Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

14 December 2017*

(EU trade mark — Invalidity proceedings — EU word mark BET 365 — Absolute ground for refusal — Distinctive character acquired through use — Proof — Use of the mark for a number of purposes — Article 7(3) and Article 52(2) of Regulation No 207/2009 (now Article 7(3) and Article 59(2) of Regulation (EU) 2017/1001))

In Case T-304/16,

bet365 Group Ltd, established in Stoke-on-Trent (United Kingdom), represented by S. Malynicz QC, and by R. Black and J. Bickle, Solicitors,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by S. Hanne, acting as Agent,

defendant,

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

Robert Hansen, residing in Munich (Germany), represented by M. Pütz-Poulalion, lawyer,

ACTION brought against the decision of the Fifth Board of Appeal of EUIPO of 21 March 2016 (Case R 3243/2014-5) relating to invalidity proceedings between Mr Hansen and bet365 Group,

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni, President, L. Madise, Rapporteur, and R. da Silva Passos, Judges,

Registrar: I. Dragan, Administrator,

having regard to the application lodged at the Court Registry on 15 June 2016,

having regard to the response of EUIPO lodged at the Court Registry on 12 August 2016,

having regard to the response of the intervener lodged at the Court Registry on 7 September 2016,

further to the hearing on 17 May 2017,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

1 On 23 May 2007, the applicant, bet365 Group Ltd, 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), as amended, itself replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1)).

2 Registration as a mark was sought for the word sign BET 365.

3 The goods and services in respect of which registration was sought are, following the restriction made in the course of the proceedings before EUIPO, in Classes 9, 28, 35, 36, 38, 41 and 42 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, for each of those classes, to the following description:

– Class 9: ‘Computer software; computer software for betting, gaming and gambling services and database management; electronic publications; computer games; electronic interactive computer games; computer software and computer programs for distribution to, and for use by, users of betting and gaming services; computer games programmes downloaded via the internet [software]; computer games software; computer programs for playing games; computer software downloaded from the internet; compact discs and DVDs; gaming apparatus adapted for use with television receivers; computer software for use in downloading, transmitting, receiving, editing, extracting, encoding, decoding, playing, storing and organising data including audio and video data’;

– Class 28: ‘Games and playthings; gaming apparatus (other than adapted for use with television receivers); games involving gambling’;

– Class 35: ‘Advertising; business management; business administration; office functions; online data processing services’;

– Class 36: ‘Financial services; financial services relating to betting, gaming, gambling, lotteries or book making; provision of financial information relating to betting, gaming, gambling, lotteries or book making services; information, advice and assistance relating to the aforementioned services’;

– Class 38: ‘Providing access to multiple user network systems allowing access to gaming and betting information and services over the internet, other global networks or via telephony (including mobile telephones); telecommunications services; transmission of radio or television programmes; data streaming services; streaming of live television and radio; online video service, offering live streaming of cultural, entertainment and sports events; providing internet chat room services; provision of online forums; transmission and communication services; transmission of sound and/or pictures; computer aided transmission of messages and images; electronic mail services; telecommunication services relating to the internet or via telephony including mobile telephones; telecommunication of information (including web pages); provision of telecommunications links to computer databases and websites on the internet or via telephony including mobile telephones; telecommunications information; factual information services relating to telecommunications’;

– Class 41: ‘Provision of betting, gambling and gaming services through physical and electronic sites and telephonic centres; betting, lottery or book making services; credit card betting, gaming, gambling, lottery or book making services; organising and conducting lotteries; electronic betting, gaming, gambling and lottery services provided by means of the internet, or via a global computer network, or online from a computer network database, or via telephony including mobile telephones, or via a television channel; interactive poker, bingo and skills games and gaming including single and multi-player gaming formats; presentation and production of poker and bingo competitions, tournaments, games and gaming; entertainment, sporting and cultural activities; organisation and conducting competitions; remote gaming services provided through telecommunication links; gambling information provided online from a computer database or via the internet; gaming services for entertainment purposes; electronic games services provided by means of the internet; organisation of games; game services provided online; services for the operation of computerised bingo and skills games; information relating to gaming provided online from a computer database or the internet; information and advisory services relating to the aforesaid services; factual information services relating to sport’;

– Class 42: ‘Computer advisory, consultancy and design services, leasing, rental and hire of computer software, computer programming’.

4 The examiner informed the applicant that he intended to reject the application for registration on the ground that, to the average English-speaking consumer, the mark applied for was descriptive of the goods and services concerned, in so far as ‘bet’ referred to betting and the element ‘365’ referred to the number of days in a year, meaning that the mark referred to the availability of all-year-round betting. It would accordingly fall within the scope of Article 7(1)(c) of Regulation No 40/94 (subsequently Article 7(1)(c) of Regulation No 207/2009, and now Article 7(1)(c) of Regulation 2017/1001), which provides that trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service, must not be registered. The examiner added that the mark in respect of which registration was sought was devoid of distinctive character, which brought it within the scope of Article 7(1)(b) of Regulation No 40/94 (subsequently Article 7(1)(b) of Regulation No 207/2009, and now Article 7(1)(b) of Regulation 2017/1001), and also prevented it from being registered.

5 The applicant challenged the preliminary assessment of the examiner, but also claimed that the mark lodged had, before the date of the application for registration, acquired distinctive character through use, which, given the provisions of Article 7(3) of Regulation No 40/94 (subsequently Article 7(3) of Regulation No 207/2009, and now Article 7(3) of Regulation 2017/1001), should in any event allow it to be registered. The applicant produced in support of its argument to that effect, a statement by its Chief Executive, Mr C., and a statement by Mr H., Chief Executive of the Remote Gambling Association, an association of gambling and betting operators. Those statements, accompanied by annexes thereto, sought to support the claim that the mark applied for had considerable market share, to demonstrate the geographic scope and longevity of its use and the investment made in promoting it, in order to show that its use was recognised by industry and trade and that the applicant alone used it for the goods and services covered.

6 By letter of 29 September 2008, the examiner acknowledged that the evidence submitted by the applicant showed that the mark had acquired distinctive character through use. In that regard, he noted that the documents produced showed that the element ‘bet365’ had been used in different contexts and styles and that Mr C.’s statement showed continuous and increasingly extensive use since 1991, with the applicant now processing over two million bets per week and being the 16th largest private company in the United Kingdom. Press cuttings indicated, in particular, that the mark had been used as a commercial mark with regard to the public in respect of internet sports betting and gambling goods and services in Ireland and the United Kingdom. It was also shown that the mark had

been the subject of an advertising campaign in the European Union, particularly in Ireland and the United Kingdom, but also in newspapers in Denmark, Germany, Spain and Sweden, with an advertising budget which rose between 2001 and 2007 from 48 000 pounds sterling (GBP) to GBP 6 000 000.

7 The application for registration of the mark was accordingly published in *Community Trade Marks Bulletin* No 2008/041 of 13 October 2008. In the absence of any third party observations, but following an opposition which was rejected, the mark was registered on 15 February 2012 for the goods and services applied for referred to in paragraph 3 above, in Classes 9, 28, 35, 36, 38, 41 and 42. The registration of the mark was published in *Community Trade Marks Bulletin* No 2012/034 of 17 February 2012.

