Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

11 June 2020*

(Appeal — EU trade mark — Regulation (EC) No 207/2009 — Opposition — Article 8(1)(b) — Likelihood of confusion — Assessment of the similarity of the signs at issue — Assessment of the distinctive character of the earlier mark)

In Case C-115/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 14 February 2019,

China Construction Bank Corp., established in Beijing (China), represented by A. Carboni and J. Gibbs, Solicitors,

appellant,

the other parties to the proceedings being:

European Union Intellectual Property Office (EUIPO), represented by J. Ivanauskas and D. Botis, acting as Agents,

defendant at first instance,

Groupement des cartes bancaires, established in Paris (France), represented by C. Herissay-Ducamp, lawyer,

intervener at first instance,

THE COURT (Tenth Chamber),

composed of I. Jarukaitis, President of the Chamber, M. Ilešič (Rapporteur) and C. Lycourgos, Judges,

Advocate General: G. Hogan,

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

* Language of the case: English.

Judgment

1 By its appeal, China Construction Bank Corp. ('CCB') seeks to have set aside the judgment of the General Court of the European Union of 6 December 2018, *China Construction Bank* v *EUIPO — Groupement des cartes bancaires (CCB)* (T-665/17, EU:T:2018:879; 'the judgment under appeal'), by which the General Court dismissed its action seeking the annulment of the decision of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 14 June 2017 (Case R 2265/2016-1), relating to opposition proceedings between Groupement des cartes bancaires and CCB ('the disputed decision').

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) was amended by Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 (OJ 2015 L 341, p. 21), which entered into force on 23 March 2016. It was subsequently repealed and replaced, with effect from 1 October 2017, by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1). However, in view of the date of the facts giving rise to the dispute, this appeal must be examined in the light of the substantive provisions of Regulation No 207/2009.

3 Article 8 of Regulation No 207/2009 provided as follows:

'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 disputed decision

4 On 14 October 2014, CCB applied to EUIPO to register the following sign as an EU trade mark:



5 The goods for which registration was sought fall within Class 36 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended ('the Nice Agreement'), and correspond to the following description: 'Banking; financial evaluation ([insurance, banking, real estate); financing services; credit card services; deposits of valuables; antique appraisal; brokerage; guarantees; fiduciary'.

6 On 7 May 2015, the Groupement des cartes bancaires filed opposition to registration of the mark applied for in respect of all the services referred to in the preceding paragraph. That opposition was based on prior rights, including the following EU trade mark, which was registered on 12 November 1999:



7 That mark is registered, inter alia, for the following services, which fall within Class 36 within the meaning of the Nice Agreement: 'Insurance and finance, namely insurance underwriting, foreign exchange bureaux; issuing of travellers' cheques and letters of credit; financial affairs, monetary affairs, banking; … management of banking and monetary flow by electronic means; … issuing of and services relating to prepayment cards, debit cards, credit cards, cash withdrawal cards …; electronic payment …; financial transactions by card holders via automated teller machines; authentication and verification …; financial information via all means of telecommunication'.

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

9 On 4 October 2016, the Opposition Division upheld the opposition on the ground that there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 207/2009. The Opposition Division did not examine the ground under Article 8(5) of that regulation.

10 CCB filed an appeal, which was dismissed by the disputed decision.

11 In that decision, the First Board of Appeal of EUIPO held that the relevant public is composed partly of professionals and partly of end consumers or the general public, whose level of attention is high.

12 With regard to the territory relevant for the assessment of the likelihood of confusion, it stated that that territory extends to the whole of the European Union, while pointing out that a finding that there is a likelihood of confusion in one part of the Union is sufficient to refuse registration of the mark sought.

13 It then considered that, as a result of the use of the earlier mark, the relevant French public identifies that mark as referring to 'CB' cards. It has previously been established, in the decision of the Fourth Board of Appeal of EUIPO of 27 August 2014 in Case R 944/2013-4, relating to opposition proceedings between the Groupement des cartes bancaires and CCB concerning the word sign CCB, registration of which as an EU trade mark was sought, that the word mark CB enjoys a reputation in France for services in Class 36 within the meaning of the Nice Agreement. The evidence presented by the Groupement des cartes bancaires in the present case substantiates the persistence of that reputation.

