

**Court of Justice EU, 17 February 2016, Shoe Branding Europe v OHIM**



**TRADEMARK LAW**

The General Court carried out a global assessment. To assess the degree of similarity between marks, it is necessary to determine the degree of visual, aural or conceptual similarity to between them.

- It should be borne in mind that, in order to assess the degree of similarity between the marks concerned, it is necessary to determine the degree of visual, aural or conceptual similarity between them and, where appropriate, to assess the importance to be attached to those various factors, account being taken of the category of goods or services in question and the circumstances in which they are marketed.

42. Accordingly, the appellant's argument to the effect that the General Court introduced the criterion of 'importance' must be rejected as unfounded.

**Once proof of the reputation of a mark has been made out, it is irrelevant to the prove the inherent distinctive character**

- Therefore, once proof of the reputation of a mark has been made out, it is irrelevant to prove the inherent distinctive character of that mark in order to obtain a finding that it has distinctive character.

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**Court of Justice EU, 17 February 2016**

(...)

ORDER OF THE COURT (Sixth Chamber)

17 February 2016 (\*)

(Appeal — Community trade mark — Regulation (EC) No 207/2009 — Article 65 — Position mark — Two parallel stripes on the side of a shoe — Opposition by the proprietor of Community and national figurative marks and international registration representing three parallel stripes applied to shoes and clothing — Opposition rejected)

In Case C-396/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 20 July 2015,

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

the other parties to the proceedings being:

adidas AG, established in Herzogenaurach (Germany), represented by I. Fowler, Solicitor, applicant at first instance, Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), defendant at first instance, THE COURT (Sixth Chamber), composed of A. Arabadjiev, President of the Chamber, S. Rodin (Rapporteur) and E. Regan, Judges, Advocate General: N. Wahl, Registrar: A. Calot Escobar, having regard to the decision taken, after hearing the Advocate General, to give a decision by reasoned order in accordance with Article 181 of the Rules of Procedure of the Court, makes the following

**Order**

1 By its appeal, Shoe Branding Europe BVBA ('Shoe Branding') seeks to have set aside the judgment of the General Court of the European Union of 21 May 2015 in adidas v OHIM — Shoe Branding Europe (Two parallel stripes on a shoe) (T-145/14, EU:T:2015:303) ('the judgment under appeal'), by which the General Court set aside the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 28 November 2013 (Case R 1208/2012-2) concerning opposition proceedings between adidas AG ('adidas') and Shoe Branding ('the contested decision').

**Legal context**

2 Article 65 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), entitled '*Actions before the Court of Justice*', provides:

- '1. Actions may be brought before the Court of Justice against decisions of the Boards of Appeal on appeals.*
- '2. The action may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation or of any rule of law relating to their application or misuse of power.*
- '3. The Court of Justice has jurisdiction to annul or to alter the contested decision.*
- '4. The action shall be open to any party to proceedings before the Board of Appeal adversely affected by its decision.*
- '5. The action shall be brought before the Court of Justice within two months of the date of notification of the decision of the Board of Appeal.*
- '6. The Office shall be required to take the necessary measures to comply with the judgment of the Court of Justice.'*

3 Article 8 of Regulation No 207/2009, entitled '*Relative grounds for refusal*', provides:

*'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.

...

5. Furthermore, upon opposition by the proprietor of an earlier trade mark within the meaning of paragraph 2, the trade mark applied for shall not be registered where it is identical with, or similar to, the earlier trade mark and is to be registered for goods or services which are not similar to those for which the earlier trade mark is registered, where, in the case of an earlier Community trade mark, the trade mark has a reputation in the Community and, in the case of an earlier national trade mark, the trade mark has a reputation in the Member State concerned and where the use without due cause of the trade mark applied for would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.'

#### **Background to the dispute**

4 The facts of the dispute were set out as follows by the General Court in paragraphs 1 to 11 of the judgment under appeal:

'1 On 1 July 2009, [Shoe Branding] filed an application for registration of a Community trade mark with [OHIM] pursuant to [Regulation No 207/2009].

2 The mark for which registration was sought, identified by [Shoe Branding] as an "other" mark, is depicted below:



...

