Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

24 September 2019 *

[Text rectified by order of 30 January 2020]

(EU trade mark – Invalidity proceedings – EU word mark Crédit Mutuel – Absolute grounds for refusal – Descriptive character – No distinctive character – Distinctive character acquired through use – Cross-claim – Article 7(1)(b) and (c) and Article 7(3) of Regulation (EU) 2017/1001 – Article 59(1)(a) and Article 59(2) of Regulation 2017/1001)

In Case T-13/18,

Crédit Mutuel Arkéa, established in Relecq Kerhuon (France), represented by A. Casalonga, F. Codevelle and C. Bercial Arias, lawyers,

applicant,

v

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

defendant,

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

Confédération nationale du Crédit mutuel, established in Paris (France), represented by B. Moreau-Margotin and M. Merli, lawyers,

ACTION brought against the decision of the Fifth Board of Appeal of EUIPO of 8 November 2017 (Case R 1724/2016-5), relating to invalidity proceedings between Crédit Mutuel Arkéa and [the] Confédération nationale du Crédit mutuel,

THE GENERAL COURT (Second Chamber),

composed of M. Prek, President, E. Buttigieg (Rapporteur) and B. Berke, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the application lodged at the Registry of the General Court on 15 January 2018,

* Language of the case: French.

having regard to the response of EUIPO lodged at the Court Registry on 29 March 2018,

having regard to the response of the intervener lodged at the Court Registry on 29 March 2018,

having regard to the cross-claim of the intervener lodged at the Court Registry on 29 March 2018,

having regard to the response of the applicant to the cross-claim lodged at the Court Registry on 2 August 2018,

having regard to the response of EUIPO to the cross-claim lodged at the Court Registry on 29 May 2018,

having regard to the written questions put by the Court to the parties and their answers to those questions lodged at the Court Registry on 1 and 4 February 2019,

further to the hearing on 26 February 2019,

gives the following

Judgment

Background to the dispute

1 The applicant, Crédit Mutuel Arkéa, is a cooperative and mutual bank.

2 It forms part of the Crédit Mutuel group, a mutual banking group organised on three territorial levels (local, regional and national) ('the Crédit Mutuel group'). Each local credit union must be affiliated to a regional federation and each federation must be affiliated to the intervener, the Confédération nationale du Crédit mutuel ('CNCM'), the central body of the network in accordance with Articles L.512-55 and L.512-56 of the code monétaire et financier français (French monetary and financial code; 'the CMF'). The banks forming part of the Crédit Mutuel group are mainly structured around two independent competing groups, Crédit Mutuel Arkéa and CM11-CIC.

3 On 5 May 2011, the intervener 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)).

4 Registration as a mark was sought for the word sign Crédit Mutuel.

5 The goods and services in respect of which registration was sought are in, inter alia, Classes 9, 16, 35, 36, 38, 42 and 45 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.

6 The sign Crédit Mutuel was registered as an individual EU trade mark on 20 October 2011 under number 9943135 for, among others, the goods and services referred to in paragraph 5 above.

7 On 26 February 2015, the applicant filed an application for a declaration of invalidity of the contested mark in respect of all the goods and services for which it had been registered, based, in particular, on Article 52(1)(a) of Regulation No 207/2009 (now Article 59(1)(a) of Regulation 2017/1001), on the ground that the mark had been registered in breach of Article 7(1)(b) and (c) of Regulation No 207/2009 (now Article 7(1)(b) and (c) of Regulation 2017/1001).

8 By decision of 11 August 2016, the Cancellation Division rejected the application for a declaration of invalidity in its entirety, finding, on the one hand, that the contested mark was descriptive of some of the goods and services covered but had acquired, in respect of those goods and services, distinctive character through use, and, on the other, that that mark was not descriptive of the other goods and services falling outside the banking sector.

9 On 20 September 2016, the applicant filed an appeal with EUIPO under Articles 58 to 64 of Regulation No 207/2009 (now Articles 66 to 71 of Regulation 2017/1001) against the decision of the Cancellation Division in so far as it found that the contested mark was not descriptive of some goods and services and that the mark had acquired distinctive character through use for the goods and services for which it was considered to be descriptive.

10 In its observations in reply of 16 February 2017, the intervener asked the Board of Appeal to dismiss the appeal and to annul the decision of the Cancellation Division to the extent that it considered the contested mark to be descriptive of some goods and services.

11 By decision of 8 November 2017 ('the contested decision'), the Fifth Board of Appeal of EUIPO dismissed the appeal.

12 In the first place, it agreed with the Cancellation Division that the relevant public was made up of the general public, being reasonably observant and circumspect, as well as professionals, at least as regards the technical or specialist goods and services. Furthermore, in respect of some services, such as financial or real estate services – which, in the Board of Appeal's view, could have a significant financial impact on their users – it considered that the level of attention of consumers belonging to the general public was high. The Board of Appeal also stated that, in so far as the contested mark was composed of French words, the relevant consumer to be taken into consideration was the French-speaking consumer.

13 In the second place, the Board of Appeal found that the term 'crédit mutuel' referred to a type of banking activity carried on by mutual banks, whose activities 'are identical to those of "traditional" banks, even though they do not serve the same purpose, namely to achieve financial gains'. Therefore, according to the Board of Appeal, since the contested mark indicated that the goods and services it covered occurred in connection with banking activities, it was descriptive as regards their kind, subject matter or intended purpose.

14 In the third place, in consequence, it considered – by means of general reasoning for groups of goods and services – that the contested mark was descriptive and non-distinctive in respect of the following goods and services ('the goods and services in the first category') since they had a sufficiently direct and specific link to the banking sector:

– Class 9: 'Automatic apparatus operated by bank card, automatic cash dispensers; bank cards; chip cards, namely integrated circuit cards (smart cards) or magnetic encoded cards or chip cards, containing credit units';

– Class 35: ‘Business consultancy or information, commercial or industrial management assistance for businesses, the self-employed, craftsmen, local authorities and individuals in conducting their business; corporate advisory services; economic analysis, appraisals, information and forecasting; economic, statistical and commercial inquiries about the financial, monetary and stock markets, in particular accessible by data transmission, by computer network, via internet, intranet and extranet networks; arranging subscriptions to a secure website providing access to banking, financial and personal information; management of files, computerised databases and data banks, and electronic professional directories, in the banking, financial, monetary and stock exchange sectors; administration of financial products, portfolios of listed securities, administration of portfolios under power of attorney; auditing and drawing up of statements of accounts’;

– Class 36: ‘Financial affairs; monetary affairs; banking business; online banking; bank account management; portfolio management; credit card and debit card services; securities brokerage; financial appraisals (banks), tax estimates and reports; debt collection; factoring; issuing of travellers’ cheques and letters of credit; financial, banking, monetary and stock exchange services accessible by telephone networks, by computerised communications networks; receiving, executing and transmitting orders for others (issuers and investors) for one or more financial instruments; financial management of investment portfolios; financial analysis of the interest-rate, foreign exchange and share markets; banking and financial information and consultancy; information and consultancy relating to investments and financial investments; investment and financial investment services; foreign exchange bureaux, deposits of valuables, safe deposit services; financial management; loan services; hire-purchase; savings; financial market operations and transactions; fund transfer services; secure payment; issuance and management of shares, bonds and UCITS; banking, financial and monetary information, accessible in particular by telephone, data transmission, computer networks, via the internet, intranets or extranets’.

15 However, the Board of Appeal, like the Cancellation Division, found that the intervener had, under Article 7(3) of Regulation 2017/1001, adduced evidence to prove that the contested mark had acquired distinctive character through use for the goods and services in the first category.

16 In the fourth place, it considered that the contested mark was non-descriptive and distinctive for the following goods and services (‘the goods and services in the second category’) since they did not have a sufficiently specific, direct, close or clear link to the banking sector:

– Class 9: ‘Automatic apparatus operated by coin or counter; magnetic, digital and optical data carriers, CD-ROMs, video discs; computer software, namely computer software for data processing, online newsletters’;

– Class 16: ‘Printed matter; books; reviews; magazines; newspapers; leaflets of paper, prospectuses of paper, posters, calendars, stickers, printed advertising matter, forms; newsletters and printed matter relating to subscriptions’;

– Class 36: ‘Insurance; real estate affairs; savings banks; insurance brokerage; financial appraisals (insurance, real estate); management of movable and immovable assets; financial sponsorship’;

– Class 38: ‘Transmission and dissemination of data; transmission of information accessible via computerised or data transmission databases and computer database servers; transmission of

information by access code to computerised or data transmission databases and computer database servers';

– Class 42: 'Secure downloading of data';

– Class 45: 'Legal services; litigation services; security services for the protection of property and individuals'.