14 As regards the comparison of the signs at issue, the First Board of Appeal of EUIPO, taking into account the reputation of the earlier mark in France, found that that mark is, despite its highly stylised character, perceived as being the group of letters 'CB'. With regard to the mark applied for, the figurative element of the mark applied for is merely incidental to the dominant element, consisting of the group of letters 'CCB'.

15 There is, therefore, some visual similarity between the signs at issue. In addition, those signs are similar phonetically to a degree greater than the average. However, it is not possible to make a conceptual comparison.

16 The First Board of Appeal of EUIPO held that, having regard to the identity of the services designated by the signs at issue, the similarity of those signs and the reputation of the earlier mark in France, the differences between the signs at issue and the above-average level of attention of the relevant public are not sufficient to rule out the likelihood of confusion.

17 It added that the fact that certain of CCB's services, designated by the mark applied for, are not used regularly by consumers increases the possibility that those consumers, even those with a high level of attention, may be misled by their inaccurate recollection of the configuration of the signs at issue.

18 For all those reasons, the First Board of Appeal of EUIPO considered that there was a likelihood of confusion in France and that, consequently, the Opposition Division of EUIPO had rightly decided to uphold the opposition.

The procedure before the General Court and the judgment under appeal

19 On 27 September 2017, CCB brought an action before the General Court.

20 In particular, it raised a plea alleging infringement of Article 8(1)(b) of Regulation No 207/2009. By that plea, CCB challenged the assessment by the First Board of Appeal of EUIPO of the distinctive character of the earlier mark, its assessment of the similarity of the signs at issue and its overall assessment of the existence of the likelihood of confusion.

21 As regards the distinctive character of the earlier mark, CCB complained in particular that the First Board of Appeal of EUIPO failed properly to identify the services in respect of which it considered that that mark enjoyed a reputation. According to CCB, the evidence produced by the Groupement des cartes bancaires did not establish the reputation of that mark for all the services covered by it.

22 As regards the assessment of the similarity of the signs at issue, CCB argued, in particular, that the First Board of Appeal of EUIPO had, in that assessment, wrongly taken into account the reputation of the earlier mark. In the disputed decision, that mark was analysed as if it were a word mark. Similarly, the sign for which registration as a trade mark is sought was analysed on the basis of its verbal element without taking account of its figurative element.

23 The General Court dismissed the action as unfounded.

Forms of order sought by the parties to the appeal

24 CCB claims that the Court should:

– set aside the judgment under appeal;

– give judgment in the case or, in the alternative, remit the case to the General Court; and

– order EUIPO and any intervener to bear their own costs and to pay those incurred by CCB in the present proceedings and in the proceedings at first instance.

25 EUIPO contends that the Court should:

– dismiss the appeal; and

– order CCB to pay the costs.

The appeal

Arguments of the parties

26 CCB raises three grounds of appeal.

27 By its first ground of appeal, it alleges that the General Court erred in law in its assessment of the existence of a likelihood of confusion and thus infringed Article 8(1)(b) of Regulation No 207/2009.

28 That ground of appeal comprises four parts.

29 CCB claims that the General Court erred in law, first, by taking the reputation of the earlier mark into account at the stage of the Court's examination of the similarity of the signs at issue and by taking that reputation into account again in the overall assessment of the likelihood of confusion. It thus double-counted the distinctive character of the earlier mark.

30 CCB points out that the assessment of the similarity of the signs at issue is an autonomous analysis. The degree of distinctive character of the earlier mark plays a role only in the context of the overall assessment of the likelihood of confusion, as does the degree of similarity of the signs at issue and the degree of similarity of the goods or services in question.

31 Second, the General Court failed to have regard to the figurative nature of the signs at issue. It analysed those signs as if they were word signs, thus ignoring the case-law on Article 8(1)(b) of Regulation No 207/2009, in accordance with which the assessment of the similarity of the signs at issue must be based on the impression made by those signs as a whole, which obviously includes their figurative elements.