4 The goods for which registration was sought are in Class 25 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the description "Footwear".

5 The Community trade mark application was published in Community Trade Marks Bulletin No 107/2010 of 14 June 2010.

6 On 13 September 2010, [adidas AG ('adidas')], filed a notice of opposition, pursuant to Article 41 of Regulation No 207/2009, to registration of the mark applied for in respect of all the goods referred to in the application for registration.

7 The opposition was based, inter alia, on the following earlier rights:

– the Community figurative mark, filed on 3 November 2003 and registered on 26 January 2006 ... That mark is reproduced below:



...

8 The grounds relied on in support of the opposition were those referred to in Article 8(1)(b) and Article 8(4) and (5) of Regulation No 207/2009.

9 By decision of 22 May 2012, the Opposition Division rejected the opposition.

10 On 2 July 2012, [adidas] filed an appeal with OHIM, pursuant to Articles 58 to 64 of Regulation No 207/2009, against the Opposition Division's decision.

11 By [the contested decision], the Second Board of Appeal of OHIM dismissed the appeal. First, the Board of Appeal rejected the opposition based on Article 8(1)(b) of Regulation No 207/2009. It took the view that the differences in the number of stripes and their respective positions on the shoe were sufficient to find that the signs at issue were, overall, dissimilar. It concluded that, even taking into account the reputation of some of the earlier marks, those differences were sufficient to preclude any likelihood of confusion in the mind of the reasonably well-informed and reasonably observant and circumspect public, even for identical goods and independently of the fact that the earlier signs, taking their extensive use into consideration, could be considered to have, at least, a normal degree of distinctiveness. Second, the Board of Appeal rejected the opposition filed pursuant to Article 8(5) of Regulation No 207/2009, on the ground that the relevant section of the public was unlikely to establish a link between the marks at issue, considering that their differences in the number of stripes and their positioning were determinant, whatever the reputation of the earlier marks may have been. ...'

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

5 By application lodged at the Registry of the General Court on 3 March 2014, adidas brought before that court an action seeking the annulment of the contested decision.

6 By the judgment under appeal, the General Court upheld the first and second pleas in law and accordingly annulled the contested decision.

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

7 By its appeal, Shoe Branding claims that the Court should:

- set aside the judgment under appeal;
- confirm the contested decision, and
- order adidas to pay the costs.

#### **The appeal**

8 Under Article 181 of its Rules of Procedure, where the appeal or cross-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, decide by reasoned order to dismiss that appeal or cross-appeal in whole or in part.

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

10 Shoe Branding relies on three grounds in support of its appeal.

**The first ground of appeal**

11 By its first ground of appeal, which is broken down into five parts, Shoe Branding submits that the General Court made an incorrect assessment of the average consumer criterion.

**The first to third parts of the first ground of appeal**

12 By the first part of the first ground of appeal, Shoe Branding criticises the General Court for having held, incorrectly, that the average consumer did not demonstrate a high level of attention. In its submission, the average consumer of sports footwear is informed, attentive, not easily fooled and well able to distinguish between different brands.

13 By the second part of the first ground of appeal, Shoe Branding criticises the General Court for having held, incorrectly, that sports footwear are everyday consumer goods. It takes the view that they are specialised goods in relation to which the average consumer is fully aware of the brand.

14 By the third part of the first ground of appeal, Shoe Branding criticises the General Court for having failed to take account of the fact that some parts of sports clothing serve an advertising or ‘billboard’ purpose.

15 According to settled case-law, findings relating to the characteristics of the relevant public and to consumers’ degree of attention, perception or attitude represent appraisals of fact (see, to that effect, judgment in [Henkel v OHIM, C-144/06 P, EU:C:2007:577](#), paragraph 51; and orders in *Longevity Health Products v OHIM*, C-84/10 P, EU:C:2010:628 paragraph 29, and *Big Line v Demon International*, C-170/14 P, EU:C:2014:2361, paragraph 42).

16 It should be observed that, in arguing that the average consumer of sports footwear displays a high level of attention, is aware of the brand affixed to a specialised goods item and pays particular attention to the advertising space such as the side of a shoe, the appellant is, in reality, disputing the General Court’s findings of fact, which falls outside the Court of Justice’s jurisdiction in hearing an appeal.

