

Court of Justice EU, 3 June 2015, The Sunrider Corporation v OHIM



TRADE MARK LAW

OHIM adjudicating bodies are not obliged to establish in their decisions the accuracy of facts which are well known.

- Whether the facts on which the Board of Appeal of OHIM has based its decision are well known or not is a factual assessment which, save where the facts or evidence are distorted, is not subject to review by the Court of Justice on appeal
- An applicant for a trade mark against whom OHIM relies on such well-known facts may challenge their accuracy before the General Court.

65 It should be recalled that OHIM adjudicating bodies are not obliged to establish in their decisions the accuracy of facts which are well known. In addition, the finding, by the General Court, as to whether the facts on which the Board of Appeal of OHIM has based its decision are well known or not is a factual assessment which, save where the facts or evidence are distorted, is not subject to review by the Court of Justice on appeal (order in *Zipcar v OHIM*, C-394/08 P, EU:C:2009:334, paragraph 42 and the case-law cited).

66 Moreover, in so far as Sunrider relies on an infringement of the rights of the defence, in particular, of the right to be heard, it must be recalled that an applicant for a trade mark against whom OHIM relies on such well-known facts may challenge their accuracy before the General Court (order in *Zipcar v OHIM*, C-394/08 P, EU:C:2009:334, paragraph 43).

Source: [ECLI:EU:C:2015:371](#)

Court of Justice EU, 3 June 2015

(K. Jürimäe, J. Malenovský and A. Prechal (Rapporteur))

ORDER OF THE COURT (Ninth Chamber)

3 June 2015 (*)

(Appeal — Community trade mark — Opposition proceedings — Application for registration of word mark SUN FRESH — Opposition by the proprietor of the earlier Community word mark SUNNY FRESH — Likelihood of confusion — Similarity of the goods covered by the marks at issue — Right to be heard — Regulation (EC) No 207/2009 — Articles 8(1)(b), 75 and 76)

In Case C-142/14 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 24 March 2014,

The Sunrider Corporation, established in Torrance (United States), represented by N. Dontas and E. Markakis, dikigoroi, appellant,

the other parties to the proceedings being:

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by P. Bullock, acting as Agent,

defendant at first instance,

Nannerl GmbH & Co. KG, established in Anthering bei Salzburg (Austria), represented by A. Thünken, Rechtsanwalt,

intervener at first instance,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Chamber, J. Malenovský and A. Prechal (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 181 of the Rules of Procedure,

makes the following

Order

1 By its appeal, The Sunrider Corporation (*'Sunrider'*) seeks to have set aside the judgment of the General Court of the European Union in *Sunrider v OHIM — Nannerl (SUN FRESH)* (T-221/12, EU:T:2014:25; *'the judgment under appeal'*), by which the General Court dismissed its action for annulment of the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 26 March 2012 (Case R 2401/2010-4), relating to opposition proceedings between Sunrider and Nannerl GmbH & Co. KG (*'the decision at issue'*).

Legal context

2 Article 8 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), which is entitled *'Relative grounds for refusal'*, provides in paragraph 1:

'Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:

...

(b) 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.'

3 Article 75 of that regulation, which is entitled *'Statement of reasons on which decisions are based'*, provides as follows:

'Decisions of the Office shall state the reasons on which they are based. They shall be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments.'

4 Article 76 of Regulation No 207/2009, which is entitled '*Examination of the facts by the Office of its own motion*', provides in paragraph 1:

'In proceedings before it the Office shall examine the facts of its own motion; however, in proceedings relating to relative grounds for refusal of registration, the Office shall be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought.'

5 Under point 2 of Article 1 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), as amended by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 136, p. 34), ('*Directive 2001/83*'), '*medicinal product*' means:

'(a) Any substance or combination of substances presented as having properties for treating or preventing disease in human beings; or

(b) Any substance or combination of substances which may be used in or administered to human beings either with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis.'

6 Article 2 of Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ 2004 L 136, p. 1) states:

'The definitions laid down in Article 1 of Directive 2001/83 ... shall apply for the purposes of this Regulation.'

Background to the dispute

7 On 6 August 2007, Nannerl GmbH & Co. KG ('*Nannerl*') filed an application with OHIM for the registration as a Community trade mark of the word sign '*SUN FRESH*'.

8 The goods in respect of which that registration was sought are in Class 32 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended ('*the Nice Agreement*'), and correspond to the following description: '*beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages*'.

9 On 6 March 2008, Sunrider filed a notice of opposition to registration of the mark applied for. That opposition was based on the existence of five earlier trade marks, including the Community word mark SUNNY FRESH, registered in respect of goods in Class 5 of the Nice Agreement, and corresponding to the following description: '*herbal nutritional supplements*'.

10 By a decision of 6 October 2010, the Opposition Division of OHIM upheld the opposition and rejected the application for registration of the mark applied for.

11 On 3 December 2010, Nannerl filed a notice of appeal against that decision.

12 By the decision at issue, the Fourth Board of Appeal of OHIM ('*the Board of Appeal*') upheld that appeal, annulled the decision at issue and rejected the opposition filed by Sunrider. The Board of Appeal concluded that there was no likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009, because of the differences between the goods in respect of which the earlier Community mark SUNNY FRESH had been registered and those in respect of which registration of the sign '*SUN FRESH*' as a Community trade mark had been applied for.

