invalidity proceedings constituted a delaying tactic and that the opposition was based on other rights.
- 57 In that regard, it must be borne in mind that, pursuant to Rule 20(7)(c) of Regulation No 2868/95, applicable to proceedings before the Board of Appeal in accordance with Rule

50(1) of that regulation, EUIPO may suspend opposition proceedings where a suspension is appropriate in the circumstances.

- 58 According to the case-law, the Board of Appeal's discretion as to whether or not to suspend proceedings is broad. Suspending proceedings remains optional for the Board of Appeal, which will do so only if it considers it appropriate. Proceedings before the Board of Appeal are therefore not automatically suspended simply because a party has requested a suspension (see judgment of 8 September 2017, *Aldi v EUIPO — Rouard (GOURMET)*, T-572/15, not published, EU:T:2017:591, paragraph 21 and the case-law cited).
- 59 The fact that the Board of Appeal has a broad discretion to suspend proceedings before it does not mean that its assessment falls outside the scope of judicial review by the Courts of the European Union. That fact does, however, restrict judicial review on the merits to ascertaining that no manifest error of assessment or misuse of powers has occurred (see judgment of 8 September 2017, *GOURMET*, T-572/15, not published, EU:T:2017:591, paragraph 22 and the case-law cited).
- 60 In that regard, it is evident from the case-law that, in exercising its discretion with respect to the suspension of proceedings, the Board of Appeal must observe the general principles governing procedural fairness within a European Union governed by the rule of law. It follows that, in exercising that discretion, the Board of Appeal must take into account not only the interests of the party whose mark or application for an EU mark is being contested, but also those of the other parties. The decision whether or not to suspend the proceedings must follow upon a balancing of the competing interests (see judgment of 8 September 2017, *GOURMET*, T-572/15, not published, EU:T:2017:591, paragraph 23 and the case-law cited).
- 61 It should also be noted that, according to settled case-law, the issue of the suspension of the proceedings must be assessed before that of whether there is a likelihood of confusion between the mark applied for and the earlier mark (see judgment of 8 September 2017, *GOURMET*, T-572/15, not published, EU:T:2017:591, paragraph 24 and the case-law cited).
- 62 In the present case, first, it is common ground that the applicant requested suspension of the opposition proceedings on 14 August 2017, when the Board of Appeal had just informed the parties that the written procedure had been closed and that a decision would be taken on the basis of the arguments and evidence submitted to it. The Board of Appeal noted that fact, stated that it saw no reason to explain why the invalidity request was not made earlier and stated that the late filing caused a new delay in the proceedings initiated by the intervener four years earlier. Secondly, the Board of Appeal noted that the opposition was based on other marks and, in particular, on trade mark No 2500604, which covered the same goods and services as those covered by the mark which was the subject of the invalidity proceedings, namely trade mark No 8178436.
- 63 It must be held that none of those grounds is vitiated by a manifest error.
- 64 In those circumstances, it must be held that, in rejecting the request for a suspension of the proceedings brought by the applicant on the grounds set out above, the Board of Appeal did not make a manifest error of assessment or breach Article 95 of Regulation No 2017/1001, Rule 20(7)(c) and Rule 50(1) of Regulation No 2868/95 or the principles of equality and impartiality.
- 65 The fourth ground of appeal should therefore be dismissed.