Procedure and forms of order sought

17 By application lodged at the Court Registry on 15 January 2018, the applicant brought the present action.

18 The applicant claims, in essence, that the Court should:

– annul the contested decision in part;

– dismiss the cross-claim;

– order EUIPO and the intervener to pay the costs.

19 EUIPO contends that the Court should:

– dismiss the action;

– dismiss the cross-claim;

– order the applicant and the intervener to pay the costs.

20 The intervener contends that the Court should:

– dismiss the action;

– uphold the cross-claim and find that the contested mark is not descriptive and is therefore valid;

– order the applicant to pay the costs.

Law

Admissibility

Subject matter of the main action

21 In reply to a written question from the Court, and in the light of EUIPO's argument that the action is inadmissible in so far as it concerns 'posters, calendars, stickers' in Class 16, the applicant stated that its action does not relate to those goods. This should be duly noted.

22 Furthermore, with regard to 'banking business' in Class 36, the applicant argued in the application that the contested mark had to be declared invalid for those services, since the term 'crédit mutuel' was the generic designation, as well as the legal designation in France, of a type of banking service, with the result that the contested mark was devoid of any distinctive character and, at the very least, was descriptive of such 'banking business'.

23 EUIPO submits that the above ground of challenge is inadmissible because, having regard to the Board of Appeal's finding referred to in paragraph 14 above, the applicant seeks a confirmatory judgment from the Court.

24 [Text rectified by order of 30 January 2020] In reply to a written question from the Court, the applicant stated that, in this action, it does not challenge the Board of Appeal's finding concerning the descriptive character of the contested mark for the goods and services in the first category, which encompasses 'banking business' in Class 36, but only the finding that, for those goods and services, the contested mark acquired distinctive character through use. This should be duly noted.

Subject matter of the cross-claim

25 EUIPO observes that, by its cross-claim, the intervener asks the Court to make a finding that the contested mark is not descriptive of the goods and services in the first category and is therefore valid. Such a head of claim, by which the intervener seeks to obtain a declaratory judgment from the Court, should be rejected as inadmissible.

26 EUIPO argues that the cross-claim would be admissible only if the Court was prepared to interpret the intervener's head of claim as actually seeking the alteration of the contested decision, so as to secure the refusal of the application for a declaration of invalidity based on Article 7(1)(c) of Regulation 2017/1001 also as regards the goods and services in the first category in respect of which the Board of Appeal found the contested mark to be descriptive.

27 In its letter of 4 September 2018 requesting a hearing, the intervener stated that its action sought the alteration of the contested decision in so far as it was based on incorrect reasoning regarding the inherent descriptiveness of the contested mark.

28 At the hearing, in response to a question from the Court, the applicant and EUIPO stated that they did not object to the interpretation of the cross-claim as seeking the alteration of the contested decision, formal note of which was made in the minutes of the hearing.

29 It must be pointed out that, by means of such a head of claim, the intervener necessarily seeks not only the alteration of the contested decision, but also the annulment thereof (see, to that effect, judgment of 27 February 2014, *Advance Magazine Publishers* v *OHIM – Nanso Group (TEEN VOGUE)*, T-509/12, EU:T:2014:89, paragraph 16 and the case-law cited), which, moreover, can be inferred from the arguments put forward in the single plea in law of the cross-claim, essentially claiming infringement of Article 59(1)(a) of Regulation 2017/1001, read in conjunction with Article 7(1)(c) of that regulation.

Admissibility of certain annexes to the application

30 At the hearing, EUIPO withdrew its objections to the admissibility of Annexes A.47 and A.49 to the application, formal note of which was made in the minutes of the hearing.

Substance

31 In support of the action, the applicant puts forward three pleas in law. The first plea alleges, in essence, infringement of Article 59(1)(a) of Regulation 2017/1001, read in conjunction with Article 7(1)(c) thereof. The second and third pleas allege, in essence, infringement of Article 59(2) of Regulation 2017/1001, read in conjunction with Article 7(3) of that regulation.

32 In the cross-claim, filed under Article 182 of the Rules of Procedure of the General Court, the intervener raises a single plea in law alleging, in essence, infringement of Article 59(2) of Regulation 2017/1001, read in conjunction with Article 7(1)(c) of that regulation.

33 Since, by its sole plea in the cross-claim, the intervener challenges the Board of Appeal's finding that the contested mark is descriptive and thus non-distinctive in respect of the goods and services in the first category, that plea should be examined first. Thereafter, in the second place, the first plea of the main action should be considered, alleging infringement of Article 59(2) of Regulation 2017/1001, read in conjunction with Article 7(1)(c) thereof. In the third place, the Court will examine the second and third pleas of the main action together, in so far as they allege, in essence, infringement of Article 59(2) of Regulation 2017/1001, read in conjunction with Article 7(3) of that regulation.

Sole plea in law of the cross-claim alleging, in essence, infringement of Article 59(2) of Regulation 2017/1001, read in conjunction with Article 7(1)(c) thereof

34 The intervener essentially argues that the contested mark is not descriptive and is thus distinctive in respect of the goods and services in the first category.

35 First, it challenges the meaning, for the relevant public, of the term 'crédit mutuel' used by the Board of Appeal.

36 It submits, first of all, that the term 'crédit mutuel' is not defined in the *Larousse* dictionary, but that the reference in that dictionary to it is to the organisation of the Crédit Mutuel network, of which the intervener is the central body.

37 Furthermore, those words are not the generic designation of a banking product or service inasmuch as they do not designate a particular type of banking service, but are perceived by the relevant public as a distinctive sign identifying the goods and services to which they refer as originating from CNCM or the Crédit Mutuel network.

38 Secondly, the intervener takes the view that the fact that those words are mentioned in the CMF does not make them the generic designation for mutual banks or one of their banking activities generally, since it is clear from the provisions of the CMF that the term 'crédit mutuel' is not specifically defined and is used only with reference to CNCM and the network of credit unions and that that term is exclusive to CNCM and its members.

39 Thirdly, the intervener states that historical theories of mutualism have no impact on the relevant public's perception of the contested mark and any evocation of a mutual organisation of whatever kind triggered by the contested mark in relation to the goods and services covered by the cross-claim is neither direct nor immediate.

40 The applicant and EUIPO contest the intervener's arguments and submit that the sole plea of the cross-claim should be rejected.

41 As is apparent from paragraphs 27 and 29 above, the intervener is asking the Court to annul and alter the contested decision in so far as it is based, so the intervener claims, on incorrect reasoning regarding the inherent descriptiveness of the contested mark.

42 It should be recalled, first of all, that under Article 59(1)(a) of Regulation 2017/1001, an EU trade mark is to be declared invalid on application to EUIPO where that mark has been registered contrary to the provisions of Article 7 thereof.

43 Article 7(1)(c) of Regulation 2017/1001 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' are not to be registered.

44 According to settled case-law, Article 7(1)(c) of Regulation 2017/1001 pursues an aim in the public interest, namely, that descriptive indications or signs relating to the characteristics of goods or services in respect of which registration is sought may be freely used by all. That provision therefore prevents such signs or such indications from being reserved to one undertaking alone because they have been registered as trade marks (see judgment of 23 October 2003, *OHIM* v *Wrigley*, C-191/01 P, EU:C:2003:579, paragraph 31 and the case-law cited).

45 Furthermore, signs or indications which may serve, in trade, to designate characteristics of the goods or service in respect of which registration is sought are, by virtue of Article 7(1)(c) of Regulation 2017/1001, regarded as incapable of performing the essential function of a trade mark, namely that of identifying the commercial origin of the goods or service, thus enabling the consumer who acquired the goods or service designated by the mark to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition (see judgment of 12 June 2007, *MacLean-Fogg* v *OHIM (LOKTHREAD*), T-339/05, not published, EU:T:2007:172, paragraph 28 and the case-law cited).

46 Consequently, for a sign to fall within the scope of the prohibition mentioned in paragraph 43 above, it must suggest a sufficiently direct and concrete link to the goods or services in question to enable the public concerned immediately, and without further thought, to perceive a description of the goods and services in question or of one of their characteristics (see judgment of 12 June 2007, *LOKTHREAD*, T-339/05, not published, EU:T:2007:172, paragraph 29 and the case-law cited).