The procedure before the General Court and the judgment under appeal

13 By application lodged at the Registry of the General Court on 25 May 2012, Sunrider brought an action for annulment of the decision at issue in which it relied on three pleas in law, of which only the second and third are relevant for the purposes of the present appeal.

14 The second plea in law was based on an infringement of the second sentence of Article 75 and the second part of Article 76(1) of Regulation No 207/2009 and, by the third plea in law, Sunrider invoked an infringement of Article 8(1)(b) of that regulation.

15 In examining those second and third pleas in law together, the General Court first of all recalled, in paragraphs 57 to 62 of the judgment under appeal, the rules and principles governing the assessment of the likelihood of confusion for the purposes of Article 8(1)(b) of Regulation No 207/2009, and, in particular, those relating to the examination of the similarity of the goods covered by the marks at issue.

16 Moreover, in paragraph 63 of the judgment under appeal, the General Court held that the Board of Appeal was fully entitled to find that, since the goods are aimed at the general public, the relevant public for the purposes of the assessment of the likelihood of confusion in relation to those goods consisted of average consumers in all EU Member States.

17 In paragraph 64 of that judgment, the General Court stated that, as regards the goods in Class 32 of the Nice Agreement, the relevant public is reasonably well informed and reasonably observant and circumspect, whereas in the case of '*nutritional supplements for medical use in the broad sense of the term*' included in Class 5 of that agreement, it had to be held that the relevant public displays a relatively high level of attention, in so far as those goods affect their health.

18 In paragraph 65 of that judgment, the General Court noted that, in paragraph 25 of the decision at issue, the Board of Appeal had found that the goods to be compared were, on the one hand, '*beers, mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and others preparations for making beverages*' in Class 32 of the Nice Agreement and, on the other, '*herbal nutritional supplements*' in Class 5 of that agreement.

19 Next, in paragraphs 67 and 68 of the judgment under appeal, the General Court observed that, by its various arguments, Sunrider was contesting the Board of Appeal's finding, set out in paragraphs 27 to 36 of the decision at issue, that the goods at issue were different

in their purpose, their usual producers, their sales outlets and their end-users, and as a result of the fact that they were neither complementary nor in competition with each other.

20 In this connection, the General Court dismissed, in the first place, in paragraphs 69 to 73 of the judgment under appeal, the arguments that the goods covered by the marks at issue ought to be regarded as similar because of their nature, purpose and function.

21 In that regard, the General Court found that the main purpose of the herbal nutritional supplements covered by the mark SUNNY FRESH in Class 5 of the Nice Agreement is to prevent or remedy medical problems in the broad sense of the term or to balance nutritional deficiencies, whereas the ‘beverages’ or ‘preparations for making beverages’ in Class 32 of that agreement are consumed mainly to quench thirst or as part of standard human nutrition.

22 In the second place, the General Court refuted, in paragraphs 74 to 79 of the judgment under appeal, Sunrider’s arguments criticising the finding, in paragraph 30 of the decision at issue, that the goods covered by the marks at issue are generally not offered for sale in the same sales outlets.

23 In this connection, the General Court set out, in paragraphs 77 and 78 of the judgment under appeal, the following considerations:

‘77 In the present case, the Court considers that the fact that nutritional supplements are generally offered for sale in pharmacies, drugstores or specialised departments is a well-known fact. In that context, it is appropriate to take into account that, although [Sunrider] attempts to challenge that fact by arguing that herbal nutritional supplements in liquid form falling within Class 5 [of the Nice Agreement] are sold in the same aisle as beverages, syrups and other preparations for beverages falling within Class 32 [of that agreement], [Sunrider] adduces no evidence in support of its claim.

78 ... [I]f, by arguing that the Board of Appeal did not specify the facts on which it relied in reaching this conclusion and that it should have clarified whether it was relying on evidence presented by the parties or well-known facts, [Sunrider] is complaining that the Board of Appeal breached the obligation to state reasons laid down in Article 75 of Regulation No 207/2009, that complaint must be rejected. It emerges sufficiently clearly from paragraph 30 of the [decision at issue] and its context that the Board of Appeal relied on well-known facts.’

24 In paragraph 81 of the judgment under appeal, the General Court held, in the third place, that the finding, set out in paragraph 30 of the decision at issue, that the consumers of the goods covered by the marks at issue are different was sufficiently substantiated, stating that, in the light of paragraph 25 of the decision at issue, that decision had to be understood as meaning that, since the respective main purposes of the goods in question are different, the level of attention of consumers is higher as regards goods in Class 5 of the Nice Agreement than as regards goods in Class 32 of that agreement.

25 In the fourth place, the General Court dismissed, in paragraph 83 of that judgment, the argument that there is a competitive relationship between the goods covered by the marks at issue, observing that that argument was the same as that relating to their main purpose and that it had already been rejected in paragraphs 70 to 72 of that judgment.

26 In the fifth place, the General Court found, in paragraph 84 of the judgment under appeal, that no complementary relationship between the goods had been established in the case under consideration.