The fifth plea in law, alleging misuse of powers

- 66 The applicant submits that it is apparent from the first sentence of Article 67 of Regulation 2017/1001 that if, as in the present case, the Opposition Division has rejected an application for registration of an EU trade mark only in respect of one particular earlier trade mark registration, without dealing with the other rights claimed, the appeal brought by the applicant for the trade mark before the Board of Appeal can lawfully relate only to the Opposition Division's refusal to allow that registration. The applicant considers that, in the absence of a counter-appeal filed by the intervener and on the basis of the abovementioned limitations of the subject matter of the dispute, the Board of Appeal infringed Articles 67 and 95 of Regulation 2017/1001 and acted *ultra vires* when it decided that the opposition could also be justified on the basis of trade mark No 2500604.
- 67 EUIPO and the intervener dispute those arguments.
- 68 First of all, it should be borne in mind that it is settled case-law that a decision may amount to a misuse of powers only where it appears, on the basis of objective, relevant and consistent factors, to have been taken in order to achieve an end other than that stated (see judgment of 15 November 2011, *Hrbek v OHIM — Outdoor Group (ALPINE PRO SPORTSWEAR & EQUIPMENT)*, T-434/10, not published, EU:T:2011:663, paragraph 22 and the case-law cited).
- 69 Next, it must be noted that the first sentence of Article 67 of Regulation No 2017/1001 states that any party to proceedings adversely affected by a decision may appeal.
- 70 It is clear from the very wording of the first sentence of Article 67 of Regulation No 2017/1001 that its purpose is to determine the persons entitled to appeal and to be parties to the proceedings and not to lay down the limits of the Board of Appeal's powers when it examines an appeal against a decision of the Opposition Division. Similarly, Article 95 of Regulation No 2017/1001, referred to in paragraph 32 above, does not allow the applicant's arguments to be accepted.
- 71 In the present case, and in any event, it is common ground that the intervener had based the opposition on a number of earlier marks and, in particular, on trade mark No 2500604, with the result that that mark formed part of the subject matter of the proceedings before the Opposition Division. In those circumstances, the Board of Appeal had, under Article 71(1) of Regulation No 2017/1001, the power to carry out a new, full examination of the merits of the opposition, in particular, with regard to trade mark No 2500604, by conducting a new examination of the likelihood of confusion, for the purposes of Article 8(1)(b) of Regulation No 2017/1001 (see, to that effect, judgment of 17 February 2017, *Unilever v EUIPO — Technopharma (Fair & Lovely)*, T-811/14, not published, EU:T:2017:98, paragraph 35 and the case-law cited).
- 72 Consequently, and since the applicant has not put forward any evidence capable of establishing the existence of a misuse of powers, the fifth plea must also be rejected.
- The sixth plea in law, alleging infringement of Article 8(1)(b), Article 94 and Article 95 of Regulation 2017/1001, and of the right to be heard and the right to a fair trial with regard to the assessment of the existence of a likelihood of confusion*
- 73 The applicant submits that, when the overall impression they create is compared, the mark applied for is not similar either to trade mark No 8178436 or to trade mark No 2500604 and therefore there is no likelihood of confusion. It adds that the Board of Appeal did not assess the likelihood of confusion globally and did not base its decision on the overall impression they produce. It also states that the Board of Appeal was wrong not to take account of the fact that a similarity of signs based on one identical element can be found to exist only in

cases where the other constituent elements are negligible. Lastly, the applicant maintains that the Board of Appeal provides no justification for its conclusion and remains silent as to the decision of the Irish Patent Office referred to by the applicant in its pleadings.

- 74 EUIPO and the intervener dispute those arguments.
- 75 Under Article 8(1)(b) of Regulation 2017/1001, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered if, because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the 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. The likelihood of confusion includes the likelihood of association with the earlier trade mark.
- 76 According to settled case-law, the risk that the public may 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 July 2003, *Laboratorios RTB v OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)*, T-162/01, EU:T:2003:199, paragraphs 30 to 33 and the case-law cited).
- 77 For the purposes of applying Article 8(1)(b) of Regulation 2017/1001, a likelihood of confusion presupposes both that the marks are identical or similar and that the goods or services which they cover are identical or similar. Those conditions are cumulative (see judgment of 22 January 2009, *Commercy v OHIM — easyGroup IP Licensing (easyHotel)*, T-316/07, EU:T:2009:14, paragraph 42 and the case-law cited).
- 78 As a preliminary point, it should be noted that the Board of Appeal examined whether there was a likelihood of confusion in the light of marks Nos 8178436 and 2500604. On the same grounds, it found that there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 2017/1001. However, since it is apparent from the examination of the first plea that the intervener has not established that it was authorised by the proprietor of trade mark No 8178436 to lodge an opposition on the basis of that mark and since the contested decision is therefore vitiated by an infringement of Article 46(1) of Regulation 2017/1001 and of Rule 15(2)(h)(iii) and of Rule 19(2) of Regulation 2868/95 in that regard, the complaint alleging infringement of Article 8(1)(b) of Regulation 2017/1001 must be examined solely on the basis of trade mark No 2500604.
- 79 In the first place, as regards the relevant public, the Board of Appeal stated that trade mark No 2500604 was addressed to the United Kingdom consumer. It also considered that the relevant public included the public at large and the professional public. It added that the level of attention of the relevant public varied from average to above average. Those assessments of the Board of Appeal, which are not disputed by the applicant, must be upheld in the light of the nature of the goods and services covered and the marks concerned.
- 80 In the second place, as regards the comparison of the goods and services covered, it must be noted that, in the present case, the applicant does not call into question the Board of Appeal's findings that those goods and services are identical. Moreover, it must be stated that that assessment is correct and must be upheld.
- 81 In the third place, as regards the comparison of the signs at issue, it should be noted that the global assessment of the likelihood of confusion, in relation to the visual, phonetic or

conceptual similarity of the signs at issue, must be based on the overall impression given by the signs, bearing in mind, in particular, their distinctive and dominant components. The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the global assessment of that likelihood of confusion. In this regard, the average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details (see judgment of 12 June 2007, *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 35 and the case-law cited).