47 In that regard, it should be borne in mind that, by using, in Article 7(1)(c) of Regulation 2017/1001, the terms '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', the EU legislature made it clear, first, that those terms must all be regarded as corresponding to characteristics of goods or services and, secondly, that that list is not

exhaustive, since any other characteristics of goods or services may also be taken into account (judgment of 10 March 2011, *Agencja Wydawnicza Technopol* v *OHIM*, C-51/10 P, EU:C:2011:139, paragraph 49).

48 The fact that the legislature chose to use the word 'characteristic' highlights the fact that the signs referred to in that provision are merely those which serve to designate a property, easily recognisable by the relevant public, of the goods or the services in respect of which registration is sought. Consequently, a sign can be refused registration on the basis of Article 7(1)(c) of Regulation 2017/1001 only if it is reasonable to believe that it will actually be recognised by the relevant public as a description of one of those characteristics (see, to that effect, judgment of 10 March 2011, *Agencja Wydawnicza Technopol* v *OHIM*, C-51/10 P, EU:C:2011:139, paragraph 50 and the case-law cited).

49 Finally, it should be noted that the descriptiveness of a sign may be assessed only, first, in relation to the relevant public's understanding of that sign and, secondly, in relation to the goods or services in question (see judgment of 12 June 2007, *LOKTHREAD*, T-339/05, not published, EU:T:2007:172, paragraph 32 and the case-law cited).

50 It is therefore necessary to determine whether the Board of Appeal was right to find in the contested decision that the word sign Crédit Mutuel was, from the standpoint of the relevant public, descriptive of the goods and services in the first category.

51 As regards, first of all, the identification of the relevant public, the Board of Appeal considered, in paragraphs 39 and 40 of the contested decision, that the goods and services covered by the contested mark were directed not only at the general public, being reasonably observant and circumspect, but also at professionals, at least as regards the technical or specialist goods and services. According to the Board of Appeal, the latter pay greater attention than general consumers when sourcing those services. In addition, for some services such as financial or real estate services, which may have a significant financial impact on their users, the level of attention of consumers will be rather high when choosing those services. The Board of Appeal also stated that, in so far as the contested mark was composed of French words, the relevant consumer to be taken into consideration was the French-speaking consumer. That definition of the relevant public, which is not challenged by the intervener, is not flawed.

52 Next, concerning the meaning of the words making up the contested mark for the relevant public thus defined, the Board of Appeal relied on the definition of 'crédit' and 'mutuel' in the online version of the *Larousse* dictionary and, for confirmation, on the documents furnished by the applicant to find, in paragraphs 46 and 47 of the contested decision, that 'together, those terms refer to the concept of a financial cooperative which essentially grants and secures financial credit between a number of companies which are grouped under one "mutual" entity, in which each user is both the beneficiary and owner' and that, consequently, the term 'crédit mutuel' referred to a type of banking activity carried on by mutual banks, whose activities were identical to those of 'traditional' banks, even though they do not pursue the same aim, namely financial gain.

53 Finally, in the light of that meaning of the term 'crédit mutuel', the Board of Appeal concluded, in paragraph 48 of the contested decision, that the contested mark was descriptive of the goods and services in the first category as regards their kind, subject matter and intended purpose, since it clearly referred to those goods and services by indicating that they occurred in connection with banking activities. Furthermore, in paragraph 73 of the contested decision, the Board of Appeal

pointed out that the contested mark did not enable the relevant public to identify the commercial origin of the goods and services in question, with the result that it should be regarded as devoid of any distinctive character in respect of them.

54 The intervener challenges that finding of the Board of Appeal, arguing that the meaning of the term 'crédit mutuel' for the relevant public used by it is incorrect.

55 First, the intervener submits that the term 'crédit mutuel' is not defined in the *Larousse* dictionary. Yet that is irrelevant because, as the Board of Appeal pointed out in paragraph 41 of the contested decision, where composite terms are concerned, dictionaries do not mention all possible combinations. The Board of Appeal was thus right to find that the ordinary, obvious meaning of such a term should be taken into account.

56 Secondly, it should be noted that, contrary to the intervener's claims, it is not apparent from the contested decision that the Board of Appeal found that the combination of the word elements 'crédit' and 'mutuel' was the generic designation of a banking product or service or that the term 'crédit mutuel' designated a 'specific type of banking service', in the sense of a particular type of loan in banking practice. By stating that the contested mark referred to a 'type of banking activity provided by mutual banks' the Board of Appeal relied on a distinction between 'traditional' banks and 'mutual' banks, which do not pursue the same aim, namely to achieve financial gains, but which carry on identical banking activities (such as lending, credit or financing services).

57 It follows that the Board of Appeal's finding regarding the meaning for the relevant public of the term 'crédit mutuel' is not flawed.

58 Moreover, that finding is borne out by the considerations identified by the cour d'appel de Paris (Court of Appeal, Paris, France) in its judgment of 27 February 2018 (Case 16/14398), submitted to the Court by the intervener as an annex to its cross-claim. That judgment was delivered in proceedings concerning the applicant's application for a declaration of invalidity of the French collective mark of which the intervener is the proprietor, comprising the same words – 'crédit' and 'mutuel' – as the contested mark. According to the considerations set out by the cour d'appel de Paris (Court of Appeal, Paris) in that judgment, it is apparent from the CMF and in particular Articles L.515-55 and R.512-20 thereof that the term 'crédit mutuel' is used to designate a type of banking activity consisting of offering banking services that implement the principles of credit unionism. The cour d'appel de Paris (Court of Appeal, Paris) added that the fact that the CMF did not specifically define 'crédit mutuel' was irrelevant, since those words used in the CMF had a meaning, relating to the definition of the purpose of credit unions, and that Article R.512-20 of the CMF defined the general principles of credit unionism, such as the non-profit nature of the activities of credit unions, the limitation of those activities to a specific territorial area or to a homogeneous group of members and the establishment of members' liability. The type of banking activity that constitutes credit unionism is thus defined, according to the cour d'appel de Paris (Court of Appeal, Paris), by those general principles.

59 The meaning accorded by the cour d'appel de Paris (Court of Appeal, Paris) to the term 'crédit mutuel' comprising the French trade mark of which the intervener is the proprietor is therefore essentially the same as the meaning ascribed by the Board of Appeal to the same words comprising the contested mark.

60 It should be noted that even though the EU trade mark system is an autonomous system with its own set of objectives and rules peculiar to it and applies independently of any national system, it is also clear from the case-law that, in the interpretation of EU law, neither the parties nor the Court itself can be prevented from drawing on elements taken from national case-law. Consequently, even though the decisions of national authorities are not binding in the context of the application of EU trade mark law, they may be taken into consideration, in particular, as in the present case, in order to assess the relevant public's perception of the words comprising the contested mark (see judgment of 25 November 2014, *UniCredit* v *OHIM*, T-303/06 RENV and T-337/06 RENV, EU:T:2014:988, paragraph 91 and the case-law cited).

61 Next, the intervener challenges the Board of Appeal's finding that, in view of its meaning for the relevant public, the contested mark was descriptive of goods and services relating to banking activities. However, the arguments put forward by the intervener in that regard cannot succeed.

62 First, its argument that the term 'crédit mutuel' is perceived by the relevant public as a distinctive sign identifying the goods and services to which it refers as originating from CNCM or the Crédit Mutuel network falls within the scope of Article 7(3) of Regulation 2017/1001, not Article 7(1)(c) thereof, since its examination entails an assessment of the qualities that the contested mark may have acquired through use by the relevant public so that the latter identifies the goods and services in question as originating from CNCM or the Crédit Mutuel network. Such an argument cannot therefore be taken into account when assessing inherent descriptiveness.

63 Secondly, the fact mentioned by the intervener that the use of the term 'crédit mutuel' is regulated or even exclusive to a single economic operator is irrelevant when assessing the inherent descriptiveness of the contested mark or its distinctive character. That fact does not affect the relevant public's perception and understanding of the term 'crédit mutuel' as such in relation to the goods and services in question, but could, at most, be a relevant consideration when examining whether the contested mark acquired, through use, distinctive character enabling it to indicate the commercial origin of the goods and services concerned as coming from a specific economic operator.

64 Thirdly, as for the intervener's argument that the Board of Appeal relied on theories of mutualism even though such theories are not relevant when examining the relevant public's perception, it must be stated that it is not clearly apparent from the contested decision that the Board of Appeal relied on the documents submitted by the applicant relating to theories of mutualism in order to reach the conclusion that the term 'crédit mutuel' referred to a type of banking activity carried on by mutual banks, or that, even if it had, those documents were decisive in reaching that conclusion.