27 In the sixth place, the General Court dismissed, in paragraph 87 of the judgment under appeal, the argument that the similarity of goods such as those covered by the marks at issue had already been confirmed, in particular, in the judgment in *OsoSPA v OHIM — Distribution & Marketing (Hai)* (T-33/03, EU:T:2005:89), holding that that judgment concerned only the similarity between the ‘beverages’ and ‘preparations for making beverages’ in Class 32 of the Nice Agreement, and the ‘strengthening and refreshing health care products, namely vitamin preparations, mineral preparations, tonics’ in Class 5 of that agreement.

28 Lastly, in the seventh place, in paragraphs 89 to 93 of the judgment under appeal, the General Court examined, before rejecting as ineffective, the arguments raised by Sunrider against paragraph 29 of the decision at issue, namely that the Board of Appeal’s finding in that paragraph — that the contested goods in Class 32 of the Nice Agreement and the goods in Class 5 of that agreement required entirely different skill sets for their manufacture and sale — was incorrect.

29 In this connection, the General Court held, first, that the argument that certain manufacturers, including Sunrider, produce both categories of the goods at issue was not sufficient to demonstrate that a large number of the manufacturers or distributors of the goods covered by the marks at issue are the same, which — according to the case-law — should be taken into account for the purpose of assessing the likelihood of confusion.

30 Secondly, the General Court held that, even if paragraph 29 of the decision at issue were vitiated by the error alleged, that circumstance could not, of itself, justify the annulment of that decision, since, having regard to the differences relating to the purposes and the marketing of the goods covered by the marks at issue, and to the lack of substitutability or complementarity, as confirmed by the judgment under appeal, a partial identity of the manufacturers of those goods could not, in any event, suffice to create a likelihood of confusion between those goods.

31 The General Court therefore rejected the second and third pleas in law and dismissed the action in its entirety.

Forms of order sought

32 Sunrider claims that the Court should:

- declare the appeal admissible;
- set aside the judgment under appeal in part, in so far as the General Court dismissed the second and third pleas in law in its action; and
- order OHIM to pay the costs.

33 OHIM contends that the Court should dismiss the appeal in its entirety and order Sunrider to pay the costs.
34 Nannerl contends that the Court should dismiss the appeal and order Sunrider to pay the costs incurred before the OHIM adjudicating bodies, the General Court and the Court of Justice.

The appeal

35 Under Article 181 of its Rules of Procedure, where an appeal is, in whole or in part, manifestly inadmissible or manifestly unfounded, the Court may at any time, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, by reasoned order dismiss that appeal in whole or in part.

36 It is appropriate to apply that provision to the present case.

37 In support of its appeal, Sunrider relies on three grounds of appeal, the first alleging an infringement of point 2 of Article 1 of Directive 2001/83 and of Article 2 of Regulation No 726/2004; the second alleging an infringement of the right to be heard; and the third, which is divided into three limbs, the last of which is itself divided into six parts, alleging an infringement of Article 8(1)(b) of Regulation No 207/2009.

Admissibility

38 OHIM contends that the appeal is inadmissible inasmuch as the appellant is, in essence, requesting the Court to substitute its own assessment for that of the General Court. OHIM contends that although, admittedly, the appellant alleges, in a general manner, that the General Court distorted the Board of Appeal's reasoning, it is none the less clear that the appellant is, in substance, contesting the factual assessment made by the General Court in the judgment under appeal.

39 That plea of inadmissibility cannot be accepted.

40 The plea of inadmissibility thereby raised does not relate to an aspect of the appeal which, as such, would affect the admissibility of the appeal. It is contended that the appeal is inadmissible in its entirety because of the particular way in which the grounds of appeal and arguments that it contains have been formulated, inasmuch as, by those grounds of appeal and arguments, Sunrider is in fact contesting the factual assessments made by the General Court and not the distortions allegedly made by the General Court.

41 It must be stated, however, that OHIM's argument in that regard is formulated in a general manner and is in no way substantiated by a specific analysis of the grounds of appeal and arguments developed in the appeal that are allegedly inadmissible for the reason given.

42 Nevertheless, if, in examining the present appeal, it were to be found that certain grounds of appeal are directed, wholly or in part, against factual assessments made by the General Court, those grounds of appeal would have to be rejected as inadmissible.

Substance

The first ground of appeal

– Arguments of the parties

43 By its first ground of appeal, Sunrider claims that in using, in paragraphs 64, 70 and 72 of the judgment under appeal, the words '*medical in the broad sense*' in

describing the function or purpose of Sunrider's goods, namely the '*herbal nutritional supplements*' in Class 5 of the Nice Agreement, the General Court not only disregarded the concept of '*medicinal product*', as it is defined in point 2 of Article 1 of Directive 2001/83 and Article 2 of Regulation No 726/2004, by creating a new definition of that concept, but also failed to specify and substantiate what it meant by those words and went beyond the factual and legal context of the dispute as it had been brought before the Board of Appeal.

44 OHIM contends that, in using the words '*medical in the broad sense*', the General Court intended merely to illustrate its reasoning that certain goods in Class 5 of the Nice Agreement, such as the herbal nutritional supplements marketed by Sunrider under the earlier trade mark, although they are not medicinal products under the legal definition in EU legislation, are purchased and consumed primarily for their beneficial effects on health and, accordingly, differ from the goods covered by the marks at issue, namely the '*beverages*' and '*preparations for making beverages*' in Class 32 of that agreement, since these latter are primarily intended to be consumed as ordinary food or to quench thirst.

