Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

12 October 2017*

(EU trade mark — Opposition proceedings — Application for EU word mark SDC-554S — Earlier non-registered national word mark SDC-554S — Relative ground for refusal — Article 8(4) of Regulation (EC) No 207/2009 (now Article 8(4) of Regulation (EU) 2017/1001) — Evidence establishing the content of national law — Rule 19(2)(d) of Regulation (EC) No 2868/95 (now Article 7(2)(d) of Delegated Regulation (EU) 2017/1430) — Production of evidence for the first time before the Board of Appeal — Discretion of the Board of Appeal — Article 76(2) of Regulation No 207/2009 (now Article 95(2) of Regulation 2017/1001))

In Case T-316/16,

Moravia Consulting spol. s r. o., established in Brno (Czech Republic), represented by M. Kyjovský, lawyer,

applicant,

v

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

defendant,

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

Citizen Systems Europe GmbH, established in Stuttgart (Germany), represented by C. von Donat, J. Lipinsky, J. Hagenberg, T. Hollerbach and C. Nitschke, lawyers,

ACTION brought against the decision of the Second Board of Appeal of EUIPO of 1 April 2016 (Case R 1575/2015-2), relating to opposition proceedings between Moravia Consulting and Citizen Systems Europe,

THE GENERAL COURT (Ninth Chamber),

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

Registrar: X. Lopez Bancalari, Administrator,

having regard to the application lodged at the Court Registry on 21 June 2016,

having regard to the response of EUIPO lodged at the Court Registry on 24 October 2016,

* Language of the case: English.

having regard to the response of the intervener lodged at the Court Registry on 2 December 2016,

having regard to the decision of 9 March 2017 joining Cases T-316/16 to T-318/16 for the purposes of the oral procedure,

further to the hearing on 11 May 2017,

gives the following

Judgment

Background to the dispute

1 On 10 April 2014 the intervener, Citizen Systems Europe GmbH, filed an application for registration of an EU trade mark with the European Union Intellectual Property Office (EUIPO) pursuant to Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended (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 mark SDC-554S.

3 The goods in respect of which registration was sought are in Class 9 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 to the following description: ‘Pocket calculators; Calculators’.

4 The EU trade mark application was published in *Community Trade Marks Bulletin* No 2014/076 of 24 April 2014.

5 On 22 July 2014 the applicant, Moravia Consulting spol. s r. o., filed a notice of opposition, pursuant to Article 41 of Regulation No 207/2009 (now Article 46 of Regulation 2017/1001), to registration of the mark applied for in its entirety.

6 In support of its opposition, the applicant relied, in the first place, on the existence of an earlier right arising from a non-registered word mark that is identical to the mark applied for, on the basis that such right existed at least in the territory of the Czech Republic. That non-registered word mark related to calculators.

7 The applicant stated that it had used the non-registered mark prior to the lodging of the application for registration of the trade mark applied for, in particular when placing an order in October 2013 for the delivery of calculators from Hong Kong (China). As evidence in that regard, the applicant presented a two-page document headed ‘Sales confirmation’ and dated 8 October 2013.

8 In the second place, the applicant claimed that the intervener had acted in bad faith. However, following a communication from EUIPO of 5 August 2014 stating, inter alia, that such a ground may be relied on only in the context of invalidity proceedings against a registered EU trade mark, the applicant indicated, in a letter to EUIPO dated 10 December 2014, that it was no longer alleging that the trade mark applicant had acted in bad faith.

9 In the third place, the applicant claimed that the mark applied for is devoid of distinctive character.

10 By decision of 5 June 2015, the Opposition Division of EUIPO dismissed the opposition lodged by the applicant and ordered it to pay the costs. The Opposition Division observed that the applicant had failed to submit information or provide evidence concerning the applicable national right on which it was relying and pursuant to which the use of the mark applied for could have been prohibited in the relevant Member State, even after EUIPO had requested the applicant to substantiate its opposition. Furthermore, the Opposition Division pointed out that a lack of distinctive character in the mark applied for fell within Article 7 of Regulation No 207/2009 (now Article 7 of Regulation 2017/1001) and, consequently, was not a valid ground in opposition proceedings.

11 On 4 August 2015 the applicant filed an appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009 (now Articles 66 to 71 of Regulation 2017/1001), against the decision of the Opposition Division.

