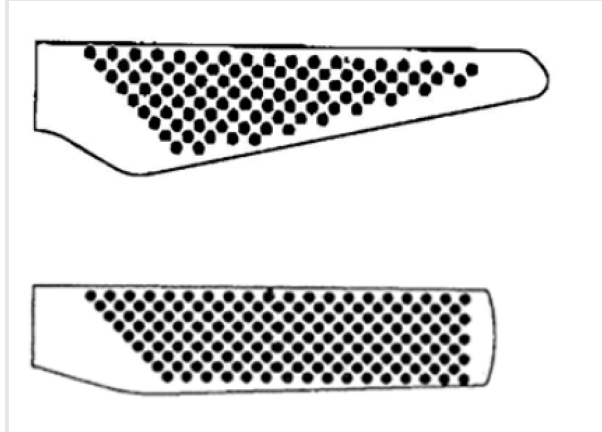


Court of Justice EU, 11 May 2017, Yoshida v EUIPO



## TRADEMARK LAW

**Ornamental and fanciful aspects do not preclude the ground for refusal under article 7(1)(e)(ii) of EU Trade Mark Regulation (exclusively the shape of goods that is necessary to obtain a technical result)**

- in so far as those aspects do not play an important role in the shape of goods at issue, all the essential characteristics of which must perform a technical function

As regards the condition relating to the fact that the ground for refusal covers any sign consisting 'exclusively' of the shape of goods which is necessary to obtain a technical result, the Court has held that the presence of one or more minor arbitrary elements in a sign, all of whose essential characteristics are dictated by the technical solution to which that sign gives effect, does not alter the conclusion that the sign consists exclusively of the shape of goods which is necessary to obtain a technical result. In addition, the ground for refusal under Article 7(1)(e)(ii) of Regulation No 40/94 is applicable only where all the essential characteristics of the sign are functional, with the result that such a sign cannot be refused registration as a trade mark under that provision if the shape of the goods at issue incorporates a major non-functional element, such as a decorative or imaginative element which plays an important role in the shape (see, to that effect, judgment of 14 September 2010, Lego Juris v OHIM, C-48/09 P, EU:C:2010:516, paragraph 52).

**Distinctiveness of a mark cannot preclude the application of the refusal ground of article 7(1)(e)(ii) of EU Trade Mark Regulation**

Moreover, the legislature has laid down with particular strictness that shapes necessary to obtain a technical result are unsuitable for registration as trade marks, since it has excluded the grounds for refusal listed in Article 7(1)(e) of Regulation No 40/94 from the scope of the exception under Article 7(3) of that regulation.

- It thus follows from Article 7(3) of the regulation that, even if a shape of goods which is necessary to obtain a technical result has become distinctive in

consequence of the use which has been made of it, it is prohibited from being registered as a trade mark (judgment of 14 September 2010, Lego Juris v OHIM, C-48/09 P, EU:C:2010:516, paragraph 47).

Source: [curia.europa.eu](http://curia.europa.eu)

**Court of Justice EU, 31 March 2010**

(J.L. da Cruz Vilaça, M. Berger, A. Borg Barthet, F. Biltgen and K. Jürimäe)

JUDGMENT OF THE COURT (Fifth Chamber)

11 May 2017 (\*)

(Appeal — EU trade mark — Registration of signs consisting of a surface with black dots — Declaration of invalidity — Regulation (EC) No 40/94 — Article 7(1)(e)(ii) — Article 51(3))

In Case C-421/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 29 July 2015,

Yoshida Metal Industry Co. Ltd, established in Tsubame-shi (Japan), represented by J. Cohen, Solicitor, T. St Quintin, Barrister, and G. Hobbs QC, appellant,

the other parties to the proceedings being:

European Union Intellectual Property Office (EUIPO), represented by A. Folliard-Monguiral, D. Gaja and J. Crespo Carrillo, acting as Agents,

defendant at first instance,

Pi-Design AG, established in Triengen (Switzerland),

Bodum France SAS, established in Neuilly sur Seine (France),

Bodum Logistics A/S, established in Billund (Denmark), represented by H. Pernez, avocate, and by R. Löhr, Rechtsanwalt,

interveners at first instance,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, M. Berger, A. Borg Barthet, F. Biltgen and K. Jürimäe, Judges,

Advocate General: M. Szpunar,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 29 September 2016,

after hearing the Opinion of the Advocate General at the sitting on 8 December 2016,

gives the following

### Judgment

1. By its appeal, Yoshida Metal Industry Co. Ltd ('Yoshida') seeks to have set aside the judgment of the General Court of the European Union of 21 May 2015, *Yoshida Metal Industry v OHIM* (T-331/10 RENV and T-416/10 RENV, not published, 'the judgment under appeal', EU:T:2015:302), by which that court dismissed its actions for annulment of the decisions of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 20 May 2010 (Cases R 1235/2008-1 and R 1237/2008-1; 'the decisions at issue') relating to invalidity proceedings brought by Pi-Design AG, Bodum France SAS and Bodum Logistics A/S (together, 'Pi-Design and

Others’) concerning two EU trade marks registered by Yoshida.

### Legal context

2. Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) was repealed and replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), which entered into force on 13 April 2009. However, in view of the time at which the events occurred, the present dispute continues to be governed by Regulation No 40/94, at least as regards provisions which are not strictly procedural ([judgment of 6 March 2014, Pi-Design and Others v Yoshida Metal Industry](#), C-337/12 P to C-340/12 P, not published, EU:C:2014:129, paragraph 2).

3. Article 7 of Regulation No 40/94, entitled ‘Absolute grounds for refusal’, provided:

‘1. The following shall not be registered:

...  
(b) trade marks which are devoid of any distinctive character;

...  
(e) signs which consist exclusively of:

...  
(ii) the shape of goods which is necessary to obtain a technical result;

...  
3. Paragraph 1(b), (c) and (d) shall not apply if the trade mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it.’

4. Article 51 of that regulation, entitled ‘Absolute grounds for invalidity’, stated:

‘1. A [n EU] trade mark shall be declared invalid on application to [EUIPO] or on the basis of a counterclaim in infringement proceedings:

(a) where the [EU] trade mark has been registered contrary to the provisions of Article 7;

...  
3. Where the ground for invalidity exists in respect of only some of the goods or services for which the [EU] trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.’

### Background to the dispute and the decisions at issue

5. The facts behind the dispute are set out in paragraphs 1 to 15 of the judgment under appeal as follows:

‘1. On 3 and 5 November 1999, [Yoshida] filed applications for registration of [EU] trade marks with [EUIPO, pursuant to Regulation No 40/94].