65 In any event, even if the Board of Appeal had relied, in particular, on those documents to confirm its conclusion as to the meaning of the term 'crédit mutuel', theories of mutualism set out the general principles applied by mutual banks and thus support the Board of Appeal's finding that the term 'crédit mutuel' designates a type of banking activity carried on by mutual banks, whose activities are identical to those of 'traditional' banks, even though they do not pursue the same aim, namely to achieve financial gains. Accordingly, the intervener's argument that theories of mutualism are irrelevant when examining the relevant public's perception of the meaning of the words comprising the contested mark must be rejected.

66 In the light of all the foregoing considerations, the Court must dismiss the single plea in law put forward by the intervener and, in consequence, the cross-claim.

The first plea in law of the main action alleging infringement of Article 59(2) of Regulation 2017/1001, read in conjunction with Article 7(1)(c) thereof

67 In the light of the information set out in paragraphs 21 and 24 above, it should be noted that, in this plea, the applicant challenges the Board of Appeal's finding that the contested mark is not descriptive of the goods and services in the second category, with the exception of 'posters, calendars, stickers' in Class 16.

68 The applicant submits that those goods and services are commonly offered in connection with banking activities or, at the very least, are likely to be offered, as evidenced by the fact that CNCM applied for registration of the contested mark for those goods and services. Consequently, the contested mark is descriptive, within the meaning of the Court's case-law, of one of the characteristics of those goods and services, namely their intended purpose, in that they may have credit unionism as their aim, and should therefore be declared invalid.

69 The applicant also maintains that, in the absence of a finding that the contested mark is descriptive of the goods and services in question, CNCM could prevent any economic actor from using the term 'crédit mutuel' in its mutual banking activities. That would be at odds with the case-law according to which any operator who might in the future offer goods or services which compete with those in respect of which registration is sought must be able freely to use the signs or indications that may serve to describe characteristics of its goods or services.

70 EUIPO and the intervener dispute the applicant's arguments and contend that this plea should be rejected.

71 It is therefore necessary to determine whether, in the light of the case-law referred to in paragraphs 44 to 49 above, the word sign Crédit Mutuel is, from the standpoint of the relevant public, descriptive of the goods and services in the second category, with the exception of 'posters, calendars, stickers' in Class 16, in respect of which that finding is not in dispute, as claimed by the applicant and contrary to the Board of Appeal's finding in the contested decision.

72 The definition of the relevant public and the meaning of the term 'crédit mutuel', which the Board of Appeal correctly set out in the contested decision and to which reference is made in paragraphs 51 and 52 above, are not disputed by the applicant.

73 As regards whether it follows from the meaning of the contested mark and the nature of the goods and services in the second category that the sign Crédit Mutuel is capable of describing the intended purpose of those goods and services, as the applicant maintains, the following remarks are apposite.

74 The Board of Appeal noted, in essence, in paragraphs 60 to 64 of the contested decision, that the contested mark was not descriptive of the goods and services in the second category since, although they could be used or offered in connection with banking activities, it was not possible to infer that they were linked to the banking sector. According to the Board of Appeal, the contested mark cannot be considered to contain obvious and direct information on the kind, subject matter or intended purpose of those goods and services.

75 It is important to note that, while arguing that the goods and services in the second category are 'commonly offered in connection with banking activities' or are 'likely to be offered', the applicant does not put forward any specific arguments to challenge the Board of Appeal's assessment referred to in paragraph 74 above or to demonstrate in practical terms how those goods and services in the second category could be used to carry on banking activities.

76 First, contrary to the applicant's claims, the mere fact that the trade mark proprietor has applied for registration of the contested mark for the goods and services in question is not sufficient to prove that they are commonly offered in connection with banking activities.

77 Second, concerning the claim that the goods and services in the second category are 'likely' to be offered in connection with banking activities, it should be noted that, admittedly, it is not necessary that the signs and indications comprising the mark referred to in Article 7(1)(c) of Regulation 2017/1001 actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in respect of which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that provision itself indicates, that such signs and indications could be used for such purposes (judgment of 23 October 2003, *OHIM* v *Wrigley*, C-191/01 P, EU:C:2003:579, paragraph 32). A word sign must be refused registration under that provision or must be cancelled if at least one of its possible meanings designates a characteristic of the goods or services concerned (judgment of 14 December 2017, *GeoClimaDesign* v *EUIPO – GEO (GEO)*, T-280/16, not published, EU:T:2017:913, paragraph 29).

78 However, as the case-law referred to in paragraph 46 above shows, for a sign to fall within the scope of the prohibition set out in Article 7(1)(c) of Regulation 2017/1001, it must suggest a sufficiently direct and concrete link to the goods or services in question to enable the public concerned immediately, and without further thought, to perceive a description of the goods and services in question or of one of their characteristics.

79 The applicant has failed to adduce any specific evidence to demonstrate the existence of such a direct and concrete link between the contested mark and the goods and services in the second category, with the exception of 'posters, calendars, stickers' in Class 16. The mere fact, put forward by the applicant, that those goods and services may be used to carry on banking activities is not sufficient to establish the existence of a sufficiently direct and concrete link between the contested mark and the goods and services in question so that the relevant public would immediately, and without further thought, perceive that mark as a description, for example, of the intended purpose of such goods and services.

80 As the Board of Appeal rightly pointed out, the goods and services in the second category are or may certainly be used in connection with banking activities. However, they are not intended exclusively for or specifically related to such activities; they may be used in many other activities, with the result that the relevant public will not immediately and without further reflection perceive the Crédit Mutuel trade mark, which refers to a type of banking activity, as noted in paragraph 52 above, as designating those goods and services or one of their characteristics, for example their intended purpose.

81 That conclusion is not invalidated by the applicant's arguments deriving from the court's case-law.

82 It is true that, in its judgment of 9 September 2010, *Nadine Trautwein Rolf Trautwein* v *OHIM (Hunter)* (T-505/08, not published, EU:T:2010:378), relied on by the applicant, the Court held, in paragraphs 37 to 40, that the goods in Class 25 were 'capable of being used, in particular, for hunting or being associated with that activity' and that the sign at issue was descriptive in that it 'designate[d] the intended purpose and level of quality of the goods in question and, therefore, some of their essential characteristics'.

83 However, the Court's finding that the relevant public, mainly comprising hunters, could immediately and without further reflection perceive the sign Hunter as indicating that 'clothing for leisure, home and sport', 'belts' and 'headbands' in Class 25 were, although not designed for hunting, particularly suited to hunting and of a quality appropriate for hunting, and that, consequently, the word sign Hunter was descriptive in that it designated the intended purpose and the quality of the goods in question, was based on the preliminary determination that goods designed for hunters and used for hunting had to meet specific functional criteria and that hunters' clothing was often characterised by its high quality for outdoor use.

84 It is thus clear from that judgment that the link between the sign and the goods in question was considered to be sufficiently direct and concrete due to the meaning of the sign, which referred to hunting, and the fact that the clothing used for hunting had specific characteristics, which enabled the relevant public to perceive that sign as describing the quality and intended purpose of those goods.

85 The applicant has failed to submit any tangible evidence to show how that assessment by the Court could be transposed to the present case. In particular, it has not demonstrated in any way that a specific characteristic of the banking activities to which the contested mark refers would enable the relevant public to establish immediately and without any reflection a link between that mark and one of the essential characteristics of the goods and services that are not specifically designed for banking activities.

86 Likewise, the applicant has failed to explain how the Court's assessment in its judgment of 19 November 2009, *Clearwire* v *OHIM (CLEARWIFI)* (T-399/08, not published, EU:T:2009:458), demonstrates an immediate connection between the contested mark and the goods and services not specifically related to banking. In that judgment, the Court found that the relevant public was, first, likely to perceive the sign CLEARWIFI as designating wireless technology that offers clear, disturbance-free access, to the internet for example, and, secondly, would have no difficulty in making a link between that sign and a specific telecommunications service, namely internet access, and between that sign and one of the characteristics of that service, namely the fact that it is disturbance-free. Accordingly, the Court held that the mark CLEARWIFI was likely to be perceived by the relevant public as an indication of the quality and intended purpose of the services in question.

87 The applicant has failed to put forward any argument to support the view that the Court's assessment, based on a specific characteristic of the services covered by the trade mark applied for to which the sign at issue referred, could be transposed to the present case.

88 Consequently, the Board of Appeal was right to find that the contested mark was not descriptive of the goods and services in the second category claimed by the applicant.