8 On 19 June 2013, the intervener, Mr Robert Hansen, after having filed an application for registration of the word mark b365 on 18 February 2013, which was successfully opposed by the applicant, filed a request for a declaration of invalidity of the trade mark BET 365, claiming that it was descriptive of the goods and services covered and that it was not distinctive.

9 In the course of the ensuing *inter partes* procedure, the applicant produced new statements by Mr C. and Mr H., dated 2 January 2014 (with 34 annexes) and 20 December 2013 (with one annex) respectively. Although the applicant continued to defend the idea that the contested mark was in itself non-descriptive and distinctive, it also maintained that its use as a mark, which gave it a distinctive character, had become even more extensive after the filing of the application for registration in 2007 and, in particular, up to the time of the filing of the request for a declaration of invalidity in 2013. In that regard, the applicant reproduced, and updated, the evidence it had submitted before, in support of the fact that the contested mark had considerable market share, to demonstrate the geographic scope and longevity of its use and to highlight the investment made in promoting it, as well as to show that its use was recognised by industry and trade and that the applicant alone used it for the goods and services covered.

10 The intervener, for his part, in particular, challenged the relevance of the evidence adduced by the applicant to show that the use of the contested mark had given it distinctive character. He submitted, inter alia, that the applicant was mainly active in Ireland and the United Kingdom and that the element 'bet365' was used by the applicant only as a company name and a domain name to attract internet users to its website, but not as a means of identifying the actual services being offered to customers, which, with the exception of the game 'bet365 bingo', are identified by other signs.

11 After receiving the applicant's additional observations, the Cancellation Division rejected the request for a declaration of invalidity by a decision of 24 November 2014. While confirming that, in itself, the contested mark was descriptive of the goods and services in question, at least in a large part of the European Union, and that it was consequently initially not distinctive, the Cancellation Division nonetheless acknowledged that that mark had acquired distinctive character through use. In essence, the Cancellation Division noted that the applicant had shown significant development of its activities under the name BET 365 and that the intervener did not dispute the use of that name by the applicant as a company name and as part of the domain name on its website. Although, in theory, a distinction could be drawn between the use of a term as a trade mark for goods and services and the use of that term as a company name, in practice, that distinction could dwindle in the minds of the public when the same term serves both functions. In the present case, it was highly doubtful that the average consumer would make the distinction when using the applicant's website for gambling or betting, even if various gambling or betting services had different individual names. It was especially unlikely that the average consumer would have any doubt that those gambling or betting services are provided by the applicant, identified by the contested mark, especially given that the mark is the subject of extensive advertising and considerable press attention.

12 The intervener appealed to EUIPO against the decision of the Cancellation Division and again requested that the contested mark be declared invalid. In essence, he criticised the fact that the Cancellation Division had found that there was use conferring distinctive character on the mark enabling the commercial origin of the various goods and services concerned to be identified, throughout the European Union, in the light of references to the term 'bet365' in press articles published in Ireland and the United Kingdom (which, according to the intervener, were to identify the applicant or the betting odds given by the applicant), and the use of that element in the domain name for the applicant's website and in the corner of the web pages concerned.

13 By decision of 21 March 2016 ('the contested decision'), the Fifth Board of Appeal of EUIPO upheld the appeal, confirming that, for the English-speaking part of the relevant public, the contested mark was descriptive and intrinsically not distinctive, and finding that the mark had not acquired distinctiveness through use in a substantial part of the relevant territory in which it intrinsically lacked distinctiveness, namely, according to the Board of Appeal, given the date on which the application for registration had been filed, Denmark, Ireland, the Netherlands, Finland, Sweden and the United Kingdom (points 52 to 55 of the contested decision in so far as concerns the relevant territory).

14 In essence, the Board of Appeal noted that showing that distinctive character has been acquired through use requires evidence that at least a significant proportion of the relevant public identifies the sign in question as an indicator of the commercial origin of the goods or services concerned. Although the applicant had indeed demonstrated commercial success, it nevertheless had failed to establish a link between that success or its advertising activities and the public's perception of the contested mark.

15 There was insufficient direct evidence in that regard (in particular points 66 to 68, 71 and 73 to 75 of the contested decision). More specifically, the Board of Appeal found that the evidence adduced by the applicant to show that the contested mark had acquired distinctive character through use consisted mainly of press articles that did not relate, on the whole, to the relevant territory and that the mark appearing in the materials in English, which did not include any reference to the date, in fact showed three figurative and colour signs including the element 'bet365' also registered by the applicant, but not the contested mark (point 56 of the contested decision).

16 The Board of Appeal acknowledged that the evidence adduced by the applicant also included television commercials broadcast in Denmark, Sweden and the United Kingdom, radio advertisements broadcast in the United Kingdom relating nevertheless, according to the Board of Appeal, to the game bet365 bingo and not to the contested mark, perimeter-board advertisements used in football matches taking place in different places in Europe but broadcast in Sweden and the United Kingdom, horse racing sponsorship, mainly in the United Kingdom, sponsorship of the football club Stoke City FC, and a number of advertising figures. While the Board of Appeal commented that the evidence adduced mainly concerned the United Kingdom rather than the other countries within the relevant territory, it also recognised that the evidence was adequate in relation to the required time during which the examination had to be made (points 57 to 63 and 66 of the contested decision). The Board of Appeal also acknowledged that the applicant had convinced it of its commercial success, with more than 21 million customers distributed in 200 countries, and, in particular, that the market share of its gambling website was impressive (point 64 of the contested decision).

17 However, the Board of Appeal expressed doubt that the applicant's success proved that the contested mark had acquired distinctive character through use. As the intervener had submitted, the evidence provided by the applicant relates to use of the element 'bet365' to designate either the applicant itself or its website, but not to its use as a mark for the purposes of identifying the goods and services registered (points 68 and 69 and 77 and 79 of the contested decision). The Board of Appeal pointed out that the turnovers, advertising figures and other evidence supplied by the applicant were not apportioned among all the goods and services for which the contested mark had been registered and that, as a result, it was impossible to know what the consumer's perspective of the mark was for those

various goods and services. In particular, there were no opinion polls, assessments from chambers of commerce, consumer organisations or competitors to provide information in that regard and the evidence supplied concerned only the services in Class 41 relating to betting and gambling per se (points 70 to 76 of the contested decision). The Board of Appeal stated in addition that the number of times a term has been searched for on the internet could not suffice to establish that a sign has become distinctive, because it reveals no information 'as to the criteria set out above in assessing the intensity of use and the recognition as a distinctive sign by the relevant public' (point 78 of the contested decision). Point 80 of the contested decision states, in conclusion that 'no consumer awareness of the contested mark has been proven by the evidence filed'.

Forms of order sought

18 The applicant claims that the Court should:

– annul the contested decision;

– order EUIPO and the intervener to bear their own costs and to pay those incurred by the applicant.

19 EUIPO contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

20 The intervener contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs of the proceedings including the costs incurred by the intervener.