2. The trade marks for which registration was sought are the signs reproduced below:

3. The goods in respect of which registration was sought are in Classes 8 and 21 of the Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, as revised and amended (“the Nice Agreement”), and correspond to the following description:

– Class 8: “Cutlery, scissors, knives, forks, spoons, whetstones, whetstone holders, knife steels, fish bone tweezers”;

– Class 21: “Household or kitchen utensils and containers (not of precious metal or coated therewith), turners, spatulas for kitchen use, knife blocks for holding knives, tart scoops, pie scoops”.

4. By decisions of 14 September and 23 November 2000, the examiner rejected those applications for registration on the ground that the signs at issue were devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94 ...

5. Following the annulment of 31 October 2001 by the Second Board of Appeal of [EUIPO] of one of the abovementioned rejection decisions, the examiner on 11 July 2002 withdrew the objection concerning the other application for registration. The trade marks at issue were registered on 25 September 2002 and 16 April 2003.

6. On 10 July 2007, [Pi-Design and Others] applied for those trade marks to be declared invalid pursuant to Article 51(1)(a) of Regulation No 40/94 ..., on the ground that they had been registered in breach of Article 7(1)(e)(ii) of that regulation ... In their observations of 17 December 2007, [they] added that the registration should also be declared invalid on the ground that the trade marks lacked distinctive character.

7. By decisions of 15 and 21 July 2008, the Cancellation Division of [EUIPO] rejected, in their entirety, the applications for a declaration of invalidity.

8. On 25 August 2008, [Pi-Design and Others] filed a notice of appeal against each of those decisions of the Cancellation Division.

9. By [the decisions at issue], the First Board of Appeal of [EUIPO], on the basis of the absolute ground for refusal set out in Article 7(1)(e)(ii) of Regulation No [40/94], upheld the appeals and annulled the decisions of the Cancellation Division.

10. In paragraphs 24 to 28 of the [decisions at issue], the Board of Appeal observed, first, that, at the time the applications for registration were filed, the signs were simply classified as “figurative”, and no description was provided. Following the objections raised by the examiner, the applicant stated that the sign was a two-dimensional representation of the “shape of a product”, namely, the handle of a knife (Case R 1235/2008-1), or that it represented the “design of knife handles” (Case R 1237/2008-1). In correspondence subsequent to the application for a declaration of invalidity filed by [Pi-Design and Others], the sign was, however, described by the applicant as “an arbitrary geometrical figure” or a “pattern of dots” (Case R 1235/2008-1).

11. According to the Board of Appeal, that latter description was made with the specific aim of avoiding the application of Article 7(1)(e)(ii) of Regulation No [40/94], the photographs of the knives marketed by the proprietor confirming that the frame surrounding the black dots represented the contour of a knife handle and that those dots represented dents.

12. The Board of Appeal stated in that context, in paragraph 29 of the [decisions at issue], that “a trade mark must be examined in accordance with the circumstances of the case. Among these circumstances are, of course, the information and the documents voluntarily submitted by the trade mark owner in support of its application.”

13. Next, in paragraphs 30 and 31 of the [decisions at issue], the Board of Appeal stated that “the sign is a figurative mark consisting of the two-dimensional representation of the handle of the products for which registration is sought”. Nevertheless, according to the Board of Appeal, the classification of a mark as figurative did not always rule out the application of Article 7(1)(e)(ii) of Regulation No 40/94.

14. Last, in paragraphs 33 to 41 of the [decisions at issue], the Board of Appeal considered whether the black dots representing dents performed a technical function. Based on the information relating to existing patents, it concluded that the dents were necessary to obtain a non-skid effect and that the fact that the same result could be obtained by other shapes did not preclude the applicability of the ground for refusal in question from applying.

15. Having declared the registrations invalid on the basis of Article 7(1)(e)(ii) of Regulation No 40/94, the Board of Appeal did not consider it necessary to rule on the other ground for invalidity relied on by [Pi-Design and Others], the admissibility of which was disputed by the applicant.’

#### **The proceedings before the General Court and Court of Justice and the judgment under appeal**

6. By applications lodged at the Registry of the General Court on 12 August and 15 September 2010, Yoshida brought actions for annulment in respect of each of the decisions at issue. In support of its actions, Yoshida relied on a single plea in law, alleging breach of Article 7(1)(e)(ii) of Regulation No 40/94. That plea was broken down into three parts, the first alleging that the scope of that provision had been misinterpreted; the second, that the subject matter of the trade marks at issue had been incorrectly assessed; and the third, that the ground for refusal in question had been misapplied.

7. By its judgments of 8 May 2012, Yoshida Metal Industry v OHIM — Pi-Design and Others (Representation of a triangular surface with black dots) (T-331/10, not published, EU:T:2012:220), and Yoshida Metal Industry v OHIM — Pi-Design and Others (Representation of a surface with black dots) (T-416/10, not published, EU:T:2012:222) (‘the judgments of 8 May 2012’), the General Court upheld the second part of the single plea in law relied on by Yoshida and annulled the decisions at issue.

8. By applications lodged at the Registry of the Court of Justice on 16 July 2012, Pi-Design and Others brought appeals by which they asked the Court to set aside the judgments of 8 May 2012, to declare that the trade marks at issue were invalid, to refer the cases back to the General Court with the obligation to refer the case back to the Board of Appeal of EUIPO in the event of annulment of the latter’s decisions, and to

order Yoshida to pay the costs. In support of their appeals, Pi-Design and Others put forward a single ground of appeal, alleging infringement of Article 7(1)(e)(ii) of Regulation No 40/94.

9. By applications lodged at the Registry of the Court of Justice on 16 July 2012, EUIPO brought appeals by which it asked the Court to set aside the judgments of 8 May 2012 and to order Yoshida to pay the costs. EUIPO put forward two grounds in support of its appeals, alleging, first, breach by the General Court of its obligation to state reasons and, second, as also alleged by Pi-Design and Others, infringement of Article 7(1)(e)(ii) of Regulation No 40/94.

10. By [judgment of 6 March 2014, Pi-Design and Others v Yoshida Metal Industry](#) (C-337/12 P to C-340/12 P, not published, EU:C:2014:129), the Court set aside the judgments of 8 May 2012, referred the cases back to the General Court and reserved the costs.

11. By the judgment under appeal, the General Court rejected the single plea raised by Yoshida and, consequently, dismissed its actions in their entirety.