12 The applicant annexed to its statement of grounds information concerning the relevant Czech trade mark law and clarified the content of that law which covers the legal protection granted to non-registered signs.

13 By decision of 1 April 2016 ('the contested decision'), the Second Board of Appeal of EUIPO dismissed the appeal.

14 First, the Board of Appeal took the view, in essence, that, in the course of the opposition proceedings, the applicant had not referred to the applicable statutory provisions and had not provided any information on the content of the rights relied on or the conditions to be fulfilled in the present case, which would allow EUIPO to assess whether the specific conditions laid down in those provisions were satisfied and whether, consequently, it was possible to prohibit use of the mark applied for under the law of the relevant Member State, namely the Czech Republic. The Board of Appeal noted that the onus was on the applicant to identify and provide all necessary information to demonstrate that the earlier mark came within the scope of application of the national law and that such law conferred the right to prohibit the use of a subsequent mark.

15 As regards the information on Czech law which the applicant submitted for the first time before the Board of Appeal, the latter held that such information could not be held to be 'additional' or 'supplementary' and was, therefore, inadmissible. Indeed, the Board of Appeal does not have the discretion to accept evidence out of time.

16 The Board of Appeal then added that, even if the evidence submitted for the first time before it had to be considered 'additional' or 'supplementary', thus enabling it to exercise discretion as to whether or not to accept that evidence out of time, it would have exercised such discretion by not taking it into consideration. According to the Board of Appeal, it is clear from the wording of Article 76(2) of Regulation No 207/2009 (now Article 95(2) of Regulation 2017/1001) that the fact that a party has invoked or produced facts and evidence out of time does not confer on it an unconditional right to have those facts and evidence taken into consideration. The Board of Appeal concluded that the circumstances surrounding the late filing of that evidence by the applicant were not capable of justifying such a delay.

17 As regards the argument alleging that the intervener had acted in bad faith, which the applicant raised again, despite stating, during the procedure before the Opposition Division, that it was no longer relying on that ground, the Board of Appeal reiterated that, pursuant to Article 41 of Regulation No 207/2009, an opposition may be brought on the basis of Article 8 of that regulation (now Article 8 of Regulation 2017/1001) and stated that, as that provision does not refer to bad faith as a ground for opposition, it would not consider that ground.

18 Last, the Board of Appeal, relying on case-law, noted that the issue addressed during the opposition proceedings was not a matter of determining whether or not the contested sign was distinctive and had to be registered under Article 7(1)(b) of Regulation No 207/2009 (now Article 7(1)(b) of Regulation 2017/1001), but rather of deciding whether the contested sign had to be refused due to the existence of an earlier right within the meaning of Article 8(4) of that regulation (now Article 8(4) of Regulation 2017/1001).

Forms of order sought

19 The applicant claims that the Court should:

– annul the contested decision;

– order EUIPO to pay the costs.

20 EUIPO and the intervener contend that the Court should:

– dismiss the application;

– order the applicant to pay the costs.

Law

Admissibility

21 EUIPO claims that the action is manifestly inadmissible. The intervener maintains, for its part, that the action is inadmissible, in as much as it is based on Article 52(1)(b) of Regulation No 207/2009 (now Article 59(1)(b) of Regulation 2017/1001).

The plea of inadmissibility raised by EUIPO

22 According to EUIPO, the dismissal, by the Board of Appeal, of the action against the decision of the Opposition Division was justified on two grounds. First, the Board of Appeal had no discretion to accept the submissions filed with the statement of grounds. Second, even if the Board of Appeal had had discretion and had exercised that discretion, it would still have dismissed the action. EUIPO maintains that the applicant does not, in the context of the present action, challenge the second ground justifying the contested decision. Consequently, even if the pleas of the applicant in relation to the first ground justifying the contested decision were to be upheld, they would still not suffice to annul that decision, since the operative part of the decision remains, in any event, justified on account of the second ground. In view of the foregoing, EUIPO concludes that the action is manifestly inadmissible.