45 Nannerl contends, first of all, that the first ground of appeal is inadmissible since, by that ground, the appellant is contesting a factual assessment by the General Court, which cannot form the subject-matter of review on appeal.

46 Nannerl submits, next, that that ground of appeal is also unfounded. It submits that the General Court implicitly characterised the goods concerned as '*medicinal products*', within the meaning of Directive 2001/83, because of how Sunrider presented them, inter alia in advertising or in the warning notices displayed on their packaging, from which consumers could have inferred, as indeed Sunrider claimed during the oral hearing before the General Court, that those goods have a therapeutic effect, namely that claimed by Sunrider in the advertisement, of soothing and reviving a dry scratchy throat or of aiding digestion, soothing the stomach and freshening the breath.

– Findings of the Court

47 According to settled case-law of the Court, it follows from a reading of Article 256 TFEU, in conjunction with the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, secondly, to assess those facts, save where they have been distorted. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions which the General Court has drawn from them (see, inter alia, order in *ASA v OHIM*, C-354/12 P, EU:C:2013:238, paragraph 28 and the case-law cited).

48 In addition, it follows from equally settled case-law that the Court of Justice has no jurisdiction to find the facts or, as a rule, to examine the evidence which the

General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. That appraisal does not therefore constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice (see, *inter alia*, order in *ASA v OHIM*, C-354/12 P, EU:C:2013:238, paragraph 29 and the case-law cited).

49 In that regard, it should be recalled that there is distortion of the clear sense of the evidence where, without recourse to new evidence, the assessment of the existing evidence appears to be clearly incorrect (see, *inter alia*, order in *Zipcar v OHIM*, C-394/08 P, EU:C:2009:334, paragraph 40 and the case-law cited).

50 Factual assessments that are not subject to review by the Court on appeal include the General Court's findings in relation to the characteristics of the relevant public and to the attention, perception or attitude of consumers, and the assessment made by the General Court, in the context of the examination of the likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009, of the similarities between the signs at issue (see, to that effect, *inter alia*, judgment in [Calvin Klein Trademark Trust v OHIM, C-254/09 P, EU:C:2010:488, paragraph 50](#); and orders in *OHIM v Sanco*, C-411/13 P, EU:C:2014:315, paragraph 55, and *Longevity Health Products v OHIM*, C-311/14 P, EU:C:2015:23, paragraph 34).

51 The same must be true of the assessment made by the General Court, in the context of the examination of that likelihood of confusion, of the similarities between the goods or services covered by the marks at issue.

52 In this case, it must be stated that the first ground of appeal is inadmissible since it in fact seeks to call into question factual assessments made by the General Court in the paragraphs in question of the judgment under appeal.

53 Thus, in paragraph 64 of that judgment, the General Court established the degree of attention of the relevant public, consisting of average consumers in all EU Member States, at whom the goods at issue are aimed.

54 In that context, the General Court found, *inter alia*, that *'[r]egarding nutritional supplements for medical use in the broad sense of the term included in Class 5 [of the Nice Agreement], it must be held that the relevant public displays a relatively high level of attention, in so far as those goods affect their health'*.

55 Contrary to what Sunrider claims, that statement as to there being *'medical use in the broad sense of the term'*, made in the context of the determination of the degree of attention of the relevant public for the purposes of the application of Article 8(1)(b) of Regulation No 207/2009, does not constitute a legal characterisation of the goods in question as *'medicinal products'* within the meaning of point 2 of Article 1 of Directive 2001/83 and Article 2 of Regulation No 726/2004.

56 Moreover, although, as recalled in paragraph 47 above, the Court has jurisdiction under Article 256 TFEU to review the legal characterisation of facts made by the General Court, the fact remains that, as regards proceedings brought against a decision adopted by a Board of Appeal of OHIM, that jurisdiction relates, as a general rule, to legal characterisations that are to be made by the General Court in the light of the rules and principles governing EU law on Community trade marks.

57 On the other hand, it must be held that, in the absence of proof of a distortion of the clear sense of the evidence made by the General Court, within the meaning of the principle laid down in the case-law recalled in paragraph 49 above, the findings made by the General Court in paragraph 64 of the judgment under appeal as to the attention of the relevant public constitute factual assessments which, as recalled in paragraph 50 above, are not subject to review by the Court of Justice on appeal.

58 In essence, for those same reasons, that conclusion must also be drawn in regard to the appellant's criticism of the assessment made by the General Court in paragraphs 70 and 72 of the judgment under appeal that the main function of herbal nutritional supplements in Class 5 of the Nice Agreement, such as the herbal concentrate marketed by Sunrider under the trade mark SUNNY FRESH, is to be consumed *'in order to prevent or remedy medical problems in the broad sense of the term or to balance nutritional deficiencies'*.

59 In those paragraphs, the General Court did no more than make a factual assessment relating to the similarity of the goods covered by the marks at issue as regards their purpose or main function, for the purposes of the examination of the likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009. In the light of what has been stated in paragraphs 50 and 51 above, such an assessment is not subject to review by the Court on appeal.