#### **Forms of order sought by the parties**

12. Yoshida claims that the Court should:

- set aside the judgment under appeal and annul the decisions at issue;

- in the alternative, set aside the judgment under appeal and annul the decisions at issue in so far as they concern the following goods for which the EU trade marks at issue were registered, namely, in Class 8 of the Nice Agreement, whetstones and whetstone holders and, in Class 21 of the Nice Agreement, household or kitchen utensils and containers (not of precious metal or coated therewith) and knife blocks for holding knives, and,

- in any event, order EUIPO and Pi-Design and Others to pay the costs, including those reserved by the [judgment of 6 March 2014, Pi-Design and Others v Yoshida Metal Industry](#) (C-337/12 P to C-340/12 P, not published, EU:C:2014:129).

13. EUIPO contends that the Court should dismiss the appeal and order Yoshida to pay the costs.

14. Pi-Design and Others request the Court to dismiss the appeal and order Yoshida to pay the costs.

#### **The appeal**

15. In support of its appeal, Yoshida raises two grounds.

#### **The first ground of appeal, alleging infringement of Article 7(1)(e)(ii) of Regulation No 40/94**

##### **Arguments of the parties**

16. By its first ground of appeal, which is its principal claim, Yoshida criticises the General Court for having contravened Article 7(1)(e)(ii) of Regulation No 40/94, first, in holding, in paragraph 39 of the judgment under appeal, that that provision ‘applies to any sign, whether two- or three-dimensional, where all the essential characteristics of the sign perform a technical function’.

17. In that regard, Yoshida argues that the General Court adopted an approach contrary to the case-law of the Court of Justice ([judgment of 14 September 2010, Lego Juris v OHIM](#), C-48/09 P, EU:C:2010:516, paragraphs 48, 52 and 72), according to which (i)



Article 7(1)(e)(ii) of Regulation No 40/94 does not prevent registration of a sign as a trade mark solely on the ground that it has functional characteristics and (ii) the words ‘exclusively’ and ‘necessary’ used in that provision serve to restrict the scope of application of Article 7(1)(e)(ii) more narrowly to signs which are solely shapes of goods which only incorporate a technical solution.

18. Second, Yoshida argues that the General Court was wrong to consider, in paragraphs 64 and 65 of the judgment under appeal, that, for it to be possible to register the signs at issue, the array of black dots had to be ‘a major non-functional element’ of those signs and those signs had to have a ‘clear ornamental character’. According to Yoshida, Article 7(1)(e)(ii) of Regulation No 40/94 does not prevent the registration of ‘hybrid’ signs comprising visually significant decorative design elements which do not only incorporate a technical solution but which also perform a distinguishing function. Such is the case with the signs at issue.

19. Third, Yoshida argues that the General Court’s statement, in paragraph 65 of the judgment under appeal, that the registration of the signs at issue ‘would improperly reduce the possibilities for competitors to bring to the market alternative product shapes incorporating the same non-skid technical solution’ disregards the presence of the decorative design elements which perform a distinguishing function.

20. EUIPO and Pi-Design and Others contend that Yoshida’s line of argument must be rejected.

#### **Findings of the Court**

21. In the first place, in so far as Yoshida argues that the signs at issue constitute ‘hybrid signs’, it seeks to call into question the factual findings made by the General Court following the examination of the relevant evidence, in particular in paragraphs 46 to 50 and 63 to 65 of the judgment under appeal, relating to the essential characteristics of the signs at issue.

22. However, under Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal is limited to points of law. The General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts or evidence have been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal ([judgment of 26 October 2016, Westermann Lernspielverlage v EUIPO](#), C-482/15 P, EU:C:2016:805, paragraph 35).

23. In that regard, given the exceptional nature of a complaint of distortion, both the provisions referred to and Article 168(1)(d) of the Rules of Procedure of the Court of Justice require, in particular, that an appellant indicate precisely the elements alleged to have been distorted by the General Court and show the errors of appraisal which, in its view, led to that distortion. Such a distortion must be obvious from the documents in the file, without there being any need to carry out a new assessment of the facts and the evidence (see, to that effect, [judgment of 20 October 2011, PepsiCo v](#)

[Grupo Promer Mon Graphic](#), C-281/10 P, EU:C:2011:679, paragraphs 78 and 79).

24. In the present case, Yoshida, which limits itself, in essence, to stating that the signs at issue contain significant decorative and distinctive elements, does not support its argument with elements from the file that are capable of clearly establishing that the General Court distorted the facts and evidence in not reaching the conclusion that the specific configuration of the array of black dots had a sufficiently significant ornamental character for them to be considered an essential non-functional element of the signs at issue.

25. In the second place, to the extent that Yoshida argues that it is apparent from paragraphs 39, 64 and 65 of the judgment under appeal that the assessment made by the General Court for the purposes of the application of Article 7(1)(e)(ii) of Regulation No 40/94 is contrary to the case-law arising from the [judgment of the Court of Justice of 14 September 2010, Lego Juris v OHIM](#) (C-48/09 P, EU:C:2010:516), its criticisms stem from a selective reading of that judgment.

26. It follows from that judgment that, by restricting the ground for refusal set out in Article 7(1)(e)(ii) of Regulation No 40/94 to signs which consist ‘exclusively’ of the shape of goods which is ‘necessary’ to obtain a technical result, the legislature duly took into account that any shape of goods is, to a certain extent, functional and that it would therefore be inappropriate to refuse to register a shape of goods as a trade mark solely on the ground that it has functional characteristics. By the terms ‘exclusively’ and ‘necessary’, that provision ensures that solely shapes of goods which only incorporate a technical solution, and whose registration as a trade mark would therefore actually impede the use of that technical solution by other undertakings, are not to be registered. Such a registration would unduly impair the opportunity for competitors to place on the market goods whose shapes incorporate the same technical solution ([judgment of 14 September 2010, Lego Juris v OHIM](#), C-48/09 P, EU:C:2010:516, paragraphs 48 and 59).

27. As regards the condition relating to the fact that the ground for refusal covers any sign consisting ‘exclusively’ of the shape of goods which is necessary to obtain a technical result, the Court has held that the presence of one or more minor arbitrary elements in a sign, all of whose essential characteristics are dictated by the technical solution to which that sign gives effect, does not alter the conclusion that the sign consists exclusively of the shape of goods which is necessary to obtain a technical result. In addition, the ground for refusal under Article 7(1)(e)(ii) of Regulation No 40/94 is applicable only where all the essential characteristics of the sign are functional, with the result that such a sign cannot be refused registration as a trade mark under that provision if the shape of the goods at issue incorporates a major non-functional element, such as a decorative or imaginative element which plays an important role in the shape (see, to that effect, [judgment of 14 September 2010, Lego Juris v OHIM](#), C-48/09 P, EU:C:2010:516, paragraph 52).

