Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

21 September 2017*

(EU trade mark — Invalidity proceedings — EU figurative mark BASIC — Earlier national trade names basic and basic AG — Relative ground for refusal — Use in the course of trade of a sign of more than mere local significance — Article 8(4) and Article 53(1)(c) of Regulation (EC) No 207/2009)

In Case T-609/15,

Repsol YPF, SA, established in Madrid (Spain), represented initially by J.-B. Devaureix and L. Montoya Terán, and subsequently by J. Erdozain López, lawyers,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by D. Hanf, acting as Agent,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO, intervener before the Court, being

Basic AG Lebensmittelhandel, established in Munich (Germany), represented by D. Altenburg and H. Bickel, lawyers,

ACTION brought against the decision of the First Board of Appeal of EUIPO of 11 August 2015 (Case R 2384/2013-1), relating to invalidity proceedings between Basic Lebensmittelhandel and Repsol, SA,

THE GENERAL COURT (Eighth Chamber),

composed of A.M. Collins (Rapporteur), President, R. Barents and J. Passer, Judges,

Registrar: X. Lopez Bancalari, Administrator,

having regard to the application lodged at the Court Registry on 29 October 2015,

having regard to the response of EUIPO lodged at the Court Registry on 29 January 2016,

having regard to the response of the intervener lodged at the Court Registry on 4 February 2016,

further to the hearing on 18 May 2017,

* Language of the case: English.

gives the following

Judgment

Background to the dispute

1 On 29 January 2007, the applicant, Repsol YPF, SA, filed an application for registration of an EU trade mark with the European Union Intellectual Property Office (EUIPO) pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1)).

2 Registration as a mark was sought for the following figurative sign, claiming the colours blue, red, orange and white:



3 The services in respect of which registration was sought are in, inter alia, Classes 35 and 39 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, inter alia, for each of those classes, to the following description:

– Class 35: 'Commercial retailing of tobacco, press, batteries, playthings';

– Class 39: 'Distribution of staple foodstuffs, pastry and confectionery, ices, prepared meals, tobacco, press, batteries, playthings'.

4 The EU trade mark application was published in *Community Trade Marks Bulletin* No 34/2007 of 16 July 2007.

5 The mark applied for was registered on 4 May 2009 under number 5648159.

6 On 26 September 2011, the intervener, Basic AG Lebensmittelhandel, submitted an application seeking that the contested mark be declared partially invalid for the services referred to in paragraph 3 above ('the contested services'), on the basis, inter alia, of Article 53(1)(c) of Regulation No 207/2009, read in conjunction with Article 8(4)(b) thereof. In support of its application, in so far as it was based on those provisions, the intervener relied on the 'business signs', within the meaning of Paragaph 5 of the Gesetz über den Schutz von Marken und sonstigen Kennzeichen (Markengesetz) (German Law on the protection of trade marks and other distinctive signs) of 25 October 1994 (BGBl. 1994 I, p. 3082 and BGBl. 1995 I, p. 156; 'the Markengesetz'), basic and basic AG, which, it claims, it uses in the course of trade in Germany and in Austria to provide services of 'retail of foodstuffs, drugstore articles, organic and other consumer products, restaurant services'.

7 The intervener provided the following evidence in annex to its application for a declaration of invalidity of 26 September 2011:

– three screenshots from its website printed on 25 July 2011, the first displaying information on the company dating from 1 July 2011 and the other two displaying maps dating from 2010 showing the location of the intervener's supermarkets in Germany and Austria;

– a screenshot from its website printed on 25 July 2011 displaying information, dating from 2010, on certain ‘basic’ products;

– its annual report for the year 2006;

– its annual report for the year 2004;

– its annual report for the year 2005;

– a letter from Biogarten Handels GmbH to ‘basic AG’, dated 21 April 2006, detailing the bonus credits issued by the former to the latter for the turnover obtained by ‘basic AG’ in the first quarter of 2006 from the sale of Biogarten products;

– a letter from Biogarten to ‘basic AG’, dated 13 December 2005, detailing the bonus credits issued by the former to the latter for the turnover obtained by ‘basic AG’ from April to September 2005 from the sale of Biogarten products;

– a delivery notice, dated 15 April 1999, issued by the company Nordlicht Naturkost Handels GmbH to ‘basic AG’ ‘Bio-Supermarkt’;