17 In the light of the foregoing, the first to third parts of the first ground of appeal must be rejected as manifestly inadmissible.

The fourth part of the first ground of appeal

18 By the fourth part of the first ground of appeal, Shoe Branding criticises the General Court for having held, incorrectly, that the average consumer of sports clothing could not distinguish between brands of sports items.

19 Thus, the General Court erred in holding that the average consumer is not observant and is not able to distinguish between different brands. The appellant, referring to the judgment in [Estée Lauder \(C-220/98, EU:C:2000:8\)](#), submits that the General Court’s

analysis is contrary to EU law, under which consumers are presumed to familiarise themselves with the quality and price of goods and make intelligent choices.

20 The appellant also refers to the judgment in [Gut Springenheide and Tusky \(C-210/96, EU:C:1998:369\)](#), arguing that advertising and, consequently, a brand frequently associated with an undertaking which constitutes a form of advertising can be held to be ‘misleading’ only if it is established that the decision to buy on the part of a significant number of consumers to whom the advertising in question was addressed was made as a result of their being misled. Evidence of a likelihood of confusion would be necessary for the General Court to so hold.

21 The appellant further argues that the General Court’s observation to the effect that the level of attention of the average consumer of sports clothing is low does not correspond to the reality on the sports clothing market. It is clear that, according to settled case-law, an appeal must indicate precisely the contested elements of the judgment or order which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (order in *Metropolis Inmobiliarias y Restauraciones v OHIM*, C-374/13 P, EU:C:2014:270, paragraph 50 and the case-law cited).

22 The appellant did not indicate on which paragraphs of the judgment in [Estée Lauder \(C-220/98, EU:C:2000:8\)](#) it was basing its arguments in support of the fourth part of the first ground of appeal, or the other legal arguments to support its assertion that consumers are presumed to familiarise themselves with the quality and price of goods and make intelligent choices.

23 Accordingly, the argument based on the judgment in [Estée Lauder \(C-220/98, EU:C:2000:8\)](#) must be rejected as manifestly inadmissible.

24 Moreover, for the sake of completeness, it should be noted that the General Court held, in paragraph 33 of the judgment under appeal, that since sports shoes are everyday consumer goods, the relevant public is made up of the average consumer, who is reasonably well informed and reasonably observant and circumspect, and whose degree of attention must be regarded as average when purchasing them.

25 The General Court did not hold that the average consumer was not observant.

26 It should, moreover, be borne in mind that, according to settled case-law, the existence of a likelihood of confusion on the part of the public must be appreciated globally, taking into account all factors relevant to the circumstances of the case. That global assessment, in relation to the visual, aural or conceptual similarity of the marks in question, as in the present case, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components (see order in *nfon v Fon Wireless and OHIM*, C-193/13 P, EU:C:2014:35, paragraph 36 and the case-law cited).

27 It follows from paragraphs 33 to 35, 39 to 41, 43 and 48 of the judgment under appeal that the General



Court carried out such a global assessment of the likelihood of confusion of the marks at issue. The appellant's argument to the effect that the General Court held that the average consumer is not able to distinguish between the different brands is, therefore, clearly unfounded. That finding is part of the assessment of the facts by the General Court which, according to the settled case-law of the Court of Justice referred to in paragraph 15 of the present order, cannot be the subject of an appeal, save where the facts and evidence submitted to the General Court are distorted.

28 Furthermore, the appellant's argument based on the judgment in [Gut Springenheide and Tusky \(C-210/96, EU:C:1998:369\)](#), to the effect that evidence of a likelihood of confusion is necessary in order for a mark to be held to be 'misleading', is based on a misreading of that judgment.

29 The Court found, in paragraph 37 of the judgment in [Gut Springenheide and Tusky \(C-210/96, EU:C:1998:369\)](#) that Community law does not preclude a national court, if it encounters particular difficulties in assessing the misleading nature of the indication in question, from making use, within the parameters established by national law, of market surveys or expert reports in order to deliver a more enlightened judgment.

30 There is therefore no requirement that evidence of a likelihood of confusion on the part of a significant number of consumers be adduced in order for a mark or other forms of advertising to be held to be 'misleading'.