89 As regards, more specifically, insurance-related services in Class 36, namely 'insurance', 'savings banks', 'insurance brokerage' and 'financial appraisals (insurance)', the Board of Appeal's assessment in paragraph 63 of the contested decision is not vitiated by any error. It is true, as the applicant claims, that the insurance sector belongs to the financial sector and that insurance services are offered by banking institutions, in particular by the banks making up the Crédit Mutuel group. Moreover, it is not uncommon to find financial institutions and an insurance company in the same economic group. It is also true that, in some of their decisions on relative grounds for refusal of registration, the adjudicating bodies of EUIPO found that banking services and insurance-related services were similar.

90 However, it should be observed, as the Board of Appeal did, that insurance activities and banking activities pursue different aims in that the former are intended to protect assets of all kinds against unforeseen events while the latter are intended to manage and add value to financial assets. Consequently, it was for the applicant to adduce evidence demonstrating that, particularly in view of the fact that insurance services are often offered by banking institutions, the contested mark would be perceived immediately and without further reflection by the relevant public as also describing insurance services that do not fall within a bank's 'usual' activities or describing one of the characteristics of those services, for example that of being offered by a mutual bank in accordance with the principles of credit unionism governing its business. Since, in the light of the provisions of Articles 59 and 62 of Regulation 2017/1001, an EU trade mark enjoys a presumption of validity until it has been declared invalid following invalidity proceedings, it is for the person who has filed the application for a declaration of invalidity to invoke before EUIPO the specific facts which call the validity of the trade mark into question (see to that effect, judgment of 28 September 2016, *European Food* v *EUIPO – Société des produits Nestlé (FITNESS)*, T-476/15, EU:T:2016:568, paragraphs 47 and 48 and the case-law cited).

91 The mere abstract reference to an activity known as 'bancassurance', as is apparent from recital 9 of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (OJ 2003 L 9, p. 3) relied on by the applicant, or the fact that, in some of their decisions on relative grounds for refusal of registration, the adjudicating bodies of EUIPO found that banking services and insurance-related services were similar, is not sufficient to establish specifically that the contested mark is perceived by the relevant public as being descriptive also of the latter services.

92 In the light of all the foregoing, the first plea of the main action must be rejected.

The second and third pleas of the main action, alleging infringement of Article 59(2) of Regulation 2017/1001, read in conjunction with Article 7(3) thereof

93 In the second and third pleas, the applicant submits, in essence, that the Board of Appeal infringed Article 59(2) of Regulation 2017/1001 and Article 7(3) of that regulation in so far as it wrongly concluded that the contested mark had acquired distinctive character through use in relation to the goods and services in the first category in respect of which it had found that the mark was descriptive and devoid of distinctive character.

94 It should be borne in mind that, under Article 7(3) of Regulation 2017/1001, if a mark does not *ab initio* have distinctive character, it may acquire such character as a result of its use for the goods or services covered by it. Such distinctive character may be acquired, inter alia, after the normal process of familiarising the public concerned has taken place. It follows that, in order to assess whether a mark has acquired distinctive character through use, all the circumstances in which

the relevant public may see that mark must be borne in mind (judgments of 22 June 2006, *Storck* v *OHIM*, C-24/05 P, EU:C:2006:421, paragraphs 70 and 71, and of 21 May 2014, *Bateaux mouches* v *OHIM (BATEAUX-MOUCHES)*, T-553/12, not published, EU:T:2014:264, paragraph 58).

95 In the same vein, Article 59(2) of Regulation 2017/1001 provides, inter alia, that where the EU trade mark has been registered in breach of Article 7(1)(c) of that regulation, it may nevertheless not be declared invalid if, in consequence of the use that has been made of it, it has after registration acquired distinctive character in relation to the goods or services for which it is registered.

96 The acquisition by a mark of distinctive character through use requires that at least a significant fraction of the relevant public should be able, owing to the mark, to identify the goods and services concerned as originating from a particular undertaking (judgments of 1 February 2013, *Ferrari* v *OHIM (PERLE')*, T-104/11, not published, EU:T:2013:51, paragraph 37, and of 22 March 2013, *Bottega Veneta International* v *OHIM (Shape of a handbag)*, T-409/10, not published, EU:T:2013:148, paragraph 75).

97 The acquisition of distinctive character through use must be assessed in a way that is both rigorous and precise. The trade mark applicant must prove that that mark alone, as opposed to any other trade mark which may also be present, indicates the commercial origin of the goods (judgment of 16 September 2015, *Société des Produits Nestlé*, C-215/14, EU:C:2015:604, paragraph 66).

98 The different objections raised by the applicant in the second and third pleas may be grouped together under several complaints. Thus, in essence, the first complaint alleges that it is impossible for the contested mark to acquire distinctive character through use. The second complaint alleges that the mark was not used in the form in which it was registered. The third complaint alleges that the mark was not used as an indication of origin and as a mark. The fourth complaint alleges that there is insufficient evidence of the acquisition of distinctive character through use for each of the goods and services in respect of which the contested mark lacked distinctive character *ab initio* or that the Board of Appeal's overall assessment of that evidence is inadequate.

– It is impossible for the contested mark to acquire distinctive character through use

99 By its second plea, the applicant submits, in essence, that the contested mark cannot acquire distinctive character through use because it follows from the provisions of the CMF that the term 'crédit mutuel' is the legal and generic designation of the banking activity of credit unionism and the legal and generic designation of mutual banks organised in networks carrying on the activity of credit unionism. Moreover, the CMF does not contain any provisions permitting CNCM to appropriate those words to the detriment of other operators carrying on or likely to carry on the activity of credit unionism. Consequently, since the French legislature intended those words to be kept copyright free in view of their meaning and purpose, and since other operators are or may lawfully be authorised to use them, the term 'crédit mutuel' cannot be appropriated and cannot acquire distinctive character through use.

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

101 In the context of the present complaint, the applicant essentially submits that the Board of Appeal did not draw all the necessary conclusions from the CMF, from which it transpires that the French legislature intended the term 'crédit mutuel' to be kept free for use by any undertaking wishing to carry on the activity of credit unionism.

102 In that connection, it is clear from the case-law that, in the circumstances referred to in Article 7(3) of Regulation 2017/1001, the fact that the sign which constitutes 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 the economic effort made by the trade mark applicant. That fact justifies putting aside the public-interest considerations underlying Article 7(1)(b), (c) and (d), which require 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 (see 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 67 and the case-law cited).

103 Consequently, it is important to note that the public-interest considerations underlying Article 7(1)(b), (c) and (d) of Regulation 2017/1001, which require signs that are descriptive, are not inherently distinctive or have become customary to be kept free, are specifically set aside in the context of the application of Article 7(3) of that regulation.

104 Furthermore, it must be pointed out, as EUIPO does, that neither Regulation 2017/1001 nor the case-law of the EU courts provides that a sign must have a certain 'ability' to acquire distinctive character through use, let alone that Article 7(3) of Regulation 2017/1001 is not applicable where the sign is composed of words designating a regulated activity. Indeed, there is nothing in the wording of Article 7(3) of Regulation 2017/1001 or in any other provision of that regulation to support the view that putting certain words on a legislative footing prevents them acquiring distinctive character through use.

105 It therefore follows that EU law provides the possibility for any sign that is devoid of distinctive character *ab initio* under Article 7(1)(b), (c) and (d) of Regulation 2017/1001 to acquire distinctive character though use, even if the words making up the disputed sign designate an activity regulated by law.

106 The applicant's argument must therefore be rejected, since it would limit the scope of Article 7(3) of Regulation 2017/1001.

107 Accordingly, the present complaint must be dismissed.

– The mark was not used in the form in which it was registered

108 The applicant states that the mere combination of the words 'crédit' and 'mutuel' is not capable of performing the essential function of a mark, namely to indicate the commercial origin of goods or services, as evidenced in particular by the fact that the contested mark was always used in writing with additional graphic elements, such as logos, or accompanied by slogans. Accordingly, it is only those elements or slogans that enable the commercial origin of the goods and services to be determined. The applicant essentially infers from this that the use of the contested mark in such a way as part of composite marks means that it is unable to acquire distinctive character through use.

109 EUIPO contends that if the Court were to confirm that the contested mark was used 'as an individual mark' – that is, in such a way as to guarantee to consumers that the goods or services in question come from the trade mark proprietor as the sole undertaking responsible for their quality– the arguments put forward by the applicant concerning the form of use of the mark must be rejected. In that case, the fact that the contested mark was used in a slightly stylised form and in conjunction with the additional figurative and verbal elements in question is not decisive, since the trade mark proprietor established, by means of a survey, that it is indeed the words 'crédit' and 'mutuel' that conjure up the idea of a bank in the minds of a significant proportion of the relevant public.