– an invoice, dated 13 November 2001, issued by Nordlicht Naturkost to ‘basic AG’ ‘Bio-Supermarkt’;

– sales statistics, dated 1 December 2006, published by Herrmannsdorfer Landwerkstätten Glonn GmbH & Co. KG, a supplier of organic foodstuffs, notably concerning ‘basic’;

– an affidavit, dated 19 September 2011, made by a member of the intervener’s marketing department;

– tables detailing the turnover ‘basic’ claims to have obtained up until July 2009, December 2010 and July 2011;

– marketing brochures of ‘basic’ supermarkets from June, July and December 2003, January, February, March, April, September and November 2004, June, October and November 2005, and January, February, April, May and December 2006;

– undated promotional and advertising material;

– an ‘Entrepreneur of the Year 2006’ certificate, dated 21 September 2006, awarded to two directors of ‘basic AG’;

– press clippings from 2003 to 2006;

– a judgment of the Landgericht München I (Regional Court, Munich I, Germany) of 9 September 2006.

8 In its application for a declaration of invalidity, the intervener also cited the relevant provisions of Paragraphs 5 and 15 of the Markengesetz and decisions of German courts interpreting those provisions.

9 By decision of 8 October 2013, the Cancellation Division granted the application for a declaration of invalidity on the basis of Article 53(1)(c) of Regulation No 207/2009, read in conjunction with Article 8(4) thereof and declared the partial invalidity of the contested mark to the extent that it was registered for the contested services.

10 On 2 December 2013, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009, against the Cancellation Division's decision. It filed a statement of grounds on 7 February 2014.

11 By decision of 11 August 2015 ('the contested decision'), the First Board of Appeal of EUIPO confirmed the decision of the Cancellation Division and dismissed the appeal.

12 In the contested decision, the Board of Appeal examined the conditions laid down in Article 8(4) of Regulation No 207/2009, whereby a non-registered trade mark or other sign used in the course of trade allows its holder to obtain a declaration of invalidity of a trade mark registered subsequently.

13 In that regard, in the first place, the Board of Appeal confirmed the finding of the Cancellation Division that the evidence submitted by the intervener, as described in paragraph 7 above, proved that a significant part of the relevant German public, which consisted of both the average consumer and professionals in the field of food retail, recognised 'basic' as a 'business identifier' (paragraph 26 of the contested decision).

14 First, as regards the geographical dimension of the sign's significance, the Board of Appeal noted that the intervener had proved widespread use of the business sign (or company name) basic in Germany (paragraphs 27 and 30 of the contested decision).

15 Secondly, as regards the economic dimension of the sign's significance, the Board of Appeal found that the evidence produced showed that the company name basic had been the subject of 'uninterrupted use' between 1999 and 2011 and, consequently, on the dates relevant to the present case, namely 29 January 2007 and 26 September 2011 (paragraphs 24 and 32 of the contested decision). It found that the activities carried out by the intervener under that name had had an economic impact for both the end consumer and professionals in the field of food retail (paragraph 34 of the contested decision). It noted, inter alia, that the intervener had adduced evidence not only of use of the figurative version of the word 'basic', of that word associated with the word 'aktiengesellschaft', and of the slogan 'Bio für alle', but also of frequent use of the word 'basic' on its own. It concluded that it was established that the intervener had used the word 'basic' per se as a 'business indicator' and that that term was perceived as such by the relevant public. That public 'also perceive[d] the [basic] sign in its figurative version and/or with the inclusion of the descriptive term 'aktiengesellschaft' (indicating the type of corporation) or with the slogan 'Bio für alle' ('Organic for all') as the designation of the company when used, for example, on the cover of promotional brochures' (paragraph 38 of the contested decision).

16 In the second place, the Board of Appeal found that the basic sign, which constituted a business sign within the meaning of Paragraph 5(2) of the Markengesetz, conferred on the intervener, in accordance with Paragraph 15(1) and (2) of the Markengesetz, an exclusive right to prohibit the use of a subsequent sign if there was a likelihood of confusion between them (paragraph 49 of the contested decision). It concluded that there was such a likelihood in the present case in the minds of the relevant public in Germany, and that such a finding would stand even if that business sign were to be considered as weak, which is not the case here (paragraph 50 of the contested decision).