28. As regards the condition that registration of a shape of goods as a trade mark may be refused under Article 7(1)(e)(ii) of Regulation No 40/94 only if the shape is 'necessary' to obtain the technical result intended, that condition does not mean that the shape at issue must be the only one capable of obtaining that result ([judgment of 14 September 2010, \*Lego Juris v OHIM\*](#), C-48/09 P, EU:C:2010:516, paragraph 53).

29. The Court has also held that the correct application of Article 7(1)(e)(ii) of Regulation No 40/94 requires that the essential characteristics of the sign at issue — that is, the most important elements of the sign — be properly identified by the authority deciding on the application for registration of the sign as a trade mark. Once the sign's essential characteristics have been identified, the competent authority has to ascertain whether they all perform the technical function of the goods at issue (see, to that effect, [judgment of 14 September 2010, \*Lego Juris v OHIM\*](#), C-48/09 P, EU:C:2010:516, paragraphs 68, 69 and 72).

30. Contrary to what Yoshida claims, it follows from those considerations that the fact that the sign concerned has ornamental and fanciful aspects does not preclude the ground for refusal under Article 7(1)(e)(ii) of Regulation No 40/94 from applying, in so far as those aspects do not play an important role in the shape of goods at issue, all the essential characteristics of which must perform a technical function.

31. Accordingly, the General Court was right to conclude, in paragraph 39 of the judgment under appeal, that Article 7(1)(e)(ii) of Regulation No 40/94 applies where all the essential characteristics of the sign perform a technical function. Similarly, the General Court's assessment, in paragraphs 64 and 65 of the judgment under appeal — essentially intended to ascertain whether the specific configuration of the array of block dots constituted a major non-functional element of the signs at issue — correctly reflects the position of the Court of Justice recalled in paragraphs 26 to 28 of the present judgment.

32. In the third place, in so far as Yoshida maintains that the distinctiveness of the signs at issue precludes the application of Article 7(1)(e)(ii) of Regulation No 40/94, it wrongly confuses the specific ground for refusal of registration set out in that provision and the ground provided for in Article 7(1)(b) of that regulation, according to which trade marks which are devoid of any distinctive character are not to be registered.

33. In that regard, it should be noted that the inclusion in Article 7(1) of Regulation No 40/94 of the prohibition of registration as a trade mark of any sign consisting of the shape of goods which is necessary to obtain a technical result ensures that undertakings may not use trade mark law in order to perpetuate, indefinitely, exclusive rights relating to technical solutions ([judgment of 14 September 2010, \*Lego Juris v OHIM\*](#), C-48/09 P, EU:C:2010:516, paragraph 45).

34. Moreover, the legislature has laid down with particular strictness that shapes necessary to obtain a

technical result are unsuitable for registration as trade marks, since it has excluded the grounds for refusal listed in Article 7(1)(e) of Regulation No 40/94 from the scope of the exception under Article 7(3) of that regulation. It thus follows from Article 7(3) of the regulation that, even if a shape of goods which is necessary to obtain a technical result has become distinctive in consequence of the use which has been made of it, it is prohibited from being registered as a trade mark ([judgment of 14 September 2010, \*Lego Juris v OHIM\*](#), C-48/09 P, EU:C:2010:516, paragraph 47).

35. Consequently, Article 7(1)(e)(ii) of Regulation No 40/94 constitutes an obstacle that may prevent a sign consisting exclusively of the shape of goods which is necessary to obtain a technical result from being registered as a trade mark, even though that sign is capable of performing the essential function of a trade mark, that of guaranteeing the identity of the origin of the goods or services in question to the consumer by enabling him, without any possibility of confusion, to distinguish those goods or services from others which have another origin (see, to that effect, [judgments of 15 September 2005, \*BioID v OHIM\*](#), C-37/03 P, EU:C:2005:547, paragraph 60, and of 16 September 2015, [Société des Produits Nestlé](#), C-215/14, EU:C:2015:604, paragraph 38).

36. Consequently, the first ground of appeal must be rejected as partly inadmissible and partly unfounded.

#### **The second ground of appeal, alleging infringement of Article 51(3) of Regulation No 40/94**

##### **Arguments of the parties**

37. By its second ground of appeal, raised in the alternative, Yoshida complains that the General Court contravened Article 51(3) of Regulation No 40/94 in that it failed to examine, as is apparent from paragraphs 48 and 53 of the judgment under appeal, whether the conditions for the application of Article 7(1)(e)(ii) of that regulation were fulfilled in relation to each of the goods for which the signs at issue had been registered.

38. In addition, Yoshida submits that the General Court could not satisfy the requirement laid down in Article 51(3) of Regulation No 40/94 by applying the findings made in the judgment under appeal to the goods at issue which lacked handles, namely, in Class 8 of the Nice Agreement, whetstones, whetstone holders and, in Class 21 of the Nice Agreement, household or kitchen utensils and containers (not of precious metal or coated therewith) and knife blocks for holding knives. According to Yoshida, so far as those goods are concerned, Article 7(1)(e)(ii) of Regulation No 40/94 is not applicable, as the signs at issue constitute two-dimensional marks that may be used as logos.

39. EUIPO and Pi-Design and Others argue that that ground cannot be upheld.

##### **Findings of the Court**

40. It is apparent from the decisions at issue that the First Board of Appeal of EUIPO concluded that the signs at issue were figurative marks consisting of the two-dimensional representation of the handle of the goods for which registration had been sought.

41. It can also be seen from the decisions at issue that that Board of Appeal of EUIPO declared the registrations of the signs at issue as EU trade marks invalid on the basis of Article 7(1)(e)(ii) of Regulation No 40/94 with regard to all the goods for which those signs had been registered.

42. However, the analysis of the file submitted to the Court shows that Yoshida did not, at any stage of the proceedings before the General Court, invoke the incompatibility of the decisions at issue with Article 51(3) of Regulation No 40/94.

43. Yoshida limited itself to arguing, under its single plea raised at first instance alleging infringement of Article 7(1)(e)(ii) of Regulation No 40/94, that the signs at issue represented a simple decorative pattern with no functional value, which was why they could not be considered to consist exclusively of the shape of goods which is necessary to obtain a technical result within the meaning of that provision.