Law

21 The applicant relies on a single plea in law, alleging infringement of Article 7(3) of Regulation No 207/2009, supported by several sets of arguments. In the first place, the Board of Appeal failed properly to assess the evidence of use of the contested mark, in particular as regards the territorial extent of that use. In the second place, the Board of Appeal failed adequately to take into account the evidence of Mr H., the Chief Executive of the Remote Gambling Association. In the third place, the Board of Appeal wrongly considered that the evidence adduced did not show use of the contested mark or its use as a trade mark. In the fourth and fifth places, the Board of Appeal wrongly penalised the applicant for failing to submit evidence of an opinion poll and evidence from a chamber of commerce, amongst the evidence of use it submitted.

22 At the outset, it must be pointed out that the applicant does not call into question, at the stage of the proceedings before the Court, the inherently descriptive and non-distinctive character of the contested mark for all the goods and services in respect of which registration was applied for. The Court's assessment therefore relates exclusively to the question of that mark's acquisition of distinctive character through use.

23 Furthermore, it must be acknowledged that the applicant's single plea in law, even though it expressly refers only to an infringement of Article 7(3) of Regulation No 207/2009, which concerns in particular the registration of marks which are in themselves descriptive and not distinctive, but which have

acquired distinctive character through use on the date of the application for their registration, also concerns an infringement of Article 52(2) of that regulation (now Article 59(2) of Regulation 2017/1001), applicable in invalidity proceedings such as in the present case, by virtue of which a mark which is in itself descriptive and not distinctive which has been registered in breach of Article 7 of Regulation No 207/2009 may nevertheless not be declared invalid if, in consequence of the use which has been made of it, it has acquired, after registration, distinctive character in relation to the goods or services for which it is registered. As was, in essence, stated in the judgment of 28 September 2016, *European Food* v *EUIPO — Société des produits Nestlé (FITNESS)* (T-476/15, currently under appeal, EU:T:2016:568, paragraph 64), the invalidity proceedings based on absolute grounds for refusal provided for in Article 52 of Regulation No 207/2009 directly refers to the absolute grounds for refusal set out in Article 7 of that regulation, and to the exception of the acquisition of distinctive character through use which moderates them, the only potential substantive difference between the two procedures being the time at which the acquisition of such distinctive character must be assessed. In that regard, in the judgment of 15 December 2016, *Mondelez UK Holdings & Services* v *EUIPO — Société des produits Nestlé (Shape of a chocolate bar)* (T-112/13, not published, EU:T:2016:735, paragraph 117), the Court confirmed that, in invalidity proceedings based on absolute grounds for refusal, the proprietor of the contested mark was entitled either to prove that it had acquired distinctive character owing to the use that had been made of it before its registration or that it had acquired such character between its registration and the date of the request for a declaration of invalidity.

24 In the present case, in the light of what is stated in paragraphs 22 and 23 above, it is sufficient, in the context of invalidity proceedings, to give a ruling taking into account the situation existing on the date of filing of the request for a declaration of invalidity, that is to say 19 June 2013, as stated by the Board of Appeal in point 53 of the contested decision.

25 It is settled case-law that, while, under Article 7(3) of Regulation No 207/2009, the absolute grounds for refusal referred to in Article 7(1)(b) to (d) of that regulation (now Article 7(1)(b) to (d) of Regulation 2017/1001) do not preclude a mark from being registered if it has become distinctive in relation to the goods or services for which registration is applied for in consequence of the use which has been made of that mark, it is because, in these circumstances, the fact that the mark in question is actually perceived by the relevant public as an indication of the commercial origin of goods or services is the result of an economic effort made by the trade mark applicant. That fact justifies putting aside the public-interest considerations underlying Article 7(1)(b) to (d) of Regulation No 207/2009, which require, in the absence of an effort of this kind, that the marks referred to in those provisions may be freely used by all in order to avoid conceding an unjustified competitive advantage to a single trader (judgment of 24 February 2016, *Coca-Cola* v *OHIM (Shape of a contour bottle without fluting)*, T-411/14, EU:T:2016:94, paragraph 66, and the case-law cited). Those findings are also valid in so far as concerns a mark registered in breach of the provisions of Article 7(1)(b) to (d) of Regulation No 207/2009, but which has acquired distinctive character in consequence of the use made of it after its registration, as is apparent from Article 52(2) of that regulation.

26 As regards the territory in which distinctive character acquired through use must be established in order for the exceptions referred to in Article 7(3) and Article 52(2) of Regulation No 207/2009 to apply, it should be noted that, in accordance with Article 1(2) of that regulation (now Article 1(2) of Regulation 2017/1001), the EU trade mark is to have a unitary character, which implies that it must have equal effect throughout the European Union. It follows from the unitary character of the EU trade mark that, in order to be accepted for registration, a sign must have distinctive character throughout the European Union. Therefore, under Article 7(2) of Regulation No 207/2009 (now Article 7(2) of Regulation 2017/1001), a mark must not be registered if it lacks distinctive character in part of the European Union (judgment of 30 March 2000, *Ford Motor* v *OHIM (OPTIONS)*, T-91/99, EU:T:2000:95, paragraphs 23 to 25). Consequently, it is necessary to establish the acquisition of distinctive character through use in the whole of the territory in which the mark did not, *ab initio*, have such character; that territory may be comprised of a single Member State (judgment of 22 June

2006, *Storck* v *OHIM*, C-25/05 P, EU:C:2006:422, paragraph 83; see also judgment of 16 March 2016, *Työhönvalmennus Valma* v *OHIM (Shape of a play box containing wooden blocks)*, T-363/15, not published, EU:T:2016:149, paragraph 35 and the case-law cited). It has, however, been held that it would be unreasonable to require proof of acquisition of distinctive character through use with regard to each individual Member State concerned (judgment of 24 May 2012, *Chocoladefabriken Lindt & Sprüngli* v *OHIM*, C-98/11 P, EU:C:2012:307, paragraph 62). In that regard, the extrapolation of the acquisition of distinctive character through use in certain Member States to other Member States cannot be ruled out, in so far as objective and credible factors permit the view that those markets are comparable in so far as concerns the perception of the contested mark by the relevant public (see, to that effect, judgment of 24 February 2016, *Coca-Cola* v *OHIM (Shape of a contour bottle without fluting)*, T-411/14, EU:T:2016:94, paragraph 80).

27 Recognition that a mark has acquired distinctive character through use requires that at least a significant proportion of the relevant public, by virtue of that mark, identifies the goods or services concerned as originating from a particular undertaking. However, the circumstances in which the condition concerning the acquisition of distinctiveness through use may be regarded as satisfied cannot be established solely on the basis of general, abstract data. It is necessary to take account of factors such as the market share held by the mark, how intensive, geographically widespread and long-standing use of the mark has been; the significance of the investments by the undertaking to promote it; the proportion of the relevant class of persons who, because of the mark, identify the product as originating from a particular undertaking; and statements from chambers of commerce and industry or other professional associations (see judgments of 21 April 2010, *Schunk* v *OHIM (Representation of part of a chuck)*, T-7/09, not published, EU:T:2010:153, paragraphs 39 and 41 and the case-law cited, and of 24 February 2016, *Shape of a contour bottle without fluting*, T-411/14, EU:T:2016:94, paragraphs 69 and 70 and the case-law cited).

