Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

7 July 2016 *

(European Union trade mark — Proceedings for a declaration of invalidity — European Union word mark LUCEO — Absolute ground for refusal — Bad faith during the filing of the application for registration — Article 52(1)(b) of Regulation (EC) No 207/2009)

In Case T-82/14,

Copernicus-Trademarks Ltd, established in Borehamwood (United Kingdom), represented by F. Henkel, lawyer,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by A. Schifko, acting as Agent,

defendant,

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

Maquet GmbH, established in Rastatt (Germany), represented by N. Hebeis, lawyer,

ACTION brought against the decision of the Fourth Board of Appeal of EUIPO of 25 November 2013 (Case R 2292/2012-4) relating to invalidity proceedings between Copernicus-Trademarks and Maquet,

THE GENERAL COURT (Ninth Chamber),

composed of G. Berardis, President, O. Czúcz (Rapporteur) and A. Popescu, Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Registry of the Court on 4 February 2014,

having regard to the response of EUIPO lodged at the Registry of the Court on 15 May 2014,

having regard to the response of the intervener lodged at the Registry of the Court on 19 May 2014,

having regard to the reply lodged at the Registry of the Court on 4 September 2014,

having regard to the intervener's rejoinder lodged at the Registry of the Court on 18 November 2014,

* Language of the case: German.

having regard to the written questions put by the Court to the parties, the answers given by the latter and their observations to the answers given by the other parties,

having regard to the fact that no application for a hearing was made by the parties within the period of one month from notification of closure of the written procedure, and having therefore decided, acting upon a report of the Judge-Rapporteur, to rule on the action without an oral procedure pursuant to Article 135a of the Rules of Procedure of the General Court of 2 May 1991,

gives the following

Judgment

Background to the dispute

1 On 29 July 2009, the intervener, Maquet GmbH, filed an application for registration of a European Union trade mark with the European Union Intellectual Property Office (EUIPO), in accordance with Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1). The trade mark for which registration was sought is the word mark LUCEA LED for the goods 'surgical lights' in Class 10 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. That application for a European Union trade mark was published in *Community Trade Marks Bulletin* No 31/2009 of 17 August 2009.

2 On 16 September 2009, Copernicus EOOD ('Copernicus'), represented by Mr A., filed an application for registration of a European Union trade mark with EUIPO, in accordance with Regulation No 207/2009.

3 The mark in respect of which registration was sought ('the mark at issue') is the word sign LUCEO.

4 The goods in respect of which registration was sought are in Classes 10, 12 and 28 and correspond, for each of those classes, to the following description:

— Class 10: 'Surgical, medical, dental and veterinary apparatus and instruments; artificial limbs, eyes and teeth; orthopaedic articles; suture materials';

— Class 12: 'Passenger vehicles included in class 12; wheels for motorcycle vehicles, included in class 12; motorcycles, included in class 12, mopeds, included in class 12; tractors, included in class 12; mobile homes and caravans, included in class 12; air vehicles, included in class 12; space vehicles, included in class 12; rail vehicles, included in class 12; tracked vehicles, included in class 12; water vehicles, included in class 12; amphibious vehicles, included in class 12; wheelchairs; mobility scooters; golf buggies; baby carriages; parts for motor vehicles, included in class 12, namely vehicle body components; drives; motors; chassis components, in particular brake parts; springs; steamers; steering; wheel suspensions; wheels; tyres; hub caps; wheel rims; axle suspensions; transmission components, namely chains; gearboxes; propeller shafts; accessories for motor vehicles, included in class 12, namely trailer couplings; roof racks, luggage for transport in vehicles, child seats, tarpaulins; snow chains';

— Class 28: 'Gymnastic and sporting articles; games'.

5 Copernicus claimed a priority for the mark at issue, which was based on the application for registration of the Austrian trade mark LUCEO No 1533/2009, filed with the Österreichisches Patentamt (Austrian Patent Office) on 16 March 2009 in respect of the same goods as those referred to in paragraph 4.

6 On 12 November 2009, Capella EOOD, which had become the proprietor of the application for the mark at issue on 21 October 2009 and which was represented by Mr A., filed a notice of opposition against the application for registration of European Union trade mark LUCEA LED, in accordance with Article 41 of Regulation No 207/2009.

7 The opposition was based on the application for registration of the mark at issue. Although that application was lodged later than the application for registration of the European Union trade mark LUCEA LED, Capella relied on its priority by invoking the claim to priority referred to in paragraph 5 above.

8 The application for registration of the mark at issue was published in *Community Trade Marks Bulletin* No 39/2010 of 1 March 2010.

9 The trade mark at issue was registered on 26 October 2010 under No 8554974. 16 March 2009 was entered on the register as the date of priority of that mark.

10 On 3 May 2011, the intervener filed an application with EUIPO for a declaration that the mark in question was invalid in respect of all the goods and services for which it had been registered.

11 The grounds of invalidity relied on in support of that application were those referred to in Article 52(1)(b) of Regulation No 207/2009. According to the intervener, Copernicus had acted in bad faith when filing the application for registration of the mark.

12 On 6 September 2011, Verus EOOD, and on 27 August 2012, the applicant, Copernicus-Trademarks Ltd, both represented by Mr A., were entered on the European Union trade mark register as proprietors of the mark at issue.

13 On 14 December 2012, the Cancellation Division declared the mark at issue to be invalid on the ground that Copernicus had acted in bad faith when filing the application for registration of the mark.

14 On that same day, the applicant, represented by Mr A., filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009, against the Cancellation Division's decision.

15 On 13 November 2013, Ivo-Kermartin GmbH, also represented by Mr A., was entered on the European Union trade mark register as the new proprietor of the mark at issue.

16 By decision of 25 November 2013 ('the contested decision'), which is addressed to the applicant, the Fourth Board of Appeal of EUIPO dismissed the appeal. It confirmed the Cancellation Division's finding that Copernicus had acted in bad faith when filing the application for registration of the mark. In that regard, the Board of Appeal relied in particular on the finding that Copernicus had applied for registration of the mark at issue solely so as to be able to oppose the application for registration of the European Union trade mark LUCEA LED and to derive economic benefits therefrom.

Forms of order sought

17 The applicant claims that the Court should:

— annul the contested decision and reject the application for a declaration of invalidity of the mark at issue;

— in the alternative, annul the contested decision and refer the case back to the Board of Appeal;

— order EUIPO to pay the costs.

18 EUIPO and the intervener contend that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

A – *Admissibility of the action*

19 At the time the application was filed, Ivo-Kermartin, not the applicant, was the proprietor of the mark at issue (see paragraph 15 above).

20 On 4 September 2014, the applicant submitted a document, as Annex K.17 to the reply, from which it is apparent that Ivo-Kermartin commissioned it to pursue the present case before the General Court in its own interests and in those of the applicant.

21 In that regard, it suffices to note that the European Union Courts are entitled to assess, depending on the circumstances of each case, whether the proper administration of justice justifies the dismissal of the action on the merits, without first ruling on its admissibility (judgment of 26 February 2002 in *Council* v *Boehringer*, C-23/00 P, EU:C:2002:118, paragraphs 51 and 52).

22 In the circumstances of the present case, the Court takes the view that, for reasons of procedural economy, it is appropriate to consider at the outset the merits of the action for invalidity, without first ruling on its admissibility, since the action is, in any event and for the reasons set out below, unfounded.

B – *The merits of the action*

23 In support of its action, the applicant puts forward three pleas in law, the first of which alleges an infringement of the second sentence of Article 75 of Regulation No 207/2009, the second an infringement of Article 76 of that regulation and the third an infringement of Article 52(1)(b) of that regulation.

24 By the arguments put forward in the context of those three pleas in law, which overlap partially, in essence, the applicant calls into question the Board of Appeal's finding that Copernicus acted in bad faith when it filed the application for registration of the mark at issue. Those arguments relate to the Board of Appeal's finding that, in the light of all the circumstances of that application, it should have been concluded that Copernicus had acted in bad faith. The applicant also puts forward arguments contesting the merits of the Board of Appeal's findings relating to the existence of such circumstances and arguments alleging that the intervener itself acted in bad faith and that the Board of Appeal failed to take that fact into account.