60 The appellant has not demonstrated that, in that respect, the judgment under appeal is vitiated by a distortion of the clear sense of the evidence, within the meaning of the principle laid down in the case-law recalled in paragraph 49 above. On the contrary, the evidence put forward by Nannerl in its response lodged before the Court tends to indicate that the General Court added the characterisation as to the goods in question having a *'medical function in the broad sense of the term'* in the light of the beneficial effects on the body, as claimed by Sunrider in its advertisement for those goods.

61 It follows that the first ground of appeal must be rejected as manifestly inadmissible and, in any event, as manifestly unfounded.

The second ground of appeal

– Arguments of the parties

62 By its second ground of appeal, Sunrider claims that by holding, in paragraph 77 of the judgment under appeal, that the fact that nutritional supplements are generally offered for sale in pharmacies, drugstores or specialised departments is a *'well-known'* fact, the General Court infringed the appellant's right to be heard,

since the General Court did not explain the basis for, or substantiate, that assessment by referring to any evidence in the file.

63 OHIM contends that this second ground of appeal is inadmissible and, in any event, unfounded.

– Findings of the Court

64 In paragraph 77 of the judgment under appeal, the General Court, in observing that nutritional supplements are generally offered for sale in pharmacies, drugstores or specialised departments, in essence reproduced the position adopted by the Board of Appeal in paragraph 34 of the decision at issue in response to Sunrider's argument that the goods covered by the marks at issue are distributed in the same sales outlets, adding only that this is a 'well-known' fact.

65 It should be recalled that OHIM adjudicating bodies are not obliged to establish in their decisions the accuracy of facts which are well known. In addition, the finding, by the General Court, as to whether the facts on which the Board of Appeal of OHIM has based its decision are well known or not is a factual assessment which, save where the facts or evidence are distorted, is not subject to review by the Court of Justice on appeal (order in *Zipcar v OHIM*, C-394/08 P, EU:C:2009:334, paragraph 42 and the case-law cited).

66 Moreover, in so far as Sunrider relies on an infringement of the rights of the defence, in particular, of the right to be heard, it must be recalled that an applicant for a trade mark against whom OHIM relies on such well-known facts may challenge their accuracy before the General Court (order in *Zipcar v OHIM*, C-394/08 P, EU:C:2009:334, paragraph 43).

67 In the present case, it is apparent from paragraph 34 of the decision at issue and from paragraph 77 of the judgment under appeal that, before both the Board of Appeal and the General Court, Sunrider did in fact contest the accuracy of the well-known facts concerned. Although the General Court did not ultimately accept Sunrider's position, it explained this by stating that Sunrider had not put forward any evidence in support of its claim. Since no distortion has been established by Sunrider in that regard, that assessment of the evidence by the General Court cannot form the subject-matter of an appeal before the Court of Justice.

68 Moreover, in paragraph 78 of the judgment under appeal, the General Court expressly dismissed the argument by which Sunrider complained that the Board of Appeal had not specified the facts on which it had relied and had not clarified whether it was relying on facts put forward by the parties or on well-known facts, in holding that it emerged sufficiently clearly from paragraph 30 of the decision at issue and its context that the Board of Appeal had relied on well-known facts.

69 That assessment also cannot be called into question in the context of the present appeal.

70 It follows from the foregoing that the second ground of appeal must be rejected as being in part manifestly inadmissible and in part manifestly unfounded.

The third ground of appeal

71 By its third ground of appeal, Sunrider complains that the General Court infringed Article 8(1)(b) of

Regulation No 207/2009. That ground of appeal comprises three limbs, the last of which is itself divided into six parts.

– The first limb of the third ground of appeal

72 By the first limb of its third ground of appeal, Sunrider complains that the General Court infringed Article 8(1)(b) of Regulation No 207/2009 by holding, in paragraph 65 of the judgment under appeal, that the goods to be compared were, on the one hand, '*beers, mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and others preparations for making beverages*' in Class 32 of the Nice Agreement and, on the other, '*herbal nutritional supplements*' in Class 5 of that agreement.

73 It is apparent from the case-law of the Court, inter alia the judgments in *Chartered Institute of Patent Attorneys (C-307/10, EU:C:2012:361)* and *Isdin v Bial-Portela (C-597/12 P, EU:C:2013:672)* that since, in the present case, it is established that the application for registration of the mark applied for covers all of the goods in Class 32 of the Nice Agreement, which consists of 61 categories of goods of great diversity, the General Court was not entitled to confine itself to comparing the '*herbal nutritional supplements*' in Class 5 of that agreement with the goods expressly mentioned in the title of Class 32 of that agreement only, but had to expand that examination to include each of the goods forming part of Class 32.

74 In this connection, it must be recalled that to allow a party to put forward for the first time before the Court of Justice a plea in law which it did not raise before the General Court would in effect allow that party to bring before the Court a wider case than that heard by the General Court. In an appeal, the Court's jurisdiction is, as a general rule, confined to a review of the General Court's assessment of the pleas argued before it (see, to that effect, inter alia, orders in *El Corte Inglés v OHIM and Emilio Pucci*, C-104/05 P, EU:C:2006:611, paragraph 40; *Tresplain Investments v OHIM*, C-76/11 P, EU:C:2011:790, paragraph 53; and judgment in *Areva and Others v Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 113).