28 It must also be noted that, according to case-law, the distinctive character of a mark, including that acquired through use, must also be assessed with regard to the goods or services in respect of which registration is applied for or obtained and in the light of the presumed perception of the mark by an average consumer of the category of goods or services in question, who is reasonably well informed and reasonably observant and circumspect (see judgments of 21 April 2010, *Representation of part of a chuck*, T-7/09, not published, EU:T:2010:153, paragraph 42 and the case-law cited, and of 24 February 2016, *Shape of a contour bottle without fluting*, T-411/14, EU:T:2016:94, paragraph 71 and the case-law cited).

29 It is also apparent from the case-law that proof of distinctive character acquired through use cannot be furnished by isolated data such as the mere production of sales volumes in respect of the goods or services concerned and advertising material. Likewise, the mere fact that the sign has been used in the European Union for some time is also not sufficient to show that the public targeted by the goods and services in question would perceive it as an indication of commercial origin (see, to that effect, judgments of 12 September 2007, *Glaverbel* v *OHIM (Texture of a glass surface)*, T-141/06, not published, EU:T:2007:273, paragraphs 41 and 42, and of 24 February 2016, *Shape of a contour bottle without fluting*, T-411/14, EU:T:2016:94, paragraph 72).

30 In that regard, the acquisition of distinctive character through use must be shown by ‘use of the mark as a trade mark’, that is to say the use of the mark for the purposes of the identification by the relevant class of persons of the goods or services covered by the mark as originating from a given undertaking (see, to that effect and by analogy, judgment of 7 July 2005, *Nestlé*, C-353/03, EU:C:2005:432, paragraphs 26 and 29).

31 In the light of those principles, the single plea in law of the application must be assessed, after, however, clarifying the situation in relation to, first, the relevant territory and, secondly, the various goods and services concerned.

32 In the part of the contested decision finding the descriptive character and lack of inherent distinctiveness of the contested mark, the Board of Appeal stated that, in the light of the meaning of the word 'bet' in English, the descriptive character and lack of inherent distinctiveness were established for English-speaking consumers of the European Union, without specifying the countries concerned (points 16 and 32). Nevertheless, in the part of the contested decision devoted to examination of whether or not the contested mark had acquired distinctive character through use, the Board of Appeal considered that the relevant territory concerned, assessed on the date of filing of the application for registration in 2007, included Denmark, Ireland, the Netherlands, Finland, Sweden and the United Kingdom, where English is spoken or widely known (points 52 and 55 of the contested decision). In the present action, EUIPO and the intervener, in their responses, submit that the scope of the relevant territory should have been wider. Accordingly, EUIPO maintains that acquisition by the contested mark of distinctive character through use should have been proved in all the Member States in which the relevant public has at least passive knowledge of English. The intervener submits that most EU consumers have, at least, an elementary knowledge of English and that, consequently, the analysis of the acquisition of distinctive character through use should have related to all the Member States.

33 In that regard, it should be noted that the Board of Appeal did not err in finding, in essence, in the relevant part of the contested decision, that the examination of the acquisition by the contested mark of distinctive character through use should have been limited solely to EU Member States in which a large part of consumers spoke or understood English and, consequently, were able to understand the meaning of the expression 'bet365'. The arguments of EUIPO and the intervener on that point cannot be upheld since they would be tantamount to considering, wrongly, that that expression is also understood by most of the relevant public in countries in which English is not widely spoken or understood by consumers.

34 However, it must also be noted that the Board of Appeal stated, in point 54 of the contested decision, that the accession to the European Community of the Republic of Cyprus and the Republic of Malta on 1 May 2004 should have been taken into account. While considering that English was widely spoken or understood in those two Member States, the Board of Appeal stated, in point 55 of the contested decision, that they should not be included in the relevant territory for the purposes of analysing the acquisition by the contested mark of distinctive character through use. It based that approach on Article 165(4)(a) of Regulation No 207/2009 (now Article 209(4)(a) of Regulation 2017/1001), taking the view that it followed from that provision that an EU trade mark could not be declared invalid pursuant to Article 52 of that regulation if the grounds for invalidity had become applicable merely because of the accession of a new Member State.

35 That analysis concerning the Republic of Cyprus and the Republic of Malta is vitiated by an error of law. Indeed, it follows from Article 165(1) and (4) of Regulation No 207/2009 (Article 165(1) now being Article 209(1) of Regulation 2017/1001) that distinctive character acquired through use must be proved only for the States that were members of the European Union at the time of filing of the application for registration of the contested mark (see judgment of 23 February 2016, *Consolidated Artists* v *OHIM — Body Cosmetics International (MANGO)*, T-761/14, not published, EU:T:2016:91, paragraph 16 and the case-law cited). That follows from the fact that the principle laid down in Article 165(4)(a) of Regulation No 207/2009 applies to the marks referred to in Article 165(1) of that regulation, namely marks registered or applied for pursuant to Regulation No 207/2009 before the date of accession of the Member State or Member States concerned. However, in the present case, that principle cannot apply in so far as concerns the accession of the Republic of Cyprus and the Republic of Malta, since those two States were already members of the European Community on 23 May 2007, the date on which the applicant sought registration of the contested mark as an EU trade mark.

36 As regards the various goods and services covered by the contested mark, as noted by the Board of Appeal in point 76 of the contested decision and not contested in the present proceedings, the applicant did not submit evidence of the acquisition of distinctive character through use of the contested mark in respect of the goods and services in Classes 9, 28, 35, 36, 38 and 42. Even though some of those goods or services have a link to betting and gambling services in Class 41 listed in the registration, in the absence of any evidence put forward to show that that mark was at least used for those goods or services, it is not possible to extend to any one or other of those goods or services the assessments made below concerning the betting and gambling services in Class 41 listed in the registration for which evidence showing the acquisition through use of that mark's distinctive character has in fact been adduced. In these circumstances, it is already clear that the contested decision cannot be annulled in so far as it concerns the goods and services listed in the registration at issue, in Classes 9, 28, 35, 36, 38 and 42, and the following analysis of the Court, consequently, concerns only the betting and gambling services in Class 41 listed in that registration.

37 The principles referred to in paragraphs 25 to 30 above lead the Court to examine, first, whether or not, irrespective of the scope of the relevant territory to be taken into consideration in the present case, certain evidence adduced by the applicant, is such as to show that the contested mark has acquired distinctive character through use. If so, it will be examined whether or not the evidence adduced by the applicant is sufficient, in the light of its substance, to conclude that errors of law or legal classification which may have been made by the Board of Appeal concerning it, accordingly, undermine the Board of Appeal's conclusion regarding the lack of distinctiveness acquired through use of the contested mark.

38 As regards the first aspect, the first question is the possibility of relying on the use of figurative marks or marks made up of a number of word elements comprising a word mark, such as the contested mark, to show the acquisition of distinctive character through use of that mark. In points 56 and 57 of the contested decision, the Board of Appeal gave a negative reply in that regard, stating that certain documents submitted by the applicant showed figurative signs and colour signs registered by it or the mark bet365 Bingo and not the contested mark. The applicant criticises that position in the third series of arguments referred to in paragraph 21 above, and contests that the use of figurative or 'extended' forms of the contested mark does not constitute use of that mark.