32 By failing to take account of the figurative character of the signs at issue, the General Court also struck an incorrect balance between the visual and phonetic comparison of those signs. Since the signs at issue include the logos of the respective undertakings and since a logo is, by its nature, designed to serve as a visual reference, the General Court should have given greater weight to the visual comparison. It overestimated the importance of the phonetic comparison.

33 Third, the General Court erred in determining the services in respect of which it considered that the earlier mark had a reputation and therefore had a high degree of distinctive character. The General Court's finding that the highly distinctive character of the earlier mark extends to 'financial affairs, monetary affairs, banking' is neither supported by evidence nor reasoned. The General Court based that finding on the reputation of the earlier mark, even though that reputation had been established for only a limited number of the services designated by that mark. Furthermore, the General Court failed to make it clear that the First Board of Appeal of EUIPO should not have relied on the decision of the Fourth Board of Appeal of EUIPO in Case R 944/2013-4, which concerned the word marks of the undertakings in dispute and therefore had a subject matter different from that of the present case.

34 Fourth, the General Court failed to make an overall assessment of the existence of the likelihood of confusion.

35 Indeed, a number of relevant factors were not taken into consideration. Thus, the fact that the level of attention of the relevant public is high should, according to CCB, have been included in the overall assessment of the existence of a likelihood of confusion, since such a fact makes it less likely that the public will have an imperfect recollection of the signs at issue and will be led to confuse the origin of the services designated by the mark applied for and that of the services designated by the earlier mark. Instead of taking that fact into account, the General Court took as its basis a general consideration that the relevant public has an imperfect recollection of the signs at issue.

36 The second ground of appeal alleges infringement of Article 36 of the Statute of the Court of Justice of the European Union, concerning the requirement that the reasoning of judgments be stated, made applicable to the General Court by virtue of the first paragraph of Article 53 of that statute.

37 In particular, the General Court failed to state the grounds for its finding that the earlier mark has a reputation and thus has a high degree of distinctive character in relation to financial, monetary and banking matters. It provided no explanation of how the evidence of use of the earlier mark, which related specifically to payment cards, could justify such a general conclusion.

38 By the third ground of appeal, which CCB raises in the alternative, the General Court is alleged to have distorted the facts and the evidence, first, by disregarding the figurative nature of the signs at issue; second, by relying on the decision of the Fourth Board of Appeal of EUIPO in Case R 944/2013-4 and, third, by conferring on the earlier mark a high degree of distinctive character for financial, monetary and banking services.

39 According to EUIPO, the appeal must be dismissed.

40 As regards the first part of the first ground of appeal, it observes that the First Board of Appeal of EUIPO and the General Court examined the graphic representation of the earlier mark and that they validly held that, notwithstanding the stylisation of that mark, the relevant public in France perceives it as the acronym 'CB'.

41 The reference to the reputation of the earlier trade mark in the context of the assessment of the similarity of the signs at issue was made only in the interest of completeness. Even if that reputation had been completely ignored in the context of that assessment, the consideration relating to the perception of the earlier mark by the relevant public would still be that indicated by the General Court.

42 EUIPO further considers that the Board of Appeal and the General Court were entitled to take account of that reputation. It observes that the assessment of the similarity of the signs at issue cannot be made solely on the basis of the graphic representation of those signs. It is clear from the case-law that the

comparison of those signs must be based on the public's perception. Accordingly, any element capable of influencing that perception, such as the reputation of the earlier mark, is relevant to that comparison.

43 With respect to the second part of the first ground of appeal, EUIPO submits that most of CCB's arguments regarding the comparison of the signs at issue are factual and are therefore inadmissible.

44 It further observes that the General Court was entitled to find that the stylisation of the earlier mark is not sufficiently striking to prevent the relevant public from focusing its attention on the group of letters 'CB'. CCB is therefore incorrect to allege that the General Court analysed the signs at issue as if they were word signs.

45 The third part of the first ground of appeal must, in EUIPO's view, be rejected as inadmissible, since it relates to the facts.