25 In the light of the substance of the pleas in law put forward by the applicant, after having considered the relevant legislation and case-law, it is necessary to examine its arguments seeking to rebut the Board of Appeal's findings relating to the circumstances of the application for registration of the mark at issue, then those concerning the Board of Appeal's finding relating to Copernicus' bad faith and, finally, those alleging that the Board of Appeal failed to sufficiently take account of the intervener's bad faith.

1. *The relevant legislation and case-law*

26 The European Union trade mark registration system is based on the 'first-to-file' principle, laid down in Article 8(2) of Regulation No 207/2009. In accordance with that principle, a sign may be registered as a European Union trade mark only in so far as that is not precluded by an earlier mark (see judgment of 11 July 2013 in *SA.PAR.* v *OHIM — Salini Costruttori (GRUPPO SALINI)*, T-321/10, EU:T:2013:372, paragraph 17 and the case-law cited).

27 However, the application of that principle is qualified, inter alia, by Article 52(1)(b) of Regulation No 207/2009, under which, following an application to EUIPO or on the basis of a counterclaim in infringement proceedings, a European Union trade mark is to be declared invalid where the applicant was acting in bad faith when it filed the application for a trade mark (see judgment of 11 July 2013 in *GRUPPO SALINI*, T-321/10, EU:T:2013:372, paragraph 18 and the case-law cited).

28 The concept of bad faith referred to in Article 52(1)(b) of Regulation No 207/2009 relates to a subjective motivation on the part of the trade mark applicant, namely a dishonest intention or other 'sinister motive'. It involves conduct which departs from accepted principles of ethical behaviour or honest commercial and business practices (see, to that effect, judgment of 14 February 2012 in *Peeters Landbouwmachines* v *OHIM — Fors MW (BIGAB)*, T-33/11, EU:T:2012:77, paragraphs 35 to 38, and the Opinion of Advocate General Sharpston in *Chocoladefabriken Lindt & Sprüngli*, C-529/07, EU:C:2009:148, paragraph 60).

29 In order to assess whether a depositor is acting in bad faith, it is necessary inter alia to examine whether he intends to use the mark applied for. In that context, it should be noted that the essential function of a trade mark is to ensure that the consumer or end-user can identify the origin of the product or service concerned by allowing him to distinguish that product or service from those of different origin, without any confusion (judgment of 11 June 2009 in *Chocoladefabriken Lindt & Sprüngli*, C-529/07, EU:C:2009:361, paragraph 45).

30 The intention to prevent the marketing of a product may, in certain circumstances, be an element of bad faith on the part of the applicant. That is in particular the case when it becomes apparent, subsequently, that the latter applied for registration of a European Union trade mark without intending to use it, solely with a view to preventing a third party from entering the market (judgments of 11 June 2009 in *Chocoladefabriken Lindt & Sprüngli*, C-529/07, EU:C:2009:361, paragraphs 43 and 44, and of 8 May 2014 in *Simca Europe* v *OHIM — PSA Peugeot Citroën (Simca)*, T-327/12, EU:T:2014:240, paragraph 37).

31 The intention of the applicant at the relevant time is a subjective factor which must be assessed by taking into consideration all the relevant factors specific to the particular case which pertained at the time of filing the application for registration of a sign as a European Union trade mark. Those grounds are normally established by reference to objective criteria, including, in particular, the commercial logic underlying the filing of the application for registration (see, to that effect, judgment of 11 June 2009 in *Chocoladefabriken Lindt & Sprüngli*, C-529/07, EU:C:2009:361, paragraphs 37, 42 and 53).

32 In the context of the overall analysis undertaken pursuant to Article 52(1)(b) of Regulation No 207/2009, account may also be taken of the origin of the contested sign and its use since its creation, the commercial logic underlying the filing of the application for registration of that sign as a European Union trade mark, and the chronology of events leading up to that filing (see, to that effect, judgment of 14 February 2012 in *BIGAB*, T-33/11, EU:T:2012:77, paragraphs 21 to 23).

33 Where the applicant for a declaration of invalidity seeks to rely on that ground, it is for that party to prove the circumstances which substantiate a finding that the European Union trade mark proprietor had been acting in bad faith when it filed the application for registration of that mark (judgment of 11 July 2013 in *GRUPPO SALINI*, T-321/10, EU:T:2013:372, paragraph 18).

34 The applicant's arguments must be examined in the light of that legislation and that case-law.

2. *The arguments concerning the Board of Appeal's findings relating to the circumstances surrounding the application for registration of the mark at issue*

35 In the contested decision, the Board of Appeal found that the application for registration of the mark at issue was part of an unlawful strategy to file applications for registration of trade marks, seeking to claim priority for an application for registration of a European Union trade mark by circumventing the six-month period of reflection provided for by Article 29(1) of Regulation No 207/2009 and the five-year grace period provided for by Article 51(1)(a) of that regulation. The application for registration of the mark at issue was filed solely so as to be able to oppose the application for registration of the European Union trade mark LUCEA LED filed by the intervener and to derive economic advantages from that opposition. The filing strategy underlying the application for registration of the mark at issue lacked transparency for third parties.

36 The applicant considers that those findings are vitiated by errors.

a) The finding that the application for registration of the mark at issue was part of an unlawful filing strategy

37 As was stated in paragraph 35 above, a first circumstance taken into account by the Board of Appeal is the fact that the application for registration of the mark at issue was part of a strategy to file applications for registration of trade marks seeking to claim priority for an application for registration of a European Union trade mark by circumventing the six-month period of reflection and the five-year grace period and to grant a blocking position to Mr A., representing the applicant, in order to oppose applications for registration of trade marks filed by third parties.

38 The Board of Appeal established the existence of such a strategy in particular in paragraphs 20, 25, 31, 32, 35 and 41 of the contested decision. In paragraph 20 of the contested decision, it noted that Copernicus was a company with links to Mr A. and that, in order to determine whether it had acted in bad faith, it was necessary to take into account not only its own conduct, but also that of Mr A. and of all the other companies linked to the latter. According to the Board of Appeal, through those companies, Mr A. pursued a filing strategy involving a large number of applications for registration, 2 392 applications for German trade marks and approximately 750 applications for Austrian trade marks which could be assigned to it, of which one, at most, was registered in each country (paragraph 25 of the contested decision). In particular in paragraphs 25, 35 and 41 of the contested decision, the Board of Appeal noted that all those applications had been filed with the sole aim of subsequently claiming a priority for an application for a European Union trade mark. The strategy of Mr A. consists in submitting infinite chains of applications for national trade marks, without paying registration fees. Where a third party applies for registration of an identical or similar mark, Mr A. then applies for registration of a European Union trade mark and claims priority for it, by relying on the last link in the chain of applications for national trade marks. Next, it opposes third party applications for registration by relying on that application for registration. In paragraphs 31 and 32 of the contested decision, the Board of Appeal considers that, since that situation was brought before it only in cases involving Mr A., it did not happen by chance, but is the result of a filing strategy pursued by Mr A.

39 In particular in paragraphs 27 to 29, 33, 35, 36 and 43 of the contested decision, the Board of Appeal set out the reasons why it considered that the application for registration of the mark at issue was part of that unlawful filing strategy. Thus, in paragraphs 27 to 29 of the contested decision, it concluded that, since 2003, the sign LUCEO had been the subject of applications for national trade marks both in Austria and in Germany and that, from 2005, applications followed on a six-monthly basis, in accordance with the system 'in Austria in March, in Germany in September'. That six-month rhythm corresponds precisely with the six-month period of reflection in order to claim priority. Those applications were successively cancelled due to non-payment of the registration fee. In particular in paragraph 33 of the contested decision, the Board of Appeal concluded that it was only after the intervener had applied for registration of the European Union trade mark LUCEA LED that Copernicus had applied for registration of the mark at issue and claimed priority for the latter by relying on the last link in the chain of applications for registration of the national trade mark LUCEO, namely on the application for registration of the Austrian trade mark filed on 16 March 2009. The Board of Appeal deduced from that that the objective pursued by Mr A. by filing the different applications for registration of the national trade mark LUCEO was to be able to claim priority for the mark at issue over the course of years after having filed the first application for registration of the sign LUCEO as a national trade mark, although Article 29 of Regulation No 207/2009 provided only for a six-month period of reflection. In paragraphs 36 and 43 of the contested decision, the Board of Appeal concluded that Mr A. had himself stated that he did not intend to use the trade mark LUCEO personally and was unable to state the names of clients who had expressed their interest in using it. In paragraphs 35, 36 and 43 of the contested decision, the Board of Appeal considered that the argument that the LUCEO mark had been 'developed' through applications for registration of national trade marks constituted merely a pretext. In that regard, first, it stated that conduct consisting of repeatedly filing applications for national trade marks without the intention to pay the registration fees or to have them registered could not be regarded as development of a trade mark, any more than the fact of slightly modifying the classes during each new application. Secondly, it considered that, after the filing of an application for registration of a sign already 'found', in this case, LUCEO, the decision to register it as a European Union trade mark did not require years of reflection. The Board of Appeal deduced from that that the sole objective of the application for registration of the mark at issue was to 'short-circuit' the application for registration of the European Union trade mark LUCEA LED, filed by the intervener.

