

**Court of Justice EU, 26 July 2017, Continental Reifen v Michelin**



V



#### TRADE MARK LAW

**The view of the General Court regarding the distinctiveness of an earlier mark is based on an error in law**

- it is clear from the brochures provided by Michelin that the stylised letter ‘x’ is used, in isolation or in combination with other letters, to designate a technical characteristic of Michelin tyres

As both Continental Reifen Deutschland and EUIPO in essence submit, and rightly so, it is clear from the brochures provided by Michelin in Annexes C.1 and C.4 to its application initiating proceedings and, inter alia, from the tables set out on pages 96 and 144 of those annexes respectively that the stylised letter ‘x’ is used, in isolation or in combination with other letters, to designate a technical characteristic of Michelin tyres, namely their tread pattern.

39. Consequently, the General Court’s reading of those brochures in paragraph 55 of the judgment under appeal is marred by a material inaccuracy. To that extent, the General Court distorted the evidence.

40. Thus, in paragraph 56 of the judgment under appeal, the General Court based its assessment of the inherent distinctiveness of the earlier French trade mark on a distortion of that evidence. It follows that, in view of the nature of that evidence, the General Court erred in law when it found that the earlier French trade mark had a normal degree of inherent distinctiveness.

**Appeal dismissed in its entirety despite error in law**

- the operative part of the judgment is shown to be well founded on other legal grounds

Consequently, the General Court was fully entitled to find that there was a likelihood of confusion between the marks at issue. Thus, the error in law found in paragraph 40 of this judgment cannot lead to the setting aside of the judgment under appeal. Taking into account the foregoing grounds, the fact that the General Court found that the earlier French trade mark had a normal, rather than weak, degree of inherent distinctiveness is irrelevant in this regard.

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**Court of Justice EU, 26 July 2017**

(J.L. da Cruz Vilaça, M. Berger (Rapporteur), A. Borg Barthet, E. Levits and F. Biltgen)

JUDGMENT OF THE COURT (Fifth Chamber)

26 July 2017 (\*)

(Appeal — EU trade mark — Regulation (EC) No 207/2009 — Article 8(1)(b) — Figurative mark including the word element ‘XKING’ — Opposition by the proprietor of national marks and an international registration including the word element ‘X’ — Rejection of opposition by the Board of Appeal — Likelihood of confusion — Distortion of the evidence)

In Case C-84/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 10 February 2016,

Continental Reifen Deutschland GmbH, established in Hanover (Germany), represented by S.O. Gillert, K. Vanden Bossche, B. Köhn-Gerdes and J. Schumacher, Rechtsanwälte,

appellant,

the other parties to the proceedings being:

Compagnie générale des établissements Michelin, established in Clermont-Ferrand (France), represented by E. Carrillo, abogada,

applicant at first instance,

European Union Intellectual Property Office (EUIPO), represented by M. Fischer, acting as Agent,

defendant at first instance,

THE COURT (Fifth Chamber),

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

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

#### Judgment

1. By its appeal, Continental Reifen Deutschland GmbH asks the Court to set aside the judgment of the General Court of the European Union of 8 December 2015, *Compagnie générale des établissements Michelin v OHIM — Continental Reifen Deutschland (XKING)* (T-525/14, not published, ‘the judgment under appeal’, EU:T:2015:944), by which the General Court annulled the decision of the Fourth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 5 May 2014 (Case R 1522/2013-4), relating to opposition proceedings between *Compagnie générale des établissements Michelin* and *Continental Reifen Deutschland* (‘the decision at issue’).

#### Legal context

2. Council Regulation (EC) No 207/2009 of 26 February 2009 on the [European Union trade mark] (OJ 2009 L 78, p. 1) came into force on 13 April 2009.

3. Article 8(1)(b) and (5) of that regulation provide:

‘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 ..., 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 EU trade mark], the trade mark has a reputation in the [European Union] 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 and the decision at issue**

4. On 15 February 2012, Continental Reifen Deutschland filed an application for registration of an EU trade mark with EUIPO pursuant to Regulation No 207/2009.

5. Registration as a mark was sought for the following figurative sign:



6. The goods in respect of which registration was sought are in Class 12 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description: *'Tyres; Inner tubes for tyres.'*

7. On 18 June 2012 Compagnie générale des établissements Michelin (*'Michelin'*) filed a notice of opposition pursuant to Article 41 of Regulation No 207/2009 to registration of the mark applied for.

8. The opposition was based, inter alia, on various earlier international marks and on an earlier French figurative mark (*'the earlier French trade mark'*), registered on 27 March 1990 for *'Envelopes, inner tubes for pneumatic tyres'*, falling within Class 12 of that agreement, as reproduced hereunder:



9. The grounds relied on in support of the opposition were those set out in Article 8(1) and (5) of Regulation No 207/2009.

10. By a decision of 8 July 2013, the Opposition Division of EUIPO upheld the opposition in so far as it was based on the earlier French trade mark pursuant to Article 8(1) of Regulation No 207/2009.