31 This argument must therefore be dismissed as clearly unfounded.

32 With regards to the appellant's argument relating to the General Court's observation that the level of attention of the average consumer of sports clothing is low, suffice it to note that it did not indicate which paragraphs of the judgment under appeal it disagreed with or in any other manner substantiate its argument.

33 This argument must therefore be dismissed as manifestly inadmissible.

34 In the light of the foregoing, the fourth part of the first ground of appeal must be dismissed as in part manifestly inadmissible and in part manifestly unfounded.

#### **The fifth part of the first ground of appeal**

35 By the fifth part of the first ground of appeal, Shoe Branding submits that the General Court failed to take account of the evidence showing that the coexistence of the two marks at issue over several decades had not led to confusion on the part of the average consumer, which the Second Board of Appeal had allowed and taken into account in the contested decision.

36 As that argument was not put forward by the appellant before the General Court, it was accordingly not examined by the General Court in the judgment under appeal.

37 Accordingly, the appellant's argument must be rejected as clearly inadmissible.

38 In the light of the foregoing, the first ground of appeal relied on by the appellant in support of its

appeal must be rejected as partly inadmissible and as partly manifestly unfounded.

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

39 Under its second ground of appeal, which is broken down into three parts, Shoe Branding submits that the General Court made an incorrect assessment of the likelihood of confusion of the marks at issue, in that that likelihood must be assessed globally.

#### **The first part of the second ground of appeal**

40 By the first part of the second ground of appeal, Shoe Branding criticises the General Court for having introduced the criteria of 'importance', which is not part of the global assessment. In the alternative, the appellant argues that the General Court nevertheless made an error of assessment in concentrating its analysis on the one dominant component of the marks at issue. It relies in that regard on the judgment in [Lloyd Schuhfabrik Meyer \(C-342/97, EU:C:1999:323\)](#), in which the Court of Justice stated that the assessment may be based on dominant or distinctive components of the mark only if all the other components are negligible.

41 It should be borne in mind that, in order to assess the degree of similarity between the marks concerned, it is necessary to determine the degree of visual, aural or conceptual similarity between them and, where appropriate, to assess the importance to be attached to those various factors, account being taken of the category of goods or services in question and the circumstances in which they are marketed (see, to that effect, judgment in [Lloyd Schuhfabrik Meyer, C-342/97, EU:C:1999:323, paragraph 27](#)).

42 Accordingly, the appellant's argument to the effect that the General Court introduced the criterion of 'importance' must be rejected as unfounded.

43 The appellant's argument that the General Court incorrectly based its assessment on what it considered to be the dominant components, taking the view that the details other than the presence of the stripes were negligible, is based on a misreading of the judgment in [Lloyd Schuhfabrik Meyer \(C-342/97, EU:C:1999:323\)](#). In paragraph 25 of that judgment, this Court held that the global assessment of the likelihood of confusion had to be based on the overall impression created by them, bearing in mind, in particular, their distinctive and dominant components.

44 It follows that this argument must be rejected as clearly unfounded.

45 In the light of the foregoing, the first part of the second ground of appeal must be rejected as being manifestly unfounded.

The second part of the second ground of appeal

46 By the second part of the second ground of appeal, Shoe Branding submits that the General Court's analysis of the facts of the case was both self-contradictory and lacking foundation.

47 Thus, the General Court stated that the Board of Appeal also ought to have taken account of factors other than the number of bands and their positioning. The appellant submits that the General Court misinterpreted the contested decision, from which it is

apparent that other figurative components may be relevant. In support of its argument, the appellant refers to the following passage from paragraph 74 of the contested decision: *'[t]he differences mainly lie in the number of stripes and especially their positioning'*.

48 The appellant submits that the General Court contradicted itself by basing the judgment under appeal on the presence of the stripes alone, despite the fact that it admonished the Board of Appeal for seemingly not addressing other factors of the marks at issue.

49 First of all, it should be noted that, in paragraph 74 of the contested decision, referred to by the appellant, the words 'mainly' and 'especially' clearly relate not to the similarities between the two marks at issue, but to the differences between them. Thus, the appellant has not demonstrated that the Board of Appeal took account of other relevant figurative components.