39 The Board of Appeal's position neglects the fact that it has been held, as the applicant rightly maintains and as EUIPO acknowledges in its response, that the acquisition, by a mark, of distinctive character through use does not necessarily mean that it has been the subject of independent use, but could result from its use as part of another registered mark or from its use in conjunction with another registered mark, provided that, in both cases, the use made leads the relevant class of persons to perceive that the goods or services designated exclusively by the mark under examination originate from a given undertaking which uses it as part of another mark or in conjunction with another mark (see, to that effect and by analogy, judgments of 7 July 2005, *Nestlé*, C-353/03, EU:C:2005:432, paragraphs 27 to 32, and of 16 September 2015, *Société des Produits Nestlé*, C-215/14, EU:C:2015:604, paragraphs 64 and 66). In the present case, certain evidence adduced by the applicant contains the word element 'bet365', which constitutes the contested mark, used either alone, with different typography and colours, or as part of terms or figurative representations such as 'bet365 bingo' and 'bet365.com', or it includes representations associating that word element with colours, graphics or particular figurative elements and a coloured background, which constitute other marks registered by the applicant (see, for example, the representations reproduced in point 56 of the contested decision). There is no reason to consider such usage of the element 'bet365' to be inherently incapable of helping to show that the contested mark has acquired distinctive character through use, particularly since that mark is a word mark, the representations and uses of which cannot all be foreseen, to the extent that they constitute use of the contested sign as a mark, which must be confirmed hereafter. For example, it can hardly be disputed that use as a mark of the figurative mark made up of the element 'bet365' in different colours on a background of another colour enables the public, if it establishes a link between

that figurative mark and the applicant's goods or services, to establish the same link between, on the one hand, the contested mark used alone for the same purposes and, on the other hand, those goods or services.

40 Accordingly, the Board of Appeal erred in law in not taking into consideration the evidence including figurative marks or marks composed of several word elements including the contested mark in order to assess the acquisition of distinctive character through use of that mark.

41 Next in question, also with regard to the third series of arguments put forward by the applicant and referred to in paragraph 21 above, are the conclusions to be drawn from the fact that the applicant also uses the word element 'bet365' as part of the name of its website accessible at the address 'www.bet365.com' and the scope to be attributed to the evidence it provided concerning the use of its website or taken from that website. In particular, in point 77 of the contested decision, the Board of Appeal noted that 'the use of the subject mark as the ... domain name is not use of the mark as a trade mark identifying and distinguishing the [holder's] goods and services'. The applicant acknowledges that mere use of the contested mark as the name of a website would not suffice to establish its use as a mark, but claims that, in the present case, it submitted numerous items of evidence showing use of its mark which enable the commercial origin of its betting and gambling services offered online to be identified.

42 In that regard, it follows from settled case-law that it is not impossible to use the same element as a mark in the context of another use, for example, as all or part of the name of a website. However, a sign which also fulfils functions other than that of the mark is distinctive for the purposes of Article 7 or Article 52(2) of Regulation No 207/2009, only if it can be perceived immediately by the relevant public as an indication of the commercial origin of the goods or services in question, so as to enable the relevant public to distinguish, without any possibility of confusion, the goods or services of the owner of the mark from those of a different commercial origin (judgments of 5 December 2002, *Sykes Enterprises* v *OHIM (REAL PEOPLE, REAL SOLUTIONS)*, T-130/01, EU:T:2002:301, paragraph 20, and of 21 November 2012, *Getty Images* v *OHIM (PHOTOS.COM)*, T-338/11, not published, EU:T:2012:614, paragraph 58). It should also be noted that the distinctive character of a sign may be assessed only, first, in the light of the goods or services in respect of which registration is sought or has been granted, and, secondly, in the light of the relevant public's perception of the sign (judgment of 5 December 2002, *REAL PEOPLE, REAL SOLUTIONS*, T-130/01, EU:T:2002:301, paragraph 21). Those considerations apply both to inherent distinctive character and to distinctive character acquired through use, one of which is required in order for a mark to be properly registered.

43 In the present case, the Board of Appeal erred in law in excluding, in point 77 of the contested decision, the possibility that the use of the contested mark as the name of a website could constitute use of the mark 'as a trade mark'. Everything depends on the documents and information submitted in that regard and what they might provide in order to assess the relevant public's perception when it sees or uses the element 'bet365' or 'bet365.com' in the course of its use of the internet.

44 In that regard, account should be taken of the fact that, first, only the applicant uses the element 'bet365' for the marketing of gambling and betting services, secondly, as the applicant confirmed at the hearing without being contradicted, that element is found in all the marks it uses to identify its services in a general manner, thirdly, its website is its main gambling and betting sales channel, fourthly, in that sector, most of the marks used by online operators are, like the contested mark, inherently descriptive and, fifthly, it is well known that betters and players are, in the very great majority of cases, regular customers. Accordingly, it is reasonable to consider that, except with regard to certain new players or betters for whom the experience is new, a customer who connects to the applicant's website at 'www.bet365.com' does not do so by chance and uses the contested mark or its derived marks to identify services offered by the applicant, as opposed to services offered by its competitors, in the same way as a customer returning to a shop whose sign corresponds to the mark of the goods and services that he is looking for, which are sold there.

45 The situation is not analogous to the situations in the cases which gave rise to the judgments of 13 May 2009, *Schuhpark Fascies* v *OHIM — Leder & Schuh (jello SCHUHPARK)* (T-183/08, not published, EU:T:2009:156), and of 18 January 2011, *Advance Magazine Publishers* v *OHIM — Capela & Irmãos (VOGUE)* (T-382/08, not published, EU:T:2011:9), relied on at the hearing by EUIPO, in which the affixing in those cases of signs corresponding to the marks at issue on shop fronts did not show that those marks were also those of the goods sold in those stores, which in that case were shoes, in respect of which acquisition by those marks of distinctive character through use was claimed.

46 Consequently, in the context and circumstances of the present case, information such as the number of connections to the applicant's website, that website's ranking in terms of the number of visits in various countries or the number of times the contested mark or its derived marks were the subject of a search using internet search engines is information which can help to show that the contested mark has acquired distinctive character through use. The same may be true of extracts of pages from the applicant's website or other websites, in various languages, on which the contested mark or its derived marks appear, provided that the scope of the evidence adduced can illustrate significant use of the contested mark as a mark.

47 It is necessary to point out, moreover, that, in the cases concerning websites which have given rise to the judgments referred to by EUIPO in its response (judgments of 21 June 2012, *Fruit of the Loom* v *OHIM — Blueshore Management (FRUIT)*, T-514/10, not published, EU:T:2012:316, paragraphs 59 to 67; of 21 November 2012, *PHOTOS.COM*, T-338/11, not published, EU:T:2012:614, paragraphs 48 to 61; and of 19 November 2014, *Out of the blue* v *OHIM — Dubois and Another (FUNNY BANDS)*, T-344/13, not published, EU:T:2014:974, paragraphs 26 to 31), the evidence adduced by the proprietors of the marks or rights concerned, or in fact the context and the circumstances, were very different from that adduced in the present case. In the first of those cases, which concerned revocation proceedings in respect of the EU trade mark FRUIT, the proprietor of that mark had a website with the address 'www.fruit.com', but had failed to adduce any evidence that that mark had been put to genuine use, including on the basis of information provided on that website which referred to another mark. The website thus did not fulfil any commercial or even mere advertising function in respect of the goods covered by the mark in question. In the second of those cases, which concerned a refusal to register the EU trade mark PHOTOS.COM, when the applicant sold photographs via a website with the address 'www.photos.com', the Board of Appeal and the Court considered that the evidence adduced by that applicant to establish the acquisition, through use, of distinctive character by the mark at issue was insufficient or ineffective from a geographical, quantitative or temporal point of view for the purposes of establishing a link between the use of that site and the identification of the commercial origin of the photographs available and, as the case may be, sold there. The Court, however, stated that the registration of a mark composed of signs or indications which were also used to designate a domain name was not excluded. Finally, in the third case, which concerned opposition proceedings relating to the registration of the EU trade mark FUNNY BANDS on the ground of the previous existence of a non-registered identical trade name used in the internet domain name 'www.funny-bands.com', the opponent sought to prove use of that name of more than mere local significance. However, as regards the website at the corresponding address, he only proved that it existed and provided a number of examples of its content, but no evidence that could be used to assess the intensity of its commercial use. In that regard, the Court found that that could have been demonstrated, inter alia, by a certain number of connections to the site, by emails received via the site or by the volume of business generated.