46 It further argues that the arguments submitted by CCB in that part are, in any event, unfounded.

47 With particular regard to the services taken into account, EUIPO considers that it is not necessary to establish a high degree of distinctive character in respect of all the specific elements of a broad category of goods or services which the mark in question designates.

48 As regards the fourth part of the first ground of appeal, EUIPO submits that the high level of attention of the relevant public does not preclude that public from having an imperfect recollection of the signs at issue.

49 The second ground of appeal must also, in EUIPO's submission, be rejected.

50 The General Court gave due reasons for its rejection of CCB's arguments that it had not been shown that the earlier mark had a high degree of distinctive character in relation to financial, monetary and banking matters.

51 The General Court stated that the finding made by the First Board of Appeal of EUIPO that the earlier mark was highly distinctive was sufficiently supported by the evidence in the present case. It follows that, in particular, there was no need to examine whether that Board of Appeal was correct to refer to the decision of the Fourth Board of Appeal of EUIPO in Case R 944/2013-4. Indeed, such an examination could not have affected the finding that the earlier mark was highly distinctive.

52 As regards, finally, the third ground of appeal, EUIPO submits that CCB failed to specify the facts and evidence which were allegedly distorted by the General Court, nor did it indicate the specific passages of the judgment under appeal in which such distortion was clearly shown.

53 That ground of appeal is, in any event, unfounded, in the view of EUIPO. Contrary to CCB's submissions, the General Court did not disregard the figurative character of the signs at issue, referred to the decision of the Fourth Board of Appeal of EUIPO in Case R 944/2013-4 merely in the interests of completeness and rightly held that the earlier mark has a high degree of distinctive character for all the services concerned.

Findings of the Court

54 In the case of opposition based on an earlier individual trade mark, the likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009, is to be understood as being the risk that the public might believe that the goods or services covered by that mark and those covered by the mark applied for come from the same undertaking or, as the case may be, from economically linked

undertakings. The existence of such a risk must be assessed globally, taking into account all factors relevant to the particular case (judgment of 5 March 2020, *Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi* v *EUIPO*, C-766/18 P, EU:C:2020:170, paragraphs 63 and 67 and the case-law cited).

55 Those factors include, inter alia, the degree of similarity between the signs at issue and the goods or services in question and also the strength of the earlier mark's reputation and its degree of distinctive character, whether inherent or acquired through use (judgments of 24 March 2011, *Ferrero* v *OHIM*, C-552/09 P, EU:C:2011:177, paragraph 64, and of 4 March 2020, *EUIPO* v *Equivalenza Manufactory*, C-328/18 P, EU:C:2020:156, paragraph 57).

56 As regards the first part of the first ground of appeal, by which CCB alleges that the General Court erroneously took into account the reputation and, accordingly, the distinctive character of the earlier mark in its assessment of the similarity of the signs at issue, it must be recalled that the examination of the similarity of the signs at issue consists of a visual, phonetic and conceptual comparison based on the overall impression which those signs make, having regard to their intrinsic qualities, on the memory of the relevant public (judgment of 4 March 2020, *EUIPO* v *Equivalenza Manufactory*, C-328/18 P, EU:C:2020:156, paragraph 71 and the case-law cited), whereas the distinctive character of the earlier mark concerns the ability of that mark to identify the goods or services in respect of which it was registered as coming from a particular undertaking and thus to distinguish those goods or services from those of other undertakings (see, with regard to the distinctive character of EU trade marks, judgment of 13 September 2018, *Birkenstock Sales* v *EUIPO*, C-26/17 P, EU:C:2018:714, paragraph 31 and the case-law cited).

57 As regards, more particularly, the reputation, it must be borne in mind that a trade mark enjoys a reputation when it is known, in a substantial part of the relevant territory, to a significant section of the public concerned by the goods or services designated. In that regard, it is necessary to take into consideration, in particular, the market share held by the mark, the intensity, geographical extent and duration of its use and the size of the investment made by the undertaking in promoting it (judgment of 28 June 2018, *EUIPO* v *Puma*, C-564/16 P, EU:C:2018:509, paragraphs 55 and 56 and the case-law cited).

