Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

18 June 2020*

(Appeal — EU trade mark — Regulation (EC) No 207/2009 — Application for EU figurative mark PRIMART Marek Łukasiewicz — Earlier national trade mark PRIMA — Article 8(1)(b) — Relative ground for refusal — Likelihood of confusion — Article 76(1) — Scope of review by the General Court of the European Union)

In Case C-702/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 9 November 2018,

Przedsiębiorstwo Produkcyjno-Handlowe 'Primart' Marek Łukasiewicz, established in Wołomin (Poland), represented by J. Skołuda, radca prawny,

appellant,

the other parties to the proceedings being:

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

defendant at first instance,

Bolton Cile España SA, established in Madrid (Spain), represented by F. Celluprica, F. Fischetti and F. De Bono, avvocati,

intervener at first instance,

THE COURT (Seventh Chamber),

composed of P.G. Xuereb, President of the Chamber, T. von Danwitz and A. Kumin (Rapporteur), Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 28 November 2019,

gives the following

* Language of the case: English.

Judgment

1 By its appeal, Przedsiębiorstwo Produkcyjno-Handlowe 'Primart' Marek Łukasiewicz seeks to have set aside the judgment of the General Court of the European Union of 12 September 2018, *Primart* v *EUIPO — Bolton Cile España (PRIMART Marek Łukasiewicz)* (T-584/17, not published, 'the judgment under appeal', EU:T:2018:530), by which the General Court dismissed its action for annulment of the decision of the Fourth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 22 June 2017 (Case R 1933/2016-4), relating to opposition proceedings between Bolton Cile España SA and Przedsiębiorstwo Produkcyjno-Handlowe 'Primart' Marek Łukasiewicz ('the contested decision').

Legal context

2 Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1) was amended by Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 (OJ 2015 L 341, p. 21), which entered into force on 23 March 2016. Regulation No 207/2009, as amended by Regulation 2015/2424, was repealed and replaced, with effect from 1 October 2017, by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1). Nonetheless, given the date on which the application for registration at issue was filed, namely 27 January 2015, which is decisive for the purpose of identifying the applicable substantive law, the facts of the case are governed by the substantive provisions of Regulation No 207/2009, in its original version (see, to that effect, judgment of 4 July 2019, *FTI Touristik* v *EUIPO*, C-99/18 P, EU:C:2019:565, paragraph 2).

3 Article 8 of Regulation No 207/2009, entitled 'Relative grounds for refusal', provides, in paragraph 1(b) thereof:

'1. Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:

…

(b) if because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark.'

4 Article 65 of that regulation, entitled 'Actions before the Court of Justice', provides:

'1. Actions may be brought before the Court of Justice against decisions of the Boards of Appeal on appeals.

2. The action may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation or of any rule of law relating to their application or misuse of power.

3. The Court of Justice has jurisdiction to annul or to alter the contested decision.

…'

5 Article 76 of that regulation, entitled 'Examination of the facts by the Office of its own motion', is worded as follows:

'1. In proceedings before it [EUIPO] shall examine the facts of its own motion; however, in proceedings relating to relative grounds for refusal of registration, [EUIPO] shall be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought.

2. [EUIPO] may disregard facts or evidence which are not submitted in due time by the parties concerned.'

6 Under Article 188 of the Rules of Procedure of the General Court, entitled 'Subject matter of the proceedings before the General Court':

'The pleadings lodged by the parties in proceedings before the General Court may not change the subject matter of the proceedings before the Board of Appeal.'

Background to the dispute and the contested decision

7 The background to the dispute, as set out in paragraphs 1 to 21 of the judgment under appeal, may be summarised as follows.

8 On 27 January 2015, the appellant filed an application for registration of an EU trade mark with EUIPO pursuant to Regulation No 207/2009.

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



10 The goods in respect of which registration was sought are in Class 30 of the Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, as revised and amended, and correspond to the following description: 'Sugars, natural sweeteners, sweet coatings and fillings, bee products; coffee, teas, cocoa and substitutes therefor; ice, ice creams, frozen yogurts and sorbets; salts, seasonings, flavourings and condiments: baked goods, confectionery, chocolate and desserts; processed grains, starches, and goods made thereof, baking preparations and yeasts; crackers'.