50 Therefore, the argument to the effect that the General Court misinterpreted the contested decision must be rejected as clearly unfounded.

51 Secondly, as regards the argument to the effect that the General Court contradicted itself, that court found, in paragraph 37 of the judgment under appeal, that the Board of Appeal had not explained why the other elements of the stripe configuration, such as their shape, their size and their colour, did not constitute relevant factors. The General Court thus found that the contested decision lacked a proper statement of reasons.

52 Thirdly, in paragraph 44 of the judgment under appeal, the General Court held that the aspects relied on by the appellant and OHIM to show that the marks at issue are different in colour and length of stripes were not relevant because they were not referred to by the Board of Appeal in the contested decision. That court further held, in regards to the argument about the different length of the stripes resulting from the difference in angle, that that minor difference between the marks at issue would not be noticed by a consumer having an average level of attention and would not influence the overall impression produced by them on account of the presence of wide sloping stripes on the side of the shoe.

53 It follows that the General Court held that the Board of Appeal had not provided a proper statement of reasons for its findings on the similarity of the signs at issue and that it had not explained why it had not taken account of the differences highlighted by the appellant and OHIM.

54 The argument that the General Court contradicted itself must therefore be rejected as clearly unfounded.

55 In the light of the foregoing, the second part of the second ground of appeal must be dismissed as being in part manifestly inadmissible and in part manifestly unfounded.

#### **The third part of the second ground of appeal**

56 By the third part of the second ground of appeal, Shoe Branding criticises the General Court for having focused, incorrectly, on certain factors over others, rather than conducting an overall appraisal of the marks.

57 In support of its ground of appeal, the appellant states that, in the judgment in *OHIM v Shaker* (C-334/05 P, EU:C:2007:333), the Court set aside the General Court's judgment at issue on the ground that the latter court had failed to provide a proper statement of reasons for its decision to concentrate solely on a single dominant component of the mark, instead of conducting an overall assessment of the likelihood of confusion between the two marks at issue.

58 The appellant submits that, in focusing, in essence, on two components, namely the presence of stripes and the reputation of the earlier mark, the General Court considered that all the other components had not been dominant, thereby committing an error of law.

59 It should be observed in that regard that the General Court held, in paragraph 41 of the judgment under appeal, that the difference between two and three stripes placed on a shoe was not sufficient to affect the similarities arising from the configuration of the signs at issue and from their position on the side of the shoe. Next, in paragraph 44 of the judgment under appeal, it took account of the difference in the length of the stripes resulting from their angle and found that that difference did not influence the overall impression produced. Thus the General Court did conduct an overall assessment.

60 It follows that the third part of the second ground of appeal must be rejected as manifestly unfounded.

61 Consequently, the second ground of appeal put forward by the appellant must be rejected as being clearly unfounded.

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

62 By its third ground of appeal, which is broken down into two parts, Shoe Branding submits that the General Court demonstrated poor judicial conduct. In exceeding the limits of its jurisdiction and ignoring certain aspects of the Board of Appeal's analysis, the General Court acted in a biased manner in favour of adidas.

#### **The first part of the third ground of appeal**

63 By the first part of the third ground of appeal, Shoe Branding submits that the General Court exceeded the powers conferred on it by ruling in the place and stead of the Board of Appeal.

64 In support of its argument, the appellant argues that, in the judgment in [Estée Lauder \(C-220/98, EU:C:2000:8\)](#), this Court stated that it must restrict itself to interpreting EU law and providing guidance as to its application by the national court, but that it is for the latter ultimately to apply EU law. Although that judgment concerns the respective spheres of jurisdiction of the Court of Justice and the national courts, the appellant takes the view that similar attributions of jurisdiction must hold true for the relationship between the General Court and the Board of Appeal.