58 Consequently, unlike the factor of the similarity of the signs at issue, the factor of the reputation and distinctive character of the earlier mark does not involve a comparison between a number of signs, but concerns only one sign, namely the sign which the opponent has registered as a mark. Since those two factors are thus fundamentally different in scope, examination of one of them does not allow conclusions to be drawn concerning the other. Even where the earlier mark has a high degree of distinctive character by reason of its reputation, that fact does not make it possible to determine whether and, if so, to what extent that mark is visually, phonetically and conceptually similar to the mark in respect of which registration is sought.

59 It is therefore incorrect in law to assess the similarity of the signs at issue in the light of the reputation of the earlier mark.

60 In the present case, in the part of the grounds of the judgment under appeal relating to the similarity of the signs at issue, the General Court held, in paragraphs 52 and 53 of that judgment, that the reputation and high level of distinctive character of a mark may be relevant to the identification of the dominant element in the overall impression made by that mark. In paragraph 54 of that judgment, it deduced therefrom that, having regard to the reputation of the earlier mark, the First Board of Appeal of EUIPO was correct to hold that the relevant public would perceive that mark as being the word element consisting of the acronym CB. It concluded, in paragraph 58 of that judgment, that that Board of Appeal was entitled to take account mainly of that component of the earlier mark when comparing the signs at issue.

61 In that regard, it must be noted that although the identification of the dominant element of a sign may be relevant for the purpose of comparing signs at issue (judgment of 22 October 2015, *BGW*, C-20/14, EU:C:2015:714, paragraph 37 and the case-law cited), it does not follow that the reputation and the degree of distinctive character of that sign, which concern it as a whole, make it possible to determine which component of that sign is dominant in the perception of the relevant public.

62 On the contrary, Regulation No 207/2009 cannot be understood as meaning that the reputation or the high level of distinctive character of a trade mark may lead to a finding that one of its constituent elements dominates over another of its elements for the purposes of assessing the similarity of signs at issue.

63 In paragraph 52 of the judgment under appeal, the General Court stated that the reputation of the earlier mark 'may influence the perception of the connections between the various elements' of that mark. However, the reputation of a highly stylised word mark, such as the earlier mark at issue, is exactly based on the knowledge of a significant part of the relevant public of all the elements, both verbal and figurative, which make up that mark.

64 It follows that, by holding that the First Board of Appeal of EUIPO was entitled to infer from the reputation and highly distinctive character of the earlier mark that it would be perceived as being the word element CB, that that word element was therefore dominant and that it must, in turn, dominate the assessment of the similarity of the signs at issue, the General Court erred in law as described in paragraph 59 of this judgment. The first part of the first ground of appeal is therefore well founded.

65 Since the reputation and distinctive character of the earlier mark were, moreover, examined in paragraphs 38 to 48 of the judgment under appeal and then incorporated, in paragraph 67 of that judgment, into the overall assessment of the existence of a likelihood of confusion, it remains to be determined whether that part of the examination carried out by the General Court is, as CCB submits in its second ground of appeal, devoid of sufficient reasoning.

66 More particularly, CCB alleges that the General Court, in response to its arguments summarised in paragraph 21 of this judgment, found, without giving sufficient reasons for that finding, that the earlier mark enjoyed a reputation and thus possessed a high degree of distinctive character, in general, for services relating to 'financial affairs, monetary affairs, banking'.

67 In accordance with settled case-law, the statement of the reasons on which a judgment of the General Court is based must clearly and unequivocally disclose the General Court's reasoning, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review (judgment of 1 December 2016, *Klement* v *EUIPO*, C-642/15 P, not published, EU:C:2016:918, paragraph 24 and the case-law cited). Where the reasoning of the General Court is contradictory or inadequate, that raises a question of law which is amenable to judicial review on appeal (judgment of 4 March 2020, *EUIPO* v *Equivalenza Manufactory*, C-328/18 P, EU:C:2020:156, paragraph 25 and the case-law cited)).