11. On 6 August 2013, Continental Reifen Deutschland filed a notice of appeal with EUIPO against that decision.

12. On 5 May 2014 the Fourth Board of Appeal of EUIPO adopted the decision at issue in which it, first, upheld the appeal and, second, rejected the opposition in its entirety. In the first place, the Board of Appeal held that, in so far as the opposition was based on the earlier French trade mark, it was apparent from the global assessment of the likelihood of confusion that the identity and the similarity of the goods in question were outweighed by (i) the differences between the mark applied for and the earlier French trade mark, (ii) the consumers' high level of attention and (iii) the weak inherent distinctive character of the earlier French trade mark. In the second place, the Board of Appeal rejected the opposition in so far as it was based on Article 8(5) of Regulation No 207/2009 on the ground that Michelin had failed to provide proof of the reputation of the earlier marks.

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

13. By application lodged at the Registry of the General Court on 13 July 2014, Michelin brought an action for annulment of the decision at issue.

14. In support of its action, Michelin invoked, in essence, three pleas in law alleging, first, infringement of Rule 19(2) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1) as amended by Commission Regulation (EC) No 1041/2005 of 29 June 2005 (OJ 2005 L 172, p. 4), second, infringement of Article 8(1)(b) of Regulation No 207/2009 and, third, infringement of Article 8(5) of that regulation.

15. **By the judgment under appeal**, the General Court accepted the second plea in law and, without considering the other pleas raised, annulled the decision at issue.

16. The General Court first considered the assessment of the Fourth Board of Appeal of EUIPO relating to the similarity of the figurative mark applied for, XKING, and the earlier French trade mark.

17. In this regard, concerning, in the first place, the distinctive and dominant elements of the figurative mark applied for, XKING, the General Court found, in paragraph 32 of the judgment under appeal, that the word element 'king' would be perceived, by the French public that understands basic English, as meaning 'king' or 'the best' and, thus, as conveying a laudatory message that the goods in question - tyres and parts for tyres - are of good quality. In addition, the word 'king', which differs from the letter 'x' in terms of colour and size, is clearly distinct from that letter even though they

are not separated by a space. Therefore, the General Court held, contrary to what was held by the Board of Appeal, that the word 'king' of the mark applied for is weakly distinctive.

18. In this context, the General Court also held, in paragraph 36 of the judgment under appeal, that the element 'x' was the dominant element of the mark applied for, since, first, it was placed at the beginning of the mark applied for, had no meaning in relation to the goods in question and was bigger than the word 'king', and, second, the word 'king' had a weak distinctive character.

19. In the second place, in its visual comparison of the marks at issue the General Court observed that the letter 'x' forming part of the mark applied for and the letter 'x' of the earlier French trade mark were both white and outlined in black. Thus, the General Court held that the letters were similar overall. In this regard, the General Court stated, inter alia, that the word 'king' of the mark applied for was certainly not negligible in the overall visual impression produced by the mark. However, as the General Court pointed out in paragraph 42 of the judgment under appeal, the letter 'x' of the mark applied for, as its dominant element, 'carries more weight in the comparison of the marks at issue than the word "king"'. In the light of this, the General Court found that the marks at issue were visually similar to an average degree. Consequently, the General Court held, in paragraph 44 of the judgment under appeal, that the Board of Appeal was wrong to consider that the degree of similarity was low.

20. In the third place, as regards the phonetic similarity of the marks at issue, after noting that the rhythm and intonation of those two marks were only slightly different and that they shared the same first syllable, namely 'x', the General Court held in paragraphs 47 and 48 of that judgment that the marks had an average level of phonetic similarity, rather than a lower than average level, as the Board of Appeal had wrongly held.

21. The General Court then examined, in paragraphs 53 to 56 of the judgment under appeal, the inherent distinctive character of the earlier French trade mark, which the Board of Appeal had found to be weak.

22. In this regard, the General Court found that, while it was apparent from the brochures provided by Michelin in Annexes C.1 and C.4 to the application initiating proceedings that letters, whether in isolation or combined with other letters or numbers, such as the letters 'r' (radial tyre), 'v' (speed rating) or 'w' (tread), were often displayed on tyres to designate their characteristics, by contrast, it was not apparent from those brochures that the letter 'x' designated a characteristic of tyres. The General Court pointed out that since the letter 'x' of the earlier French trade mark was not a standard letter 'x', but was stylised, it would not be perceived as designating a characteristic of those goods. In the light of those considerations, the General Court found that the inherent distinctive character of that earlier mark had to be regarded as normal.

23. Finally, the General Court held in paragraph 57 of the judgment that, taking into account (i) the strong similarity or identity of the goods concerned, (ii) the average degree of similarity between the mark applied for and the earlier French trade mark and (iii) the normal degree of inherent distinctiveness of that earlier trade mark, it had to be held that there was a likelihood of confusion between those two marks. Therefore, the General Court found that the Board of Appeal had been wrong to reject the opposition to the extent that it was based on the earlier French trade mark.

#### **Forms of order sought**

24. By its appeal, Continental Reifen Deutschland claims that the Court should:

- set aside the judgment under appeal;
- refer the case back to the General Court for it to re-examine the inherent degree of distinctiveness of the signs at issue, including the elements of which those signs are composed, as well as the degree of similarity between those signs; and
- order Michelin to pay the costs.

25. Michelin contends that the Court should:

- dismiss the appeal; and
- order Continental Reifen Deutschland to pay the costs.

26. EUIPO contends that the Court should:

- set aside the judgment under appeal;
- refer the case back to the General Court for it to re-examine the inherent degree of distinctiveness of the signs at issue, including the elements of which those signs are composed; and
- order Michelin to pay the costs incurred by EUIPO.