40 The applicant claims that the Board of Appeal's findings are erroneous. In that context, it puts forward arguments contesting, first, the Board of Appeal's finding relating to the existence of an unlawful filing strategy pursued by Mr A. and, secondly, the finding that the application for registration of the mark at issue was part of that strategy.

The existence of an unlawful filing strategy

41 The applicant contests the Board of Appeal's finding relating to the existence of an unlawful filing strategy on the part of Mr A., such as described in paragraph 38 above. In that context, first, it claims that, contrary to the Board of Appeal's findings, Mr A. pursues a legitimate business activity, namely that of a trade mark agent. Secondly, it claims that the inferences drawn by the Board of Appeal from the existence of other cases before it in which Mr A. was involved are vitiated by error.

– The arguments concerning the legitimate character of Mr A.'s business model

42 The applicant claims that the Board of Appeal should not have deduced from the number of applications for registration of national trade marks which can be attributed to Mr A. that those applications were filed with the sole aim of being then able to claim priority for an application for registration of a European Union trade mark. On the contrary, the large number of those applications is a direct consequence of his legitimate activity as a trade mark agent, which consists in the creation

of a portfolio of trade marks intended to be sold to third parties, a fact which the Board of Appeal failed to take sufficiently into account. The applications for registration of national trade marks are part of a process of developing the marks.

43 EUIPO and the intervener contest those arguments.

44 In that regard, in the first place, it should be noted that the applicant does not put forward any arguments seeking to rebut the Board of Appeal's finding that, in order to determine whether Copernicus had acted in bad faith, it was necessary to take account not only of its own conduct, but also that of Mr A. and all of the companies linked to it.

45 In the second place, it must be noted that, in paragraph 34 of the contested decision, the Board of Appeal found that nothing precluded an undertaking from exercising an activity as trade mark agent and therefore, in the context of such an activity, nothing precluded it from filing applications for registration of marks which it did not intend to use itself, but to sell to third parties. However, the Board of Appeal considered that Mr A.'s activity could not be deemed equivalent to such an activity.

46 In the third place, it is necessary to reject the applicant's argument alleging that the chain of applications for registration of national trade marks is part of an attempt to develop the marks, which could legitimately be carried out by a trade mark agency.

47 In that regard, it should be pointed out that, admittedly, nothing precludes the proprietor of a validly registered trade from 'developing' it with a trade mark which succeeds it, by modifying it as far as concerns the sign, the list of goods and services covered or the geographical extent of its protection.

48 However, as is apparent from the Board of Appeal's findings, Mr A. submitted chains of applications for registration of national trade marks, which were filed every six months, alternately in Germany and in Austria, just before the expiry of the six-month period of reflection in order to claim priority for a European Union trade mark in accordance with Article 29(1) of Regulation No 207/2009. Those applications were successively cancelled due to non-payment of registration fees and were therefore not examined by the national trade mark offices.

49 Such conduct cannot be considered to be legitimate business activity, but must be considered to be contrary to the objectives of Regulation No 207/2009.

50 As the Board of Appeal correctly stated, Article 29(1) of Regulation No 207/2009 provides that the person filing an application for registration of a national trade mark enjoys a six-month period of reflection to decide whether he wants also to submit an application for registration of a European Union trade mark for that mark and for goods and services identical to those in respect of which that mark is filed or contained within the latter. For its part, Article 51(1)(a) of that regulation provides that the proprietor of a European Union trade mark is to be declared to be revoked on application to EUIPO or on the basis of a counterclaim in infringement proceedings if, within a continuous period of five years, the trade mark has not been put to genuine use in the European Union in connection with the goods or services in respect of which it is registered, and there are no proper reasons for the non-use.

51 It must be noted that the successive chain of applications for registration of national trade marks for the same sign in respect of goods and services covered by classes which are at least partially identical seeks to grant Mr A. a blocking position. When a third party files an application for registration of an identical or similar European Union trade mark, Mr A. applies for registration of a European Union trade mark, claims priority for it by relying on the last link of the chain of applications for registration of national trade marks and brings opposition proceedings on the basis of that application for a European Union trade mark. The successive chain of applications for registration of national trade

marks is designed therefore to grant him a blocking position for a period exceeding the six-month period of reflection provided for by Article 29(1) of Regulation No 207/2009 and even the five-year grace period provided for by Article 51(1)(a) of that regulation.

52 Therefore, it must be noted that not only the filing strategy practiced by Mr A. is incompatible with the objectives pursued by Regulation No 207/2009, but that it is not unlike the cases of 'abuse of law', which are characterised by circumstances in which, first, despite formal observance of the conditions laid down by European Union rules, the purpose of those rules has not been achieved, and, secondly, there exists an intention to obtain an advantage from those rules by creating artificially the conditions laid down for obtaining it (judgments of 14 December 2000 in *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraphs 52 and 53, and of 21 July 2005 in *Eichsfelder Schlachtbetrieb*, C-515/03, EU:C:2005:491, paragraph 39).

53 In the fourth place, in so far as the applicant claims that it sells the trade marks in its portfolio to third parties, it should be noted that, in paragraphs 36 and 43 of the contested decision, the Board of Appeal found that the existence of third parties interested in the applications for national trade marks filed by the applicant could not be established and that the applicant did not put forward any arguments capable of calling that conclusion into question. In any event, it should be pointed out that, if Mr A.'s objective were solely to extend his portfolio of European Union and national trade marks, he could have merely registered such trade marks, instead of chaining together the applications for national trade marks, which were not examined and were successively cancelled due to the fact that he did not pay the registration fees.

54 Therefore, it must be concluded that the Board of Appeal was correct to find that the steps undertaken by Mr A. and the companies linked to him could not be assimilated with an activity which a trade mark agency could legitimately exercise, but sought to grant him a blocking position for a period exceeding the six-month period of reflection provided for by Article 29(1) of Regulation No 207/2009 and the five-year grace period provided for by Article 51(1)(a) of that regulation.

55 None of the other arguments put forward by the applicant is capable of calling into question that finding.

56 In the first place, it is necessary to reject the applicant's argument that, in reality, the number of applications for registration did not correspond to the number of separate trade marks applied for, which is much lower. That argument confirms rather the Board of Appeal's findings. In order to exercise a legitimate activity as a trade mark agency, it was not necessary to proceed with a multitude of applications for the same trade mark, as did Mr A.

57 In the second place, the applicant claims that a large proportion of the 'developed trade marks' was indeed registered. Contrary to the intervener's arguments, Mr A. and the companies linked to him did not own only 90, but 200 registered European Union trade marks. Mr A. constantly attempted, as far as was legally and economically possible, to have all of the trade marks which he developed fully registered.

58 In that regard, first, concerning the argument alleging that Mr A. attempted to have all of the trade marks which he developed fully registered, it suffices to note, first, that, according to the Board of Appeal's findings, a large proportion of the applications which can be attributed to him was not examined and was unsuccessful, due to the fact that the registration fees were not paid and, secondly, that the applicant failed to contest those findings in detail.