23 In paragraph 21 of the application, the applicant justifies the late filing of specific references to Czech law, on which the applicant was relying and pursuant to which the use of the mark applied for was allegedly capable of being prohibited in the relevant Member State. For that purpose, the applicant maintains, in essence, that it submitted all of the evidence relating to its earlier right as a user of the non-registered sign within the time limit prescribed by EUIPO and that only the information on the national law was missing. The applicant adds that, pursuant to the principle *iura novit curia*, it was not necessary to file details of the specific provisions of Czech law, which is accessible to the public. In addition, the applicant submits that EUIPO was obliged to clarify matters by indicating what specific information was lacking in its opposition so that the applicant could duly correct this. However,

according to the applicant, EUIPO's request for further details regarding the opposition was unclear and did not enable the applicant to understand what EUIPO's specific criticisms of its opposition actually were.

24 In that regard, it is necessary to note that the applicant has invoked, in the context of the present application, reasons that, in its opinion, justified the late filing of the evidence in question. Thus, the applicant contests in general EUIPO's position that that evidence that had been filed out of time could not be accepted. Even supposing that there is evidence in the case file that contradicts the argument submitted by the applicant, such a finding would relate to the substance of the action, rather than to its admissibility. Regardless of the justification given by the applicant for the late filing of its evidence during the administrative procedure, it therefore cannot be claimed, as EUIPO does, in essence, that the applicant is, in the present case, merely criticising the part of the contested decision in which the Board of Appeal found that it had no discretion as to the taking into account of that evidence.

25 In those circumstances, the plea of inadmissibility raised by EUIPO against the action should be rejected.

The plea of inadmissibility raised by the intervener

26 The intervener maintains that, although the applicant stated, during the opposition proceedings, that it was no longer pursuing that ground, it appears to rely on Article 52(1)(b) of Regulation No 207/2009 in order to challenge the contested decision.

27 In the present case, the applicant has, pursuant to Article 41 of Regulation No 207/2009, brought opposition proceedings against the registration of an EU trade mark pursuant to Article 8(4) of that regulation. The intervener points out that Article 52(1)(b) of Regulation No 207/2009, concerning bad faith on the part of the applicant when filing an application for an EU trade mark, is an absolute ground of invalidity and is not listed as a ground of opposition to the registration of an EU trade mark, with the consequence that it cannot be relied on in the context of opposition proceedings. Consequently, according to the intervener, that ground is inadmissible.

28 During the opposition proceedings, the applicant stated expressly to the Opposition Division that it was no longer invoking the bad faith of the intervener, on which it initially sought to rely. However, during the proceedings before the Board of Appeal, the applicant claimed once again that the request for registration of the contested sign resulted from bad faith on the part of the intervener, which led the Board of Appeal to find, in paragraph 85 of the contested decision, that, since opposition proceedings could be based on Article 8 of Regulation No 207/2009 and that provision did not list bad faith as a ground of opposition, that issue would not be considered.

29 In addition, in paragraph 26 of its application, the applicant lists among the pleas advanced in support of its application, infringement of Article 52(1)(b) of Regulation No 207/2009 without, however, submitting an argument to substantiate that assertion. During the hearing, when responding to a question put to it by the Court, the applicant maintained that it still sought to rely on that plea.

30 It is necessary to note that, pursuant to Article 76(d) of the Rules of Procedure of the General Court, the application must contain a summary of the pleas in law on which the application is based and that summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the General Court to rule on the action, if necessary without any other supporting information (see judgment of 18 September 2012, *Scandic Distilleries* v *OHIM — Bürgerbräu, Röhm & Söhne (BÜRGER)*, T-460/11, not published, EU:T:2012:432, paragraph 16 and the case-law cited). As the plea alleging an infringement of Article 52(1)(b) of Regulation No 207/2009 patently does not comply with

those requirements, that plea must be rejected as manifestly inadmissible. In addition, the reference to that plea at the present stage of the action is surprising, given that the applicant had expressly stated to the Opposition Division that it was no longer relying on the intervener's bad faith.

31 It follows from the above that the plea in law alleging infringement of Article 52(1)(b) of Regulation No 207/2009 must be dismissed as inadmissible.