#### **The appeal**

27. In support of its appeal, the appellant raises a single ground of appeal - which is divided into four parts - alleging infringement of Article 8(1)(b) of Regulation No 207/2009.

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

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

28. By the second part of its single ground of appeal, which must be considered in the first place, Continental Reifen Deutschland in essence criticises the General Court for having distorted certain evidence in paragraph 55 of the judgment under appeal, namely Annexes C.1 and C.4 to the application initiating proceedings, and for concluding from these annexes that the letter 'x' in the earlier French trade mark did not designate a characteristic of the tyres.

29. Continental Reifen Deutschland submits that it is apparent from the tables set out on pages 96 and 144 of those annexes that letters, displayed either in isolation or in combination with other letters or numbers, including a stylised letter 'x', are used to indicate a tyre's size and tread. Thus, the relevant public, which consists of professionals and end consumers, will be inclined to perceive every letter or combination of letters and numbers as containing potential information on the goods in question. In addition, it submits that the distinctiveness of a single letter is generally considered to be low. In the light of these considerations, Continental Reifen Deutschland maintains that the

distinctiveness of the earlier French trade mark must be considered to be low rather than normal, as was wrongly found by the General Court.

30. Michelin claims that the General Court did not distort any of the evidence set out in Annexes C.1 and C.4 of the application initiating proceedings. In this regard, it submits, first, that the General Court's assessment regarding the inherent distinctiveness of the earlier French trade mark is not entirely based on those annexes. Thus, Michelin submits that it is apparent from the judgment under appeal, in particular from paragraph 54, that the General Court found that EUIPO itself had in a previous decision already established that the degree of distinctiveness of an earlier figurative trade mark X of Michelin, registered in respect of pneumatic tyres, was normal. Thus, those annexes are, in its submission, simple items of evidence confirming that previous decision.

31. Second, Michelin contends that Continental Reifen Deutschland's statement that letters are often displayed on tyres in order to designate characteristics such as the speed index or the size of the tyres is fallacious. Indeed, to the extent that this kind of marking composed of letters is used for consumer information purposes, it is generally located on a specific part of the tyre reserved for technical information and does not include 'x' as a stand-alone sign. Michelin further submits that the earlier French trade mark is protected and has been used by the Michelin group as such for more than five decades in connection with tyres and not as an indication of tyre size or tread pattern.

32. EUIPO takes the view that the General Court based its finding that the earlier French trade mark had a normal degree of inherent distinctiveness on distorted evidence. In this context, EUIPO submits that it was irrelevant for the assessment of the inherent distinctiveness whether the letter 'x' was actually and commonly used by a certain number of operators to designate a characteristic of tyres or not; in its view account need only be taken of the point of view of the relevant public. In other words, it was appropriate to establish whether that public expected the letter 'x' to designate a certain characteristic given the common use of other single letters to that effect. In this context, EUIPO observes that single letters are commonly used in the tyre sector to indicate their qualities and characteristics. Thus, EUIPO maintains that the relevant public - professionals and end consumers - is frequently exposed and, consequently, used to a variety of single letters designating the technical features of tyres.

33. It follows that, according to EUIPO, the relevant public, when confronted with a new single letter in the context of pneumatic tyres, will most likely be inclined to assume that this letter stands for a technical feature of the tyres. Under these circumstances, EUIPO takes the view that the relevant public will only attribute a weak distinctiveness to the single letter 'x' used in the context of tyres.

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

34. By the second part of its single ground of appeal, Continental Reifen Deutschland contends, in essence, that the General Court, in paragraph 55 of the judgment under appeal, distorted the evidence because it did not find that it followed from the brochures annexed to the application lodged before it that the stylised letter 'x', either on its own or in combination with other letters, designates a characteristic of tyres.

35. It should be noted that, in accordance with 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 therefore 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 are distorted, constitute points of law subject, as such, to review by the Court of Justice on appeal (see, inter alia, judgments of 2 September 2010, *Calvin Klein TrademarkTrust v OHIM*, C-254/09 P, EU:C:2010:488, paragraph 49, of [19 March 2015, \*Mega Brands International v OHIM\*, C-182/14 P, EU:C:2015:187](#), paragraph 47 and case-law cited, and of [26 October 2016, \*Westermann Lernspielverlage v EUIPO\*, C-482/15 P, EU:C:2016:805](#), paragraph 35 and case-law cited).

36. It should also be recalled that such distortion must be obvious from the documents before the Court, without there being any need to carry out a new assessment of the facts and the evidence (see, inter alia, judgments of 20 November 2014, *Intra-Press v OHIM*, C-581/13 P and C-582/13 P, not published, EU:C:2014:2387, paragraph 39 and case-law cited, and of [26 October 2016, \*Westermann Lernspielverlage v EUIPO\*, C-482/15 P, EU:C:2016:805](#), paragraph 36 and case-law cited).

37. In paragraph 55 of the judgment under appeal, the General Court held that although, admittedly, 'it is apparent from the brochures provided by [Michelin] in Annexes C.1 and C.4 to the application that letters, whether in isolation or combined with other letters or numbers, are often displayed on tyres to designate their characteristics, such as the letters "r" (radial tyre), "v" (speed rating) or "w" (tread), by contrast, it is not apparent from those brochures that the letter "x" designates a characteristic of tyres. In addition, the letter "x" of the earlier French trade mark is not a standard letter "x". It is white and has a double outline in black. Accordingly, that stylised letter will not be perceived as designating a characteristic of those goods.' In the light of those matters, the General Court held in paragraph 56 of that judgment that the inherent distinctiveness of the earlier French trade mark had to be regarded as normal.