59 Secondly, the fact that a certain number of marks were finally registered in the name of Mr A. or of companies linked to him also does not call into question the Board of Appeal's findings. The unlawful filing strategy pointed out by that board implies that, when Mr A. decides to use his blocking position, he applies for registration of a European Union trade mark, claiming priority on the basis of the last link of the chain of applications for registration of national trade marks.

60 Thirdly, as regards the exact number of trade marks which could be attributed to Mr A. or to companies linked with him, it should be noted that the Board of Appeal's findings are based on a comparison of the scale of the applications for registration, on the one hand, and of the registered trade marks, on the other hand. Even assuming that 200 marks were registered, as the applicant claims, the difference between the number of applications for registration of national trade marks, namely more than 3 000, and that of trade marks in fact registered remains considerable. In any event, it must be pointed out that the applicant does not adduce any evidence allowing it to be established that, at the time the contested decision was adopted, 200 registered trade marks could be attributed to Mr A.

61 Therefore, those arguments must also be rejected.

62 In the third place, the applicant's argument that, in part, some applications for registration were not pursued due to the fact that the market did not develop in the way generally expected or because it became apparent that the name chosen was not appropriate for the goods or services at issue, is also not capable of demonstrating that the Board of Appeal's findings were vitiated by error. The same also applies to the argument alleging that it is difficult to find a word sign in certain sectors which does not conflict with earlier rights. Those arguments are not capable of justifying the chaining together of applications for registration of trade marks for the same sign.

63 Therefore, it is necessary to reject all of the applicant's arguments alleging that the multitude of applications for registration of German and Austrian trade marks which can be attributed to Mr A. can be justified on the basis of the legitimate business activity he pursued.

– The other cases concerning Mr A. and taken into account by the Board of Appeal

64 The applicant claims that the Board of Appeal's conclusion that the situation at issue before it in the present case (paragraphs 38 and 39 above) did not happen by chance, is mistaken. First of all, in all of the five cases referred to by the Board of Appeal, Mr A. had knowledge of the filing of an application for registration of a European Union trade mark by a third party only after having itself filed the application for registration of a European Union trade mark. Next, the Board of Appeal referred itself to three other cases in which Mr A. had based its opposition on a trade mark which had already been registered at the time the third party's application was filed. Moreover, the existence of those three cases shows that Mr A. did not await the filing of an application for registration of an identical or similar mark by a third party before applying itself for registration of a European Union trade mark and claiming priority for that trade mark by relying on an application for registration of a national trade mark. Furthermore, the number of cases referred to by the Board of Appeal is limited in relation to the number of applications for trade marks filed since the beginning of 2001 and in relation to the more than 200 European Union trade marks registered. In addition, the five procedures referred to by the Board of Appeal were exceptions and were the product of chance. Finally, under the second sentence of Article 75 of Regulation No 207/2009, the Board of Appeal should have heard the applicant in that regard before adopting the contested decision.

65 EUIPO and the intervener contest those arguments.

66 In the first place, it is necessary to examine the plea in law alleging an infringement of the right to be heard.

67 In that regard, it should be pointed out that, pursuant to the second sentence of Article 75 of Regulation No 207/2009, decisions of EUIPO may be based only on grounds on which the parties have been able to present their comments.

68 Concerning the three cases relating to the marks VORTEX, ROCKY and FORERUNNER to which the Board of Appeal referred in paragraphs 31 and 32 of the contested decision, it should be noted that, in its application for a declaration of invalidity of 2 May 2011, the intervener states that Mr A. was involved in trade mark conflicts and that he systematically claimed priority for applications for registration of European Union trade marks by relying on applications for registration of national trade marks. In that context, in Annexes 4c and 6 to that application, it made reference to a large number of signs affected by the practice, including the signs VORTEX, ROCKY and FORERUNNER. In relation to those marks, the applicant and its predecessors therefore had the opportunity to express their views during the proceedings before EUIPO.

69 In so far as the applicant claims that, if it had known that, in the contested decision, the Board of Appeal would take account of those applications for trade marks as evidence suggesting that Copernicus acted in bad faith, it would have expressed its views in that regard to a greater extent, it suffices to note that the right to be heard for the purposes of the second sentence of Article 75 of Regulation No 207/2009 extends to the factual and legal factors on which the decision-making act is based, but not to the final position which the authority intends to adopt (see, to that effect, judgment of 7 September 2006 in *L & D* v *OHIM — Sämann (Aire Limpio)*, T-168/04, EU:T:2006:245, paragraph 116). Consequently, that argument must also be rejected.

70 In the second place, it is necessary to examine the applicant's argument alleging that the situation which arose in the present case and in the three cases relating to the marks VORTEX, ROCKY and FORERUNNER was the product of chance, since Mr A. was unaware of the third parties' applications for registration at the time of his application for registration.

71 In that regard, it should be noted that, admittedly, in accordance with Article 29 of Regulation No 207/2009, the applicant for a national trade mark may, during a six-month period of reflection running from the date of filing that application, claim priority for an application for registration of a European Union trade mark. In theory, it is thus possible that, during that period of reflection, a third party could apply for registration of an identical or similar sign as a European Union trade mark and, for its part, without being aware of that application, the applicant for registration of the national trade mark decide also to apply for registration of a European Union trade mark and claim priority for it.

72 However, as was stated in paragraphs 42 to 63 above, in the circumstances of the case, the Board of Appeal was correct to find that the chain of applications for national trade marks carried out by Mr A. was designed to grant him a blocking position which he used in order to oppose applications for registration made by third parties. In those circumstances and in the light of the fact that that situation arose only in the cases involving Mr A., the Board of Appeal was correct to find that it was not the product of chance.

73 None of the arguments put forward by the applicant is capable of undermining that conclusion.

74 First, the applicant claims that, contrary to the Board of Appeal's findings, in certain cases Mr A. based the opposition on European Union trade marks which were already registered.

75 That argument must be rejected in so far as it relates to the cases concerning the trade marks VORTEX, ROCKY and FORERUNNER, reference to which was made by the Board of Appeal in the contested decision. In those cases, the opposition was based on applications for registration of later trade marks, but claimed priority on the basis of an application for an earlier trade mark.

76 Therefore, in the case relating to the mark ROCKY (R 2147/2010-4) and in the case relating to the mark VORTEX (R 512/2011-4), the opposition was based on later applications for registration of European Union trade marks, but which claimed priority by relying on earlier applications for registration of German trade marks.

77 As regards the case relating to the mark FORERUNNER (R 2000/2010-4), it must be noted that, in that case, the opposition was, admittedly, based on an application for registration of an Austrian trade mark and not on an application for registration of a European Union trade mark. However, it concerned an approach which is very similar to that in the present case, the only difference arising from the fact that the applicant had based the opposition directly on the application for registration of an Austrian trade mark instead of basing it on an application for a European Union trade mark, claiming priority on the basis of that application for registration of a national trade mark.

78 In that context, it is necessary to reject the applicant's argument alleging that, in another case relating also to the mark VORTEX (R 1496/2011-4), the opposition was based on a European Union trade mark which was registered. In that regard, it suffices to note that, in that case, that mark was already registered as a result of the filing strategy pursued by Mr A. in the earlier case referred to in paragraph 76 above (R 512/2011 4). Therefore, that argument is not capable of showing that, as regards the European Union trade mark VORTEX, Mr A. did not pursue his unlawful filing strategy.

79 Secondly, the applicant claims that the number of cases referred to by the Board of Appeal is limited. In that regard, first, it should be noted that, since the Board of Appeal found that the situation at issue had not arisen before it, except in the context of cases involving Mr A., the fact that the number of cases referred to by the Board of Appeal is limited is not such as to call into question its finding that it could not be the product of chance. Secondly, assuming that, in other cases, the applicant may have based the opposition on a trade mark which was registered without it being possible to assimilate that registration with the unlawful filing strategy identified by the Board of Appeal, that is not such as to call into question the finding that, as regards the trade marks VORTEX, ROCKY, FORERUNNER and the mark at issue, Mr A. pursued such a strategy.