- 82 First, as regards the visual comparison, it should be noted that the mark applied for consists of a word element of five letters, ‘s’, ‘k’, ‘y’, ‘f’ and ‘i’, whereas the word element of trade mark No 2500604 contains three, namely ‘s’, ‘k’ and ‘y’. In addition, it must be noted that the word element of that mark is fully included in the mark applied for. For that reason, the signs must be regarded as having an average degree of visual similarity at the very least, as the Board of Appeal rightly found. That is especially true since, according to established case-law, as regards a mark containing word elements, the consumer generally pays greater attention to the beginning of a mark than to the end (see, to that effect, judgment of 6 October 2015, *Monster Energy v OHIM — Balaguer (icexpresso + energy coffee)*, T-61/14, not published, EU:T:2015:750, paragraph 45 and the case-law cited). The relevant public will therefore focus more on the word element ‘sky’ of the mark applied for, which is identical to trade mark No 2500604.
- 83 Secondly, as regards the aural comparison, the Board of Appeal was right to find that trade mark No 2500604 and the first syllable of the mark applied for were pronounced identically and that, for the English-speaking consumer, there was, as a result of the presence of the ‘y’ and ‘i’, an aural similarity between the single syllable of that mark and the second syllable of the mark applied for. Accordingly, the Board of Appeal did not make an error of assessment when it concluded that there was, at least, a medium degree of aural similarity between the marks at issue.
- 84 Thirdly, as regards the conceptual comparison, it should be noted that, although the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (judgment of 22 June 1999, *Lloyd Schuhfabrik Meyer*, C-342/97, EU:C:1999:323, paragraph 25), the fact remains that, when perceiving a word sign, he will break it down into word elements which, for him, suggest a concrete meaning or which resemble words known to him (see, to that effect, judgment of 6 October 2004, *Vitakraft-Werke Wührmann v OHIM — Krafft (VITAKRAFT)*, T-356/02, EU:T:2004:292, paragraph 51). It follows from the foregoing that the Board of Appeal was right to find that the relevant public would perceive the mark applied for as consisting of the terms ‘sky’ and ‘fi’. Consequently, that public will perceive that the word element ‘sky’ refers to the sky and that the element ‘fi’ refers to the English word ‘Fidelity’, as is the case in expressions such as ‘wifi’ and ‘hifi’. In those circumstances, in accordance with the findings of the Board of Appeal, since they refer to the element ‘sky’, the marks at issue also have at least an average degree of conceptual similarity.
- 85 In the light of the foregoing, it must be concluded that, on the basis of an overall impression, the marks at issue have, for the relevant public, an average degree of visual, aural and conceptual similarity.
- 86 Fourthly, as regards the likelihood of confusion, it must be noted that a global assessment of the likelihood of confusion implies some interdependence between the factors taken into account and, in particular, between the similarity of the trade marks and that of the goods or services covered. Accordingly, a low degree of similarity between those goods or services may be offset by a high degree of similarity between the marks, and vice versa (judgment of

29 September 1998, *Canon*, C-39/97, EU:C:1998:442, paragraph 17, and judgment of 14 December 2006, *Mast-Jägermeister v OHIM — Licorera Zacapaneca (VENADO with frame and others)*, T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 74).