38. As both Continental Reifen Deutschland and EUIPO in essence submit, and rightly so, it is clear from the brochures provided by Michelin in Annexes C.1 and C.4 to its application initiating proceedings and, inter alia, from the tables set out on pages 96 and 144 of those annexes respectively that the stylised letter

'x' is used, in isolation or in combination with other letters, to designate a technical characteristic of Michelin tyres, namely their tread pattern.

39. Consequently, the General Court's reading of those brochures in paragraph 55 of the judgment under appeal is marred by a material inaccuracy. To that extent, the General Court distorted the evidence.

40. Thus, in paragraph 56 of the judgment under appeal, the General Court based its assessment of the inherent distinctiveness of the earlier French trade mark on a distortion of that evidence. It follows that, in view of the nature of that evidence, the General Court erred in law when it found that the earlier French trade mark had a normal degree of inherent distinctiveness.

41. As regards Michelin's arguments, according to which that assessment is based not only on the evidence contained in Annexes C.1 and C.4 of the application initiating proceedings, but also on the finding in paragraph 54 of that judgment that EUIPO had itself in a previous decision already recognised the normal degree of distinctiveness of one of Michelin's earlier figurative trade marks, which consisted of the letter 'x' in isolation and was registered for pneumatic tyres, those arguments cannot succeed, given that they are based on an erroneous reading of that judgment.

42. In fact, the General Court, after outlining in paragraph 53 of the judgment under appeal the Board of Appeal's assessment in the decision at issue, limited itself to referring, in paragraph 54 of that judgment, to EUIPO's decision, invoked by Michelin, in which the distinctiveness of one of the earlier figurative X trade marks of that company, registered for pneumatic tyres, had been held to be normal. However, the General Court made no reference to the normal distinctiveness of one of Michelin's earlier trade marks when it went on to examine, in paragraph 55 of that judgment, the distinctiveness of the earlier French trade mark before considering, in paragraph 56 of that judgment, that the latter mark's distinctiveness had to be described as normal.

43. It follows from all the matters set out above that the second part of the single ground of appeal is well founded.

44. However, it must be recalled that it follows from the case-law of the Court of Justice that an error in law by the General Court does not invalidate the judgment under appeal if the operative part of the judgment is shown to be well founded on other legal grounds (see, to that effect, judgments of [3 October 2013, Rintisch v OHIM, C-121/12 P, EU:C:2013:639](#), paragraph 35 and case-law cited, and of [21 July 2016, EUIPO v Grau Ferrer, C-597/14 P, EU:C:2016:579](#), paragraph 29 and case-law cited).

45. That being so, the Court must consider the other parts of the single ground of appeal.

#### **The first part of the single ground of appeal Arguments of the parties**

46. By the first part of its single ground of appeal, Continental Reifen Deutschland complains that the General Court erred in law in paragraphs 32, 34 and 36 of the judgment under appeal in its assessment of the

distinctive and dominant elements of the mark applied for, XKING. That part contains two grounds of challenge.

47. The appellant puts forward two arguments in support of the first ground of challenge.

48. In the first place, it criticises the General Court for having distorted the facts and misconstrued the principles established by the case-law when it describes the word 'king' as 'weakly distinctive' on the ground that it conveys a laudatory message. In this regard, Continental Reifen Deutschland submits, first, that the General Court was wrong in finding that the word element 'king' of the mark applied for will be perceived, by the relevant French public that understands basic English, as meaning 'king' or 'the best' and, thus, as conveying the laudatory message that the goods in question are of good quality. Second, given that the word 'king' does not in itself designate a quality, quantity or characteristic of the goods in question, it can be understood as a laudatory term only if it is combined with another meaningful term. Continental Reifen Deutschland maintains that the General Court did not consider to what extent the combination of the elements 'x' and 'king' could be perceived as meaning 'x the best' and, therefore, be considered to convey a laudatory message for the goods in question.

49. In the second place, Continental Reifen Deutschland argues that the General Court failed to take into account the graphical representation of the element 'king' in its assessment of the distinctiveness of that element. If account is taken of the nature of that element, it must, in Continental Reifen Deutschland's submission, be perceived as the dominant element of the composite sign for which registration as a mark is sought. Consequently, the General Court should have considered the impact of this element on the overall impression produced by the mark applied for.

50. In support of its second ground of challenge, which focuses on paragraph 36 of the judgment under appeal, the appellant submits, in essence, that the General Court was wrong to conclude, in the context of its assessment of the distinctiveness of the letter 'x' in the mark applied for, that this letter had to be perceived as the dominant element of the mark applied for.

51. In this regard, Continental Reifen Deutschland submits, in the first place, that, in accordance with settled case-law, when assessing the dominant and distinctive character of one or more given elements of a composite trade mark, it is appropriate to take account primarily of the intrinsic qualities of each of those elements. In addition and accessorially, account may be taken of the relative position of the various components within the arrangement of the composite mark. In its view, the General Court misconstrued that case-law by determining the degree of distinctiveness of the element 'x' first from its position within the composite sign 'XKING' and second from the lack of distinctiveness or from the smaller size of the element 'king'.