32 For the sake of completeness, it should be noted that Article 52(1)(b) of Regulation No 207/2009 sets out the absolute grounds for invalidity of an EU trade mark, including when the applicant acts in bad faith when filing its application for registration (judgment of 11 June 2009, *Chocoladefabriken Lindt & Sprüngli*, C-529/07, EU:C:2009:361, paragraphs 34 and 35), and therefore bad faith may be relied upon in the context of an application for a declaration of invalidity against a registered mark. However, as the intervener claims, the bad faith of the applicant for an EU trade mark is not included in Article 41 of Regulation No 207/2009 among the grounds for opposition to the registration of an EU trade mark. Therefore, that plea must, in any event, be rejected.

Substance

33 In support of its action, the applicant relies essentially on two pleas in law. The first plea alleges infringement of Article 8(4) and Article 76(1) of Regulation No 207/2009 (Article 76(1) now being Article 95(1) of Regulation 2017/1001) and of Rule 50(1) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1). The second plea alleges infringement of Article 52(1)(b) of Regulation No 207/2009.

34 Since the second plea has been rejected as inadmissible, it is only necessary to consider the first plea.

35 In support of that plea, the applicant claims that the Board of Appeal erred in its application of Rule 50(1) of Regulation No 2868/95, read in conjunction with Article 76(2) of Regulation No 207/2009, when, in the contested decision, it failed to take into account the facts and evidence submitted that had been put forward by the applicant. The applicant maintains that the Board of Appeal misconstrued its discretionary power in relation to evidence first submitted in the appeal proceedings against the decision of the Opposition Division. The applicant claims that, in the present case, it submitted all of the evidence regarding its earlier right as a user of a non-registered sign within the prescribed time limit and that only the information on national law was missing. Consequently, the applicant maintains that it cannot be stated that it failed to file any evidence during the opposition proceedings. The applicant also argues that in the contested decision the Board of Appeal erroneously applied the principles laid down in the judgment of 28 October 2015, *Rot Front* v *OHIM — Rakhat (Маска)* (T-96/13, EU:T:2015:813), since that judgment was delivered after the time limit for bringing an action again the Opposition Division's decision. Consequently, the applicant submits, that judgment cannot be relevant for the present case.

36 EUIPO and the intervener dispute the applicant's arguments.

37 As the arguments relied on by the applicant in its first plea overlap, it is necessary to examine them together.

38 Under Article 8(4) of Regulation No 207/2009, the proprietor of a sign other than a registered trade mark may oppose registration of a European Union trade mark if that sign satisfies all of four conditions: (i) the sign must be used in the course of trade; (ii) it must be of more than mere local significance; (iii) the right to that sign must have been acquired in accordance with EU law or the law of the Member State in which the sign was used prior to the date of application for registration of the EU trade mark; and (iv) the sign must confer on its proprietor the right to prohibit the use of a

subsequent trade mark (see judgment of 29 June 2016, *Universal Protein Supplements* v *EUIPO — H Young Holdings (animal)*, T-727/14 and T-728/14, not published, EU:T:2016:372, paragraph 22 and the case-law cited). Those conditions are cumulative; thus, where a sign does not satisfy one of those conditions, the opposition based on the existence of a non-registered trade mark or of other signs used in the course of trade within the meaning of Article 8(4) of Regulation No 207/2009 cannot succeed (see judgment of 21 January 2016, *BR IP Holder* v *OHIM — Greyleg Investments (HOKEY POKEY)*, T-62/14, not published, EU:T:2016:23, paragraph 20 and the case-law cited).

39 The first two conditions, namely those concerning the use and scope of the sign relied on, the latter having to be of more than mere local significance, arise from the wording itself of Article 8(4) of Regulation No 207/2009 and must therefore be interpreted in the light of EU law. Regulation No 207/2009 thus sets out uniform standards relating to the use of signs and their significance, which are consistent with the principles underlying the system established by that regulation (see judgment of 29 June 2016, *animal*, T-727/14 and T-728/14, not published, EU:T:2016:372, paragraph 23 and the case-law cited).

40 By contrast, it is apparent from the phrase 'where and to the extent that, pursuant to ... the law of the Member State governing that sign' that the two other conditions, set out subsequently in Article 8(4)(a) and (b) of Regulation No 207/2009, are conditions laid down by that regulation which, unlike the conditions above, must be assessed in the light of the criteria set by the law governing the sign relied on. That reference to the law governing the sign relied on is entirely justified, given that Regulation No 207/2009 allows signs which fall outside of the EU trade mark system to be relied on against an EU trade mark. Therefore, only the law which governs the sign relied on can determine whether that sign predates the EU trade mark and whether it can justify a prohibition of the use of a subsequent trade mark. In accordance with Article 76(1) of Regulation No 207/2009, the burden of proving that such condition is met lies with the opponent before EUIPO (see judgment of 29 June 2016, *animal*, T-727/14 and T-728/14, not published, EU:T:2016:372, paragraph 24 and the case-law cited).