75 However, an argument which was not raised at first instance does not constitute a new plea that is inadmissible at the appeal stage if it is simply an amplification of an argument already developed in the context of a plea set out in the application before the General Court (see, inter alia, judgment in *Areva and Others v Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 114).

76 In the present case, it must be stated that Sunrider did not, in any of the three pleas in law relied on in support of its application before the General Court, claim that paragraph 25 of the decision at issue was vitiated by an error of law on the ground that, in the context of the examination of the similarity of the goods covered by the marks at issue, the Board of Appeal ought to have compared the goods covered by the earlier trade mark with each of the goods in Class 32 of the Nice Agreement in respect of which the registration of the mark applied for had been sought.

77 It follows that, in that respect, the appellant has not contested the decision at issue; accordingly, the argument relied on under the first limb of the third ground of appeal, which cannot, moreover, be characterised as a plea involving a matter of public policy that the General Court ought to have examined of its own motion, constitutes a new argument that was not the subject of an assessment by the General Court and it is, therefore, inadmissible at the appeal stage.

78 Moreover, Sunrider did not claim that the General Court, in so far as it confined itself, in paragraph 65 of the judgment under appeal, to reproducing paragraph 25 of the decision at issue in a literal manner, had not dealt with one of its arguments raised before that court, thereby vitiating that judgment by a failure to state reasons.

79 Although in its application submitted before the General Court, in particular in its third plea in law alleging an infringement of Article 8(1)(b) of Regulation No 207/2009, Sunrider admittedly contested several aspects of the examination of the similarity of the goods covered by the marks at issue set out in paragraphs 27 to 36 of the decision at issue, it did not call into question the terms of the description of the products to be compared, as set out in paragraph 25 of the decision at issue, which constitutes the starting point of that examination.

80 Since the arguments developed in the third plea in law in the action before the General Court are fundamentally different from those relied on under the first limb of the third ground of appeal, it cannot be claimed that the latter arguments, based on the case-law of the Court and, in particular, on the judgment in *Chartered Institute of Patent Attorneys* (C-307/10, EU:C:2012:361), constitute simply an amplification of a plea already put forward before the General Court, even if, as Sunrider has argued, it raised that judgment in the course of the proceedings, in particular and for the first time in its letter requesting an oral hearing before the General Court, and therefore after the closure of the written procedure.

81 It follows that the first limb of the third ground of appeal must be rejected as being manifestly inadmissible.

– The second limb of the third ground of appeal

82 By the second limb of its third ground of appeal, directed against paragraph 64 of the judgment under appeal, Sunrider complains that the General Court distorted the terms of the decision at issue by substituting its own assessment and reasoning as to the determination of the level of attention of the relevant public for those of the Board of Appeal.

83 In the first place, the appellant claims that, in comparing, in paragraph 64 of the judgment under appeal, the goods covered by the mark applied for in Class 32 of the Nice Agreement with the *'nutritional supplements for medical use in the broad sense of the term included in Class 5 [of the Nice Agreement]'*, the General Court contradicted itself, since in paragraph 65 of that judgment it held that, as regards the goods covered by the earlier trade mark, the comparison was to

relate to goods corresponding to the following description: *"herbal nutritional supplements" in Class 5 [of that agreement]*.

84 In the second place, by distinguishing, in paragraph 64 of the judgment under appeal, the *'relatively high level of attention'* of the relevant public at whom the goods covered by the earlier trade mark are aimed from the lower level of attention of the relevant public at whom the goods covered by the mark applied for are aimed, the General Court distorted the terms of paragraph 25 of the decision at issue, which had nevertheless been approved in paragraph 63 of that judgment, by substituting its own reasoning for that provided by the Board of Appeal, since the latter did not draw any distinction as to the level of attention of the relevant public.

85 In this respect, with regard to the first argument, it is not apparent that the General Court, by referring, in paragraph 64 of the judgment under appeal, to *'nutritional supplements for medical use in the broad sense of the term included in Class 5 [of the Nice Agreement]'*, compared goods covered by the earlier trade mark other than the *"herbal nutritional supplements" in Class 5 [of that agreement]* to which it referred in paragraph 65 of that judgment.

86 As is confirmed by paragraphs 70 to 72 of the judgment under appeal, in which the General Court found that the main function of the goods concerned is to be consumed in order to prevent or remedy medical problems in the broad sense of the term or to balance nutritional deficiencies, the goods described in paragraph 64 of that judgment by a reference back to their main function are exactly the same as those to which reference is made in paragraph 65 of that judgment.

87 Accordingly, there is no contradiction to be found between paragraphs 64 and 65 of the judgment under appeal in that regard.

88 So far as the second argument is concerned, it must be stated that after expressly approving, in paragraph 63 of the judgment under appeal, the definition of the relevant public as set out in paragraph 25 of the decision at issue, the General Court merely added, in paragraph 64 of that judgment, an observation as to the difference in the level of attention of that public according to whether the goods are those covered by the earlier trade mark or those covered by the mark applied for.

89 Besides the fact that this appears to be a ground included purely for the sake of completeness which cannot, according to settled case-law, lead to a judgment of the General Court being set aside (see, inter alia, judgment in *OHIM v Kessel medintim*, C-31/14 P, EU:C:2014:2436, paragraph 53), it does not contain any distortion of the terms of paragraph 25 of the decision at issue.