11 The trade mark application was published in *European Union Trade Marks Bulletin* No 2015/022 of 3 February 2015.

12 On 29 April 2015, Bolton Cile España, intervener at first instance, filed a notice of opposition, under Article 41 of Regulation No 207/2009, to the registration of the mark applied for in respect of all the goods referred to in paragraph 10 of this judgment.

13 The opposition was based in particular on the Spanish trade mark PRIMA, registered on 22 September 1973 under number 2578815 and renewed on 9 April 2013, designating goods in Class 30 and corresponding to the following description: 'Sauces and condiments; coffee; tea; cocoa; sugar; rice; tapioca; sago, artificial coffee; flour and preparations made from cereals; bread; biscuits; cakes; pastry and confectionery; edible ices; honey; treacle; yeast, baking-powder; salt; mustard; pepper; vinegar; ice'.

14 The ground relied upon in support of the opposition was that set out in Article 8(1)(b) of Regulation No 207/2009.

15 After EUIPO's Opposition Division dismissed the opposition in its entirety, Bolton Cile España, on 24 October 2016, filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009, against the Opposition Division's decision.

16 By the contested decision, the Fourth Board of Appeal of EUIPO annulled the Opposition Division's decision, upheld the opposition, refused the trade mark application and ordered the appellant to bear the costs incurred in the course of the opposition and appeal proceedings.

17 After stating, as regards the earlier Spanish mark, that the relevant territory for analysing the likelihood of confusion was Spain and that the relevant public was the public at large in that Member State, the Board of Appeal took the view that, having regard to the identity and similarity of the goods at issue, the average level of visual and above-average level of phonetic similarity of the signs at issue, together with the at most average level of attention of the relevant public and the average level of inherent distinctiveness of the earlier mark, there was a likelihood of confusion on the part of the relevant public. In particular, in order to conclude that the level of inherent distinctiveness of the earlier mark was average, the Board of Appeal noted the absence of any meaning of that mark with regard to the goods concerned, stating that the Spanish consumer would understand the word 'prima' as meaning 'female cousin' or 'bonus payment', and not as denoting the excellence of something, as is the case in other languages of the European Union.

The procedure before the General Court and the judgment under appeal

18 By application lodged at the Court Registry on 24 August 2017, the appellant brought an action for annulment of the contested decision.

19 In support of its action, it relied on a single plea in law alleging infringement of Article 8(1)(b) of Regulation No 207/2009.

20 By the judgment under appeal, the General Court dismissed the action in its entirety and upheld the Board of Appeal's findings with respect to the existence of a likelihood of confusion. In particular, it held, in paragraphs 87 to 90 of the judgment under appeal, that the appellant's argument concerning the weak distinctive character of the earlier mark should be declared inadmissible on the basis of Article 76(1) of Regulation No 207/2009, as that argument had been put forward before it for the first time.

Forms of order sought

21 The appellant claims that the Court should:

– set aside the judgment under appeal and annul the contested decision;

– order EUIPO and Bolton Cile España to pay the costs of the proceedings before the Board of Appeal and the General Court, and

– order EUIPO to pay the costs of the proceedings before the Court of Justice.

22 EUIPO and Bolton Cile España contend that the Court should:

– dismiss the appeal and

– order the appellant to pay the costs.

The appeal

23 In support of its appeal, the appellant relies on a single ground of appeal alleging infringement of Article 76(1) of Regulation No 207/2009, read in conjunction with Article 65 of that regulation.

Admissibility

24 Bolton Cile España contends that the appeal is inadmissible. First, the appeal does not include a summary of the pleas in law relied on, in breach of Article 168(1)(d) of the Rules of Procedure of the Court of Justice. Second, the appellant's main arguments concerning the meaning of the word 'prima' and the distinctive character of a mark that includes such a word raise questions of fact and not law.

25 As regards the first plea of inadmissibility, it should be pointed out that the appeal includes a plea in law, a summary of that plea in law and the legal arguments relied on and indicates the paragraphs of the judgment under appeal allegedly vitiated by error, so that the requirements of Article 168(1)(d) of the Rules of Procedure of the Court of Justice are met.