48 Accordingly, the error of law committed by the Board of Appeal concerning the use of the contested mark as an internet domain name led it, wrongly, not to take into consideration evidence concerning the use of the applicant's website or evidence taken from that website.

49 Also in question, in the light of the third series of arguments put forward by the applicant referred to in paragraph 21 above, is the fact that the applicant chose the element 'bet365', which corresponds to the contested mark, as a company name. According to the Board of Appeal, the press articles submitted by the applicant show only use of that element as a company name, rather than as a mark, as was stated in point 79 of the contested decision. The applicant maintains, as the Cancellation Division also considered, that the recipients of its betting and gambling services have no doubt, when they encounter the contested mark, that it identifies the commercial origin of the services offered to them by the applicant and does not refer simply to it as a company.

50 In that regard, the same principles as those referred to in paragraph 42 above, concerning the concurrent use of the same element both as a mark and in another way, are applicable.

51 In the present case, it is with difficulty that general information, in particular of a financial nature, concerning the applicant in the financial press or more personal information concerning the directors of that company can illustrate use of the contested mark, even if it can, as the case may be, provide indirect information concerning the success of that mark and its derived marks, since all the marks used by the applicant to identify its services in general use the element 'bet365', as noted in paragraph 44 above. By contrast, the appearance of that element, as demonstrated in the file submitted to the Board of Appeal, in the sporting press or specialist gambling and betting press, for example, in association with betting odds, a comparison of services offered by different providers, or in the context of sponsorship of sporting events which constitute the betting medium, clearly illustrate its use as a mark in order to designate the origin of the services proposed or referred to, to distinguish them from services of the applicant's competitors and, as the case may be, to promote them.

52 The Board of Appeal therefore erred in its legal characterisation of the facts before it when it ruled, in point 79 of the contested decision, that the press articles submitted by the applicant could not, at least with regard to some of them, illustrate use of the contested mark as a mark.

53 Having regard to the first series of arguments put forward by the applicant referred to in paragraph 21 above, it is also necessary to examine the assessment made in points 70 to 73 of the contested decision, which is disputed by the applicant, in which the Board of Appeal cast doubt on the relevance of turnovers, stake figures or advertising investment referred to by the applicant as evidence which can help to show that the contested mark had acquired distinctive character through use, on the ground that they did not refer to specific goods and services, whereas the registration of the contested mark was granted for a whole series of goods and services, not limited strictly to gambling and betting.

54 That general assessment of the Board of Appeal is not open to criticism in principle. However, having regard to the fact that the contested mark and its derived marks are the only ones to be used by the applicant as marks capable of identifying its gambling and betting services in general, as found in paragraph 44 above, if the figures submitted can, reasonably, be attributed essentially to gambling and betting, they must accordingly be taken into consideration for those services. For example, the stake figures, advertising investment, particularly that concerning sponsorship, or the sums paid to affiliate websites directing players and betters to the applicant's website relate either completely or essentially to gambling and betting services marketed by the applicant under the contested mark or its derived marks. Accordingly, for those services, the information in question can help to show that the contested mark has acquired distinctive character through use.

55 The Board of Appeal therefore also erred in its legal characterisation of the facts by excluding that information from its assessment.

56 Having addressed those questions of principle, it is necessary to examine the applicant's criticisms of the contested decision, taking into account the specific evidence that it submitted to the Board of Appeal.

57 The applicant submits, in the context of the first series of arguments referred to in paragraph 21 above, that the Board of Appeal failed sufficiently to take into account press articles reporting the use of the contested mark in several countries of the relevant territory, and not merely in the United Kingdom.

58 Exhibit JC 16 submitted by the applicant to EUIPO includes numerous press articles from July 2001 to May 2007, which refer to betting odds or comments from journalists or bookmakers, in which the applicant is identified by the name 'bet365' or, as the case may be, as 'bet365.com'. Sponsored sporting events having names including the element 'bet365' are also referred to in those articles. Such appearances of that element illustrate its use as a mark, since references of that type are used to identify which operator has offered particular betting odds, or made a particular comment about a competitor participating in a particular event or which betting operator is sponsoring a sporting event which constitutes the betting medium (for example, documents Nos 4, 209 or 248 of 431 from the UK press or Nos 2, 4, 33 or 115 of 163 from the Irish press). Although other press articles in that exhibit refer to the use of the element 'bet365' 'as a company name', they are significantly fewer in number (for example, document No 6 of 431 from the UK press, which features a list of millionaires including the owners of the applicant company or documents Nos 76 and 77 of 431 from the UK press which include information and comments about various companies).

59 Exhibit JC 17 submitted to EUIPO by the applicant includes press articles covering the period from January 2007 to November 2013. Although that exhibit includes among the articles from the UK press numerous documents showing the use of the element 'bet365' as a company name (for example, documents Nos 13, 31, 46, 68, 105 and 156 of 231), it also includes among those articles a very considerable number of documents referring to sporting events having a name including the element 'bet365', in particular horse races, documents reporting the applicant's betting odds (such as documents Nos 120 to 125, 157, 179 to 185 and 204 of 231) and at least one article referring to the application 'bet365' which can be used to play and bet on a mobile telephone (document No 14 of 231). The other 231 press articles in Exhibit JC 17 from the Irish press, include in particular documents referring to sporting events having a name including the element 'bet365', but also documents reporting the applicant's betting odds and several comments from the applicant as a bookmaker (for example documents Nos 43 and 68 of 231).

60 Exhibits JC 16 and JC 17 consequently provide a very great deal of evidence of use of the element 'bet365' as a mark in respect of the relevant public in Ireland and the United Kingdom from July 2001 to November 2013.

61 Exhibits JC 18 (a) to JC 18 (g) submitted to EUIPO by the applicant include press articles from online news services and traditional newspapers in seven other Member States. Those documents contain an undated comparison of the quality of the services of seven gambling and betting operators. The applicant is designated therein by the contested mark and by one of its figurative representations. Articles published between 2007 and 2013 and an undated article concerning football, which indicate the betting odds offered by the applicant under the name 'bet365' or feature advertisements for the contested mark or the website 'bet365.com' are also included. In particular, Exhibit JC 18 (c) contains several sporting press articles from the Swedish press published between 2008 and 2012, featuring comments from the applicant, which is identified by the name bet365, and betting odds offered by it. That exhibit also includes an article on an advertising campaign run by the applicant in 2013.