17 In reaching that conclusion, first, the Board of Appeal found that the contested services in Class 35 and the intervener's 'area of activity' were similar. It also found there to be a close link between the contested services in Class 39 and the intervener's activity of retailing food and drugstore goods. In its view, the retail and distribution services were complementary (paragraphs 41 to 44 of the contested decision).

18 Secondly, the Board of Appeal held that there was a high degree of similarity between the company name basic and the contested mark, since they both contained the word 'basic'. It held that that finding could not be called into question by either the decorative figurative elements of the contested

mark or by the applicant's argument that that word lacked any distinctive character. With regard to the latter point, it repeated that the intervener had clearly demonstrated that the business sign basic had been used to distinguish its business in the minds of the relevant public in Germany and was capable of performing that function. It added that the word 'basic' was an English word that did not describe that business for German consumers (paragraphs 45 to 48 of the contested decision).

19 The Board of Appeal concluded from all the foregoing considerations that the Cancellation Division had correctly declared, on the basis of Article 53(1)(c) of Regulation No 207/2009, read in conjunction with Article 8(4) thereof, that the contested mark was invalid for the contested services and that it was therefore not necessary to examine the grounds of the request for a declaration of invalidity based on Article 53(1)(a) of that regulation (paragraph 51 of the contested decision).

Forms of order sought

20 The applicant claims that the Court should:

– annul the contested decision;

– order EUIPO to pay the costs.

21 EUIPO and the intervener contend that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

22 By way of a first measure of organisation of procedure, adopted in accordance with Article 89 of the Rules of Procedure, the Court requested EUIPO to reply to a question in writing before the hearing. By way of a second measure of organisation of procedure, the Court requested the parties to reply to a question orally at the hearing. These requests were met.

Law

Preliminary observations

23 In support of its action, the applicant relies on three pleas in law. In the first plea in law, the applicant claims that the Board of Appeal incorrectly assessed the evidence furnished by the intervener in relation to use of the signs basic and basic AG in the course of trade in Germany. In the second plea, it claims that the Board of Appeal erred in finding that there was a likelihood of confusion under Paragraph 15(1) and (2) of the Markengesetz. In the third plea, the applicant alleges infringement of Article 36 TFEU.

24 Under Article 53(1)(c) of Regulation No 207/2009, an EU trade mark is to be declared invalid on application to EUIPO where there is an earlier right as referred to in Article 8(4) of that regulation and the conditions set out in the latter paragraph are satisfied.

25 Pursuant to those provisions, the proprietor of a sign used in the course of trade, other than a non-registered trade mark, may apply for a declaration that an EU trade mark is invalid if that sign satisfies all of the following four conditions: the sign must be used in the course of trade; it must be of more than mere local significance; the right to that sign must have been acquired in accordance with the law of the Member State in which the sign was used prior to the date of filing of the application for registration of the EU trade mark; and, lastly, the sign must confer on its proprietor

the right to prohibit the use of a subsequent trade mark. Thus, where a sign does not satisfy one of those conditions, the application for a declaration of invalidity based on the existence of a sign other than a trade mark used in the course of trade, within the meaning of Article 8(4) of Regulation No 207/2009 cannot be successful (see, to that effect, judgment of 24 March 2009, *Moreira da Fonseca* v *OHIM — General Óptica (GENERAL OPTICA)*, T-318/06 to T-321/06, EU:T:2009:77, paragraphs 32 and 47).

26 The first two conditions, namely those relating to the use of the sign relied on and its significance, which must be more than merely local, are clear from the wording of Article 8(4) of Regulation No 207/2009 and must therefore be interpreted in the light of EU law. Regulation No 207/2009 thus sets out uniform standards, relating to the use of signs and their significance, which are consistent with the principles underlying the system established by that regulation (judgment of 24 March 2009, *GENERAL OPTICA*, T-318/06 to T-321/06, EU:T:2009:77, paragraph 33).