80 Since the Board of Appeal's finding that the situation in the present case was not the product of chance can be confirmed on the basis of its findings relating to the marks VORTEX, ROCKY and FORERUNNER, the applicant's arguments relating to the Board of Appeal's additional finding concerning the marks ANDROMEDA and DORADO JUMP IN THE AIR can be rejected as ineffective. Even on the assumption that they are well founded, they are not capable of calling into question the Board of Appeal's conclusion that the situation at issue before it was not the product of chance.

81 Therefore, all of the arguments relating to the Board of Appeal's finding that Mr A. pursued a filing strategy seeking to oppose applications for registration made by third parties must be rejected.

The application for registration of the mark at issue

82 The applicant contests also the merits of the Board of Appeal's finding that the application for registration of the mark at issue was part of the abovementioned unlawful filing strategy.

83 In that context, it should be noted that, as was stated in paragraph 39 above, it is apparent from the Board of Appeal's findings that, since 2005, Mr A. has chained together the applications for registration of the German and Austrian trade marks LUCEO in accordance with the six-monthly system 'in Austria in March, in Germany in September'. According to the Board of Appeal, Copernicus applied for registration of the mark at issue in response to the application for registration of the European Union trade mark LUCEA LED filed by the intervener and the sole objective of Copernicus' application was to oppose the registration of the European Union trade mark LUCEA

LED. In that context, it took account in particular of the facts that, first, until the intervener filed the application for registration of the European Union trade mark LUCEA LED, Mr A. merely chained together applications for the national trade marks LUCEO, whereas, after that filing, he applied for registration of the mark at issue and based the opposition on that mark, and, secondly, such behaviour corresponded with his unlawful filing strategy.

84 The applicant considers that those findings are in error. The application for registration of the mark at issue did not aim to 'short-circuit' the application for registration of the European Union trade mark LUCEA LED, filed by the intervener.

85 In the first place, the applicant relies on the fact that the application for registration of the mark at issue is only the expression of the legitimate business activity pursued by Mr A., which consisted in the creation of a portfolio of European Union trade marks with a view to selling those trade marks to third parties. He developed the mark at issue with applications for registration of national trade marks by modifying the list of goods and services in respect of which registration was applied for, before including it in his portfolio in an extended and updated form.

86 EUIPO and the intervener contest those arguments.

87 In that regard, it should be noted, first, that, in paragraphs 36 and 43 of the contested decision, the Board of Appeal concluded that Mr A. had himself stated that he did not want to use the mark at issue personally and was unable to indicate the name of the clients who had expressed an interest in it. Mr A. does not put forward any arguments capable of showing that that finding is wrong.

88 Secondly, the applicant does not put forward any arguments capable of showing that the chain of applications for registration of the national trade marks LUCEO was justified on account of the pursuit of a legitimate business activity. On the contrary, as was stated in paragraphs 46 to 52 above, not only is it not possible to regard Mr A.'s conduct as a development of the mark at issue, but in addition it seeks to monopolise the sign LUCEO by circumventing the six-month period provided for by Article 29(1) of Regulation No 207/2009 and the five-year grace period provided for by Article 51(1)(a) of that regulation.

89 Therefore, that argument must be rejected.

90 In the second place, the applicant claims that, at the time Copernicus applied for registration of the mark at issue or for the Austrian trade mark LUCEO, it was unaware of the application for registration of the trade mark LUCEA LED and that therefore there was no link between the two applications.

91 EUIPO and the intervener contest those arguments.

92 In that regard, first of all, it should be pointed out that, the applicant's argument invoking Copernicus' lack of awareness refers to the subjective element relating to the intention of the applicant (for registration of the trade mark) at the time when he files the application. However, in accordance with the case-law cited in paragraph 31 above, the existence of bad faith on the part of the applicant must normally be established by reference to objective criteria.

93 It is also necessary to note that the Board of Appeal established the presence of objective criteria strongly suggesting that the filing of the application for registration of the mark at issue took place in response to the filing of the application for registration of the European Union trade mark LUCEA LED by the intervener.

94 It is in the light of that case-law and those facts that it is necessary to examine the arguments put forward by the applicant to show the absence of a link between the filing of the application for the European Union trade mark LUCEA LED by the intervener and the application for registration of the mark at issue by Copernicus.

95 First, the applicant claims that, at the time the application for registration of the Austrian trade mark LUCEO was filed, the intervener had not yet applied for registration of the European Union trade mark LUCEA LED and Copernicus could therefore not have been aware of it.

96 In that regard, it should be noted that, as was stated in paragraphs 38 and 41 to 81 above, according to the unlawful filing strategy pursued by Mr A., the applications for registration of German and Austrian trade marks were filed in order to grant him a blocking position which he used to oppose possible applications for registration of identical or similar signs by third parties.

97 Therefore, the fact that Copernicus or Mr A. were unaware of the existence of the application for registration of the European Union trade mark LUCEA LED at the time when they applied for registration of the Austrian trade mark LUCEO does not preclude the finding that the application for the mark at issue, in respect of which priority was claimed on the basis of the application for registration of the Austrian trade mark LUCEO, took place in response to the application for registration of the European Union trade mark LUCEA LED.

98 Secondly, it is necessary to reject the applicant's argument that the registration fees relating to the application for registration of the Austrian trade mark LUCEO of 16 March 2009 were not paid because, at that time, Mr A. had already decided to apply for registration of the mark at issue. In that regard, it suffices to note that, during the nine previous applications for registration of the German and Austrian trade marks LUCEO, Mr A. also did not pay the registration fees, without subsequently filing an application for registration of a European Union trade mark LUCEO at the end of the respective periods of reflection.

99 Thirdly, the applicant claims that the application for registration of the mark at issue was not filed in response to the intervener's application for registration, but in response to the fact that the period of reflection for the purposes of claiming priority for a European Union trade mark was about to expire.

100 That argument is also not convincing.

101 First, it should be noted that, with respect to the applications for registration of the German and Austrian trade marks LUCEO, Mr A. allowed the six-month period of reflection to expire without filing an application for registration of a European Union trade mark, and merely submitted another application for a national trade mark in order to maintain his blocking position.

102 Secondly, it should be stated that an approach amounting to checking near the end of the six-month period of reflection whether applications for registration of identical or similar trade marks had been filed was perfectly compatible with Mr A.'s filing strategy. By chaining together the applications for registration of the German and Austrian trade marks LUCEO, he sought to be granted a blocking position allowing him to oppose possible applications for registration of identical or similar signs filed by third parties. In order to benefit from that blocking position or to maintain it, it sufficed to check, before the expiry of the respective period of reflection, whether third parties had filed applications for registration of identical or similar trade marks.

103 Therefore, it is necessary to reject all of the applicant's arguments seeking to show that, at the time when Copernicus applied for registration of the mark at issue, it was unaware of the application for registration of the European Union trade mark LUCEA LED.

104 In the third place, the applicant claims that the Board of Appeal failed to sufficiently take into account the fact that Copernicus could also have filed a notice of opposition on the basis of the application for registration of the Austrian trade mark LUCEO of 16 March 2009, which would have been less costly and more certain.

105 EUIPO and the intervener contest that argument.

106 That argument must also be rejected.

107 That argument is not capable of calling into question the evidence suggesting that the application for registration of the mark at issue sought to 'short-circuit' the application for registration of the European Union trade mark LUCEA LED. Admittedly, the applicant correctly invokes the fact that an opposition could also have been based on the application for registration of the Austrian trade mark LUCEO of 16 March 2009, as the applicant did in the case relating to the trade mark FORERUNNER (R 2000/2010-4) referred to in paragraph 77 above. However, it must be stated that the application for registration of the mark at issue was capable of strengthening Mr A.'s blocking position vis-à-vis the intervener, since, as a European Union trade mark, it covered the entirety of the European Union and thus allowed him to oppose the registration of a national trade mark also before the trade mark offices in the Member States of the Union.