90 Since the Board of Appeal did not express its views as to the level of attention of the relevant public, it cannot be inferred that it implicitly decided that that level would necessarily be the same for the goods covered by the marks at issue.

91 In addition, there is no contradiction to be found between the statement that the relevant public at which the goods at issue are aimed is the same and the statement that that public's level of attention is different according to whether the goods are those covered by the mark applied for or those covered by the earlier trade mark.

92 It follows that the second limb of the third ground of appeal must be rejected as being in part ineffective and in part manifestly unfounded.

– The third limb of the third ground of appeal

93 By the third limb of its third ground of appeal, which limb is itself divided into six parts (*'parts one to six'*), Sunrider complains that the General Court erred in law in the examination and assessment of the factors and criteria governing the appraisal of the similarity of the goods concerned.

94 Part one seeks to criticise the judgment under appeal as regards the interpretation and application by the General Court of the term *'medical'*, as being that which characterises the main purpose of herbal nutritional supplements.

95 Since the arguments developed in support of this first part are in essence identical to those which have already been rejected in the context of the examination of the first ground of appeal, part one must — in so far as it also relates to assessments of an essentially factual nature by the General Court, and therefore, to assessments that are, as a general rule, not subject to review — also be rejected as manifestly inadmissible.

96 Part two concerns paragraph 90 of the judgment under appeal and, in particular, the General Court's statement that a likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009, can exist only if a *'large part'* of the manufacturers or distributors of the goods in question are the same.

97 According to the appellant, the General Court, having adopted that legally incorrect criterion, subsequently, in paragraphs 91 and 92 of the judgment under appeal, also incorrectly rejected Sunrider's arguments that the goods covered by the marks at issue have common manufacturers and distributors. Moreover, in so holding, the General Court, in the appellant's view, disregarded the rules of procedure in relation to the burden of proof and failed to provide sufficient reasons for its judgment.

98 By part three, Sunrider complains that the General Court used a legally incorrect criterion, in paragraph 92 of the judgment under appeal, in concluding that a partial identity of the manufacturers of the goods covered by the marks at issue is not sufficient to create a likelihood of confusion between those goods. In the context of the assessment of the identity of the manufacturers and distributors, the appellant claims that the only relevant criterion is that based on the similarity of the goods concerned.

99 The appellant claims that the General Court thus used a more demanding criterion, which did not take into account the similarity of the signs at issue in the assessment of the likelihood of confusion. Accordingly, the General Court did not take into account the principle of interdependence either, from which it ought to have

concluded that, in the light of the obvious similarity of the signs at issue, even a low degree of similarity of the goods covered by the marks at issue would be sufficient to create a likelihood of confusion.

100 As regards parts one to three, which it is appropriate to examine together, it is apparent, in the first place, from paragraph 29 of the decision at issue that, in the present case, the Board of Appeal found, first of all, that there were no indications that the manufacturers of the goods covered by the marks at issue were identical; next, it found that those goods required entirely different skill sets for their manufacture and sale; and, lastly, it found that, as a result, those goods were *'usually produced by different manufacturers'*.

101 As OHIM has stated, the criterion based on the usual commercial origin of the goods concerned is in essence the same as that accepted by the General Court at paragraph 90 of the judgment under appeal, and criticised by the appellant, that a *'large part'* of the manufacturers and distributors of the goods at issue are the same.

102 Such a criterion cannot be criticised since it is consistent with the principle, laid down in the settled case-law of the Court, that the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings constitutes a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 207/2009 ([see, inter alia, judgment in Isdin v Bial-Portela, C-597/12 P, EU:C:2013:672, paragraph 17 and the case-law cited](#)).

103 Accordingly, the criticism of the application of that criterion made in paragraphs 91 and 92 of the judgment under appeal, alleging that the criterion is legally incorrect, must also be rejected.

104 Moreover, the appellant cannot contend that the General Court applied a legally incorrect criterion in concluding, in paragraph 92 of the judgment under appeal, that there was no likelihood of confusion between the goods covered by the marks at issue.

105 Placed in its proper context, the conclusion reached by the General Court in paragraph 92 of the judgment under appeal must be understood as meaning that the absence of a likelihood of confusion stems from the fact that the goods are not similar.

106 In this connection, it must be recalled that the Board of Appeal found, in paragraph 36 of the decision at issue, that, since the goods covered by the marks at issue were different, there could not be a likelihood of confusion; accordingly, the opposition had to be rejected regardless of, inter alia, the degree of similarity of the signs at issue.

107 That approach cannot be criticised.

108 As the General Court stated in paragraph 59 of the judgment under appeal, a likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009, presupposes both that the marks at issue are identical or similar and that the goods or services which they cover are identical or similar. Those conditions are cumulative. Accordingly, the opposition is rejected regardless of the degree of similarity, or even the identity

of the signs at issue, if the goods which they cover are different.

109 Before the General Court, the only issue was the finding relating to the absence of similarity of the goods covered by the marks at issue. Accordingly, having rejected each of Sunrider's arguments criticising that finding, the General Court was entitled to confirm that there was no likelihood of confusion, and it did not need to take into account the similarity of the signs at issue or, therefore, the principle of interdependence relied on by the appellant.