27 By contrast, it is apparent from the phrase 'where and to the extent that, pursuant ... to the law of the Member State governing that sign', that the other two conditions, set out subsequently in Article 8(4)(a) and (b) of Regulation No 207/2009, constitute conditions laid down by the regulation which, unlike the conditions above, must be assessed in the light of the criteria set by the law governing the sign relied on. That reference to the law governing the sign relied on is entirely justified, given that Regulation No 207/2009 makes it possible for signs which fall outside the EU trade mark system to be relied on against an EU trade mark. Therefore, only the law of the Member State which governs the sign relied on can determine whether that sign predates the EU trade mark and whether it can justify a prohibition of the use of a subsequent trade mark (judgment of 24 March 2009 in *GENERAL OPTICA*, T-318/06 to T-321/06, EU:T:2009:77, paragraph 34). On that basis, the invalidity applicant must establish that the sign in question falls within the scope of the law of the Member State relied on and that it allows use of a subsequent mark to be prohibited (see, to that effect, judgments of 29 March 2011, *Anheuser-Busch* v *Budějovický Budvar*, C-96/09 P, EU:C:2011:189, paragraph 190, and 10 February 2015, *Infocit* v *OHIM — DIN (DINKOOL)*, T-85/14, not published, EU:T:2015:82, paragraph 63 and the case-law cited).

28 Paragraph 5 of the Markengesetz, entitled 'Commercial designations' (geschäftliche Bezeichnungen) provides:

'1. Business signs and titles of works shall enjoy protection as commercial designations.

2. Business signs are signs which, in the course of trade, are used as trade names, company names, or specific designations of a commercial activity or undertaking.

Business symbols and other signs intended to distinguish one commercial activity from other commercial activities and are regarded as symbols of the commercial activity by the relevant public shall be deemed equivalent to the special designation of a commercial activity.'

29 It is apparent from the documents before the Court that the earlier rights relied on in support of the application for the contested mark to be declared partially invalid, in so far as that application is based on Article 53(1)(c) of Regulation No 207/2009 read in conjunction with Article 8(4)(b) of that regulation, are 'business signs' (Unternehmenskennzeichen), within the meaning of Article 5 of the Markengesetz, namely the business signs basic and Basic AG, which the intervener claims to use for services described as 'retail of foodstuffs, drugstore articles, organic and other consumer products, restaurant services'.

30 Paragraph 15 of the Markengesetz provides:

'1. Acquisition of protection of a commercial designation shall grant its proprietor an exclusive right.

2. Third parties shall be prohibited from using the commercial designation or a similar sign in the course of trade without authorisation in a manner liable to cause confusion with the protected designation.

...'

31 It is in the light of those considerations that the merits of the present action must be examined.

The first plea in law, alleging that the Board of Appeal did not properly assess the evidence furnished by the intervener with regard to use of the basic and basic AG signs in the course of trade in Germany

32 The applicant's first claim is that the evidence furnished by the intervener does not establish to the requisite legal standard that the basic and basic AG signs have been used in Germany, other than locally, in the course of trade, both economically and geographically.

33 First, the applicant, referring inter alia to the judgment of 23 October 2013, *Dimian* v *OHIM — Bayer Design Fritz Bayer (Baby Bambolina)* (T-581/11, not published, EU:T:2013:553), submits that it was for the intervener to establish that the earlier signs relied on were used in the course of trade in a 'continuous and uninterrupted' manner up until the filing of the application for a declaration of invalidity of the contested mark, which in this instance was on 26 September 2011. However, in the present case, the evidence furnished by the intervener in order to establish such use essentially related only to the period from 2003 to 2006.

34 Secondly, the applicant claims that most of the evidence produced by the intervener does not state where the products were sold, the nature of those products, or any other information required to establish use in the course of trade. In addition, such information would not in itself be sufficient to demonstrate that the earlier signs were used in connection with the contested services.

35 The applicant adds that the Board of Appeal relied mostly on an affidavit which was made by the intervener itself and could therefore be of only limited relevance.

36 As regards the documents which contain representations of the intervener's figurative marks, the applicant claims that they cannot establish use of the basic and basic AG business signs since they do not refer to those business signs but rather to 'other trademarks covered by separate registrations'.

37 Lastly, the applicant claims that the fact that 24 supermarkets are operated under the basic business sign in Germany, as indicated in paragraph 28 of the contested decision, is insufficient to establish significant presence, on account of the country's large size.

38 The applicant's second claim is that the intervener adduced no evidence to establish that the basic or basic AG 'marks' have acquired sufficient recognition (Verkehrsgeltung), within the meaning of the Markengesetz, among the relevant public in Germany.

39 For its part, EUIPO contends, firstly, that the Board of Appeal was correct to find that the intervener had established that the earlier business sign basic, designating a company supplying retail services of food and drugstore goods as well as fast food services in Germany, had been used, both in economic and geographical terms, in trade of more than local significance.