68 In paragraphs 39 to 41 of the judgment under appeal, the General Court stated, with ample reasoning, that the assessment contained in the disputed decision concerning the reputation of the earlier trade mark could be likened to a finding by the First Board of Appeal of EUIPO of the existence of the highly distinctive character of that mark.

69 It then clearly stated, in paragraph 44 of that judgment, that CCB, while not contesting the existence of the earlier mark's reputation in respect of certain services, argued that such a reputation could not be established for all the services designated by that mark. The General Court held, in paragraph 45 of that judgment, that, in order to respond to that argument put forward by CCB, it was necessary to

examine whether the assessment contained, in essence, in the disputed decision that the earlier mark enjoyed a reputation for the general category of services relating to 'financial affairs, monetary affairs, banking' was justified.

70 In paragraph 46 of that judgment, the General Court held that that assessment was duly justified by paragraphs 22 to 24 of the disputed decision, since the data contained in those paragraphs demonstrated the importance and reputation of the earlier mark in the French payment system and in the routing of bank card transactions in France.

71 In that regard, it must be noted that CCB correctly submits that the importance and reputation of the earlier mark in the system of bank card transactions does indeed make it possible to understand why the General Court considered that that mark has a highly distinctive character for services relating to bank card payments, but does not explain in any way why the earlier mark has, in general, a highly distinctive character in the field of financial, monetary and banking services.

72 It is important to recall, in that context, that the distinctive character of a trade mark must be assessed on the basis of the goods or services covered by it and the presumed perception of the relevant section of the public. It follows that the degree of that distinctive character must be determined on the basis of, inter alia, the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been and the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking (judgments of 22 June 1999, *Lloyd Schuhfabrik Meyer*, C-342/97, EU:C:1999:323, paragraphs 22 and 23, and of 19 June 2014, *Oberbank and Others*, C-217/13 and C-218/13, EU:C:2014:2012, paragraphs 39 and 41).

73 Paragraph 46 of the judgment under appeal refers to such factors, but they relate to the market share held by the earlier mark and the intensity of use of that mark in France with regard, specifically, to services enabling credit card transactions to be performed.

74 As the General Court itself found in paragraph 45 of the judgment under appeal, in order to determine whether there is a likelihood of confusion on the part of the public, it was necessary to examine the distinctive character of the earlier mark for services relating to 'financial affairs', 'monetary affairs' and 'banking', those services being among those designated by the earlier mark and being, moreover, essentially identical to those covered by the mark sought.

75 However, the General Court failed to conduct that review. In paragraph 46 of the judgment under appeal, it simply referred to the reputation enjoyed by the earlier mark in the specific subcategory of services enabling credit card transactions to be performed. Furthermore, in paragraph 47 of that judgment, it merely disregarded CCB's criticism of the fact that the disputed decision took account of the decision of the Fourth Board of Appeal of EUIPO in Case R 944/2013-4.

76 It thus appears that the judgment under appeal is devoid of an assessment of the reputation and distinctive character of the earlier mark duly carried out on the basis of the services designated by that mark in relation to 'financial affairs', 'monetary affairs' and 'banking', that broader spectrum of services designated by that mark nonetheless being, as is apparent from paragraph 45 of the judgment under appeal, that on the basis of which it was appropriate to assess whether there is a risk that the public might erroneously believe that the services offered by CCB under the mark applied for come from the Groupement des cartes bancaires or an undertaking connected therewith.

77 It follows that the statement of reasons for the General Court's conclusion in paragraph 48 of the judgment under appeal that the distinctive character of the earlier mark was correctly assessed in the disputed decision is inadequate. That defect in the statement of reasons also vitiates the overall

assessment of the existence of a likelihood of confusion made by the General Court in paragraph 67 of the judgment under appeal, which paragraph refers, in particular, to paragraph 48 thereof. In those circumstances, the second ground of appeal must be upheld.

78 In view of the error of law found in the examination of the first part of the first ground of appeal and the failure to state reasons found in the examination of the second ground of appeal, the judgment under appeal must be set aside, without it being necessary to examine the second to fourth parts of the first ground of appeal or the third ground of appeal.

The action before the General Court

79 It follows from the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union that, if the appeal is well founded, the Court may itself give final judgment in the matter, where the state of the proceedings so permits.