26 The second plea of inadmissibility must also be rejected. The appellant's argument that the General Court misinterpreted and misapplied Article 76(1) of Regulation No 207/2009, read in conjunction with Article 65 of that regulation, by declaring the appellant's argument concerning the weak distinctive character of the earlier mark inadmissible on the ground that that argument had been put forward before it for the first time, is a question of law which may be subject to review on appeal.

The single ground of appeal

Arguments of the parties

27 The appellant claims, in essence, that the General Court infringed Article 76(1) of Regulation No 207/2009 by declaring inadmissible, in paragraphs 87 to 90 of the judgment under appeal, its argument concerning the weak distinctive character of the earlier mark on the ground that that argument had been put forward before it for the first time.

28 In the first place, the appellant claims that the word 'prima', which means 'first', 'foremost', 'best' or 'principal' and thus has a laudatory connotation, constitutes a well-known fact. Well-known facts need not be raised during the administrative stage of the proceedings, as a party can challenge the accuracy of well-known facts before the General Court even if it did not mention them in the proceedings before EUIPO.

29 In that context, the appellant submits that the procedural rule set out in Article 76(1) of Regulation No 207/2009, which, as regards relative grounds for refusal of registration, restricts the examination by EUIPO to the facts, evidence and arguments provided by the parties and the relief sought, constitutes an exception to the general rule that EUIPO shall examine the facts of its own motion and therefore, as such, should be interpreted restrictively.

30 It claims that, if the General Court had taken into account the well-known fact that the word 'prima' has a laudatory meaning, it would have had to find that the earlier mark has weak inherent distinctiveness and, therefore, would have come to a different conclusion with regard to the existence of a likelihood of confusion.

31 In the second place, the appellant submits that, as the Board of Appeal analysed of its own motion the issues relating to the meaning of the word 'prima' and the distinctive character of the earlier mark, it has the right to challenge that assessment before the General Court.

32 EUIPO contends, in essence, in the first place, that the General Court made an error of law in finding that the appellant's argument was inadmissible. Although a literal interpretation of the second sentence of Article 76(1) of Regulation No 207/2009 could support the view that, in the opposition proceedings, EUIPO lacks competence to examine certain issues where the parties have not provided facts, evidence and arguments in support of their claims, such an interpretation has been rejected by the case-law of the Court resulting, inter alia, from the judgment of 1 February 2005, *SPAG* v *OHIM — Dann and Backer (HOOLIGAN)* (T-57/03, EU:T:2005:29, paragraphs 21, 22 and 32). It follows from that case-law that, when applying Article 8(1)(b) of Regulation No 207/2009, the degree of inherent distinctiveness of an earlier mark constitutes one of the legal conditions which must be examined by the General Court of its own motion for the purposes of an exhaustive assessment of the likelihood of confusion. Accordingly, the issue of the inherent distinctiveness of the earlier mark constitutes an issue of law which can be raised for the first time before the General Court.

33 However, EUIPO contends, in the second place, that the error of law thus made by the General Court is without consequence for the legality of the judgment under appeal, as the argument raised by the appellant before the General Court was manifestly unfounded.

34 First, the evidence adduced by the appellant before the General Court in support of its arguments concerning the meaning of the word 'prima' was either irrelevant or inadmissible, thus leaving unsubstantiated its assertion concerning the weak distinctive character of the earlier mark. Second, it follows implicitly from the judgment under appeal that the alleged laudatory meaning of the word 'prima' in Spanish with regard to the goods at issue does not constitute a well-known fact; it thus escapes review by the Court of Justice on appeal. Third, even if it were accepted that the earlier mark has only a weak distinctive character, that circumstance would not affect the conclusion reached in the judgment under appeal because there can be a likelihood of confusion even where the earlier mark at issue has a weak distinctive character.

35 For its part, Bolton Cile España contends that the ground of appeal should be dismissed. In the first place, as it is not the General Court's function to review the facts in the light of the documents produced before it for the first time, its review cannot go beyond the factual and legal context of the proceedings as brought before the Board of Appeal by the parties, which is apparent from Article 76(1) of Regulation No 207/2009. If it had been accepted that the appellant's argument concerning the allegedly weak distinctive character of the earlier mark should have been examined for the first time before the General Court, that would have had the effect of changing the subject matter of the proceedings before the Board of Appeal and would have constituted an infringement of Article 188 of the Rules of Procedure of the General Court.