40 In that regard, EUIPO rejects the applicant's claim that the operation of 24 supermarkets cannot, in view of the size of the country, be regarded as a significant presence in Germany.

41 Furthermore, EUIPO contends that the Board of Appeal correctly concluded that the intervener proved uninterrupted use from 1999 to 2011 and a significant commercial presence in Germany of the earlier business sign basic in order to designate supermarkets providing retail services of food and drugstore goods as well as fast food services.

42 At the hearing, in response to the written question that the Court put to the parties by way of the second measure of organisation of procedure, EUIPO contended that it was not legally necessary to prove continuous use of the earlier sign between the two relevant dates, namely the date of filing of the application for registration of the EU mark and the date of filing of the application for a declaration of invalidity. It stated that where the existence of the earlier right is established on both those dates there is a 'form of presumption' that the right continued to exist between the two dates, although that presumption is rebuttable.

43 EUIPO contests the arguments put forward by the applicant. First of all, it states that the Board of Appeal did not base its findings primarily on the affidavit drawn up by the intervener. It notes that, inter alia, the Board of Appeal was careful to verify that the information contained in that affidavit was corroborated by additional objective evidence. Secondly, it contends that the documents taken into consideration in assessing use of the earlier business sign basic all demonstrate use of the basic sign as a commercial designation. Finally, it asserts that the applicant's claim that the evidence submitted does not state where the products were sold, the nature of those products, or any other information required to establish use in the course of trade lacks any factual basis and is too general and unspecific.

44 Secondly, EUIPO observes that the earlier right relied on in the present case is not a non-registered trade mark within the meaning of Paragraph 4(2) of the Markengesetz, but a business sign within the meaning of Paragraph 5(2) of that law.

45 The intervener puts forward, in essence, the same arguments as EUIPO. However, at the hearing, contrary to the position taken by EUIPO, the intervener argued that it was not necessary, in the present case, to demonstrate that the business signs relied on were still in use at the date of filing of the application for a declaration of invalidity. According to the intervener, under the applicable German law, it must be assumed that those earlier rights still existed on that date.

46 By its first plea, the applicant seeks to call into question the Board of Appeal's assessment of the first two conditions set out in paragraph 25 above, which, as is common ground between the main parties, are conditions that fall to be interpreted under EU law. In that regard, it should be pointed out at the outset that, contrary to the intervener's submissions at the hearing, it is clear from the text of Article 8(4) of Regulation No 207/2009, to which Article 53(1)(c) thereof refers, that in order for Article 8(4) of the regulation to be successfully invoked in invalidity proceedings under Article 53(1)(c), use of the earlier non-registered sign must be established.

47 As regards the first condition for application of Article 8(4) of Regulation No 207/2009, it should be noted that, according to the case-law, a sign is used in the course of trade where such use is made in the context of commercial activity with a view to economic advantage and not in the private sphere (see judgment of 3 March 2016, *Ugly* v *OHIM — Group Lottuss (COYOTE UGLY)*, T-778/14, not published, EU:T:2016:122, paragraph 28 and the case-law cited).

48 As regards the relevant period for the purpose of assessing that condition, it is clear from the case-law that an applicant for a declaration of invalidity must prove that the sign relied on was used in the course of trade before the date of application for registration of the EU mark at issue (see, to that effect, judgment of 29 March 2011, *Anheuser-Busch* v *Budějovický Budvar*, C-96/09 P, EU:C:2011:189, paragraphs 164 to 168). Furthermore, according to the case-law, that sign must still be in use at the time of filing of the application for a declaration of invalidity (judgment of 23 October 2013, *Baby Bambolina*, T-581/11, not published, EU:T:2013:553, paragraph 27). In other words, it must be

established that the sign relied on was used not only on the date of filing of the application for registration of the EU mark, but also on the date of filing of the application for a declaration of invalidity. Where such evidence is furnished it may legitimately be considered that that sign was 'still ... in use' on the latter date, within the meaning of the case-law cited above.

49 Accordingly, in the present case, as is apparent from the contested decision (see paragraph 24, read in conjunction with paragraph 32), it was for the intervener to establish that the earlier signs basic and basic AG were used in the course of trade on 29 January 2007, the date of filing the application for registration of the contested mark, and on 26 September 2011, the date of filing the application for a declaration of invalidity of that mark.