41 With regard to the application of the provisions of Article 8(4)(b) of Regulation No 207/2009, regard must be had, in particular, to the national rules relied on and to the judicial decisions delivered in the relevant Member State. On that basis, the opponent must establish that the sign at issue falls within the scope of the law of the Member State relied on and that it allows use of a subsequent mark to be prohibited (see judgment of 29 June 2016, *animal*, T-727/14 and T-728/14, not published, EU:T:2016:372, paragraph 25 and the case-law cited).

42 Rule 19(2)(d) of Regulation No 2868/95 (now Article 7(2)(d) of Commission Delegated Regulation (EU) 2017/1430 of 18 May 2017 supplementing Regulation No 207/2009 and repealing Regulations No 2868/95 and (EC) No 216/96 (OJ 2017 L 205, p. 1)) places on the opponent the burden of providing EUIPO not only with particulars showing that it satisfies the necessary conditions, in accordance with the national law that it is seeking to have applied, in order to be able to have the registration of an EU trade mark prohibited by reason of an earlier right, but also with particulars establishing the content of that law (see, to that effect and by analogy, judgment of 5 July 2011, *Edwin* v *OHIM*, C-263/09 P, EU:C:2011:452, paragraph 50). It is true that the Board of Appeal and the EU judicature must, of their own motion, obtain information about the national law where such information is necessary to assess whether the ground for refusal of registration in question applies, which entails them taking into consideration, in addition to the facts which have been expressly put forward by the parties to the opposition proceedings, facts which are well known, that is, facts which are likely to be known by anyone or which may be learnt from generally accessible sources (see, to that effect, judgments of 27 March 2014, *OHIM* v *National Lottery Commission*, C-530/12 P, EU:C:2014:186, paragraphs 39, 44 and 45, and of 28 October 2015, *Маска*, T-96/13, EU:T:2015:813, paragraph 31 and the case-law cited). However, that obligation only applies in circumstances where EUIPO or the EU judicature already have before them information relating to national law, either in

the form of claims as to its content, or in the form of evidence submitted and whose probative value has been claimed (see, to that effect and by analogy, judgment of 28 October 2015, *Маска*, T-96/13, EU:T:2015:813, paragraph 31 and the case-law cited).

43 Therefore, in the present case, it is indeed for the applicant, in its capacity as opponent, to provide EUIPO with particulars establishing the content of the national law.

44 In addition, it is necessary to note that, to support its opposition, the applicant referred to a non-registered earlier trade mark with identical wording to the mark applied for and claimed that such earlier mark exists at least in the territory of the Czech Republic. As stated in paragraph 7 above and as follows from the seventh subparagraph of paragraph 9 of the contested decision, the only evidence relating to the use of the earlier mark that the applicant provided to the Opposition Division is a two-page document headed 'Sales confirmation' and dated 8 October 2013. The applicant provided no evidence of the relevant national law, which caused its opposition to be rejected by the Opposition Division. As pointed out in paragraph 12 above, it is in the statement of grounds in its action before the Board of Appeal that the applicant referred for the first time to the provisions of Czech national law governing the legal protection of non-registered signs.

45 Therefore the Court must assess whether the Board of Appeal was entitled to conclude, in paragraph 70 of the contested decision, that in circumstances such as those of this case it did not have the discretion to accept evidence submitted for the first time before it regarding the protection given to the earlier mark by the relevant Czech law, since the applicant had failed to provide any evidence to that effect before the Opposition Division.