36 In the second place and in any event, the General Court, in paragraph 92 of the judgment under appeal, decided on the meaning of the word 'prima' and on the distinctive character of the earlier mark, grounding its decisions, in accordance with Article 76(1) of Regulation No 207/2009, on the facts provided by the parties and on those taken into account of its own motion, and confirmed that the inherently distinctive character of the earlier mark was average for the goods at issue. Thus, even assuming that the argument concerning the allegedly weak distinctive character of the word 'prima' would have been declared admissible, that would not have changed the General Court's conclusion. In that regard, the General Court's implicit reasoning is sufficient.

The assessment of the Court

37 The appellant submits that, in paragraph 90 of the judgment under appeal, the General Court infringed Article 76(1) of Regulation No 207/2009 by declaring its argument concerning the weak distinctive character of the earlier mark inadmissible on the ground that that argument had been put forward before it for the first time.

– Error of law allegedly made by the General Court in the application of Article 76(1) of Regulation No 207/2009

38 Article 188 of the Rules of Procedure of the General Court, entitled 'Subject matter of the proceedings before the General Court', determines the scope of the review by the General Court of the decisions adopted by EUIPO. Under that provision, 'the pleadings lodged by the parties in proceedings before the General Court may not change the subject matter of the proceedings before the Board of Appeal.'

39 The matters that may properly be put before the General Court thus depend on the subject matter of the proceedings before the Board of Appeal. In that regard, Article 76 of Regulation No 207/2009, entitled 'Examination of the facts by the Office of its own motion', states, in paragraph 1 thereof, that, although 'in proceedings before it [EUIPO] shall examine the facts of its own motion', in proceedings 'relating to relative grounds for refusal of registration' that examination shall be restricted to 'the facts, evidence and arguments provided by the parties and the relief sought.'

40 In the present case, the appellant does not dispute the General Court's finding that it did not argue before the Board of Appeal that the inherent distinctiveness of the earlier mark PRIMA was weak because of the laudatory meaning of the word 'prima' in Spanish. However, it submits that that was an issue which the Board of Appeal was required to examine in any event.

41 In that regard, it is true that, under Article 76(1) of Regulation No 207/2009, in proceedings relating to relative grounds for refusal of registration, EUIPO is restricted in its examination to the facts, evidence and arguments provided by the parties and the relief sought, so that the Board of Appeal may base its decision only on the relative grounds for refusal relied on by the party concerned and the related facts and evidence presented by the parties. The fact remains that, as the Advocate General observed, in essence, in points 49 to 51 and 58 of his Opinion, the Board of Appeal is required to decide on all issues which, in the light of the facts, evidence and arguments provided by the parties and the relief sought, are necessary to ensure a correct application of that regulation and in respect of which it has all the information required in order to be able to take a decision, even if no element of law related to those issues has been relied on by the parties before it.

42 In the light of that obligation incumbent on the Board of Appeal, Article 76 of Regulation No 207/2009 and Article 188 of the Rules of Procedure of the General Court cannot be interpreted as meaning that the arguments seeking to call into question the considerations of the Board of Appeal relating to the issues on which it is required to take a decision will not form part of the subject matter of the proceedings before the General Court if they have not been put forward during the proceedings before the Board of Appeal.

43 In the context of opposition proceedings based on Article 8(1) of Regulation No 207/2009, the assessment of the inherent distinctive character of the earlier mark constitutes an issue of law which is necessary to ensure the correct application of that regulation, so that the instances of EUIPO are required to examine that issue, if necessary of their own motion. As that assessment does not presuppose any matter of fact which is for the parties to establish and does not require the parties to provide facts, arguments or evidence tending to establish that character, EUIPO alone is able to detect

and assess the existence thereof having regard to the earlier mark on which the opposition is based. Consequently, that issue forms part of the subject matter of the proceedings before the Board of Appeal within the meaning of Article 188 of the Rules of Procedure of the General Court.

44 Accordingly, the reasoning of the Court set out in paragraphs 87 to 90 of the judgment under appeal misconstrued the scope of Article 76(1) of Regulation No 207/2009.