- 87 In the present case, as the Board of Appeal rightly found, in view of the identity of the goods and services covered, the fact that the marks at issue are visually, phonetically and conceptually similar to an average degree, the normal level of inherent distinctiveness of trade mark No 2500604, a finding which is not disputed by the applicant and which is free of error, and the fact that the level of attention of the relevant public varies from average to above average, there is a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation 2017/1001.
- 88 The applicant's arguments are not such as to cast doubt on that conclusion.
- 89 First of all, the applicant submits that the Board of Appeal did not assess the likelihood of confusion globally and did not rely on the overall impression produced by it.
- 90 However, it is clear from the contested decision that, after citing the relevant case-law, the Board of Appeal took into account all the factors and, in particular, the similarity of the marks as well as those of the goods and services, the level of attention of the relevant public and the distinctive character of the earlier mark in finding that there was a likelihood of confusion between the marks at issue within the meaning of Article 8(1)(b) of Regulation No 2017/1001. In doing so, the Board of Appeal assessed the likelihood of confusion globally. Furthermore, in examining the likelihood of confusion in the light of all the elements of the marks at issue and taking account, in particular, of the distinctive and dominant element of the mark applied for, namely the element 'sky', which is the longest of the two elements of that mark and appears at the beginning of the sign, the Board of Appeal relied on the overall impression produced by the marks at issue to conclude that there was a likelihood of confusion. In those circumstances, the two abovementioned arguments must be rejected, as must, consequently, the argument by which the applicant submits that the Board of Appeal was wrong not to take account of the fact that a similarity of signs based on a single identical element can be found to exist only in cases where the other constituent elements are negligible.
- 91 Next, the applicant submits that the Board of Appeal does not justify its conclusion and remains silent as to the decision of the Irish patent office to which the applicant had referred in its written pleadings. When questioned on that point at the hearing, the applicant argued that the failure to take that decision into account showed that there was an error in the assessment of the likelihood of confusion.
- 92 In that respect, it suffices to note that, according to settled case-law, the European Union trade mark regime is an autonomous system with its own set of objectives and rules peculiar to it; it applies independently of any national system. EUIPO is not bound by national registration decisions which are merely factors which may only be taken into consideration, without being given decisive weight (see judgment of 27 June 2017, *Jiménez Gasalla v EUIPO (B2B SOLUTIONS)*, T-685/16, not published, EU:T:2017:438, paragraph 41 and the case-law cited).
- 93 Accordingly, the abovementioned arguments must be rejected.
- 94 It follows from the foregoing that, by upholding the opposition, inter alia, on the basis of trade mark No 2500604, the Board of Appeal did not infringe Article 8(1) of Regulation No 2017/1001.

95 As regards the remaining arguments, the applicant does not explain how the Board of Appeal infringed Articles 94 and 95 of Regulation 2017/1001, and the right to be heard and the right to a fair trial by assessing whether there is a likelihood of confusion. Those complaints are therefore inadmissible and must be rejected.

96 In those circumstances, the sixth plea must be rejected.

The seventh plea in law, alleging multiple infringements of the right to a fair trial with regard to the repeated failure to take into account the applicant's observations relating to its requests to restrict the list of goods and services

97 The applicant in essence criticises the Board of Appeal for having acceded to its requests to restrict the list of goods and services covered by the application for registration without first asking the intervener whether it intended to maintain its opposition to the other goods and services covered by the application for registration. It states that, by doing so, the Board of Appeal replaced the response to be given by the other party to the proceedings with its own speculative presumption and therefore acted *ultra vires* in breach of the principle of impartiality contained in Article 95 of Regulation 2017/1001. It also concludes that its right to a fair trial and to a reasoned decision were infringed.

98 EUIPO and the intervener dispute those arguments.

99 First of all, it must be noted that, pursuant to Article 72(1) of Regulation No 2017/1001, actions may be brought before the Courts of the European Union only against decisions of the Boards of Appeal. Therefore, it is only pleas directed against the decision of the Board of Appeal itself which are admissible in such an action (see judgment of 18 July 2017, *Savant Systems v EUIPO — Savant Group (SAVANT)*, T-110/16, not published, EU:T:2017:521, paragraph 14 and the case-law cited). Accordingly, the arguments directed against the decision of the Opposition Division are inadmissible and must be rejected.

100 As regards the remaining arguments, it should be noted that, in the present case, the Board of Appeal found that EUIPO had not taken into consideration the last request for restriction of the goods and services submitted by the applicant on 8 February 2016. That restriction related to the deletion of 'mechanisms for coin operated apparatus'. The Board of Appeal rectified that omission by accepting, in the contested decision, the restriction applied for and ordering that the requested trade mark be limited accordingly.

101 First, it must be stated that the applicant has no interest in challenging the taking into account of its request for restriction of goods in the contested decision, since, in doing so, the Board of Appeal granted one of its requests.

102 Secondly, and in any event, it must be noted, as regards the applicant's allegation that its right to a fair trial was infringed, that, according to the case-law, the right to a fair 'trial' cannot be relied on in proceedings before the Boards of Appeal of EUIPO since proceedings before the Boards of Appeal are administrative and not judicial in nature (see judgment of 3 May 2018, *Raise Conseil v EUIPO — Raizers (RAISE)*, T-463/17, not published, EU:T:2018:249, paragraph 22 and the case-law cited).