65 It should be noted at the outset that, in the field of Community marks, the Court of Justice's jurisdiction is provided for by Article 65 of Regulation No 207/2009, which repealed and replaced Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

66 As regards Article 63 of Regulation No 40/94, the wording of which is identical to Article 65 of Regulation No 207/2009, the Court of Justice has held that the General Court can carry out a full review of the legality of the decisions of OHIM's Boards of Appeal, if necessary examining whether those boards have made a correct legal classification of the facts of the dispute or whether their assessment of the facts submitted to them was flawed ([judgment in \*Les Éditions Albert René v OHIM\*, C-16/06 P, EU:C:2008:739, paragraph 39](#), and order in *Herhof v OHIM*, C-418/10 P, EU:C:2011:187, paragraph 48).

67 It follows that the General Court has jurisdiction to find and appraise the relevant facts and to assess the evidence submitted to it.

68 It is, moreover, apparent from the operative part of the judgment under appeal that the General Court did not rule in the place of the Board of Appeal, but only annulled the contested decision.

69 In the light of the foregoing, the first part of the second ground of appeal must be rejected as being manifestly unfounded.

#### **The second part of the third ground of appeal**

70 By the second part of the third ground of appeal, Shoe Branding submits that the General Court misrepresented certain parts of the contested decision in order to strengthen its position in favour of adidas.

71 Thus, the General Court failed to take account of the Board of Appeal's analysis of the distinctiveness of the mark sought to be registered. In the appellant's submission, the Board of Appeal stated that although adidas' reputation causes it to enjoy stronger protection, the fact that its trade mark is so non-distinctive also causes it to enjoy much weaker protection. In so doing, the Board of Appeal made a strong argument against adidas' reputation being a significant factor in determining the likelihood of confusion. The General Court, by contrast, attached great importance to the fact that adidas enjoyed a considerable reputation.

72 In support of its argument the appellant refers to the following from paragraphs 62 and 63 of the contested decision:

*'Whereas a company is certainly free to choose a trade mark with a low or even non-distinctive character and use it on the market, it must accept, however, in so doing, that competitors are equally entitled to use marks with similar or identical non-distinctive components.... The "interdependence principle" cannot only be applied in one direction. It must be applied both ways. This implies that the scope of protection of trade marks with a weak distinctive character is weaker, correspondingly.'*

73 Since the paragraphs referred to by the appellant are found in the chapter of the contested decision entitled *'The inherent distinctive character of the earlier marks'*, the appellant is arguing, in essence, that the General Court failed to take account of that part of the analysis relating to the inherent distinctive character of the earlier mark.

74 It should be borne in mind in that regard that marks with a highly distinctive character, either per se, or because of their reputation on the market, enjoy broader protection than those with a less distinctive character. The distinctive character of the earlier trade mark and, in particular, its reputation, must therefore be taken into account in the assessment of whether there exists a likelihood of confusion (judgment in *Ferrero Deutschland v OHIM*, C-108/07 P, EU:C:2008:234, paragraphs 32 and 33, and the case-law cited).

75 Therefore, once proof of the reputation of a mark has been made out, it is irrelevant to prove the inherent distinctive character of that mark in order to obtain a finding that it has distinctive character (see, to that effect, judgment in *L & D v OHIM*, C-488/06 P, EU:C:2008:420, paragraphs 65 and 67).

76 Given that the General Court — correctly — took into account, in paragraph 47 of the judgment under appeal, the Board of Appeal's analysis finding that proof of the reputation of the earlier mark had been made out, the issue whether or not it took into account that part of the analysis concerning its inherent distinctive character became irrelevant.

77 It follows that the second part of the third ground of appeal must be dismissed as manifestly unfounded.

78 Consequently, the third ground of appeal put forward by the appellant must be rejected as being clearly unfounded.

79 In the light of all the foregoing considerations, the appeal must be dismissed in its entirety as being, in part, manifestly inadmissible and, in part, manifestly unfounded.

#### **Costs**

80 Under Article 137 of the Rules of Procedure, which is applicable to the procedure on appeal pursuant to Article 184(1) thereof, a decision as to costs is to be given in the order which closes the proceedings.

81 As the present order has been adopted prior to notification of the appeal to the applicant at first instance and, therefore, before the latter has incurred costs, it is appropriate to decide that Shoe Branding must bear its own costs.

#### **On those grounds, the Court (Sixth Chamber) hereby orders:**

1. The appeal is dismissed.
2. Shoe Branding Europe BVBA shall bear its own costs.

[Signatures]