44. In that regard, the examination of the file before the Court reveals that, while Yoshida argued at first instance that the registrations of the signs at issue covered various goods in Classes 8 and 21 of the Nice Agreement, it did so for the sole purpose of disputing in a general manner the applicability of Article 7(1)(e)(ii) of Regulation No 40/94 to the signs at issue.

45. However, by its second ground of appeal, Yoshida essentially criticises the General Court for not having reviewed the legality of the decisions at issue in the light of Article 51(3) of Regulation No 40/94, and claims that the conditions of application set by Article 7(1)(e)(ii) of that regulation are not met as regards certain specific goods allegedly lacking handles.

46. According to the settled case-law of the Court of Justice, to allow a party to put forward for the first time before the Court of Justice pleas and arguments which it did not raise before the General Court would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the jurisdiction of the Court of Justice is thus confined to a review of the assessment of the General Court of the pleas and arguments debated before it (see, in particular, judgment of 8 November 2016, BSH v EUIPO, C-43/15 P, EU:C:2016:837, paragraph 43 and the case-law cited).

47. In those circumstances, the second ground of appeal must be rejected as inadmissible.

48. It follows from all of the foregoing that the appeal must be dismissed in its entirety.

#### **Costs**

49. Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded the Court is to make a decision as to costs.

50. Under Article 138(1) of those rules, which applies to appeal proceedings by virtue of 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 EUIPO and Pi-Design and Others have applied for costs to be awarded against

Yoshida and Yoshida has been unsuccessful, it must be ordered to pay the costs of the appeal proceedings.

On those grounds, the Court (Fifth Chamber) hereby:

1. Dismisses the appeal;
2. Orders Yoshida Metal Industry Co. Ltd to pay the costs

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#### **Opinion of A-G Szpunar**

delivered on 8 December 2016 (1)

Case C-421/15 P

Yoshida Metal Industry Co. Ltd

v

European Union Intellectual Property Office (EUIPO)  
(Appeal — EU trade mark — Regulation (EC) No 207/2009 — Ground for refusal or invalidity of the registration — Signs which consist exclusively of the shape of goods which is necessary to obtain a technical result — Article 7(1)(e)(ii) — Examination of the ground for refusal or invalidity in respect of a group of goods or services — Article 52(3) — Reasons stated for the decision of a Board of Appeal of EUIPO — General reasons stated for all the goods or services concerned — New ground at the appeal stage — Inadmissibility)

#### **Introduction**

1. By the present appeal, Yoshida Metal Industry Co. Ltd ('Yoshida') seeks to have set aside the judgment of the General Court of the European Union of 21 May 2015, *Yoshida Metal Industry v EUIPO*, (2) by which that court dismissed its action seeking annulment of the decisions of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) relating to invalidity proceedings between, on one hand, Pi-Design AG, Bodum France and Bodum Logistics A/S ('Pi-Design and Others') and, on the other hand, Yoshida. (3)

2. The judgment under appeal, delivered after the General Court's decision had been set aside and the case referred back to that court, (4) confirms the invalidity of the two figurative marks registered by Yoshida.

3. In addition to the issue of whether the General Court complied with the judgment delivered on the first appeal, the new appeal brought by Yoshida raises a further aspect concerning the existence of the ground for invalidity relied on in respect of all of the goods concerned, and the adequacy of the statement of reasons in the decisions at issue and in the judgment under appeal on that point. (5)

#### **Legal context**

4. Under Article 7(1)(e)(ii) of Regulation (EC) No 207/2009, (6) signs which consist exclusively of 'the shape of goods which is necessary to obtain a technical result' are not to be registered.

5. Article 52(1)(a) of that regulation provides that, on application, an EU trade mark is to be declared invalid where that trade mark has been registered contrary to the provisions of Article 7.

6. Article 52(3) of Regulation No 207/2009 provides as follows:

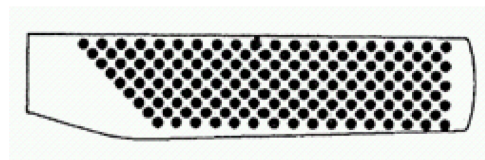
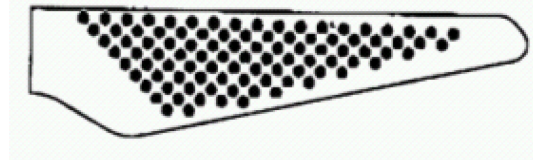


‘Where the ground for invalidity exists in respect of only some of the goods or services for which the EU trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.’

#### Background to the dispute

7. The facts of the dispute, as set out in paragraphs 1 to 15 of the judgment under appeal, may be summarised as follows.

8. On 3 and 5 November 1999, Yoshida filed applications at EUIPO for registration of two marks consisting of the figurative signs reproduced below:



9. The goods in respect of which registration was sought are in Classes 8 and 21 of the Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, as revised and amended, and correspond to the following description:

– Class 8: ‘Cutlery, scissors, knives, forks, spoons, whetstones, whetstone holders, knife steels, fish bone tweezers’;

– Class 21: ‘Household or kitchen utensils and containers (not of precious metal or coated therewith), turners, spatulas for kitchen use, knife blocks for holding knives, tart scoops, pie scoops’.

10. The trade marks at issue were registered on 25 September 2002 and 16 April 2003.

11. On 10 July 2007, Pi-Design and Others lodged applications for a declaration of invalidity with regard to the marks at issue based on the ground in Article 7(1)(e)(ii) of Regulation No 40/94.

12. By decisions of 15 and 21 July 2008, the Cancellation Division of EUIPO rejected those applications.

13. By the decisions at issue, ruling on an appeal brought by Pi-Design and Others, the First Board of Appeal of EUIPO annulled the decisions of the Cancellation Division and declared the marks invalid on the basis of Article 7(1)(e)(ii) of Regulation No 207/2009.

#### The procedure before the General Court and the Court of Justice, and the judgment under appeal

14. By applications lodged at the Registry of the General Court on 12 August and 15 September 2010, Yoshida brought actions for annulment of the decisions at issue, based on a single plea alleging infringement of Article 7(1)(e)(ii) of Regulation No 207/2009.

15. By two judgments delivered on 8 May 2012, Yoshida Metal Industry v OHIM — Pi-Design and

Others (Representation of a triangular surface with black dots), (7) and Yoshida Metal Industry v OHIM — Pi-Design and Others (Representation of a surface with black dots), (8) the General Court upheld that plea and those actions.