52. In the second place, Continental Reifen Deutschland submits that in any event the General Court wrongly found the element ‘x’ to be dominant. It argues that the positioning of the element ‘x’ at the beginning of the sign ‘XKING’ and the fact that it is larger than the element ‘king’, which would render the element ‘x’ slightly dominant, is offset by the characteristics of the second element, namely its greater length and its stylisation in thick black letters. In addition, it maintains that the elements ‘x’ and ‘king’, which form a single word and are not separated by a space, will be perceived by the public as a unitary whole.

53. In the third place, the appellant criticises the General Court for having stated that the letter ‘x’ has no meaning in relation to the goods in question. In this regard, first, the General Court omitted to take into consideration the general rule derived from the case-law that a single letter of the alphabet — irrespective of whether it is descriptive in relation to the goods or services in question — in itself constitutes an inherently weak element of a sign, since, among other things, it will not attract the consumer’s attention.

54. Second, the appellant submits that the General Court should have considered whether the element ‘x’, which is perceived separately in the mark applied for, had a meaning in relation to the goods in question and, if so, what effect that element would have when read in conjunction with the element ‘KING’, since that court itself stated, in paragraph 55 of the judgment under appeal, that ‘letters, whether in isolation or combined with other letters or numbers, are often displayed on tyres to designate their characteristics.’

55. Michelin submits, in essence, that the General Court properly analysed the mark applied for and the arguments and evidence provided by the parties when it took the view in paragraphs 32 and 36 of the judgment under appeal that the letter ‘x’ was the distinctive and dominant element of the mark ‘XKING’ due to its position at the beginning of the mark applied for, its graphical representation that differs from the element ‘king’ and its larger size. As regards the distinctiveness of the word ‘king’ in the mark applied for, Michelin considers that the General Court had sufficient evidence regarding the word and the capacity of the French public to perceive it as a laudatory expression to establish that the element, which evokes the words ‘king’ or ‘best’, was weakly distinctive in relation to the goods in question. Thus, according to Michelin, the General Court was right to find in paragraphs 34 and 43 of that judgment that the element ‘x’ of the mark applied for was distinctive and dominant, while the element ‘king’ was only weakly distinctive.

56. In any event, Michelin argues, first, that, since the appellant failed to prove that the General Court distorted the facts with regard to the linguistic knowledge of the relevant public and its comprehension of the meaning of the elements of the signs at issue, it is for the General Court to assess the facts and the evidence submitted to it and to determine the degree of English comprehension that the French

public has. Second, Michelin submits that, according to settled case-law, the assessment of the distinctiveness of a sign with two elements is a question of fact.

57. EUIPO maintains, in the first place, that the question whether the General Court was right to consider that the French public understands the word ‘king’ not only in the strict sense of ‘king’, but also in the laudatory sense of ‘the best’, is not a question of law subject to review by the Court of Justice.

58. In the second place, EUIPO takes the view, in essence, that the appellant’s argument that the General Court erred in law when it found that, bearing in mind the factors extrinsic to the element ‘x’, namely its position and its size in comparison with the element ‘king’ and the weakly distinctive character of that element, the element ‘x’ was the dominant and distinctive element of the mark applied for, results from a misreading of the judgment under appeal.

59. In the third place, EUIPO submits that the supposed general rule pursuant to which a single letter of the alphabet in itself constitutes an inherently weak element of a sign, which the appellant claimed that the General Court had failed to take into account, does not exist. EUIPO argues that although case-law does show the difficulty in demonstrating the inherent distinctiveness of single letters, the Court of Justice has nonetheless not established a general rule relating to the distinctiveness of certain categories of mark. It submits that the Court of Justice has thus always pointed to EUIPO’s obligation to carry out a case-by-case analysis of the distinctive character of any category of mark, based on the facts of the case.

60. Lastly, EUIPO claims that the General Court erred in law in basing its conclusion as to the dominant character of the element ‘x’ in the mark applied for on, *inter alia*, the fact that the letter ‘x’ has no meaning in relation to the goods in question. It claims that this lack of meaning is based on a manifest distortion of the evidence. As a result, the finding of the General Court as to the inherent distinctiveness of the letter ‘x’ in the two marks at issue should have been different.

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

61. As regards the first argument raised by Continental Reifen Deutschland in the context of its first ground of challenge of the first part of the single ground of appeal, as summarised at paragraph 48 of this judgment, it should be noted that it follows from a reading of Article 256 TFEU in conjunction with the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that an appeal brought against decisions of the General Court is limited to points of law and must be based on the grounds of lack of competence of the General Court, a breach of procedure before the General Court which adversely affects the interests of the appellant, or an infringement of EU law by the General Court (see, *inter alia*, orders of 25 February 2016, *Deutsche Rockwool Mineralwoll v OHIM*, C-487/15 P, not published, EU:C:2016:130, paragraph 28, and of 8 November 2016, *Franmax v EUIPO*, C-361/16 P, not published, EU:C:2016:834, paragraph 10).

62. As a result and as has already been explained in paragraph 35 of this judgment, the appraisal of the facts and the assessment of the evidence do not, save where the facts or evidence are distorted, constitute points of law subject, as such, to review by the Court of Justice on appeal.