110 Concerning the use of the word mark Crédit Mutuel in composite marks, the intervener recalls that it is settled case-law that the distinctive character of a mark may be acquired in consequence of its use as part of or in conjunction with a registered trade mark, and that the word elements of a mark are, as a rule, more distinctive than the figurative elements. Accordingly, it is the word element 'crédit mutuel' that will be more easily remembered, and not the logos or slogans, which have only a secondary role.

111 It should be observed that the acquisition of distinctive character may be as a result both of the use, as part of a registered trade mark, of a component thereof and of the use of a separate mark in conjunction with a registered trade mark. In both cases it is sufficient that, in consequence of such use, the relevant class of persons actually perceive the goods or service, designated exclusively by the mark applied for, as originating from a particular undertaking (judgments of 7 July 2005, *Nestlé*, C-353/03, EU:C:2005:432, paragraph 30, and of 17 July 2008, *L & D* v *OHIM*, C-488/06 P, EU:C:2008:420, paragraph 49).

112 Thus, regardless of whether the sign is used as part of a registered trade mark or in conjunction with the registered trade mark, the fundamental condition is that, as a consequence of that use, the sign may serve to identify, in the minds of the relevant class of persons, the goods to which it relates as originating from a particular undertaking (judgment of 16 September 2015, *Société des Produits Nestlé*, C-215/14, EU:C:2015:604, paragraph 65).

113 In paragraphs 111 and 112 of the contested decision, the Board of Appeal noted that, even if the contested mark was used in a form that differed from the form in which it was registered, that did not affect, in the present case, the finding that such use was liable to enable the mark to acquire distinctive character through use. In fact, according to the Board of Appeal, the elements with which the contested mark was used, namely a graphic form or the addition of other word marks in the form of slogans, did not alter its distinctive character.

114 Although the applicant does not take issue with the principle that the distinctive character of a mark may be acquired in consequence of the use of that mark as part of or in conjunction with a registered trade mark, it states, on the basis of the case-law, that it is still necessary for the relevant public to perceive the part of the mark or the mark segregated from the other mark with which it was combined, taken separately, as indicating the origin of the goods or services it designates.

115 It must be pointed out, as the applicant does, that the proprietor of a trade mark in respect of which a declaration of invalidity is sought must prove that that mark alone, as opposed to any other trade mark which may also be present, identifies the commercial origin of the goods (judgment of 16 September 2015, *Société des Produits Nestlé*, C-215/14, EU:C:2015:604, paragraph 66).

116 Therefore, in the present case, whether the Board of Appeal's finding as set out in paragraph 113 above is well founded depends, as EUIPO essentially claims, on whether the use made of the contested mark enables it on its own to identify the commercial origin of the goods and services in question, in such a way as to guarantee to consumers that they come from a particular undertaking.

117 That matter will be considered below in the examination of the third complaint of the second and third pleas in law.

– ***The contested mark was not used as an indicator of origin and as a mark***

118 In its second plea, the applicant essentially submits that, contrary to the Board of Appeal's finding, 'Crédit Mutuel as a whole' does not refer to CNCM, the central body that does not carry on any banking activities and is not known to consumers, but rather, as the CMF indicates, to mutual banks in general that are mainly structured around two independent competing groups, Crédit Mutuel Arkéa and CM11-CIC. This prevents the contested individual mark from fulfilling its function of indicating origin, which is borne out by the fact that Crédit Mutuel Arkéa and CM11-CIC use different marks to designate their goods and services for their customers in order to avoid confusion. Moreover, in order to distinguish itself from its competitor, Crédit Mutuel Arkéa uses the term 'crédit mutuel' alongside a different logo from that used by CM11-CIC. Therefore, the term 'crédit mutuel' considered in isolation does not enable the public to ascertain the commercial origin of the goods and services in question.

119 In its third plea, the applicant maintains that, in the vast majority of the documents submitted by CNCM as evidence that the contested mark acquired distinctive character through use, the term 'crédit mutuel' is not used as a mark to designate goods and services, but as a reference to the Crédit Mutuel group. Such a reference does not constitute use as a trade mark proving the acquisition of distinctive character for the different goods and services in question because it does not enable the contested mark to fulfil its function of indicating origin, particularly since the term 'crédit mutuel' is the legal and generic designation of the activity of credit unionism itself and of the service providers carrying on that activity.

120 Likewise, since it is not usual practice in the banking sector for consumers to personify the mark and there is no company or trade name exactly matching the name 'Crédit Mutuel', the use of the term 'crédit mutuel' also cannot be viewed as the use of a company or trade name equating to use as a trade mark.

121 EUIPO observes that the applicant submits, in essence, that the use established by the trade mark proprietor is not use 'as an individual mark', but rather use 'as a collective mark'. In that regard, EUIPO defers to the Court's assessment on the application to the facts of the present case of the case-law of the EU Courts relating to the use of a mark in a manner consistent with its essential function and, in particular, the use of an individual mark as an indication of collective commercial origin.

122 The intervener contends that the existence of possible competition within the Crédit Mutuel group has no bearing on the ability of the term 'crédit mutuel' to acquire distinctive character through use. First, Crédit Mutuel does in fact designate the group of the same name, as acknowledged, inter alia, by the Conseil d'État (Council of State, France) and the French competition authority. Consequently, since the contested mark is used by several legally related economic entities, it is a sign of recognition for the public of membership of that group.

123 Second, the existence of specific marks to designate the goods and services offered by the applicant and CM11-CIC respectively does not erase the use of the Crédit Mutuel 'umbrella mark', since that mark is used consistently and is the sign of membership of the group that catches the public's attention when choosing a banking product.

124 Third, the fact that CNCM, as the central body, does not engage in any banking activities and is therefore not known to consumers is irrelevant since, in accordance with the case-law, it is not necessary for the mark to be used by its proprietor and it is sufficient for it to be actually used by authorised third parties, which is the case here.

125 Fourth, the fact that the applicant uses a different logo from that used by CM11-CIC is also irrelevant, inasmuch as the word element is easier for consumers to remember and, in those circumstances, the word sign Crédit Mutuel is indeed the distinctive element enabling the public to associate the goods and services with the same commercial origin.

126 Fifth, the intervener argues that the word sign Crédit Mutuel is actually used as a trade mark. It states that, in accordance with the case-law, the use of a company name or trade name may be regarded as use in relation to financial products even when the sign is not affixed to those products, where the third party uses that sign in such a way that a link is established between the company name, trade name or shop name and the goods or services in question. The intervener adds that the sign Crédit Mutuel is essentially a service mark the use of which must involve affixing it to the different materials relating to those services. Finally, it observes that there is no company or trade name exactly matching the name 'Crédit Mutuel' and that the term 'crédit mutuel' appears on the documents submitted independently of any mention of the form of the company, as the Board of Appeal noted.

127 Sixth, the intervener maintains that the documents it produced show that, for consumers, the word mark Crédit Mutuel has, for many years, referred to banking products and services offered not by all mutual or cooperative banks, but by a single bank, being the banking network whose central body is CNCM.

128 In the context of the present complaint of the second and third pleas in law, the applicant submits, in essence, that the evidence submitted by the intervener indicates that the contested mark refers, at most, to the Crédit Mutuel group and therefore to its constituent mutual banks, not to CNCM, which is the proprietor of the trade mark. As a result, the contested mark was not used as a trade mark, but as a reference to that group. This prevents the contested individual mark from fulfilling its function of indicating origin and thus acquiring distinctive character through use.

129 It is clear from case-law that, for a mark to have acquired distinctive character through use, it is necessary 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 (see judgment of 15 December 2016, *Shape of a chocolate bar*, T-112/13, not published, EU:T:2016:735, paragraph 68 and the case-law cited).

130 If the relevant class of persons, or at least a significant proportion thereof, identifies the product as originating from a particular undertaking because of the mark, it must be concluded that the requirement for registering the mark laid down in Article 7(3) of Regulation 2017/1001 is satisfied (see judgment of 15 December 2016, *Shape of a chocolate bar*, T-112/13, not published, EU:T:2016:735, paragraph 70 and the case-law cited).