110 It follows that parts one to three must be rejected as being manifestly unfounded.

111 By part four, Sunrider criticises paragraph 93 of the judgment under appeal, by which the General Court rejected as ineffective its argument directed against paragraph 29 of the decision at issue, in which the Board of Appeal stated that the goods covered by the marks at issue required entirely different skill sets for their manufacture and sale. According to the appellant, the ineffective nature of that argument contradicts the importance of paragraph 29 in the Board of Appeal's reasoning.

112 So far as part four is concerned, the criticism of paragraph 93 of the judgment under appeal made by the appellant must be rejected as inadmissible.

113 In that paragraph, the General Court held that, even if paragraph 29 of the decision at issue were to be regarded as being vitiated by error in so far as the Board of Appeal stated, in that paragraph, that the goods covered by the marks at issue required entirely different skill sets for their manufacture and sale, that circumstance was not sufficient, of itself, to justify annulment of that decision, since the absence of similarity of those goods was sufficiently established, having regard to the other differences between those goods that had been established correctly by the Board of Appeal. From this the General Court inferred that the argument relating to that statement had to be rejected as ineffective.

114 The General Court's assessment qualifying the importance of the statement as to the skill sets required for manufacturing or marketing the goods covered by the marks at issue cannot, in the light of all the findings set out in the decision at issue as regards the similarity of the goods, be called into question on appeal, since the General Court has exclusive jurisdiction to assess the evidence adduced before it, save where the clear sense of that evidence has been demonstrably distorted.

115 Accordingly, since the appellant has not demonstrated that the General Court distorted the clear sense of the evidence and, in particular, the decision at issue by relying on a manifestly incorrect assessment of them, its arguments must be rejected as inadmissible.

116 By part five, the appellant complains that the General Court found, in paragraph 83 of the judgment under appeal, that the goods covered by the marks at issue were not substitutable, without providing a specific statement of reasons to support that finding. It claims, in short, that the General Court relied mainly, if not exclusively, on only the criterion based on the purpose

of the goods covered by the marks at issue in order to establish that they were dissimilar whereas, according to the case-law, it ought to have taken into account all relevant factors.

117 Those arguments must be rejected as being manifestly unfounded.

118 According to settled case-law, in assessing the similarity of the goods or services concerned, all the relevant factors pertaining to the relationship between those goods or services is to be taken into account. Those factors include, in particular, their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary ([see, inter alia, judgment in Sunrider v OHIM, C-416/04 P, EU:C:2006:310, paragraph 85](#), and order in *OHIM v Sanco*, C-411/13 P, EU:C:2014:315, paragraph 39).

119 It must be stated that, in the decision at issue, the Board of Appeal examined the similarity of the goods covered by the marks at issue by taking into account a multitude of factors, including the nature, purpose and method of use of those goods, and whether they are in competition with each other or are complementary.

120 The General Court itself examined, before rejecting, the different arguments relied on by the appellant against that examination, as regards each of those factors.

121 It is not apparent that, in that context, certain relevant factors pertaining to the relationship between the goods covered by the marks at issue were not taken into account. Contrary to what the appellant states, it cannot, in any event, be claimed that the General Court examined the similarity of the goods solely in the light of the factor relating to the function or purpose of the goods concerned.

122 As regards, in particular, the factor relating to whether the goods are in competition with each other, the General Court did not infringe its obligation to state reasons by holding, in paragraph 83 of the judgment under appeal, that Sunrider's argument relating to that factor had to be rejected, since it was based on arguments that had already been examined and rejected at paragraphs 70 to 72 of that judgment.

123 Indeed, since the appellant did not contest the fact that the arguments in question were in essence the same, the General Court was entitled to confine itself to referring to the examination that had previously been made in the judgment under appeal.

124 Moreover, a difference between the goods covered by the marks at issue as to their main function is clearly relevant, even decisive, for the purposes of the examination of their substitutability and, therefore, of whether they are in competition with each other.

125 Lastly, the arguments developed by the appellant under part six cannot be accepted either.

126 It cannot be argued that the General Court failed to examine the nature of the goods under comparison.

127 It is apparent from paragraph 69 of the judgment under appeal that, in paragraphs 70 to 72 of that judgment, the General Court examined a series of arguments by which Sunrider claimed that the goods at

issue ought to be perceived as similar because of their nature, purpose and function.

128 In that context, the General Court, *inter alia*, examined certain arguments based specifically on the nature of the goods at issue and, in particular, on the fact that certain goods covered by the earlier trade mark are sold in liquid form or in the form of liquid concentrates that can be mixed with water, and it held that, although such goods may have ordinary nutritional functions, these are secondary in relation to the main function of the goods covered by the earlier trade mark.

129 Consequently, part six must be rejected as being manifestly unfounded.

130 In the light of all of the foregoing, the appeal must be dismissed.

Costs

131 Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings pursuant to Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since OHIM and Nannerl have applied for costs and Sunrider has been unsuccessful, Sunrider must be ordered to pay the costs relating to the present proceedings.

On those grounds, the Court (Ninth Chamber) hereby orders:

1. The appeal is dismissed.
 2. The Sunrider Corporation shall pay the costs.
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