62 Exhibits JC 18 (a) to JC 18 (g) thus provide evidence of use of the contested mark as a mark, in particular in Sweden, which can help to show that the contested mark acquired distinctive character through use.

63 Contrary to what EUIPO maintained at the hearing, it was for the Board of Appeal to examine those exhibits in a sufficiently complete manner, or at least those concerning the countries which corresponded to the territory it had considered relevant. The applicant did not merely submit hundreds of press articles to it without comment. Point 11 of Mr C.'s statement sets out not only their

provenance, but also that they illustrate uses of the contested mark as a mark and specifies where required that certain articles were translated into English. Moreover, Article 76(1) of Regulation No 207/2009 (now Article 95(1) of Regulation 2017/1001) provides that, in proceedings before it, EUIPO is to examine the facts of its own motion. The exception to that rule concerning proceedings relating to relative grounds for refusal of registration is not applicable in the present case, since the intervener initiated invalidity proceedings against the contested mark on the basis of an absolute ground for invalidity and not on the basis of a relative ground for invalidity. If the Board of Appeal had considered it too difficult to identify the relevant documents submitted by the applicant in the light of the volume of exhibits submitted, it could, at least, pursuant to the means of giving or obtaining evidence laid down in Article 78(1) of Regulation No 207/2009 (now Article 97(1) of Regulation 2017/1001), have asked the applicant to identify them more precisely.

64 In addition, the applicant puts forward, also in the context of the first series of arguments referred to in paragraph 21 above, various evidence concerning the use of its website in order to show that the contested mark acquired distinctive character through use in various countries.

65 First, it submits that its website offering gambling and betting services operates in several languages. As is apparent from Exhibit JC 4 submitted to EUIPO by the applicant, the applicant's website has existed since 2006, inter alia in English, Danish and Swedish. That evidence gives an indication that the applicant has a significant customer base in at least one country in which those languages are spoken, since the creation and daily maintenance of an interactive website in a language entails costs which would not otherwise be justified.

66 The applicant also puts forward the ranking of its website in terms of visitors in various countries as is apparent from Exhibit JC 5, which it submitted to EUIPO. In that regard, it must be noted that a high ranking in terms of visitors can help to establish that the contested mark, which is repeated in the name of the applicant's website, acquired distinctive character through use in the countries concerned, since, as has already been stated in paragraph 44 above, except with regard to players and betters for whom the experience is new, a connection to the website of a gambling and betting operator does not happen by chance, but is a response to the desire to see the precise offers of that operator and potentially to place a bet. In the present case, ranks 33 and 74, in Sweden and the United Kingdom respectively, as is clear from Exhibit JC 5, are indications that the contested mark has acquired distinctive character through use in those territories.

67 Such indications can also be inferred from information concerning new subscribers to the applicant's website, as is apparent from Exhibit JC 6(b) communicated by the applicant to the Board of Appeal. Each season, since the 2008/2009 season in the United Kingdom, several hundreds of thousands of players and betters register on the site (735 122 for the 2012/2013 season). The corresponding figures for Denmark are in the tens of thousands (85 183 new registrations for the 2012/2013 season). The figures for the rest of the European Union (excluding Spain for which separate data was also provided) are aggregated and amount to several hundred thousand new players and betters each season (901 835 new registrations for the 2012/2013 season). Exhibit JC 6 (a) submitted to EUIPO by the applicant provides older information (2006/2007 season) but contains information broken down according to country for 'the rest of the European Union', namely 7 062 new registrations for Finland, 8 291 for Ireland, 462 for the Netherlands and 59 322 for Sweden. That information therefore concerns new players and betters registering during one season on the applicant's website and, while it is possible to imagine that some of them have registered quite by chance on that gambling and betting website rather than on another, it may also reasonably be considered that most have not done so by chance, but rather have registered either on the advice of other players or betters, or after studying the offer and, as the case may be, having compared it with others, or even because they wish precisely to be registered on several sites belonging to different operators in order to place their bets individually in accordance with what they consider to be the offer giving the best chance of profit for the stake. In the latter scenarios, which are the most likely, registration on the applicant's website at the address

'www.bet365.com' illustrates that the contested mark or its derived marks were used as marks, since they specifically made it possible to identify the origin of the services which could be used as a result of that registration.

68 Similarly, the applicant is also correct in raising certain evidence submitted by it concerning the affiliation programme with third-party websites which seeks to encourage internet users on those sites to go to its site. Since the third-party site which allowed the redirection, and subsequently an internet user's subscription and initial payment in order to place a bet with the applicant, receives a commission from the applicant, the figures and division by country of those commission payments may give an indication of the use of the contested mark. When an internet user navigating to a third-party site is attracted by the contested mark or its derived marks accompanied by promotional elements to the point that he subsequently makes a subscription to the applicant via its website and makes an initial payment, it is because the contested mark plays a role as a mark which identifies a particular service offer to which the internet user intends to respond. In that regard, Exhibit JC 30 submitted to EUIPO by the applicant indicates that every season, since the 2007/2008 season in the United Kingdom, several million pounds sterling have been paid to affiliate websites. The corresponding figure for Denmark exceeds one million pounds sterling for the 2012/2013 season. The figures for the rest of the European Union (except Spain) are aggregated and have amounted to several tens of millions of pounds sterling since the 2010/2011 season. For the countries dealt with individually at least, those figures provide a clear indication that the contested mark or its derived marks are used to market the applicant's gambling and betting services.

69 By contrast, the mere number of redirections from third-party websites to the applicant's website do not give a reliable indication of use of the contested mark to identify the applicant's services, since at that stage of the internet user's decision-making, given the descriptive nature of the contested mark, it is highly possible that he will make a connection by chance before even finding out precisely the content of the offer available.

70 The applicant also relies on the stake figures collected as shown in Exhibit JC 10(a) which it submitted to EUIPO. In that regard, that exhibit shows, for the 2012/2013 season, figures amounting to several billion pounds sterling in the United Kingdom, hundreds of millions of pounds sterling in Denmark and several billion pounds sterling for the rest of the European Union (excluding Spain). For the countries dealt with individually at least, those figures provide a clear indication that the contested mark or its derived marks are used to market the applicant's gambling and betting services, since a player or a better needs to make use of the element 'bet365' in order to play or place a bet.