131 Although the acquisition of distinctive character may be as a result of use both as part of a registered trade mark or a component thereof and of a separate mark in conjunction with a registered trade mark, as pointed out in paragraph 111 above, it is clear from the case-law that, in consequence of such use, the relevant class of persons must actually perceive the goods or service, designated exclusively by the mark applied for, as originating from a particular undertaking. Thus, regardless of whether the sign is used as part of a registered trade mark or in conjunction with the registered trade mark, the fundamental condition is that, as a consequence of that use, the sign for which registration as a trade mark is sought may serve to identify, in the minds of the relevant class of persons, the goods to which it relates as originating from a particular undertaking (judgment of 16 September 2015, *Société des Produits Nestlé*, C-215/14, EU:C:2015:604, paragraphs 64 and 65).

132 As regards the acquisition of distinctive character through use, the identification by the relevant class of persons of the goods or service as originating from a particular undertaking must be as a result of the use of the mark as a trade mark. The expression 'use of the mark as a trade mark' must therefore be understood as referring to use of the mark for the purposes of the identification by the relevant class of persons of the goods or service as originating from a particular undertaking (see judgment of 22 June 2006, *Storck* v *OHIM*, C-24/05 P, EU:C:2006:421, paragraph 61 and the case-law cited).

133 Therefore, not every use of the mark amounts necessarily to use as a mark (judgment of 22 June 2006, *Storck* v *OHIM*, C-24/05 P, EU:C:2006:421, paragraph 62).

134 It is in the light of the foregoing considerations that the Court must examine whether the Board of Appeal was right to find that, in the present case, the evidence submitted by the intervener was capable of establishing that the contested mark had acquired distinctive character through the use made of it so that it designated, in the minds of the relevant class of persons, the goods and services covered by it as originating from a particular undertaking.

135 It is clear from the case-law referred to in paragraphs 129 to 131 above that the use of the trade mark in accordance with its essential function, namely to indicate the commercial origin of goods and services as coming from a particular undertaking, is of fundamental importance in assessing the evidence adduced to establish that that mark acquired distinctive character through use.

136 The contested decision (pages 27 to 40) shows that the intervener submitted extensive evidence to demonstrate that the contested mark was known to the relevant public and that it had therefore acquired distinctive character through use. That evidence consists of surveys, evidence of the Crédit Mutuel group's participation in partnerships, financial information, including evidence of the Crédit Mutuel group's ranking in league tables, and advertising campaigns.

137 The conclusions drawn by the Board of Appeal from such evidence regarding the commercial origin of the goods and services designated by the contested mark are not clear. Indeed, the Board of Appeal states that the relevant public perceives the contested mark as identifying the banking products and services as originating either from the 'proprietor', namely CNCM (paragraphs 97, 105, 108 and, in essence, paragraphs 99 and 100 of the contested decision), or from 'the bank' or 'a bank' (paragraphs 103, 104 and 107 of the contested decision), or from the 'Crédit Mutuel group', the 'Crédit Mutuel network' or the 'undertaking "groupe Crédit Mutuel"' (paragraphs 104 and 116 of the contested decision).

138 It should be borne in mind that the contested mark is an individual mark. Although the intervener is the proprietor of the French trade mark Crédit Mutuel registered as a collective mark, which was found to have acquired distinctive character through use by the cour d'appel de Paris (Court of Appeal, Paris) in its judgment of 27 February 2018, based on evidence similar to that submitted by the intervener in the proceedings before EUIPO, it chose not to register the contested mark as an EU collective mark. Furthermore, in the proceedings before the Cancellation Division, the intervener insisted that the contested mark had been filed and registered as an individual mark (see page 4 of the Cancellation Division's decision).

139 It is also common ground between the parties that the contested mark is not used by its proprietor, CNCM, which is not a mutual bank and therefore does not itself carry on banking activities. The intervener claims that the contested mark is used by several entities within the Crédit Mutuel group and is thus a sign of recognition for the public of membership of that group.

140 Moreover, the parties agree that the banks making up the Crédit Mutuel group that use the contested mark are mainly structured around two independent competing groups, Crédit Mutuel Arkéa and CM11-CIC, as is apparent from paragraph 88 of the contested decision, which use the contested mark with other marks or associate it with their own logos to designate their goods and services for their customers.

141 However, the possibility remains that such collective use of the contested individual mark may enable it to acquire distinctive character through use.

142 As is clear from paragraph 135 above, when assessing whether a mark has acquired distinctive character through use, it is necessary that such use be in accordance with the essential function of a mark. As regards individual marks, such as the contested mark, the essential function is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition which the Treaty seeks to establish and maintain, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality (see, to that effect and by analogy, judgments of 8 June 2017, *W. F. Gözze Frottierweberei and Gözze*, C-689/15, EU:C:2017:434, paragraph 41 and the case-law cited, and of 7 June 2018, *Schmid* v *EUIPO – Landeskammer für Land- und Forstwirtschaft in Steiermark (Steirisches Kürbiskernöl)*, T-72/17, under appeal, EU:T:2018:335, paragraph 44).

143 It follows that, in order to establish whether an individual mark has acquired distinctive character as a result of the collective use made of it, it is necessary to determine whether it guarantees to consumers that the goods or services in question come from a particular undertaking, to be construed as a single undertaking under the control of which those goods or services are manufactured or supplied and which is responsible for their quality.

144 In the present case, the Court must examine whether the intervener, namely the proprietor of the contested mark, is to be regarded as a 'single undertaking' within the meaning of the case-law referred to in paragraph 142 above, as it claims it should, on account of the legal and commercial links between it and the members of the Crédit Mutuel group, so that it may be inferred from the link between the contested mark and the goods and services supplied by the members of that group that the mark acquired distinctive character through the use made of it.

145 Against that backdrop, it is important to ascertain whether the intervener exercises control over the goods and services supplied by the banks forming part of the Crédit Mutuel group that actually use that mark, so that consumers perceive the goods or services in question as originating from a single undertaking responsible for their quality.

146 CNCM is the central body of the Crédit Mutuel group. Under Article L.512-56 of the CMF, it is responsible for the collective representation of credit unions in order to assert the rights and interests they have in common, for exercising administrative, technical and financial control over the organisation and management of each credit union branch, and for taking all necessary measures for the proper functioning of credit unionism. Article R.512-20 of the CMF provides that credit unions must undertake to abide by the articles of association, internal regulations, instructions and decisions of CNCM. As stated in its articles of association, CNCM operates as an association.

147 In reply to a written question from the Court, the intervener drew attention to its tasks as the central body of the Crédit Mutuel group and submitted that it exercises administrative, technical and financial control over the members of the network and that it takes the necessary measures in order, in particular, to ensure the liquidity and solvency of each of the group's branches.

148 However, that does not establish that it also exercises control over the goods and services supplied by the banks forming part of the Crédit Mutuel group within the meaning of the case-law referred to in paragraph 142 above.

149 Contrary to the intervener's claims, even if the Crédit Mutuel group were a single undertaking for the purposes of competition law or prudential requirements, as is apparent from the various decisions and measures adopted by European and national authorities relied on by the intervener, that does not, in itself, lead to the conclusion that the intervener as the group's central body is also a single undertaking within the meaning of the case-law cited in paragraph 142 above. The concept of 'single undertaking' has an autonomous meaning under EU trade mark law, as interpreted by the case-law referred to above, and cannot be confused or applied by analogy with concepts laid down in other areas of EU law, such as competition law or the prudential supervision of credit institutions.

150 The criteria to be met for finding that a Crédit Mutuel group exists for the purposes of prudential supervision or the application of competition law are not the same as those for finding that there is a 'single undertaking' within the meaning of the case-law concerning the use of individual EU marks in accordance with their essential function.

151 In the latter situation, the only relevant criterion is whether the use of the contested mark for the goods and services supplied by the Crédit Mutuel group's members guarantees to consumers that they come from a single undertaking under the control of which those goods or services are supplied and which is responsible for their quality. However, the intervener has failed to demonstrate that this is the case with the Crédit Mutuel group.

152 The arguments put forward by the intervener to show that it indirectly but necessarily exercises control over the quality of the goods and services offered by the banking institutions forming part of the Crédit Mutuel group are not persuasive. It maintains that financial robustness, solvency and liquidity are the qualities consumers look for in a reliable bank. To the extent that it exercises control in that regard over the banking institutions of the Crédit Mutuel group, it is therefore also responsible for the quality of the goods and services they supply.

153 However, the fact that the intervener is responsible for exercising control for prudential purposes, even though that control may have an effect on customers' perception of the banks belonging to the Crédit Mutuel group by contributing to their image as 'reliable banks', does not lead to the conclusion that, in addition to monitoring their financial situation, the intervener also exercises control over the goods and services they supply to consumers, so that they are responsible for the quality of those goods and services. Only the latter criterion, if met, would permit a finding that the contested individual mark, of which the intervener is the proprietor, indicates that the goods and services it designates come from a single undertaking, thus enabling that mark, by guaranteeing the commercial origin of the goods and services, to acquire distinctive character as a result of its collective use by the members of the Crédit Mutuel group.