63. In addition, in accordance with the case-law cited in paragraph 36 of this judgment, such distortion must be obvious from the documents before the Court, without there being any need to carry out a new assessment of the facts and the evidence.

64. In the present appeal, Continental Reifen Deutschland maintains that the General Court distorted the facts when it assessed the distinctive character of the element ‘king’ of the mark applied for. However, by its arguments, the appellant seeks, in reality, to challenge the factual assessments made by the General Court and, thereby, require the Court of Justice to substitute the General Court’s findings as to matters of fact with its own.

65. It follows that the first argument of the first ground of challenge of the first part must be rejected as inadmissible.

66. As regards the second argument invoked by Continental Reifen Deutschland in the context of the first ground of challenge of the first part of the single ground of appeal, as set out in paragraph 49 of this judgment, it should be noted, first, that, after referring in paragraph 27 of the judgment under appeal to the relevant case-law, which provides that ‘the global assessment of the likelihood of confusion must, so far concerns the visual, phonetic or conceptual similarity of the signs at issue, be based on the overall impression given by those signs, bearing in mind, in particular, their distinctive and dominant elements’, the General Court carried out in paragraphs 30 to 36 of that judgment an assessment of the distinctive and dominant characters of the components of the mark applied for.

67. In the context of that assessment, the General Court did take into consideration the graphical representation of the element ‘king’ in paragraph 32 of that judgment and held that ‘*that word [“king”], which differs from the letter “x” in terms of colour and size, is clearly distinct from that letter even though they are not separated by a space*’.

68. It follows that the second argument is based on a misreading of the judgment under appeal and must, as a result, be rejected as unfounded.

69. As regards the second ground of challenge of the first part of the single ground of appeal, as summarised in paragraphs 50 to 54 of this judgment, it must be held that, by that ground, the appellant is attempting, in essence, to call in question the assessment made by the General Court in paragraph 36 of the judgment under appeal that found that the letter ‘x’ will be perceived as the dominant element of the mark applied for.

70. In that regard, it must be pointed out that the determination of distinctive character, or lack of distinctive character, of the various elements of a sign and their importance in the overall impression given by the sign involves a weighing up of those criteria that

entails an analysis of a factual nature which, unless the facts or evidence have been distorted, falls outside the jurisdiction of the Court of Justice (see, to that effect, judgment of 17 July 2008, *L & D v OHIM*, C-488/06 P, EU:C:2008:420, paragraphs 82 and 83; order of 24 March 2011, *Muñoz Arraiza v OHIM*, C-388/10 P, not published, EU:C:2011:185, paragraphs 63 and 66; judgments of 6 September 2012, *United States Polo Association v OHIM*, C-327/11 P, not published, EU:C:2012:550 paragraphs 57, 59 and 61, and of 21 February 2013, *Seven for all mankind v Seven*, C-655/11 P, not published, EU:C:2013:94, paragraph 85).

71. Thus, first, the arguments set out in paragraphs 50 to 54 of this judgment are inadmissible, since they seek to challenge the factual findings made by the General Court in the judgment under appeal, while no allegation of distortion of the facts or evidence has been advanced by the appellant.

72. Second, as regards the appellant’s argument, noted in paragraph 53 of this judgment, that the General Court omitted to take into consideration what the appellant claims is a general rule that a single letter of the alphabet constitutes a weakly distinctive element of a sign, the short answer to that point is, as observed by EUIPO, that such a rule is not to be found in the case-law of the Court of Justice.

73. In particular, in the judgment of [9 September 2010, OHIM v BORCO-Marken-Import Matthiesen \(C-265/09 P, EU:C:2010:508\)](#), cited by the appellant in support of its argument, the Court reaffirmed its settled case-law according to which the distinctive character of a mark must always be assessed specifically by reference to the goods or services designated (judgment of [9 September 2010, OHIM v BORCO-Marken-Import Matthiesen, C-265/09 P, EU:C:2010:508](#), paragraph 35 and case-law cited). Similarly, although the Court did establish in that judgment that there are certain categories of signs, including single letters, which are less likely prima facie to have distinctive character initially, it did not, however, establish a general, abstract rule that the distinctiveness of such letters must, in all cases, be considered to be weak. On the contrary, the Court reaffirmed the obligation on trade mark authorities to carry out an examination of this matter based on the facts (see, to that effect, judgment of [9 September 2010, OHIM v BORCO-Marken-Import Matthiesen, C-265/09 P, EU:C:2010:508](#), paragraph 37).

74. It follows that the appellant’s argument must be rejected as unfounded.

75. Finally, as regards the appellant’s argument summarised in paragraph 54 of this judgment and on the assumption that it should be interpreted as a criticism of the General Court for failing to give a sufficient explanation of the assessment in paragraph 36 of the judgment under appeal, it should be pointed out that it follows from the written pleadings submitted to the Court by the appellant, Michelin and EUIPO that the parties were in agreement that the letter ‘x’ in the disputed mark had no meaning other than that of the

corresponding letter of the alphabet and that neither the appellant nor EUIPO had claimed that the perception of the relevant public had any potential to be different in that regard. Therefore, the General Court cannot be criticised for failing to give further reasons for that assessment.