108 Therefore, none of the arguments put forward by the applicant is capable of showing that the Board of Appeal's findings that the application for registration of the mark at issue was part of an unlawful filing strategy pursued by Mr A. and sought to 'short-circuit' the application for registration of the European Union trade mark LUCEA LED filed by the intervener are erroneous. On the contrary, Copernicus' behaviour in relation to the mark at issue shows definitively the operation of the unlawful filing strategy practiced by Mr A., which, for the reasons set out in paragraphs 42 to 63 above, cannot be considered to be compatible with the objectives of Regulation No 207/2009.

b) The use of the mark at issue

109 A second fact taken into consideration by the Board of Appeal is the way Mr A. made use of the mark at issue. In paragraphs 36 and 43 of the contested decision, the Board of Appeal found that, first, Mr A. had stated that he did not intend to use the mark at issue himself and was unable to indicate the name of the clients who expressed an interest in that mark and, secondly, he had requested payment of EUR 75 000 from the intervener. The Board of Appeal deduced therefrom that that request for payment was the sole possibility to exploit the mark at issue. In that context, it stated that it was necessary to compare that amount with the official fees which were paid in total for the mark at issue.

110 The applicant considers that those findings of the Board of Appeal are vitiated by error.

111 In the first place, the applicant contests the Board of Appeal's findings concerning the economic use of the mark at issue. In that regard, it claims that Mr A. did not make a request for financial compensation in the context of the opposition procedure. It is only after succeeding in the context of that procedure that it requested the intervener to cease its actions, in order to defend its rights and not appear inactive. It is only after the intervener offered to purchase the mark at issue for EUR 15 000 that Mr A. requested EUR 75 000. It did not calmly and secretly wait for the intervener to make use of the trade mark LUCEA LED for its goods, nor did it wait for it to use it longer for its goods so as to bring an action for damages. Therefore, it is wrong to conclude that the sole aim of the registration of the mark at issue was to extract funds from the opposing party. Moreover, the applicant claims that the other cases referred to by the Board of Appeal and which concern other trade marks which can be attributed to Mr A. are administrative procedures which were brought solely to ensure the enforcement rights of the trade marks held by the latter or by one of his companies. They are not civil proceedings and no payments were requested from the other parties.

112 EUIPO and the intervener contest those arguments.

113 In that regard, it should be stated that the applicant does not put forward any arguments showing an error of assessment affecting the Board of Appeal's findings that, first, Mr A. did not intend to use the mark at issue himself and, secondly, no third parties expressing an interest in the mark at issue were identifiable. The applicant fails in particular to adduce any evidence showing that, during the years preceding the application for registration of the European Union trade mark LUCEA LED, the successive applications for the national trade marks LUCEO gave rise to interest on the part of third parties. It must therefore be concluded that the applicant does not put forward any satisfactory explanations regarding the way Mr A. intended to use the mark at issue, other than to oppose possible applications for registration of identical or similar signs, such as that filed by the intervener.

114 Moreover, the arguments alleging, first, that Mr A. requested payment from the intervener only after being successful in the context of the opposition proceedings and, secondly, that he did not wait longer before making his position known are not capable of calling into question the Board of Appeal's conclusion relating to the economic use of the mark at issue. In that context, it should in particular be noted that the fact that he succeeded before the opposition division strengthened Mr A.'s position concerning the negotiation of a financial arrangement with the intervener.

115 Furthermore, as regards the arguments relating to the other trade marks, it should be noted that the applicant has failed to explain how Mr A. intended to use those trade marks, except by relying on them to oppose the registration of identical or similar trade marks and by deriving economic advantages from that blocking position. The applicant does not put forward any arguments allowing it to be established that Mr A. intended to use them himself or that third parties expressed an interest with regard to them. That finding is not called into question by the fact that the cases to which the Board of Appeal referred are opposition proceedings. Mr A.'s manner of proceeding as regards the mark at issue shows that, on the assumption that he succeeded in the context of the opposition proceedings, he was prepared to initiate formal notice proceedings against the use of identical or similar signs and to start negotiations.

116 Therefore, all of the complaints concerning the Board of Appeal's findings relating to the economic use of the mark at issue must be rejected.

117 In the second place, the applicant claims that, contrary to the Board of Appeal's findings, the applications for registration of national trade marks were not free. Documentary fees were payable in Austria at the time the application for registration of the trade mark was filed, regardless of whether, in the end, the mark was registered. In total, Mr A. paid fees of a six-figure amount to different trade mark offices in respect to the registration of trade marks, but also for marks in respect of which the procedure had not been pursued until registration.

118 EUIPO and the intervener contest those arguments.

119 In that regard, it should be noted that the applicant does not adduce any concrete evidence allowing the amounts it paid for the applications for registration of German trade marks to be established.

120 Secondly, concerning fees paid in respect of applications for registration of Austrian trade marks, it must be noted that, in paragraph 40 of the contested decision, the Board of Appeal acknowledged that, in Austria, the filing of an official form was subject to a documentary fee. Therefore, contrary to what is claimed by the applicant, it cannot be deduced from the contested decision that the Board of Appeal found that such fees had not been paid with respect to the applications for registration of Austrian trade marks.

121 That finding is not called into question by the fact that, in paragraph 21 of the contested decision, the Board of Appeal made reference to the 'free' character of the filing strategy pursued by Mr A. That finding of the Board of Appeal must be read in conjunction with its finding in paragraph 40 of the contested decision, where it acknowledged that documentary fees were payable with respect to the applications for Austrian trade marks. By referring to the 'free' character of the filing strategy pursued by Mr A., the Board of Appeal merely concluded that the unlawful filing strategy pursued by him allowed for the non-payment of the registration fees in respect of the applications for registration of German and Austrian trade marks, since the legislation in those two Member States does not require payment of such fees at the time the application for registration is filed.

122 In that context, it should also be noted that the applicant itself acknowledges that the non-payment of the registration fees in respect of the applications for registration of German and Austrian trade marks allowed it to reduce the costs incurred by its filing strategy. However, it must be stated that that confirms the Board of Appeal's findings. Since, according to that strategy, Mr A. and the companies linked with him applied for registration of a European Union trade mark only when a third party filed an application for an identical or similar European Union trade mark and merely chained together applications for registration of German and Austrian trade marks without paying the registration fees where that was not the case, they could minimise the costs resulting from that filing strategy, while circumventing the six-month period of reflection provided for by Article 29 of Regulation No 207/2009 and the five-year grace period provided for by Article 51(1)(a) thereof. Therefore, concerning the mark at issue, Mr A. did not pay any registration fees in respect of the 10 applications for registration of the German and Austrian trade marks LUCEO and it is only after the intervener applied for registration of the European Union trade mark LUCEA LED that a registration fee was paid in the context of the application for registration of the mark at issue.

123 Thirdly, the applicant's argument alleging that the total amount of fees paid by Mr A. is not capable of showing an error of assessment affecting the Board of Appeal's findings relating to the economic use of the mark at issue.

124 First, it should be noted that, even after having been requested by the General Court to submit evidence establishing the payment, by Mr A., of 'a total six-figure amount', the applicant merely submitted a reproduction of the provisions of the Gebührengesetz (Law on the collection of fees) of 1957, in the version of 11 November 2011 (BGBl. 267/1957), by invoking the fact that it was no longer possible to identify exactly the amount of documentary fees paid since the accounting records of the companies concerned can no longer be found.

125 Secondly and in any event, even assuming that, in respect of all of the registrations or applications for registration of trade marks carried out by Mr A. or companies linked with him, a total six-figure amount was paid to different trade mark offices, that would not be capable of establishing an error affecting the Board of Appeal's findings relating to the existence of a filing strategy seeking to block applications for registration of identical or similar trade marks filed by third parties. The economic success of such a filing strategy depends, first, on the possibility of minimising the costs incurred in order to create a blocking position before a conflict with a registration applied for by a third party arises and, secondly, on the generation of income exceeding the costs incurred in the context of such a conflict. It must be noted that the filing strategy pursued by Mr A. sought to limit the costs resulting from applications for preliminary registrations, in respect of which registration fees were not paid, and that, solely in respect of the mark at issue did Mr A. request payment of EUR 75 000 and thus a total five-figure amount from the intervener.