16. By judgment of 6 March 2014, (9) ruling on the appeal brought by Pi-Design and Others, the Court of Justice set aside those judgments on the ground that they infringed Article 7(1)(e)(ii) of Regulation No 207/2009 and referred the cases back to the General Court.

17. By the judgment under appeal, the General Court, ruling on the case as referred back to it, rejected the single plea alleging infringement of Article 7(1)(e)(ii) of Regulation No 207/2009, and the actions in their entirety, and ordered Yoshida to pay the costs of the proceedings before the General Court and before the Court of Justice.

#### The forms of order sought

18. By its appeal, Yoshida claims that the Court should set aside the judgment under appeal and annul the decisions at issue:

- primarily, in their entirety, or
- in the alternative, in so far as they declare the marks invalid for ‘whetstones and whetstone holders’ (Class 8) and ‘household or kitchen utensils and containers (not of precious metal or coated therewith) and knife blocks’ (Class 21)

and that EUIPO and Pi-Design and Others should be ordered to pay the costs.

19. EUIPO and Pi-Design and Others contend that the Court should dismiss the appeal and order the appellant to pay the costs.

#### Analysis

20. In support of its appeal, the applicant raises two grounds, alleging: (i) infringement of Article 7(1)(e)(ii) of Regulation No 207/2009; and (ii) infringement of Article 52(3) of that regulation.

21. In accordance with the Court’s wishes, I will restrict my analysis to the second ground of the appeal.

#### Second ground of appeal: infringement of Article 52(3) of Regulation No 207/2009

22. The present ground of appeal is relied upon in support of Yoshida’s head of claim in the alternative, seeking that the judgment under appeal be set aside and the decisions at issue annulled in so far as they declare its trade marks invalid for some of the goods concerned, namely ‘whetstones and whetstone holders’, ‘household or kitchen utensils and containers ... and knife blocks’. There are two parts to that ground of appeal.

#### The first part

23. In the first part, Yoshida claims that by failing to examine whether the ground for invalidity relied upon in the present case existed in respect of all the goods covered by the marks at issue, the General Court infringed Article 52(3) of Regulation No 207/2009.

24. It is settled case-law that the issue of whether one of the grounds for refusal or invalidity referred to in Article 7 of Regulation No 207/2009 applies to a mark or not must be assessed in the specific circumstances of

the case in relation to the goods or services to which the mark relates. (10) In addition, Article 52(3) of Regulation No 207/2009 provides that where the ground for invalidity exists in respect of only some of the goods or services, the declaration of invalidity extends only to those goods or services. (11)

25. It follows that, first, EUIPO's examination of the grounds for invalidity must be carried out in relation to each of the goods or services for which trade mark registration is sought. Secondly, EUIPO's decision applying such a ground must, in principle, state reasons in respect of each of those goods or services. (12)

26. In the present case, it is not disputed that the decisions at issue uphold the existence of the ground for invalidity referred to in Article 7(1)(e)(ii) of Regulation No 207/2009 for all the goods covered by the trade mark applications concerned.

27. In addition, I observe that, at first instance, Yoshida did not raise any plea alleging infringement of Article 52(3) of Regulation No 207/2009 by the Board of Appeal or any plea alleging that the statements of reasons for the decisions at issue were inadequate in that regard.

28. Therefore, the plea raised by Yoshida at the appeal stage must be understood as criticising the General Court for not having raised — of its own motion — the alleged failure by the Board of Appeal of EUIPO to examine the ground for invalidity in relation to all the goods concerned and to state reasons to the requisite legal standard for its decisions with respect to that matter.

29. It is necessary to assess whether such a ground of appeal, which is essentially tantamount to criticising the General Court for failing to have raised a plea of its own motion, is admissible at the appeal stage.

#### – Admissibility

30. I observe that it is settled case-law that the General Court cannot be criticised for not adjudicating on a plea that was not raised before it. (13)

31. The application of that principle poses difficulties so far as pleas to be raised of the court's own motion are concerned.

32. It might be claimed that where the General Court may, or even must, raise a plea of its own motion, it itself commits an error of law which may be sanctioned by the Court of Justice on appeal if it fails to do so. That approach may explain why the Court sometimes agrees to examine such a plea at the appeal stage. (14)

33. However, it is apparent from further explanation in more recent case-law that a ground of appeal alleging that the General Court failed to review of its own motion the statement of reasons for a decision whose annulment is sought before it is inadmissible where that ground concerns aspects which were not raised before the General Court.

34. The Court of Justice has rejected as inadmissible a plea concerning an alleged failure by the General Court to sanction the inadequacy of the statement of reasons for such a decision regarding matters which had not been expressly raised by the appellant in its action before the General Court. (15)

35. I consider that limitation on the grounds of appeal to be fully justified by the principles of appeal proceedings before the Court of Justice. In an appeal, the jurisdiction of the Court of Justice is, as a rule, confined to a review of the findings of law on the pleas argued before the General Court. (16) An examination of the merits of the disputed findings must imply a review of whether the reasons stated for the decision whose annulment is sought before the General Court are adequate. However, it would be excessive to require that Court to review of its own motion the statement of reasons for such a decision on aspects which were not raised before it. (17)

36. It follows that a plea alleging that the General Court did not sanction of its own motion an infringement of the obligation to state reasons by the body which issued the measure in question, regarding points which were not expressly raised before the General Court, is inadmissible at the appeal stage.

37. In my view that approach also applies to proceedings on trade marks.

38. As regards, more specifically, the application by EUIPO and by the General Court of Article 52(3) of Regulation No 207/2009, an appeal cannot concern the issue of whether the decision of the Board of Appeal states adequate reasons with regard to part of the goods or services where the applicant has not expressly raised that aspect before the General Court.

39. It is not enough, in this respect, for the appellant to have brought a general challenge against the applicability of the ground for refusal or invalidity in respect of all the goods or services concerned. It must, in order to claim that such a ground is inapplicable in respect of part only of those goods or services, have expressly done so during the proceedings before the General Court.

40. That approach may be inferred from the Court's case-law. The Court has already held that, in so far as a EUIPO decision clearly indicates that the ground for refusal is applicable to all the goods concerned, it is for the applicant to identify, in its action before the General Court seeking annulment of that decision, the goods to which, in its view, that ground for refusal cannot be applied or to dispute the fact that the goods concerned form a homogenous category. (18)

41. In the present case Yoshida, in its action before the General Court, merely challenged the application of the ground for invalidity in general and did not specifically mention its application to a part of the goods concerned, namely 'whetstones and whetstone holders', 'household or kitchen utensils and containers' and 'knife blocks'.