71 As regards the advertising expenditure put forward by the applicant, as contained in Exhibit JC 19 submitted by the applicant to EUIPO, it is possible to draw conclusions similar to those concerning the stake figures (see paragraph 70 above). The information concerns the various seasons since 2006/2007 and shows several million pounds sterling, and even several tens of millions, of advertising expenditure for each season both in Denmark and in the United Kingdom. The advertising expenditure in the rest of the European Union (excluding Spain) also amounts to several million pounds sterling per season, but is not broken down by country. For the countries dealt with individually at least, those figures provide a clear indication that the contested mark or its derived marks are used to market the applicant's gambling and betting services, since those marks are the only ones used by the applicant to identify its betting and gambling services in general. Other evidence adduced by the applicant before the Board of Appeal concerning advertisements using the contested mark and its derived marks may constitute indications that the contested mark has acquired distinctive character through use, in particular outside the United Kingdom. Accordingly, Exhibits JC 20(a) to JC 20(e) submitted to EUIPO by the applicant include several copies of advertisements for sports betting in the languages of the countries concerned, which appeared between 2007 and 2013 in the English, Danish and Swedish printed press. Exhibit JC 21(a) submitted to EUIPO by the applicant contains examples of scripts for television advertisements shown, in English or in the language of the country concerned in Denmark, Sweden and the United Kingdom. Mr C.'s statement (points 14.1

to 14.22) includes photographs of television advertisements broadcast in Denmark, Sweden and the United Kingdom, and the DVD accompanying the applicant's observations before the Board of Appeal contains footage from those advertisements in which celebrities appear. Exhibit JC 21(b) submitted to EUIPO by the applicant contains a number of advertising scripts in English, apparently for radio broadcast in the United Kingdom. Exhibit JC 25 submitted to EUIPO by the applicant contains examples of short television commercials broadcast between 2009 and 2014 in Denmark, Sweden and the United Kingdom.

72 By contrast, Mr C.'s statement (point 17 et seq.), to be read in conjunction with Exhibit JC 23 submitted by the applicant to EUIPO, from which, according to EUIPO, it may be concluded that advertising at football grounds is seen in the whole of the European Union on television, does not in fact provide sufficiently precise information concerning the broadcasting of that advertising in various countries of the European Union, contrary to what the Board of Appeal appears to have considered in paragraph 58 of the contested decision. All that is indicated is overall broadcast transmission times for the whole of the European Union, which does not allow any distinction to be made between countries. The same is true of the evidence provided by the applicant to EUIPO to illustrate the advertising of the contested mark or its derived marks by means of the activities of the football club Stoke City FC, in particular the photos contained in Exhibit JC 29. Although it is likely that the Premier League football matches in which that club takes part may be viewed on a television channel in all EU countries, those photos of players, grounds or accessories, give no indication of the actual broadcast of that advertising in different EU countries. Nor do the press articles contained in Exhibit JC 29(b) submitted to EUIPO by the applicant, taken from newspapers from Ireland and the United Kingdom give any indications in that regard.

73 The applicant also puts forward, in the context of the second series of arguments referred to in paragraph 21 above, certain evidence from Mr H.'s statement and from Annex CH 1 to that statement. That evidence hardly differs, however, from that set out previously in Mr C.'s statement and the annexes thereto. Mr H. confirms, for example, the applicant's advertising efforts in Denmark, Sweden and the United Kingdom. Such a contribution, by a person who is not the applicant, may reinforce the credibility of the statements and evidence adduced by the latter but does not change the substantive assessment that may be made about them, assuming that they are genuine. Thus, although confirmed by Mr H., the evidence adduced concerning the sponsorship of the football club Stoke City FC, as explained in paragraph 72 above, has limited value in terms of helping to show that the contested mark has acquired distinctive character through use in the whole of the territory concerned. The evidence adduced concerning the applicant's success, as highlighted by Mr H. can at most provide indirect confirmation of the commercial success of a mark of the same name and of its derived marks, exclusively used by the applicant to identify its gambling and betting services in a general manner, but cannot actually contribute to that demonstration on account of its very general nature.

74 Moreover, it should be noted that, indeed, some of the evidence referred to in the above paragraphs does not in itself contain all the information which would allow it to be considered compelling from the outset. For example, copies of advertisements from the Danish or Swedish printed press from Exhibit JC 20 were not supplied in the form of copies of the pages of the newspapers in which they appeared, as Mr C., moreover, notes in his statement (point 13.7) where he indicates that they may be proofs. Likewise, much of the information put forward by the applicant, particularly concerning the stakes collected or its advertising expenditure comes from purely internal sources. Nevertheless, evidence from sources other than the applicant, or evidence which is difficult to dispute is plentiful: for example, full articles from the Swedish press; a comparative study on the use of websites in different countries, which ranks the applicant's website as 33rd in Sweden and 74th in the United Kingdom; the fact that the applicant's website exists in English, Danish and Swedish; photographs and examples of television commercials broadcast in Denmark, Sweden and the United Kingdom featuring a number of celebrities (illustrated by points 14.1 to 14.22 of Mr. C.'s statement and on the DVD annexed to the applicant's observations submitted to the Board of Appeal); the very considerable number of press articles, such as those concerning the *Sunday Times* ranking submitted in Annex CH

1 to Mr H.'s statement, reporting the commercial success of the applicant, which was recognised by the Board of Appeal as 'successful and well-known ... with more than [21] million clients distributed in 200 countries' (point 64). That seemingly reliable evidence, which is consistent with other evidence provided by the applicant, reinforces the credibility of the latter evidence. Accordingly, in the absence of any specific criticism of their accuracy and given the plausible nature of the information they convey, the Court considers all the evidence referred to in paragraphs 57 to 73 above to be credible, in so far as it concerns information profitably put forward by the applicant to show the distinctive character acquired by the contested mark through use on 19 June 2013 in the relevant territory.

75 In these circumstances, given the criteria for assessing whether a mark has acquired distinctive character through use, in particular those referred to in paragraphs 27 to 29 above, and having regard, first, to the various errors of law or legal characterisation of the facts referred to in paragraphs 38 to 55 above and secondly, the considerable evidence adduced by the applicant before the Board of Appeal, identified in paragraphs 57 to 74 above, which may effectively help to show whether the contested mark has acquired distinctive character through use in the relevant territory, but which the Board of Appeal did not take into account for that purpose, it is evidence that the contested decision is not sufficiently substantiated by valid grounds justifying its operative provisions concerning the gambling and betting services in Class 41 listed in the registration. Consequently, with regard to those services, the single plea in law seeking annulment is well founded and there is no need to examine the last arguments put forward by the applicant concerning the lack of opinion polls or evidence from a chamber of commerce in respect of which it was criticised by the Board of Appeal.

76 It should be noted that, taking in account the grounds justifying the annulment of the contested decision, it is not for the Court to make a detailed and conclusive analysis for the whole of the relevant territory, particularly since the Board of Appeal did not itself conduct such an analysis (see, by analogy, judgment of 5 July 2011, *Edwin* v *OHIM*, C-263/09 P, EU:C:2011:452, paragraphs 71 and 72).

77 In the light of the foregoing, the contested decision must be annulled in so far as it concerns the services in Class 41 listed in the registration of the contested mark.

Costs

78 Under Article 134(3) of the Rules of Procedure of the General Court, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the General Court may order that one party, in addition to bearing his own costs, pay a proportion of the costs of the other party.

79 The applicant, EUIPO, and the intervener, having each been partly unsuccessful, taking into account the circumstances of the present case, each party must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. **Annuls the decision of the Fifth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 21 March 2016 (Case R 3243/2014-5) in so far as it concerns the services in Class 41 listed in the registration of the EU trade mark BET 365;**

2. **Dismisses the action as to the remainder;**

3. **Orders each party to bear its own costs.**

Gervasoni Madise Da Silva Passos

Delivered in open court in Luxembourg on 14 December 2017.

E. Coulon
Registrar

S. Gervasoni
President