126 Therefore, none of the arguments put forward by the applicant is capable of showing that the Board of Appeal's finding that the only possibility to exploit the mark at issue was to use it to oppose applications for registration of identical or similar trade marks and to derive economic advantages from that opposition is erroneous.

c) The lack of transparency

127 A third situation taken into account by the Board of Appeal is the lack of transparency of Mr A.'s filing strategy. Therefore, in paragraph 21 of the contested decision, it pointed out the non-transparent character of the applications for registration of trade marks which can be attributed to Mr A. and considered that his strategy caused a 'confusion at the level of intellectual property law, which is impossible to navigate for third parties'. In paragraph 51 of the contested decision, it concluded that the application for registration of the mark at issue had been filed in conditions which were not transparent for third parties and contrary to the fundamental structure of trade mark law consisting in ensuring legal certainty by means of intellectual property rights which can be consulted.

128 The applicant considers that those findings of the Board of Appeal are vitiated by errors.

129 In the first place, the applicant complains that the Board of Appeal found the existence of a 'priority trap' by relying on the fact that the applications for registration of national trade marks had been concealed and it was impossible for third parties to find them. By using the expression 'priority trap', the Board of Appeal infringed the principle that, for the purposes of determining priority, it is not the time of the possible subsequent registration, but the time the application is filed, which is decisive. Moreover, there was no 'priority trap'. First, the national trade marks which were the subject of an application for registration were referred to in public and freely accessible on online databases. Therefore, they could have been found free of charge and with a minimum of effort. Mr A.'s decision to apply for registration of German and Austrian trade marks was a conscious decision so as to ensure their visibility and that potentially interested persons gain awareness of the marks available. The intervener therefore had, or at least should have had, knowledge of the application for registration of the Austrian trade mark LUCEO of 16 March 2009. Secondly, in so far as the Board of Appeal invokes a lack of transparency due to the fact that the applicant appeared under different names during the course of a decade and that certain marks were held by different companies during that period, that finding is not relevant and, in any event, unfounded.

130 EUIPO and the intervener contest those arguments.

131 First, in so far as, by those arguments, the applicant complains that the Board of Appeal concluded that third parties such as the intervener were unable to find the applications for registration of the German and Austrian trade marks LUCEO, it suffices to note that, in paragraph 42 of the contested decision, the Board of Appeal clearly stated that the finding of bad faith on the part of Copernicus did not depend on the question whether an 'unrecognisable priority trap' had existed. Therefore, contrary to what the applicant claims, the contested decision is not based on the finding that third parties would have been unable to find the applications for registration of the German and Austrian trade marks LUCEO.

132 Secondly, it is necessary to examine whether the arguments put forward by the applicant are capable of showing that the Board of Appeal's conclusion that Mr A.'s filing strategy suffered from a lack of transparency is erroneous.

133 In that context, the applicant claims that the Board of Appeal should not have taken account of the fact that applications for trade marks and trade marks which could be attributed to Mr A. had been successively transferred to several companies linked with him.

134 In that regard, it should be noted that, admittedly, the applicant correctly points out that the identification of the proprietor of the trade mark on which an opposition is or may be based has no effect on the question whether a likelihood of confusion exists between two trade marks.

135 However, in contrast to what is claimed by the applicant, that does not mean that, in the circumstances described in paragraphs 38 and 39 above, the successive transfers of trade mark rights to different companies were not capable of making the unlawful filing strategy pursued by Mr A. less visible to third parties. They had the effect of making less apparent the fact that one and the same person, namely Mr A., organised a multitude of applications for trade marks by means of different companies and that a situation like that which arose in the present case was not the product of chance, but the consequence of an unlawful filing strategy, which was based on applications for registration of German and Austrian trade marks being chained together.

136 That finding is not called into question by the applicant's argument that the parties making the applications for registration of the trade marks and EUIPO could have established that all of those opposition proceedings could be attributed to Mr A., since the latter was always mentioned as the representative of the companies in the trade mark offices' databases. Even assuming that that was possible with respect to all of the cases concerning the trade marks or applications for trade marks which can be attributed to Mr A., including those which were cancelled due to the fact that the registration fees had not been paid, that does not in any way alter the fact that the transfers had the effect of making less clear, at least at first view, the fact that the opposition proceedings at issue were the expression of an unlawful filing strategy organised by an individual.

137 In that context, it should also be noted that, despite the fact that the General Court requested it to set out the reasons why the successive transfers took place, the applicant failed to put forward concrete arguments in that regard, but merely claimed, in an abstract manner, that they took place for internal reasons, connected with the economy and technical management of the undertaking.

138 In view of those considerations, it must be concluded that the Board of Appeal did not commit an error of assessment by taking into account the successive transfers of trade marks and applications for trade marks as an element affecting the transparency of the actions taken by Mr A. and the companies linked to him.

139 Thirdly, concerning the argument that the intervener could have found the applications for registration of the national trade marks LUCEO, it should be noted that the Board of Appeal correctly concluded that the alternation between the applications for registration of German and Austrian trade marks and the non-payment of registration fees in respect of them made Mr A.'s strategy less transparent for third parties. After finding an application for registration of a German or Austrian trade mark, in respect of which registration fees were not paid, a third party could, admittedly, expect that fee to still be paid and the mark registered. However, it could not reasonably expect that fee not to be paid and that, just before the expiry of the six-month reflection period provided for by Article 29 of Regulation No 207/2009, another application for registration of the trade mark LUCEO would be filed in another Member State, since such conduct is contrary to the spirit of Regulation No 207/2009 for the reasons set out in paragraphs 51 and 52 above.

140 Fourthly, as regards the argument that the Board of Appeal infringed the principle that, for the purposes of determining priority, it is not the time of the possible subsequent registration, but the time the application is filed which is decisive, it suffices to note that the Board of Appeal merely examined whether, at the time the application for registration of the mark at issue was filed, Copernicus acted in bad faith, as is provided for in Article 52(1)(b) of Regulation No 207/2009. Contrary to what the applicant claims, the Board of Appeal therefore did not base its decision on the time of the possible subsequent registration.

141 Having regard to the foregoing considerations, it must be concluded that the arguments put forward by the applicant are not capable of showing the existence of an error of assessment affecting the Board of Appeal's finding that the successive transfers of trade marks and applications for trade marks to

different companies, the alternation between the applications for registration of German and Austrian trade marks and the non-payment of registration fees in respect of them made Mr A.'s unlawful filing strategy less transparent for third parties.

142 In the second place, the applicant puts forward arguments seeking to contest the Board of Appeal's other findings relating to the lack of transparency of Mr A.'s filing strategy, which concern the submission of evidence necessary in order to establish the claim of priority and the accessibility of the files relating to the applications for registration of German trade marks. In that context, it also alleges an infringement of the second sentence of Article 75 of Regulation No 207/2009, since the Board of Appeal did not give it the opportunity to express its views in that regard. Those arguments will be considered in paragraphs 152 to 156 below.

3. *The arguments relating to the Board of Appeal's finding concerning Copernicus' bad faith*

143 It is in the light of the above considerations that it is necessary to examine the applicant's arguments that the Board of Appeal was not entitled to conclude that, in view of the circumstances surrounding the application for registration of the mark at issue, Copernicus had to be regarded as having acted in bad faith.

144 In that regard, first, it should be noted that, as was stated in paragraphs 37 to 108 above, the applicant has not put forward arguments capable of contesting the Board of Appeal's finding that Copernicus' application for registration was part of an unlawful filing strategy consisting in successively chaining together applications for registration of national trade marks and seeking to grant a blocking position to Mr A., which he used to oppose possible applications for registration of identical or similar signs by third parties, by claiming priority for an application for registration of a European Union trade mark. Secondly, it must be noted that none of the applicant's arguments are capable of affecting the finding that such conduct is not compatible with the objectives of Regulation No 207/2009, since it seeks to circumvent the six-month period of reflection provided for by Article 29 of that regulation and the five-year grace period provided for by Article 51(1)(a) thereof. Thirdly, as is apparent from paragraphs 109 to 126 above, the applicant has not put forward arguments so as to rebut the Board of Appeal's finding that Copernicus intended to use the mark at issue by opposing applications for registration such as that of the intervener and by deriving economic benefits from that opposition. Fourthly, as was stated in paragraphs 127 to 141 above, its arguments are not capable of calling into question the merits of the Board of Appeal's finding that certain elements had the effect of rendering the unlawful filing strategy of Mr A. less visible to third parties, namely successive transfers of trade marks and trade mark applications to different companies, the alternation between the applications for registration of German and Austrian trade marks and the non-payment of registration fees.