42. Consequently, Yoshida cannot, at the appeal stage, criticise the General Court for failing to have examined that aspect of its own motion or for failing to have sanctioned an allegedly inadequate statement of reasons in the decisions at issue on that point.

43. It would be a different matter, in my opinion, if it were not the Board of Appeal but the General Court which had found for the first time that there was a ground for invalidity in respect of those goods. (19) In



that situation, the inadequacy of the statement of reasons for the General Court's judgment from the perspective of Article 52(3) of Regulation No 207/2009 could legitimately be raised at the appeal stage. (20)

44. However, that is not the case here, since the General Court merely confirmed the decisions of EUIPO's Board of Appeal declaring the invalidity of the Yoshida trade marks in respect of all the goods concerned.

45. The first part of the present ground of appeal is therefore, in my opinion, inadmissible.

– **In the alternative, regarding substance**

46. Even if the Court were to hold that the present branch of the second ground of appeal is admissible, I consider it to be in any event unfounded.

47. First of all, I would like to point out that it is settled case-law that the statement of reasons must disclose in a clear and unequivocal manner the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent EU Court to exercise its power of review. However, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question of whether the statement of reasons for a measure is to be deemed adequate must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. (21)

48. The Court has already held that when refusing registration of a trade mark, the competent authority is required to state in its decision its conclusion for each of the individual goods and services specified in the application for registration. However, where the same ground for refusal or invalidity is given for a category or group of goods or services, the competent authority may confine itself to stating general reasons in respect of all of the goods or services concerned. (22)

49. That power on the part of the competent authority in the trade marks field takes account of the fact that trade mark applications often relate to many goods or services. (23)

50. The same approach has been adopted by the Court concerning the examination of grounds for refusal or invalidity by EUIPO. (24)

51. In order not to undermine the right to effective judicial review, the power to give a general statement of reasons in respect of all the goods or services concerned extends only to goods and services which are interlinked in a sufficiently direct and specific way, to the point where they form a sufficiently homogeneous category or group of goods or services. (25)

52. I take the view that that condition is fully satisfied in the present case.

53. I observe that the goods referred to in the applications for the marks at issue, namely 'cutlery, scissors, knives, forks, spoons, whetstones, whetstone holders, knife steels, fish bone tweezers' and 'household or kitchen utensils and containers (not of precious metal or coated therewith), turners, spatulas

for kitchen use, knife blocks for holding knives, tart scoops, pie scoops' are all kitchen utensils. (26)

54. In my view those goods form a sufficiently homogenous group for the purposes of the examination of the ground for invalidity put forward.

55. It is apparent from the grounds of decisions at issue (27) that the signs at issue represent handles of the goods in respect of which registration has been sought. That reasoning is based on the premise that all the goods concerned, namely various kitchen utensils, may be equipped with a handle.

56. In my view, the Board of Appeal therefore indicated to the requisite legal standard why there was a link between the goods concerned which justified them being examined together. The reasons stated for the decisions at issue, although succinct, are coherent and enable Yoshida to understand the reasoning of EUIPO's Board of Appeal in relation to all the goods concerned, and the General Court to review that reasoning.

57. The issue of the statement of reasons must be distinguished from that of the merits of those decisions. (28) The obligation to state adequate reasons is satisfied where it is apparent from the clear and coherent reasons stated for those decisions that the Board of Appeal considered that all the goods at issue formed a homogenous group because they have a shared characteristic. The issue of whether the Board of Appeal incorrectly found, as the appellant claims, that all the goods had that shared characteristic, falls within the scope of the merits of those decisions.

58. In this connection, Yoshida's argument that some of the goods concerned do not have handles in fact seeks to call into question the merits of the reasoning of the Board of Appeal on a new aspect, which was not raised before the General Court and which moreover concerns a factual point. That argument is therefore inadmissible at the appeal stage.

59. In any event, that argument is not convincingly developed. First, as regards the 'whetstones' or 'household or kitchen utensils and containers', which include pots or pans, Yoshida does not explain why those goods could not have handles.

60. Secondly, as EUIPO correctly observes, 'whetstone holders' and 'knife blocks' are goods which do not have any use independent from the handling of whetstones or knives and which therefore cannot form a separate category or group of products for the purposes of an examination of the grounds for refusal or invalidity. Lastly, even if 'knife blocks' could be regarded as constituting a separate group of goods from that of 'knives', it would in any event be necessary to adopt a common approach. (29)

61. For all those reasons, I consider the first part of the second ground of appeal to be inadmissible or, in any event, unfounded.

**The second part**

62. Yoshida claims that the reasoning adopted by the General Court cannot be applied to some of the goods concerned, namely those without handles.

63. I observe that the review of the General Court's observance of the obligation to state adequate reasons must be distinguished from the substantive legality of the judgment under appeal. (30) In the present case, while referring to an alleged irregularity vitiating the reasoning of the judgment under appeal, Yoshida is in fact challenging the merits of the findings of fact upheld by the General Court, which are exempt from review at the appeal stage. (31)

64. Therefore, it is my view that the second part of the present ground of appeal is also inadmissible.

#### Conclusion

65. Having regard to the foregoing, I propose that the Court should reject the second ground of the appeal as inadmissible or, in any event, as in part inadmissible and in part unfounded.

1. Original language: French.

2. T-331/10 RENV and T-416/10 RENV, not published, EU:T:2015:302 ('the judgment under appeal').

3. Decisions of the First Board of Appeal of EUIPO of 20 May 2010 (Cases R 1235/2008-I and R 1237/2008-1) ('the decisions at issue').

4. Judgment of 6 March 2014, Pi-Design and Others v Yoshida Metal Industry (C-337/12 P to C-340/12 P, not published, EU:C:2014:129).

5. I note that a similar problem is raised in another pending appeal (see OHIM v Unibail Management, C-513/14 P, currently pending before the Court of Justice).

6. Council Regulation of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1). I note that, in the present case, the substantive provisions applicable are those of Regulation No 207/2009, since the legal context of the case is the date at which the decision of the EUIPO Board of Appeal was adopted. In any event, both Article 7(1)(e)(ii) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) and Article 51(3) thereof (corresponding to Article 52(3) of Regulation No 207/2009) are drafted in essentially identical terms.