80 In the present case, the Court has the necessary information to enable it to give final judgment on the action.

81 As has been recalled in paragraphs 55 and 72 of this judgment, the distinctive character of the earlier mark is a relevant factor for the purposes of the overall assessment of the existence of a likelihood of confusion and must be determined in relation to the goods or services covered by that mark and the presumed perception of the relevant section of the public.

82 With regard to that factor, the First Board of Appeal of EUIPO merely noted, in paragraphs 22 to 25 of the disputed decision, that the earlier trade mark had a reputation in France in the sector of services enabling credit card transactions to be performed. Notwithstanding the significantly broader scope of services designated by the earlier mark, the First Board of Appeal of EUIPO failed to examine the distinctive character of that mark by taking into account, more generally, the services designated by that mark.

83 It is also apparent from paragraph 30 of the disputed decision that the First Board of Appeal of EUIPO relied on the reputation of the earlier mark for the purposes of assessing the similarity of the signs at issue. For the reasons set out in paragraphs 58 and 59 of this judgment, such an approach is incorrect.

84 It follows that CCB's arguments put forward before the General Court, in the context of its plea alleging infringement of Article 8(1)(b) of Regulation No 207/2009, that the First Board of Appeal of EUIPO erred in its assessment of the similarity of the signs at issue and failed properly to identify the services in respect of which the distinctive character of the earlier mark was to be examined are well founded. Since that plea in law must therefore be upheld, the disputed decision must be annulled.

Costs

85 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

86 Under Article 138(1) of those rules, applicable 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.

87 Furthermore, under Article 184(4) of the Rules of Procedure, an intervener at first instance which has not itself brought the appeal may be ordered to pay the costs in the appeal proceedings only if it took part in the written or oral stage of the proceedings before the Court of Justice.

88 In the present case, the Groupement des cartes bancaires, which was an intervener at first instance, lodged a rejoinder with the Registry of the Court for the purpose of responding both to the appeal and CCB's reply. However, that rejoinder, which was not preceded by a response from the Groupement des cartes bancaires, was, in accordance with Article 175 of the Rules of Procedure, under which the purpose of the rejoinder is to supplement the response, classified as a document not provided for by those rules and was therefore not placed on the case file.

89 Although the Groupement des cartes bancaires must, therefore, be regarded as not having participated in the proceedings before the Court of Justice and cannot, therefore, be ordered to pay the costs in the appeal proceedings, it is necessary, however, to rule, as regards that party, on the costs incurred at first instance. Since the Court of Justice is giving final judgment in the dispute by ruling on the action, it is also for the Court to rule on the costs incurred at first instance.

90 Since CCB succeeds both in its action and on appeal, and since it has claimed that EUIPO and the Groupement des cartes bancaires should be ordered to pay the costs, it is appropriate, in the light of the foregoing, to order EUIPO to bear its own costs of both the present appeal and the proceedings at first instance and to pay all the costs incurred by CCB in the present appeal and half of the costs incurred by CCB in the proceedings at first instance. The Groupement des cartes bancaires is to bear its own costs and to pay half of the costs incurred by CCB in the proceedings at first instance.

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

1. **Sets aside the judgment of the General Court of the European Union of 6 December 2018, *China Construction Bank* v *EUIPO — Groupement des cartes bancaires (CCB)* (T-665/17, EU:T:2018:879);**

2. **Annuls the decision of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 14 June 2017 (Case R 2265/2016-1);**

3. **Orders the European Union Intellectual Property Office (EUIPO) to bear its own costs and to pay the costs incurred by China Construction Bank Corp. in the present appeal and half of the costs incurred by China Construction Bank Corp. in the proceedings at first instance;**

4. **Orders the Groupement des cartes bancaires to bear its own costs and to pay half of the costs incurred by China Construction Bank Corp. in the proceedings at first instance.**

Jarukaitis Ilešič Lycourgos

Delivered in open court in Luxembourg on 11 June 2020.

A. Calot Escobar
Registrar

I. Jarukaitis
President of the Tenth Chamber