145 It should be noted that those elements on their own allow it to be concluded that Copernicus acted in bad faith at the time of filing the mark at issue. As the Board of Appeal correctly pointed out in paragraph 21 of the contested decision, bad faith exists inter alia where applications for trade marks are diverted from their initial purpose and filed speculatively or solely with a view to obtaining financial compensation. In the light of the circumstances of the case, the Board of Appeal was entitled to formulate the conclusion according to which the chain of applications for registration of German and Austrian trade marks LUCEO organised by Mr A. were intended to grant a blocking position to him which he used to be able to claim priority for an application for registration of a European Union trade mark where a third party applied for registration of an identical or similar European Union trade mark. Therefore, when Copernicus applied for registration of the mark at issue, it did not intend to make use of its essential function, namely to guarantee the identity of the origin of goods or services to the consumer or end user, by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin (see paragraph 29 above), but intended to use it in order to prevent the registration of the European Union trade mark LUCEA LED applied for by the intervener and to derive economic advantages from its blocking position.

146 None of the arguments put forward by the applicant is capable of calling into question that finding.

147 First, the applicant claims that Copernicus did not attempt to prevent the intervener from making use of a trade mark which it had already used previously. In that regard, it should be noted that, admittedly, the existence of such an intention constitutes one of the elements which can indicate the existence of bad faith within the meaning of Article 52(1)(b) of Regulation No 207/2009. However, contrary to what is claimed by the applicant, the absence of such an intention does not preclude a finding that the applicant acted in bad faith (see, to that effect, judgment of 14 February 2012 in *BIGAB*, T-33/11, EU:T:2012:77, paragraph 20). Therefore, that argument must be rejected.

148 Secondly, the applicant claims that, in the present case, there is no invisible priority trap for third parties. In that regard, it suffices to note that, as was stated in paragraphs 131 and 143 to 145 above, in the circumstances of the case, the Board of Appeal was entitled to conclude that Copernicus acted in bad faith, even where it would not have been impossible for a third party to find the applications for registration of national trade marks.

149 Thirdly, the applicant claims that the application for registration of the Austrian trade mark LUCEO of 16 March 2009 already constituted a consolidated legal position and that it was in Copernicus' legitimate interests to apply for registration of the mark at issue and to claim priority for it by relying on that application, in the priority period.

150 In that regard, first, it should be noted that, as a result of the considerations set out in paragraphs 49 to 52 above, the filing strategy behind the application for registration of the mark at issue cannot be considered to be compatible with the spirit of Regulation No 207/2009.

151 Secondly, in so far as the applicant invokes, in essence, that it acted in the context of the rules laid down in Regulation No 207/2009, it is necessary to point out that Article 52(1)(b) of Regulation No 207/2009 provides for the invalidity of a European Union trade mark where the proprietor acted in bad faith at the time of filing the application for registration of it and therefore qualifies the application of the rules invoked by the applicant.

152 It follows that, in the circumstances noted in paragraph 144 above, the Board of Appeal was correct to conclude that Copernicus acted in bad faith at the time of filing the application for registration of the mark at issue.

153 Therefore, the Board of Appeal's finding relating to Copernicus' bad faith can already be confirmed on the basis of the circumstances noted in paragraph 144 above.

154 Therefore, the applicant's arguments referred to in paragraph 142 above and contesting the Board of Appeal's other findings relating to the lack of transparency on the part of Mr A.'s unlawful filing strategy must be rejected as ineffective. First, those arguments seek to show the erroneous character of the Board of Appeal's finding in paragraphs 23 and 24 of the contested decision that, in the context of the allegation of bad faith, it was necessary to take into account the fact that Copernicus had not submitted the evidence necessary for the purposes of claiming priority and that the mere fact that the file of the mark at issue still did not contain any documents making it possible to verify the merits of the claim was part of a strategy of concealment and intentional non-transparency. Secondly, they seek to show that the Board of Appeal's finding in paragraph 47 of the contested decision that the lack of transparency concerning the claim for priority resulted also from the fact that the files relating to the applications for registration of German trade marks were no longer accessible, were erroneous. In the light of what is set out in paragraphs 143 to 153 above, it must be stated that, even if the arguments put forward by the applicant demonstrated that those findings were vitiated by errors of assessment, the Board of Appeal's finding relating to bad faith on the part of Copernicus should be confirmed.

155 Therefore, the applicant's argument alleging that the Board of Appeal infringed the second sentence of Article 75 of Regulation No 207/2009 by failing to give Copernicus or the subsequent proprietors of the mark at issue the opportunity to express their views concerning access to the files relating to the applications for registration of the German trade marks must also be rejected as ineffective.

156 Therefore, both the applicant's arguments contesting the Board of Appeal's findings relating to the circumstances of the application for registration of the mark at issue and those relating to the Board of Appeal's conclusion concerning Copernicus' bad faith must be rejected.

4. *The arguments alleging that the intervener or its lawyer acted in bad faith*

157 The applicant claims also that the Board of Appeal should have taken the bad faith of the intervener and its lawyer more into account. In that context, it claims, in essence, that, in the past, the intervener's lawyer was M.A.'s partner and therefore knew his business model. The intervener itself acted in bad faith by applying for registration of the European Union trade mark LUCEA LED, although it knew of the existence of the application for registration of the Austrian trade mark LUCEO of 16 March 2009. In the light of the relationship between Mr A. and the intervener's lawyer, the Board of Appeal should have taken a critical approach towards the intervener's assertions.

158 First of all, it is apparent from paragraphs 17 and 18 of the contested decision, according to which the relationship between Mr A. and the intervener's lawyer does not make its action before EUIPO inadmissible, that the Board of Appeal took account of the applicant's arguments concerning that relationship.

159 As regards the applicant's argument alleging that, in the present case, the Board of Appeal failed to take the intervener's bad faith sufficiently into account, it should be noted, admittedly, that assuming that the intervener's bad faith is established, it should be taken into account in the context of an action for invalidity against the trade mark of which it is the proprietor, namely that trade mark LUCEA LED. By contrast, in the present proceedings, which relate to the mark at issue LUCEO and in which the Board of Appeal established that Copernicus acted in bad faith at the time the application for that trade mark was filed, possible bad faith on the part of the intervener is not capable of demonstrating an error affecting the Board of Appeal's conclusion that the declaration of invalidity was justified. As the Board of Appeal correctly found in paragraph 22 of the contested decision, the ground for invalidity for bad faith is based on public interest and cannot therefore depend on the bad faith of the person who applies for the invalidity of the trade mark.

160 In any event, it should be noted that the applicant does not specify the 'inside information' of the intervener's lawyer which the intervener could have benefited from dishonestly. In the light of the unlawful character of Mr A.'s filing strategy (see paragraphs 49 to 52 above), the intervener's lawyer was not obliged to refrain from assisting a client to apply for registration of a trade mark which was likely to conflict with a sign to which that strategy related.

161 Regarding the complaint alleging that the Board of Appeal should have taken a critical approach towards the intervener's assertions, it must be pointed out that, subject to the applicant's arguments which were not examined because they are ineffective (paragraphs 154 and 155 above), the examination of its arguments did not reveal any infringement, by the Board of Appeal, of the obligation to carry out an ex officio examination of the facts provided for by Article 76(1) of Regulation No 207/2009 or of the principle of sound administration. For the rest, that complaint must, moreover, be rejected in accordance with Article 44(1) of the Rules of Procedure of the General Court of 2 May 1991, since the applicant failed to specify the findings of the Board of Appeal which it intended to challenge with that complaint.

162 Therefore, the applicant's argument that the Board of Appeal should have taken more account of the intervener's bad faith must also be rejected and, therefore, all of the arguments put forward in support of the applications for a declaration of invalidity of the contested decision.

163 In the light of all of the foregoing considerations, the action must therefore be dismissed in its entirety without there being any need to rule on its admissibility.

Costs

164 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by EUIPO and the intervener.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Copernicus-Trademarks Ltd to bear its own costs and those of the European Union Intellectual Property Office (EUIPO) and Maquet GmbH.**

Berardis Czúcz Popescu

Delivered in open court in Luxembourg on 7 July 2016.

[Signatures]