7. T-331/10, not published, EU:T:2012:220.

8. T-416/10, not published, EU:T:2012:222.

9. Judgment of 6 March 2014, Pi-Design and Others v Yoshida Metal Industry (C-337/12 P to C-340/12 P, not published, EU:C:2014:129).

10. Judgment of 9 September 2010, OHIM v BORCO-Marken-Import Matthiesen (C-265/09 P, EU:C:2010:508, paragraph 35 and the case-law cited).

11. An analogous provision is set out in Article 13 of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25) (formerly Article 13 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ 1989 L 40, p. 1).

12. See, to that effect, concerning Article 13 of Directive 89/104, judgment of 15 February 2007, BVBA Management, Training en Consultancy (C-239/05, EU:C:2007:99, paragraph 34) and, concerning Regulation No 207/2009, order of 18 March 2010, CFMCEE v OHIM (C-282/09 P, EU:C:2010:153, paragraphs 37 to 41).

13. See, to that effect, judgments of 8 December 2011, Chalkor v Commission (C-386/10 P, EU:C:2011:815, paragraph 70), and of 22 October 2015, AC-Treuhand v Commission (C-194/14 P, EU:C:2015:717, paragraph 55).

14. See order of 9 February 2012, Deutsche Bahn v OHIM (C-45/11 P, not published, EU:C:2012:69, paragraph 61) and judgment of 19 June 2014, FLS Plast v Commission (C-243/12 P, EU:C:2014:2006, paragraph 48) in which the Court held that the General Court was correct not to raise of its own motion a plea alleging a breach of the obligation to state adequate reasons in the decision whose annulment was sought.

15. Judgments of 26 November 2013, Gascogne Sack Deutschland v Commission (C-40/12 P, EU:C:2013:768, paragraphs 46 to 55 and 61 to 64) and of 17 September 2015, Total v Commission (C-597/13 P, EU:C:2015:613, paragraphs 21 and 22).

16. Judgment of 26 November 2013, Gascogne Sack Deutschland v Commission (C-40/12 P, EU:C:2013:768, paragraph 52). See also the Opinion of Advocate General Wahl in Total v Commission (C-597/13 P, EU:C:2015:207, paragraphs 118 to 128).

17. See the Opinion of Advocate General Wahl in Total v Commission (C-597/13 P, EU:C:2015:207, paragraphs 118 to 128).

18. Order of 11 December 2014, FTI Touristik v OHIM (C-253/14 P, not published, EU:C:2014:2445, paragraph 49). I note that in that case the applicant had disputed before the General Court the applicability of the ground for refusal in respect of part of the goods and services, but had not adequately developed that argument. Consequently, the ground of appeal at issue was rejected not as inadmissible but as manifestly unfounded.

19. I observe that the General Court has the power to alter the decision of EUIPO's Board of Appeal, pursuant to Article 65(3) of Regulation No 207/2009.

20. See, regarding such a situation, in the context of the examination of a relative ground for refusal, judgment of 17 October 2013, Isdin v Bial-Portela (C-597/12 P, EU:C:2013:672, paragraphs 28 and 29).

21. Judgment of 21 October 2004, KWSSaat v OHIM (C-447/02 P, EU:C:2004:649, paragraph 65).

22. Judgment of 15 February 2007, BVBA Management, Training en Consultancy (C-239/05 P, EU:C:2007:99, paragraph 38).

23. Opinion of Advocate General Sharpston, BVBA Management, Training en Consultancy (C-239/05, EU:C:2006:450, paragraphs 42 and 43).

24. See orders of 6 February 2009, MPDV Mikrolab v OHIM (C-17/08 P, not published, EU:C:2009:64,

paragraph 34); of 9 December 2009, Prana Haus v OHIM (C-494/08 P, not published, EU:C:2009:759, paragraph 46); of 18 March 2010, CFCMCEE v OHIM (C-282/09 P, EU:C:2010:153, paragraphs 37 and 38); of 21 March 2012, Fidelio v OHIM (C-87/11 P, not published, EU:C:2012:154, paragraph 43); judgment of 17 October 2013, Isdin v Bial-Portela (C-597/12 P, EU:C:2013:672, paragraph 27), and extensive case-law of the General Court, inter alia judgments of 27 April 2016, Niagara Bottling v EUIPO(NIAGARA) (T-89/15, not published, EU:T:2016:244, paragraph 31) and of 12 May 2016, Zuffa v EUIPO (ULTIMATE FIGHTING CHAMPIONSHIP) (T-590/14, not published, EU:T:2016:295, paragraph 26).

25. See, to that effect, judgment of 15 February 2007, BVBA Management, Training en Consultancy (C-239/05, EU:C:2007:99, paragraph 36) and order of 18 March 2010, CFCMCEE v OHIM (C-282/09 P, EU:C:2010:153, paragraph 40) and extensive case-law of the General Court, inter alia judgments of 2 April 2009, Zuffa v OHIM (ULTIMATE FIGHTING CHAMPIONSHIP) (T-118/06, EU:T:2009:100, paragraph 28) and of 16 October 2014, Larrañaga Otaño v OHIM (GRAPHENE) (T-458/13, EU:T:2014:891, paragraph 26).

26. The fact that the goods fall within two separate classes, Classes 8 and 21, as Yoshida pointed out in its appeal, is irrelevant, since the classification within the Nice Agreement is purely for administrative purposes.

27. See points 30, 34 to 36 and 40 of the decisions at issue.

28. See judgment of 2 April 1998, Commission v Sytraval and Brink's France (C-367/95 P, EU:C:1998:154, paragraph 67).

29. The General Court has consistently held that where the use of two categories of goods together is required or, at least, implied by their intrinsic characteristics, the Board of Appeal may apply a common approach to them. See judgments of 2 December 2008, Ford Motor v OHIM (FUN) (T-67/07, EU:T:2008:542, paragraph 44), and 8 September 2010, Wilfer v OHIM (Representation of the head of a guitar) (T-458/08, EU:T:2010:358, paragraph 66).

30. See, to that effect, judgment of 2 April 1998, Commission v Sytraval and Brink's France (C-367/95 P, EU:C:1998:154, paragraph 67), and the Opinion of Advocate General Léger, Belgium v Commission (C-197/99 P, EU:C:2001:658, paragraphs 39 and 40).

31. The Court of Justice has already found to be inadmissible a ground of appeal to the effect that the category of the goods and services at issue used for the examination of an absolute ground for refusal did not constitute a homogenous group. See order of 7 July 2011, MPDV Mikrolab v OHIM (C-536/10 P, not published, EU:C:2011:469, paragraphs 34 and 38).