46 According to settled case-law, it is clear from the wording of Article 76(2) of Regulation No 207/2009, relating to the assessment of the facts by EUIPO of its own motion, that, as a general rule and unless otherwise specified, the submission of facts and evidence by the parties remains possible after the time limits to which such submission is subject under the provisions of Regulation No 207/2009 and that EUIPO is in no way prohibited from taking account of facts and evidence which are invoked or produced out of time (see judgment of 11 December 2014, *CEDC International* v *OHIM — Underberg (Shape of a blade of grass in a bottle)*, T-235/12, EU:T:2014:1058, paragraph 44 and the case-law cited). In other words, EUIPO may take them into account after the time limit set by the Opposition Division and, as the case may be, for the first time before the Board of Appeal by applying the discretion conferred on it by Article 76(2) of Regulation No 207/2009 (see, to that effect, judgment of 11 December 2014, *Shape of a blade of grass in a bottle*, T-235/12, EU:T:2014:1058, paragraph 44 and the case-law cited).

47 It is also consistently held that, in stating that EUIPO 'may', in such a case, decide to disregard such evidence, that provision grants EUIPO a wide discretion to decide, while giving reasons for its decision in that regard, whether or not to take such information into account (see judgment of 11 December 2014, *Shape of a blade of grass in a bottle*, T-235/12, EU:T:2014:1058, paragraph 45 and the case-law cited).

48 It is understood that such discretion relates only to the matter of whether or not it is necessary to accept evidence that is submitted out of time. Such discretion does not relate to the assessment of the nature of that evidence.

49 Under the third subparagraph of Rule 50(1) of Regulation No 2868/95, where the action is directed against a decision of an Opposition Division, the Board of Appeal must limit its examination of the action to facts and evidence presented within the time limits set or specified by the Opposition Division, unless the Board considers that 'additional' or 'supplementary' facts and evidence must be taken into account pursuant to Article 76(2) of Regulation No 207/2009 (see, to that effect, judgments of 3 October 2013, *Rintisch* v *OHIM*, C-120/12 P, EU:C:2013:638, paragraph 31, and of 21 July 2016, *EUIPO* v *Grau Ferrer*, C-597/14 P, EU:C:2016:579, paragraph 23).

50 In that respect, the Court of Justice initially interpreted Article 76(2) of Regulation No 207/2009, in relation to proof of use, as follows: when no proof of genuine use of the relevant mark is submitted within the time limit set by EUIPO, the opposition must automatically be rejected by EUIPO; conversely, where evidence was produced within the time limit set by EUIPO, the submission of additional proof remains possible (see, to that effect, judgment of 18 July 2013, *New Yorker SHK Jeans* v *OHIM*, C-621/11 P, EU:C:2013:484, paragraphs 28 and 30).

51 Subsequently, the Court of Justice held that Article 76(2) of Regulation No 207/2009 should be interpreted in the same way in relation to proof of the existence, validity and scope of protection of a trade mark, since that provision contains a rule which applies horizontally within the scheme of that regulation, inasmuch as it applies irrespective of the nature of the relevant proceedings. The Court of Justice inferred from the above that Rule 50 of Regulation No 2868/95 cannot be interpreted as meaning that it extends the discretion of the Boards of Appeal to new evidence (judgment of 21 July 2016, *EUIPO* v *Grau Ferrer*, C-597/14 P, EU:C:2016:579, paragraph 27, and the Opinion of Advocate General Szpunar in *OHIM* v *Grau Ferrer*, C-597/14 P, EU:C:2016:2, points 55 and 57).

52 Taking into account the principles set out above, it is therefore necessary to assess whether the applicant had, in the context of the opposition proceedings, produced at least some evidence as to the existence, validity and scope of protection of the earlier non-registered trade mark on which it is relying.

53 Clearly, in that respect, the Board of Appeal was entitled to hold that the applicant had produced no evidence as to the content of the national law at issue within the time limit and that the applicant had also failed to submit a legitimate reason justifying its conduct.

54 The only piece of evidence submitted by the applicant for the purpose of proving the existence, validity and scope of protection of the earlier non-registered trade mark was, as is referred to in paragraphs 7 and 44 above, a two-page document headed ‘Sales confirmation’ dated 8 October 2013 and relating to a delivery of calculators from Hong Kong.

55 As EUIPO points out in its response, that document provides no information on the use of the earlier mark relied on that relates to, inter alia, the place and duration of that use, or even on the possibility of concluding that the scope of that trade mark is of more than mere local significance. Nor does that document contain information on the requisite conditions under the law of the Czech Republic.