103 Thirdly, as regards the alleged infringement of Article 95 of Regulation No 2017/1001 invoked by the applicant, it should be noted that the applicant submits that the Board of Appeal 'acted *ultra vires* and breached the principle of impartiality enshrined [in Article 95 of Regulation 2017/1001]', by accepting the request for restriction made by the applicant while taking the view that the intervener had to be regarded as wishing to maintain its opposition. The applicant complains that, in doing so, the Board of Appeal substituted its

own assessment of the response that the intervener wished to give to the opposition proceedings and failed to take the applicant's submissions into account.

- 104 In the present case, the applicant's argument does not explain how the Board of Appeal — by granting the request for restriction of the goods and services without, admittedly, asking the intervener whether, for that reason, it intended to waive the opposition procedure — infringed Article 95 of Regulation No 2017/1001, the provisions of which have been set out in paragraph 32 above.
- 105 In any event, it is apparent from the observations submitted by the intervener in response to the appeal brought by the applicant before the Board of Appeal, first, that the intervener was aware of the existence of the four requests for restriction of the list of goods and services covered by the mark applied for, including that of 8 February 2016, and, secondly, that the intervener, despite the latter request, maintained its opposition. In its response, the intervener states that its conduct throughout the administrative procedure proves that it had no intention of withdrawing its opposition. It states, in that regard, that it drew attention in particular to the applicant's tactics, which it considered to be dilatory, consisting of making restriction requests one after another in order to delay the outcome of the procedure. The present line of argument must therefore be rejected.
- 106 Fourthly, the applicant states that it did receive a reasoned decision and invokes, in support of its argument, the infringement of Article 94 of Regulation No 2017/1001. On that point, it should be noted that the Board of Appeal stated that it was clear from the course of the procedure that the intervener wished to maintain its opposition against all the other goods and services covered by the mark applied for, with the result that it was not necessary to ask it to submit observations in that regard. It must be held that, in so doing, the Board of Appeal gave sufficient reasons for the contested decision on that point.
- 107 The seventh plea must therefore be rejected.

The eighth plea, alleging infringement of Article 96 of Regulation No 2017/1001 as regards the Board of Appeal's refusal to take into account the applicant's request for oral proceedings

- 108 The applicant submits that, in view of the arguments relating to the various procedural and substantive issues that it put forward, it would have been expedient to grant its request for oral proceedings before the Board of Appeal.
- 109 EUIPO and the intervener dispute those arguments.
- 110 Article 96(1) of Regulation No 2017/1001 provides that if EUIPO considers that oral proceedings would be expedient, they are to be held either at the instance of EUIPO or at the request of any party to the proceedings.
- 111 In the present case, the applicant has not put forward any evidence to show that the Board of Appeal should have concluded that it would be expedient to hold oral proceedings. Accordingly, the applicant has not shown that, by refusing to hold a hearing on the ground that there was no need to hold oral proceedings, the Board of Appeal infringed Article 96 of Regulation No 2017/1001.
- 112 Accordingly, the eighth plea must be rejected.

The request made by the applicant at the hearing that the proceedings be stayed

- 113 At the hearing, the applicant requested that the present proceedings be stayed pending delivery of the judgment in Case C-371/18 in which the High Court of Justice (England and Wales), Chancery Division (Patents Court), made a reference for a preliminary ruling to the Court of Justice concerning trade mark No 2500604.
- 114 The other parties having expressed their views on that issue, the Court considers it appropriate, in the circumstances of the present case, to reject that request, given that the judgment in Case C-371/18 *Sky and Others* will not bring an end to the proceedings in relation to trade mark No 2500604, currently pending before the High Court of Justice (England and Wales), Chancery Division (Patents Court), before the United Kingdom courts.
- 115 Accordingly, the action must be dismissed in its entirety.

Costs

- 116 As regards the costs incurred in the proceedings before the General Court, it must be borne in mind that, 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.
- 117 Since the applicant has been unsuccessful, it must be ordered to pay the costs relating to the proceedings before the Court, in accordance with the forms of order sought by EUIPO and the intervener.
- 118 The costs incurred before EUIPO continue to be governed by the contested decision (see, to that effect, judgment of 10 November 2016, *Polo Club v EUIPO — Lifestyle Equities (POLO CLUB SAINT-TROPEZ HARAS DE GASSIN)*, T-67/15, not published, EU:T:2016:657, paragraph 120).

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders KID-Systeme GmbH to pay the costs of the present proceedings.**

Berardis

Papasavvas

Spineanu-Matei

Delivered in open court in Luxembourg on 16 May 2019.

E. Coulon

V. Tomljenović

Registrar

President

* Language of the case: English.