76. Having regard to the foregoing reasoning, the second ground of challenge of the first part of the single ground of appeal must be rejected as in part inadmissible and in part unfounded. Accordingly, the first part of the single ground of appeal must be rejected as in part inadmissible and in part unfounded.

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

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

77. By the third part of its single ground of appeal, Continental Reifen Deutschland claims, in essence, that the General Court was wrong to find that the marks at issue had an average degree of visual and phonetic similarity. The third part comprises two grounds of challenge, which concern the General Court's assessment of, respectively, the visual similarity and the phonetic similarity of those marks.

78. In support of its first ground of challenge, the appellant criticises the General Court in the first place for having disregarded what the appellant claims is a general rule derived from case-law, according to which an assessment of similarity can be carried out on the basis of the dominant element alone only when the other elements of the mark are negligible. The appellant argues that, since the General Court stated in paragraph 42 of the judgment under appeal that the word 'king' of the mark applied for was longer than the letter 'x' in that mark and that it was not negligible in the overall visual impression produced by the mark, it could not conclude, in paragraph 43 of that judgment, that the marks at issue had an average degree of similarity as a result of the similarity between the letter 'x' of the mark applied for and the letter 'x' in the earlier French trade mark.

79. In the second place the appellant submits that when the General Court, in paragraph 41 of the judgment under appeal, compared the element 'x' of the two marks at issue, it ignored the impact of the differences in stylisation between the element 'x' in each of the two marks. Thus, the General Court failed, according to the appellant, to state reasons for its finding that the stylisation of that element was negligible for the purposes of a comparison of the signs in question.

80. In support of its second ground of challenge, the appellant claims, in essence, that the General Court failed to provide reasons for its finding in paragraph 47 of the judgment under appeal, relating to the average degree of phonetic similarity between the two marks at issue.

81. Michelin and EUIPO submit, in essence, that the assessment as to the similarity of the two marks at issue is a question of fact that cannot form the subject of an appeal.

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

82. First, it should be noted that the argument raised by the appellant in the context of the first ground of

challenge of the third part of its single ground of appeal - which alleges that the General Court disregarded, in paragraph 43 of the judgment under appeal, the supposed general rule that assessments as to the similarity of the marks at issue cannot be based solely on the dominant element of the mark applied for - results from a misreading of the judgment under appeal. It is apparent from paragraph 43 of that judgment that the General Court found that the marks had an average degree of visual similarity on three separate grounds, namely the dominant character of the letter 'x' in the mark applied for, the weakly distinctive character of the additional element 'king' in that mark, and the similarity between the letter 'x' in that mark and the letter 'x' in the earlier French trade mark. Consequently, that argument must be rejected as unfounded.

83. Second, as regards the absence of sufficient reasoning alleged in the context of the first ground of challenge of the third part of the single ground of appeal, it should be recalled that, in accordance with the Court's settled case-law, the duty incumbent upon the General Court under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice of the European Union to state reasons for its judgments does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know the grounds on which the General Court has based its findings and provides the Court of Justice with sufficient information for it to exercise its powers of review on appeal (see, inter alia, the judgment of 20 November 2014, *Intra-Press v OHIM*, C-581/13 P and C-582/13 P, not published, EU:C:2014:2387, paragraph 53 and case-law cited).

84. In this instance, it must be noted that the General Court, in paragraph 41 of the judgment under appeal, based its appraisal as to the similarity of the element 'x' in the two marks at issue on an assessment that 'the letter "x" of the mark applied for and the letter "x" of the earlier [French] trade mark are both white and outlined in black'. Thus, the General Court has explained to the requisite legal standard its reasons for finding, in spite of their differing stylisations noted in paragraphs 39 and 40 of the judgment under appeal, that those two letters should be held to be similar overall. Consequently, the General Court did not fail in its obligation to state reasons.

85. Furthermore, to the extent that, by this ground of challenge, the appellant is seeking to obtain a new assessment of the facts, that ground of challenge is inadmissible in accordance with the case-law set out in paragraph 35 of this judgment, since Continental Reifen Deutschland has not invoked any distortion of the facts or evidence submitted to the General Court (see, by analogy, judgment of [24 March 2011, Ferrero v OHIM, C-552/09 P, EU:C:2011:177](#), paragraph 89).

86. Third, Continental Reifen Deutschland submits in the context of the second ground of challenge of the third part of its single ground of appeal that the General Court failed to provide reasons for its finding as to the phonetic similarity between the marks at issue. However, it should be pointed out that the General Court found, in paragraph 47 of the judgment under appeal, first, that the mark applied for will be pronounced as two syllables, namely 'x' and 'king', while the earlier French trade mark is pronounced as one single syllable, namely 'x', and, second, that the rhythm and intonation of those two marks are only slightly different. Thus, there is no ground for maintaining that the General Court failed to state sufficient reasons for its finding in that regard. Although the appellant also contests, in that second ground of challenge, the General Court's assessment in paragraph 47 of the judgment under appeal, which states that the rhythm and intonation of those marks are only slightly different, such an argument must be rejected on the same grounds as those explained in paragraph 85 of this judgment. Accordingly, the second ground of challenge must be rejected as in part inadmissible and in part unfounded.

87. It follows from the foregoing reasoning that the third part of the single ground of appeal must be rejected as in part inadmissible and in part unfounded.