45 In any event, it should be pointed out that, in the present case, the Board of Appeal decided of its own motion on the issue of the inherent distinctive character of the earlier mark. In paragraph 27 of the contested decision, it took the view that, in the absence of any meaning of the earlier national mark with regard to the goods concerned, the level of inherent distinctiveness of that mark was average given that the Spanish consumer would understand the word 'prima' as meaning 'female cousin' or 'bonus payment' and not as a word denoting the excellence of something.

46 However, as the Advocate General observed in point 71 of his Opinion, the appellant had to be in a position to criticise those findings of the Board of Appeal before the General Court, as, under Article 263 TFEU, when read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, an applicant must be able to contest before the EU Courts each and every issue of fact and law on which an EU body bases its decisions.

47 It follows from the foregoing that the General Court made an error of law in paragraphs 87 to 90 of the judgment under appeal by declaring the appellant's argument concerning the allegedly weak distinctive character of the earlier mark inadmissible on the ground that that argument had been put forward before it for the first time.

– *The consequences of the error of law made by the General Court*

48 Contrary to what is contended by EUIPO and Bolton Cile España, that error of law is capable of leading to the setting aside of the judgment under appeal.

49 In the first place, EUIPO contends that, even if the General Court had declared the arguments relating to the weak distinctive character of the earlier mark admissible and well founded, that circumstance would not have affected the conclusion reached in the judgment under appeal regarding the likelihood of confusion. A likelihood of confusion cannot be precluded where the distinctive character of the earlier mark is weak (see, to that effect, judgment of 26 July 2017, *Continental Reifen Deutschland* v *Compagnie générale des établissements Michelin*, C-84/16 P, not published, EU:C:2017:596, paragraph 99 and the case-law cited).

50 However, as the Advocate General observed in point 80 of his Opinion, the mere possibility that the findings of the General Court might still stand is not enough to dismiss the appeal, as the judgment under appeal could be upheld, despite the error of law identified in paragraph 47 of this judgment, only if that error were shown to be entirely irrelevant for the outcome of the case.

51 The existence of a likelihood of confusion on the part of the public must be appreciated globally, taking into account all factors relevant to the circumstances of the case (judgments of 11 November 1997, *SABEL*, C-251/95, EU:C:1997:528, paragraph 22; of 12 June 2007, *OHIM* v *Shaker*, C-334/05 P, EU:C:2007:333, paragraph 34; and of 20 September 2007, *Nestlé* v *OHIM*, C-193/06 P, not published, EU:C:2007:539, paragraph 33), and the distinctive character of an earlier mark is one of those relevant factors (see, to that effect, judgment of 26 July 2017, *Continental Reifen Deutschland* v *Compagnie générale des établissements Michelin*, C-84/16 P, not published, EU:C:2017:596, paragraph 98 and the case-law cited).

52 Consequently, it cannot be ruled out that, in the present case, the General Court would have reached a different conclusion to that reached in the judgment under appeal if it had regarded the appellant's arguments relating to the weak distinctive character of the earlier mark as admissible. In particular, in such a situation, it could have accepted those arguments and, consequently, found that there was no likelihood of confusion.

53 Moreover, it should be borne in mind that, where the earlier trade mark and the sign whose registration is sought coincide in an element that is weakly distinctive with regard to the goods at issue, the global assessment of the likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 207/2009 does not often lead to a finding that such likelihood exists (see, to that effect, judgment of 12 June 2019, *Hansson*, C-705/17, EU:C:2019:481, paragraph 55).

54 The conclusion that the General Court made an error of law in its assessment of the likelihood of confusion between the mark applied for and the earlier mark is not contrary, either, as the Advocate General observed in points 82 and 83 of his Opinion, to the principle of judicial economy, which states that, if the grounds of a judgment of the General Court disclose an infringement of EU law but its operative part is shown to be well founded for other legal reasons, the appeal must be dismissed (judgment of 24 January 2018, *EUIPO* v *European Food*, C-634/16 P, EU:C:2018:30, paragraph 33 and the case-law cited).