50 In addition, it should be noted that, as is apparent from the contested decision (see, in particular, paragraph 26, which makes reference to paragraph 5) and as expressly confirmed by EUIPO both in its written response to the question put to it by the Court by way of the first measure of organisation of procedure, and orally at the hearing, the Board of Appeal based its assessment, in particular of the first two conditions set out in paragraph 25 above, exclusively on the evidence provided by the intervener in annex to its application for a declaration of invalidity of 26 September 2011, as set out in paragraph 7 above.

51 It must be concluded that several of those pieces of evidence establish, to the requisite legal standard, that, before the date on which the application for registration of the contested mark was filed, the intervener used the basic and basic AG signs in Germany in order to designate itself as a company providing retail of foodstuffs, drugstore articles and other consumer products as well as restaurant services. It accordingly used those signs in the context of commercial activity with a view to obtaining an economic advantage.

52 Although the name of the intervener is basic AG Lebensmittelhandel, it is apparent from the evidence that, in the course of trade, prior to 29 January 2007, it was generally referred to using the basic or basic AG signs, as 'AG' is simply the acronym for 'Aktiengesellschaft', the legal form of a German joint stock company.

53 Thus, the intervener's annual report for 2006 (see the third indent of paragraph 7 above), which was intended for both its shareholders and the general public, states, in particular, on a page relating to the 'history of basic organic supermarkets', that the intervener was founded in 1997, opened its first 'basic' organic supermarket in Munich in 1998, and opened its first 'basic' bistro, offering restaurant services, in 1999. It is also clear from that annual report that a second supermarket, which included a 'basic' bistro and a 'drugstore-bio' opened in Munich in 2000 and that the intervener subsequently continued to expand its chain of 'basic' organic supermarkets, which numbered 21 across Germany at the end of 2006. It also states that 'basic' receives increasing media attention and that approximately 250 press articles were written about it in 2006. That annual report contains numerous other references to the intervener using the designation 'basic' as well as references to 'basic' organic supermarkets, each of which is identified by the word 'basic' placed in front of the name of the German city in which it is established (for example 'basic Augsburg City', 'basic Berlin-Steglitz' and 'basic Bonn, im Gangolf').

54 Information similar to that outlined in paragraph 53 above is also included in the intervener's annual reports for the years 2004 and 2005 (see the fourth and fifth indents of paragraph 7 above).

55 As regards the two letters from Biogarten, the first dated 21 April 2006 and the second 3 December 2005 (see the sixth and seventh indents of paragraph 7 above), it must be observed that they are addressed to 'basic AG' and demonstrate that, under that sign, the intervener achieved a certain turnover from the sale of organic food products supplied by Biogarten. The delivery note and the invoice which relate to the supply of cane sugar, fruit and cereals and were issued by Nordlicht Naturkost, on 15 April 1999 and 13 November 2001 respectively, are also addressed to 'basic AG' and specifically refer to it as 'organic supermarket' (see the eighth and ninth indents of paragraph 7 above).

56 The sales statistics dated 1 December 2006 published by the organic food supplier Herrmannsdorfer Landwerkstätten Glonn (see the tenth indent of paragraph 7 above), are entitled '408 *statistics of basic subsidiaries' and show delivery amounts and sale prices of certain foodstuffs in a number of the intervener's establishments, identified by the word 'basic', followed by a number ranging from one to sixteen.

57 In addition, it is clear from the intervener's various marketing brochures from 2003 to 2006 (see the thirteenth indent of paragraph 7 above) that, in its commercial communications with consumers, the intervener almost always designates itself using the basic sign.

58 Furthermore, on the 'Entrepreneur of the Year 2006' certificate awarded to two of the intervener's directors on 21 September 2006 (see the fifteenth indent of paragraph 7 above), it is stated that they work for basic AG. It should also be added that in the numerous press clippings from 2003 to 2006 (see the sixteenth indent of paragraph 7 above), the intervener is generally referred to as 'basic' or 'basic AG'.

59 Lastly, it must be concluded that those pieces of evidence corroborate, to the requisite legal standard, the information contained in the affidavit signed on 19 September 2011 by a member of the intervener's marketing department (see the eleventh indent of paragraph 7 above), which indicates that the basic and basic AG signs were used in the course of trade in Germany on the date of filing of the application for registration of the contested mark.

60 On the other hand, none of the evidence referred to in paragraph 7 above establishes to the requisite legal standard that those signs were still used by the intervener on the date the application for a declaration of invalidity was submitted, namely 26 September 2011, in order to designate itself as a company providing retail of foodstuffs, drugstore articles and other consumer products as well as restaurant services.