#### **The fourth part of the single plea**

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

88. By the fourth part of its single ground of appeal, Continental Reifen Deutschland, supported by EUIPO, submits that the General Court erred in law in finding there to be a likelihood of confusion between the marks at issue within the meaning of Article 8(1)(b) of Regulation No 207/2009. The appellant claims that such an error stems from an erroneous assessment of the distinctiveness and similarity of those marks as well as from an erroneous assessment of the interdependence of those factors. In that regard, EUIPO maintains that the General Court could not come to the conclusion that the earlier French trade mark had a normal degree of inherent distinctiveness without, first, distorting the evidence submitted to it and, second, making an error in law.

89. Michelin contends that the appellant has failed to establish how the General Court erred in law.

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

90. By the fourth part of its single ground of appeal, the appellant submits that the General Court, on the basis of its incorrect assessments, in paragraph 57 of the judgment under appeal, of the distinctiveness of the earlier French trade mark and the similarity of the marks at issue, erred in law in finding there to be a likelihood of confusion between the marks at issue within the meaning of Article 8(1)(b) of Regulation No 207/2009.

91. In this regard, it should be noted that the General Court based its assessment in paragraph 57 as to the likelihood of confusion between the marks at issue on three separate grounds, namely, first, the high degree of similarity or identity of the goods in question, second,

the average degree of similarity of those marks, and third, the normal degree of inherent distinctiveness of the earlier French trade mark.

92. In this instance, it is not in dispute that the goods covered by the marks at issue are highly similar or identical. In addition, it is apparent from paragraphs 82 to 87 of this judgment that arguments seeking to challenge the General Court's assessment as to the average degree of similarity of the marks at issue will not be successful.

93. By contrast, as has been stated in paragraph 43 of this judgment, the second part of this appeal, which is based on an error in law in the assessment of the distinctiveness of the earlier French trade mark, must be held to be well founded.

94. Nonetheless, contrary to what both the appellant and EUIPO claim and as is explained in paragraph 44 of this judgment, this error in law is insufficient to cause the judgment under appeal to be set aside because the General Court could find that there was a likelihood of confusion between the marks at issue on the basis of other legal grounds.

95. In this regard, it must be pointed out, in the first place, that, according to recital 8 of Regulation No 207/2009, the assessment of the likelihood of confusion depends on a number of factors including, in particular, the recognition of the trade mark on the market, the association which can be made with the used or registered sign, the degree of similarity between the trade mark and the sign and between the goods or services identified (judgment of 15 March 2007, T.I.M.E. ART v OHIM, C-171/06 P, not published, EU:C:2007:171, paragraph 31).

96. In addition, under Article 8(1)(b) of Regulation No 207/2009, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered if, because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected. Such likelihood of confusion includes the likelihood of association with the earlier trade mark.

97. Thus, the existence of a likelihood of confusion on the part of the public must be assessed globally, taking into account all factors relevant to the circumstances of the case (judgments of 15 March 2007, T.I.M.E. ART v OHIM, C-171/06 P, not published, EU:C:2007:171, paragraph 33, and of [2 September 2010, Calvin Klein Trademark Trust v OHIM, C-254/09 P, EU:C:2010:488](#), paragraph 44 and case-law cited).

98. In the second place, the Court of Justice has already held on a number of occasions that, although the distinctive character of an earlier mark must be taken into account when assessing the likelihood of confusion globally, it is, however, only one factor among others involved in that assessment (judgment of 8 November 2016, BSH v EUIPO, C-43/15 P, EU:C:2016:837, paragraph 61 and case-law cited).

99. Furthermore, although it is true that the more distinctive the earlier mark the greater the likelihood of confusion will be, such a likelihood of confusion cannot, however, be precluded where the distinctive character of the earlier mark is weak (judgment of 8 November 2016, BSH v EUIPO, C-43/15 P, EU:C:2016:837, paragraph 62 and case-law cited).

100. Thus, even in a case involving an earlier mark of weak distinctive character, the General Court may hold that there is a likelihood of confusion on account, in particular, of a similarity between the signs and between the goods or services covered (judgment of 8 November 2016, BSH v EUIPO, C-43/15 P, EU:C:2016:837, paragraph 63 and the case-law cited).

101. Consequently, the General Court was fully entitled to find that there was a likelihood of confusion between the marks at issue. Thus, the error in law found in paragraph 40 of this judgment cannot lead to the setting aside of the judgment under appeal. Taking into account the foregoing grounds, the fact that the General Court found that the earlier French trade mark had a normal, rather than weak, degree of inherent distinctiveness is irrelevant in this regard.

102. It follows that the fourth part of the single ground of appeal is unfounded.

103. In the light of all those considerations, the single ground of appeal should be rejected and, consequently, the appeal should be dismissed in its entirety.

#### **Costs**

104. In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Pursuant to 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.

105. Since the appeal has been dismissed and Michelin has applied for costs against Continental Reifen Deutschland alone, and since Continental Reifen Deutschland and EUIPO have been unsuccessful, Continental Reifen Deutschland should be ordered to bear its own costs and to pay those incurred by Michelin, and EUIPO should be ordered to bear its own costs.

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

1. Dismisses the appeal;
2. Orders Continental Reifen Deutschland GmbH to bear its own costs and to pay those incurred by Compagnie générale des établissements Michelin;
3. Orders the European Union Intellectual Property Office (EUIPO) to bear its own costs.

[Signatures]