56 It is also clear that the ‘Sales confirmation’ is a list that refers to a number of products, amongst which the earlier non-registered mark does not feature, the closest reference to it being ‘SDC-554+’.

57 Moreover, as the intervener submits, the ‘Sales confirmation’ does not contain any specifications relating to the specific products that it lists, and does not prove that the order to which it appears to refer led to a delivery of the relevant goods for the earlier non-registered trade mark.

58 During the hearing, in response to the General Court’s question as to how exactly the aforementioned ‘Sales confirmation’ contained information on the requisite conditions and on the protection offered by the law of the Czech Republic regarding the earlier non-registered trade mark, the applicant gave no explanation.

59 Further, the applicant produced before the Opposition Division a document to which was attached a letter sent by the intervener to a German body, which, however, contains no detail whatsoever as to the existence, validity and scope of the protection of the earlier non-registered trade mark.

60 In such conditions, it cannot be held that the applicant had already provided, during the proceedings before the Opposition Division, some evidence intended to prove the existence, validity and scope of the protection of the earlier trade mark. Therefore, the references to the provisions of Czech law

provided by the applicant for the first time when setting out its statement of grounds in the application before the Board of Appeal are not 'additional' or 'supplementary' evidence to that which had been submitted before the Opposition Division.

61 Consequently, the Board of Appeal did not err in law when it held that it did not have discretion to accept evidence produced for the first time before it, since such evidence was out of time.

62 In the light of the foregoing, it should be noted that, unlike the circumstances of the case giving rise to the judgment of 29 June 2016, *Group* v *EUIPO — Iliev (GROUP Company TOURISM & TRAVEL)* (T-567/14, under appeal, EU:T:2016:371), the evidence submitted by the applicant before the Opposition Division in the current case did not allow the Board of Appeal to exercise its discretion.

63 In addition, during the hearing, the applicant made available to the Court several examples of the calculator that it claims to market and on which was inscribed the earlier non-registered trade mark. However, without having to rule on the probative value of that evidence as regards the existence, validity and scope of the protection of the earlier non-registered trade mark, it is sufficient, for the purposes of rejecting such evidence, to find that such evidence has been submitted out of time. First, as is explained in paragraphs 38 to 51 of this judgment, that evidence should have been submitted during the proceedings before the Opposition Division of EUIPO. Second, in any event, under Article 85(1) of the Rules of Procedure, evidence produced or offered is to be submitted in the first exchange of pleadings. Pursuant to Article 85(3) of those rules, the main parties may, exceptionally, produce or offer further evidence before the oral part of the procedure is closed or before the Court's decision to rule without an oral part of the procedure, provided that the delay in the submission of such evidence is justified. In that respect, the submission of the aforementioned evidence during the hearing occurred out of time for the purpose of those provisions. Since the applicant has not justified the submissions of such evidence out of time, it should be rejected as inadmissible, pursuant to Article 85(1) and (3) of the Rules of Procedure.

64 As regards the applicant's argument that the Board of Appeal erred in applying the principles laid down in the judgment of 28 October 2015, *Маска* (T-96/13, EU:T:2015:813), although that judgment was delivered after the deadline for the lodging of an action against the Opposition Division's decision given in the present proceedings, it should be noted that, according to established case-law, the interpretation by the Court of Justice of a provision of EU law is limited to clarifying and explaining its meaning and scope, as it should have been understood and applied since its entry into force. It follows that the provision thus interpreted may, and must, be applied even to legal relationships which arose and were established before the judgment in question and it is only exceptionally, in application of a general principle of legal certainty which is inherent in the Union legal order, that the Court may decide to restrict the right to rely upon a provision, which it has interpreted, with a view to calling in question legal relationships established in good faith. Those considerations apply to the EU institutions when they, in turn, are required to implement the provisions of EU law which are subsequently interpreted by the Court (see judgment of 16 September 2013, *Spain* v *Commission*, T-402/06, EU:T:2013:445, paragraph 104 and the case-law cited).

65 For the sake of completeness, the Board of Appeal was right to hold, in paragraph 71 of the contested decision, that, even if the evidence submitted before it for the first time had to be considered to be 'additional' or 'supplementary', and even if it were necessary to find that the Board of Appeal did have discretion allowing it to accept that evidence, it would not have taken such evidence into consideration.