154 It follows that, in the present case, the contested individual mark was not used in accordance with its essential function of indicating the commercial origin of the goods and services as coming from a single undertaking under the control of which those goods or services are manufactured or supplied and which is responsible for their quality. Instead, as EUIPO and the applicant essentially claim, it was used as an indication of collective commercial origin or, more specifically, as an indication that the goods and services in question come from a producer or provider belonging to the association or collective body made up of the banks affiliated to the Crédit Mutuel group. In addition, the intervener expressly states (see its arguments referred to in paragraphs 122 to 127 above) that the contested mark is a sign of recognition for the relevant public of membership of the Crédit Mutuel group.

155 Such use of the contested mark as an indication of the origin of the goods or services of one of the banks belonging to the Crédit Mutuel group may, depending on the circumstances, indicate that a collective mark fulfils its function of indicating origin. Unlike an individual mark, the EU collective mark does not designate goods or services from a single undertaking, but enables, under Article 74 of Regulation 2017/1001, identification of the commercial origin of the goods or services which it covers in so far as they come from members of the association which is the proprietor of that mark (see, to that effect, judgments of 8 June 2017, *W. F. Gözze Frottierweberei and Gözze*, C-689/15, EU:C:2017:434, paragraph 50, and of 20 September 2017, *The Tea Board* v *EUIPO*, C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 57).

156 The intervener's argument that consumers associate the banking services offered under the Crédit Mutuel mark with the Crédit Mutuel group, thus distinguishing them from services from other sources, illustrates the use of that mark as a collective mark rather than as an individual mark.

157 However, as noted in paragraph 138 above, the contested mark was registered as an individual mark, not as a collective mark.

158 Since the intervener has failed to establish that the contested individual mark fulfilled the essential function of indicating commercial origin, namely of ensuring that the goods and services it designates come from a single undertaking under the control of which those goods and services are supplied and which is responsible for their quality within the meaning of the case-law referred to in paragraph 142 above, the Board of Appeal was wrong to conclude that the mark had acquired distinctive character through the use made of it by the members of the Crédit Mutuel group.

159 That conclusion is borne out by the fact, put forward by the applicant, that in order to designate their goods and services for their customers, Crédit Mutuel Arkéa and CM11-CIC, two independent competing groups around which the mutual banks forming part of the association

of which the intervener is the central body are structured, use different marks in addition to the contested mark or associate the contested mark with a specific logo so as to indicate the commercial origin of those goods and services as coming from one group or the other. This is not denied by the intervener, who nevertheless considers it to be irrelevant in so far as the existence of specific marks to designate the goods and services offered by the applicant and CM11-CIC respectively does not erase the use of the Crédit Mutuel 'umbrella mark', which the intervener appears to construe as the mark used by all the banks belonging to the Crédit Mutuel group.

160 However, as noted in paragraph 154 above and as the intervener itself states, even if the contested mark were to be construed as an 'umbrella mark', it is the sign of membership of the group and thus indicates, at most, the collective origin of the goods and services as coming from the Crédit Mutuel group.

161 As is apparent from the case-law referred to in paragraph 131 above, the contested individual mark must be capable of designating, on its own, in the minds of the relevant public, the goods and services covered by it as originating from a single undertaking within the meaning of the case-law cited in paragraph 142 above.

162 Against that backdrop, it should be noted that the Board of Appeal was wrong to find, in paragraph 97 of the contested decision, that the surveys submitted by the intervener as evidence that the contested mark had acquired distinctive character through use demonstrated 'unambiguously' that the relevant public perceived that mark as identifying the banking products and services as originating from the intervener. Those surveys show that the respondents associate the sign Crédit Mutuel with a bank or, more generally, a financial institution, or even with a banking product such as a loan. They are therefore capable of demonstrating, at most, that as far as the relevant public is concerned, the sign Crédit Mutuel designates products and services in the banking sector or provided by a banking or financial institution. Moreover, that is precisely why the contested mark was considered to be descriptive of those banking-related products and services.

163 The fact, put forward by the intervener, that a certain proportion of respondents stated that they had heard of the 'name' Crédit Mutuel is in no way capable of proving that the relevant public associates the contested mark with the intervener. At most, it proves that the relevant public is familiar with that expression, which refers, as far as that public is concerned, to a bank, financial institution or banking product.

164 The finding in paragraph 158 above is not called into question by the intervener's other arguments.

165 First, the Court must reject the argument that, in order for a mark to acquire distinctive character through use, it need not be used by its proprietor and it is sufficient for it to be actually used by authorised third parties, as is claimed to be the case here with the contested mark.

166 The case-law on which the intervener relies in that connection concerns proof of genuine use of a mark with the consent of its proprietor within the meaning of Article 18(2) of Regulation 2017/1001, in terms of which such use is to be deemed to constitute use by the proprietor. However, there is no provision similar to Article 18(2) of Regulation 2017/1001 that applies to

the acquisition by a mark of distinctive character through use, so that it cannot automatically be assumed that the use of a mark by a third party with the consent of the proprietor proves that a mark has acquired distinctive character through use.

167 Although the Court has acknowledged that the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 18(1) of Regulation 2017/1001, are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of that regulation (judgment of 18 April 2013, *Colloseum Holding*, C-12/12, EU:C:2013:253, paragraph 34), it did not refer to the requirements under Article 18(2) thereof.

168 Consequently, the case-law relied on by the intervener concerning the application of Article 18(2) of Regulation 2017/1001 is not relevant in the context of the application of Article 7(3) of that regulation.

169 Second, the intervener's argument that, even though the purpose of a company or trade name is not, of itself, to distinguish goods or services, there may be use of such a name 'in relation to goods or services' where the third party uses that sign in such a way that a link is established between the sign which constitutes the company or trade name and the goods marketed or the services provided by the third party (judgment of 11 September 2007, *Céline*, C-17/06, EU:C:2007:497, paragraphs 21 to 23), does not establish that the contested mark designates the proprietor as the origin of the goods and services concerned. As the Board of Appeal pointed out in paragraph 117 of the contested decision, the proprietor of the trade mark is the intervener, whose trade name is 'Confédération nationale du Crédit mutuel'. The contested mark therefore does not match the intervener's trade name.

170 In the light of the foregoing considerations, the second and third pleas in law must be upheld and the contested decision must be annulled in part in so far as the Board of Appeal found that the contested mark acquired distinctive character through use in relation to the goods and services in the first category in respect of which the mark was descriptive and non-distinctive, without there being any need to examine the other complaints raised by the applicant challenging the Board of Appeal's assessment of the distinctive character acquired through use of the contested mark.

Costs

171 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. As provided in Article 134(2) of the Rules of Procedure, where there are several unsuccessful parties the Court is to decide how the costs are to be shared. Lastly, under Article 134(3) of the Rules of Procedure, 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 Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

172 In the present case, the applicant requested that EUIPO and the intervener be ordered to pay the costs. EUIPO requested that the applicant and the intervener be ordered to pay the costs. The intervener requested that the applicant be ordered to pay the costs.

173 In those circumstances, and in the light of the fact that the applicant, EUIPO and the intervener have been unsuccessful on some of their heads of claim, it is appropriate, as regards the costs related to the main action, to order the applicant to pay one third of its own costs and one third of the costs of EUIPO and the intervener, to order EUIPO to pay two thirds of its own costs and two thirds of the applicant's costs, and to order the intervener to pay two thirds of its own costs. The intervener is ordered to pay the costs of the cross-claim.

On those grounds,

THE GENERAL COURT (Second Chamber),

hereby:

1. **Annuls the decision of the Fifth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 8 November 2017 (Case R 1724/2016-5) in so far as it concludes that the contested mark acquired distinctive character through use for the goods and services for which it was descriptive and non-distinctive;**

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

3. **Dismisses the cross-claim;**

4. **Orders Crédit Mutuel Arkéa to bear a third of its own costs and to pay a third of the costs incurred by EUIPO and Confédération nationale du Crédit mutuel in the main action;**

5. **Orders EUIPO to pay two thirds of its own costs and two thirds of the costs incurred by the applicant in the main action;**

6. **Orders Confédération nationale du Crédit mutuel to bear two thirds of its own costs incurred in the main action and the costs incurred in the cross-claim.**

Prek Buttigieg Berke

Delivered in open court in Luxembourg on 24 September 2019.

[Signatures]