61 It must therefore be concluded that none of the evidence examined in paragraphs 53 to 58 above relates to the years after 2006 or, most particularly, the year 2011. As for the promotional and advertising material referred to in the fourteenth indent of paragraph 7 above, it is sufficient to note that it is not dated.

62 As for the affidavit of 19 September 2011, it is clear it was primarily intended to corroborate the intervener's use of the basic sign in the course of trade prior to 2007.

63 Nevertheless, that affidavit also contains some information which relates to subsequent years. In particular, it includes a table showing, for each year between 1998 and 2010, the number of supermarkets operated by the intervener in Germany and Austria under the basic sign and a table showing, for each year between 2001 and 2010, the advertising expenses the intervener incurred in relation to that sign. In addition, annexed to that affidavit are tables prepared internally detailing the turnover 'basic' claims to have obtained up until July 2009, December 2010 and June 2011 (see the twelfth indent of paragraph 7 above).

64 However, that affidavit was made by someone who is professionally linked to the intervener. It cannot therefore be as reliable and credible as a declaration made by a third party or a person who is unconnected with the company in question. That affidavit is insufficient in itself and merely provides an indication which must be confirmed by further probative evidence (see, to that effect, judgment of 16 May 2013, *Reber* v *OHIM — Klusmeier (Wolfgang Amadeus Mozart PREMIUM)*, T-530/10, not published, EU:T:2013:250, paragraph 36). Yet such evidence is entirely lacking in the present case in relation to the years after 2006 and, most particularly, the year 2011. In that respect, it should be noted that EUIPO's assertion, made with reference to paragraph 33 of the contested decision, to the effect that the information in the affidavit in relation to the turnover and advertising expenditure is corroborated by the intervener's annual reports, which are approved by external accountants, is

misleading. The annual reports provided by the intervener in annex to its application for a declaration of invalidity of 26 September 2011 related only to 2004, 2005 and 2006, that is to say a period long before 2011.

65 Neither are the screenshots from the intervener's website printed on 25 July 2011 (see the first and tenth indents of paragraph 7 above) sufficient or conclusive in relation to the use of the basic and basic AG signs on the date the application for a declaration of invalidity was submitted. From the first screenshot, which shows a schematic diagram of the intervener, one can, at best, infer that the intervener referred to itself as 'basic AG' on 1 July 2011. The next two screenshots of maps showing the location of the intervener's supermarkets in Germany and Austria do not in any way demonstrate that those supermarkets were operated under the basic or basic AG signs. Moreover, those maps are from 2010. As for the final screenshot, the little information it provides regarding the sale of products bearing the basic sign in the intervener's supermarkets also dates from 2010.

66 Lastly, the Court must reject the claim made by the intervener at the hearing to the effect that the press clippings referred to in paragraph 29 of the contested decision, and which make reference to the basic sign, mostly date from 2006 to 2011. Nowhere does the contested decision state that as a fact. On the contrary, that claim is contradicted by paragraph 5 of the contested decision which expressly states that the press clippings date from 2003 to 2006. The Board of Appeal based its assessment of the first two conditions described in paragraph 25 above exclusively on the evidence set out in paragraph 5 of the contested decision and reproduced in paragraph 7 above (see paragraph 50 above).

67 The Court concludes from all of the foregoing considerations that the Board of Appeal could not conclude, on the sole basis of the evidence relied upon in the contested decision, that the condition requiring use of the signs relied on in the course of trade was satisfied. Given that the four conditions for the application of Article 8(4) of Regulation No 207/2009 are cumulative, the first plea must be upheld.

68 It follows that the contested decision must be annulled without it being necessary to examine the other two pleas.

Costs

69 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since EUIPO has been unsuccessful, it must be ordered to pay the applicant's costs, in accordance with the form of order sought by the applicant. Since the applicant has not applied for costs against the intervener, the latter must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Annuls the decision of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 11 August 2015 (Case R 2384/2013-1);**

2. **Orders EUIPO to bear its own costs and those incurred by Repsol YPF, SA;**

3. **Orders Basic AG Lebensmittelhandel to bear its own costs.**

Collins Barents Passer

Delivered in open court in Luxembourg on 21 September 2017.

E. Coulon
Registrar

A. M. Collins
President