66 As the Board of Appeal pointed out, it is clear from the wording of Article 76(2) of Regulation No 207/2009 that the fact that a party has invoked or produced evidence out of time does not confer on it an unconditional right to have that evidence taken into consideration by EUIPO.

67 In that regard, the Court of Justice has held that, where EUIPO is called upon to give judgment in the context of opposition proceedings, taking into account evidence produced out of time is particularly likely to be justified where EUIPO finds, first, that the evidence which has been produced late is, on the face of it, likely to be genuinely relevant to the outcome of the opposition brought before it and, second, that the stage of the proceedings at which that late submission takes place and the circumstances surrounding it do not argue against such matters being taken into account (judgment of 13 March 2007, *OHIM* v *Kaul*, C-29/05 P, EU:C:2007:162, paragraph 44).

68 First, it should be pointed out that, as EUIPO correctly maintains, the applicant in the present case had to be aware that it was obliged to produce some evidence to establish the content of Czech law.

69 Such an obligation arises already from Rule 19(2)(d) of Regulation No 2868/95, as mentioned in paragraph 42 above. In addition, it clearly follows from the content of EUIPO's letter of 5 August 2014 that it had informed the applicant of the evidence that had to be submitted in support of an opposition based on Article 8(4) of Regulation No 207/2009, indicating in particular the content of national law, particularly with regard to the conditions of protection of the right relied on and the scope of the holder's rights, as well as, in respect of a non-registered trade mark, providing evidence that such trade mark was used in the course of trade.

70 Despite that specific request for information, the applicant failed to submit before the Opposition Division any evidence of the content of national law or any information whatsoever on such content.

71 Second, the information provided by the applicant to justify that delay cannot be accepted.

72 Turning first to the principle *iura novit curia* relied upon by the applicant, such principle relates only to the application of EU law. According to established case-law, the determination and interpretation of rules of national law is a matter of establishing the facts, not applying the law. Consequently, it is only EU law which falls within the area of law, in which the maxim *iura novit curia* applies; national law is an issue of fact, where facts must be adduced and the requirements of the burden of proof apply, and the content of national law must be demonstrated where necessary by the production of evidence (see, to that effect, judgment of 20 March 2013, *El Corte Inglés* v *OHIM — Chez Gerard (CLUB GOURMET)*, T-571/11, EU:T:2013:145, paragraph 35 and the case-law cited). As is clear from paragraph 42 of this judgment, first, it is only in circumstances where EUIPO already has information on national law available to it that it must of its own motion inform itself of the latter, if it is necessary to do so for the purposes of assessing the conditions for the application of a ground for refusal to register. Second, the Court is able to carry out an effective check on this point and verify, beyond the documents submitted to it, the wording, the conditions of application and the scope of the legal rules relied on by the applicant only if documents are submitted to it as evidence of the applicable national law and, if necessary, only by filling any gaps in those documents.

73 Thus, it is necessary to reject the applicant's argument that EUIPO was too general when it requested the applicant to clarify its opposition. As stated in paragraph 69 above, the letter of 5 August 2014 requesting the applicant to complete its opposition contained sufficient detail as to the evidence needed to be submitted in support of its opposition. That letter clearly stated the pieces of evidence admitted in the context of an opposition based on Article 8(4) of Regulation No 207/2009 and provided more specific and detailed information in that respect than the information contained in Rule 19(2)(d) of Regulation No 2868/95. The applicant replied to that letter on 10 December 2014 and provided various details and pieces of information relating to the opposition, without, however, responding to the request from the Opposition Division of EUIPO for information on national law. Indeed, during the hearing, when responding to a question asked by the Court requesting that the applicant explain why it had not responded to that request of the Opposition Division, the applicant did no more than to insist that EUIPO's request was too general, without providing any argument to substantiate that assertion.

74 It follows from the foregoing that the single plea in law put forward by the applicant must be rejected and, consequently, the action must be dismissed in its entirety.

Costs

75 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

76 Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by EUIPO and the intervener.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. Dismisses the action;

2. Orders Moravia Consulting spol. s r. o. to pay the costs.

Gervasoni Madise Da Silva Passos

Delivered in open court in Luxembourg on 12 October 2017.

E. Coulon
Registrar

S. Gervasoni
President