55 As is apparent from paragraph 51 of this judgment, the global assessment of the likelihood of confusion must take into account all factors relevant to the circumstances of the case, including the distinctive character of the earlier mark. In that regard, it follows from the Court's case-law that a finding that there is no such likelihood of confusion cannot, because of the interdependence of the relevant factors in that regard, be ruled out in advance and in any event (see, to that effect, judgment of 12 June 2019, *Hansson*, C-705/17, EU:C:2019:481, paragraph 55).

56 In the second place, it is appropriate to reject Bolton Cile España's argument that, even if the appellant's argument concerning the allegedly weak distinctive character of the earlier mark had been declared admissible, that circumstance would not have changed the assessment of the General Court, which, in any event, in paragraph 92 of the judgment under appeal, regarded the inherent distinctive character of that mark as average for the goods at issue.

57 In that regard, it is common ground that, in paragraph 91 of the judgment under appeal, the General Court noted that 'before the Opposition Division, the appellant argued that "the term 'prima' in Spanish means 'bonus' or 'cousin' (female)" and that those are the meanings accepted by the Board of Appeal in paragraph 22 of the contested decision'.

58 The General Court inferred from this, in paragraph 92 of the judgment under appeal, that it is appropriate, 'as to the remainder, to uphold the Board of Appeal's finding that, in the absence of meaning of the earlier mark with regard to the goods concerned, the latter's intrinsic distinctive character is average'.

59 However, as the Advocate General observed in points 92 and 93 of his Opinion, even assuming that, in paragraphs 91 and 92 of the judgment under appeal, the General Court, for the sake of completeness, examined the arguments put forward by the appellant and rejected them as unfounded, it should be noted at the outset that the Court's reasoning was inadequate and that inadequate reasoning is a matter of public policy (see, to that effect, judgment of 20 December 2017, *EUIPO* v *European Dynamics Luxembourg and Others*, C-677/15 P, EU:C:2017:998, paragraph 36 and the case-law cited).

60 The General Court did not specify, in the judgment under appeal, why it regarded those arguments as unfounded, as it merely recalled the argument put forward by the appellant before the Opposition Division without explaining why that argument should prevail over that relied on before the General Court. Moreover, before the General Court, the appellant did not submit that the meaning that it had

given to the word 'prima' in Spanish before the Opposition Division, that is, 'bonus payment' or 'female cousin', was incorrect, rather it solely claimed that that word could also have, in addition to those meanings, other meanings and a laudatory connotation.

61 In addition, while it is true, as contended by Bolton Cile España, that the General Court's reasoning may be implicit, that reasoning must nonetheless enable the persons concerned to know why the General Court has not upheld their arguments and provide the Court of Justice with sufficient material for it to exercise its power of review (see, to that effect, judgment of 28 February 2019, *Groupe Léa Nature* v *EUIPO*, C-505/17 P, not published, EU:C:2019:157, paragraph 55). However, that is not the case here, as is apparent from paragraph 60 of this judgment.

62 Consequently, even assuming that the General Court, for the sake of completeness, in paragraph 92 of the judgment under appeal, rejected as unfounded the arguments put forward by the appellant concerning the weak distinctive character of the earlier mark, the judgment under appeal should be set aside on the ground of inadequate reasoning.

63 It follows from all the foregoing that, due to the error of law made by the General Court, as is apparent from paragraph 47 of this judgment, the judgment under appeal must be set aside.

The action before the General Court

64 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

65 As the Advocate General observed in point 98 of his Opinion, the state of the proceedings in the present case does not permit final judgment to be given, as the General Court failed to rule, or at least failed to adequately rule, on the appellant's argument, set out in paragraphs 83 to 85 of the judgment under appeal, concerning the weak distinctive character of the earlier mark.

66 Consequently, the case must be referred back to the General Court and the costs must be reserved.

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

1. **Sets aside the judgment of the General Court of the European Union of 12 September 2018, *Primart* v *EUIPO — Bolton Cile España (PRIMART Marek Łukasiewicz)* (T-584/17, not published, EU:T:2018:530);**

2. **Refers the case back to the General Court of the European Union;**

3. **Reserves the costs.**

Xuereb von Danwitz Kumin

Delivered in open court in Luxembourg on 18 June 2020.

A. Calot Escobar
Registrar

P.G. Xuereb
President of the Seventh Chamber