Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 31 May 2017 [1]

Joined Cases C-673/15 P to C-676/15 P

The Tea Board
v

European Union Intellectual Property Office (EUIPO)

(Appeal — EU trade mark — Regulation (EC) No 207/2009 — Article 8(1)(b) — Opposition by the proprietor of EU collective marks — Article 66(2) — Collective marks consisting of a geographical indication — Function — Conflict with an application for registration of an individual mark — Likelihood of confusion — Concept — Similarity between goods or services — Criteria for assessment — Article 8(5) — Word and figurative mark containing the word element 'darjeeling' — Earlier collective mark consisting of the geographical indication 'Darjeeling')

1. By its appeals, The Tea Board asks the Court of Justice to set aside in part the judgments of the General Court of the European Union of 2 October 2015, *The Tea Board* v *OHIM — Delta Lingerie (Darjeeling)* (T-624/13, EU:T:2015:743), of 2 October 2015, *The Tea Board* v *OHIM — Delta Lingerie (Darjeeling collection de lingerie)* (T-625/13, not published, EU:T:2015:742), of 2 October 2015, *The Tea Board* v *OHIM — Delta Lingerie (DARJEELING collection de lingerie)* (T-626/13, not published, EU:T:2015:741) and of 2 October 2015, *The Tea Board* v *OHIM — Delta Lingerie (Darjeeling)* (T-627/13, not published, EU:T:2015:740) (together 'the judgments under appeal'), by which the General Court dismissed in part the actions for annulment of the decisions of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 11 and 17 September 2013 (R 1387/2012-2, R 1501/2012-2, R 1502/2012-2 and R 1504/2012-2, 'the decisions at issue'), concerning opposition proceedings between The Tea Board and Delta Lingerie. The judgments are also the subject of four cross-appeals lodged by Delta Lingerie.

I. Legal context

2. Under Article 7(1)(c) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark, [2] '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.

1 Original language: French.

2 OJ 2009 L 78, p. 1.

3. Article 66 of that regulation, entitled '[EU] collective marks', provides:

'1. An [EU] collective mark shall be [an EU] trade mark which is described as such when the mark is applied for and is capable of distinguishing the goods or services of the members of the association which is the proprietor of the mark from those of other undertakings. Associations of manufacturers, producers, suppliers of services, or traders which, under the terms of the law governing them, have the capacity in their own name to have rights and obligations of all kinds, to make contracts or accomplish other legal acts and to sue and be sued, as well as legal persons governed by public law, may apply for [EU] collective marks.

2. In derogation from Article 7(1)(c), signs or indications which may serve, in trade, to designate the geographical origin of the goods or services may constitute [EU] collective marks within the meaning of paragraph 1. A collective mark shall not entitle the proprietor to prohibit a third party from using in the course of trade such signs or indications, provided he uses them in accordance with honest practices in industrial or commercial matters; in particular, such a mark may not be invoked against a third party who is entitled to use a geographical name.

3. The provisions of this Regulation shall apply to [EU] collective marks, unless Articles 67 to 74 provide otherwise.'

II. Background to the dispute and the decisions at issue

4. The background to the dispute, as set out in the judgments under appeal, may be summarised as follows.

5. On 22 October 2010, Delta Lingerie, filed applications for registration of Community trade marks at OHIM, pursuant to Regulation No 207/2009.

6. The marks in respect of which registration was sought are:

– the figurative sign reproduced below, comprising the word element ‘darjeeling’ depicted in white letters inside a light green rectangle:

– the figurative sign reproduced below, comprising the word element ‘darjeeling collection de lingerie’ depicted in white letters inside a light green rectangle:

– the figurative sign reproduced below, comprising the word element ‘darjeeling collection de lingerie’ depicted in black letters against a white background:

– the figurative sign reproduced below, comprising the word element ‘darjeeling’ depicted in black letters against a white background:

7. The goods and services in respect of which registration was sought are in Classes 25, 35 and 38 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. [3]

8. The Community trade mark applications were published in *Community Trade Marks Bulletin* No 4/2011 of 7 January 2011.

9. On 7 April 2011, The Tea Board, a body formed under the 1953 Indian Tea Act (No 29 of 1953) and empowered to administer the production of tea, filed a notice of opposition, pursuant to Article 41 of Regulation No 207/2009, to registration of the marks applied for in respect of the goods and services referred to in point 7 above.

10. The opposition was based on the following earlier marks:

– the earlier EU collective word mark DARJEELING, applied for on 7 March 2005 and registered on 31 March 2006 under No 4 325 718;

– the earlier EU collective figurative mark reproduced below, applied for on 10 November 2009 and registered on 23 April 2010 under No 8 674 327:

11. The two EU collective marks cover goods in Class 30 corresponding to the following description: ‘Tea’.

12. The grounds relied on in support of the opposition were those referred to in Article 8(1) and (5) of Regulation No 207/2009.

3 The goods and services correspond to the following description: Class 25: ‘Women’s undergarments and day and night lingerie, in particular girdles, bodies, bustiers, basques, bras, panties, G-strings, tangas, brassieres, shorties, boxer shorts, garter belts, suspenders, garters, camisoles, short nighties, panty hose, stockings, swimwear; Clothing, knitwear, body linen, slipovers, T-shirts, corsets, bodices, short nighties, boas, overalls, combinations (clothing), sweaters, bodies, pyjamas, nightgowns, trousers, indoor trousers, shawls, dressing gowns, bathrobes, swimwear, bathing trunks, petticoats, scarves’; Class 35: ‘Retailing of women’s underwear and lingerie, perfumes, toilet water and cosmetic lotions, household and bath linen; Business consultancy with regard to the creation and operation of retail outlets and central purchasing agencies for retailing and advertising purposes; Sales promotion (for others), advertising, business management, business administration, online advertising on a computer network, distribution of advertising material (leaflets, flyers, free newspapers, samples), arranging newspaper subscriptions for others; Business information or enquiries; Organisation of events and exhibitions for commercial or advertising purposes, advertising management, rental of advertising space, radio and television advertising, advertising sponsorship’; Class 38: ‘Telecommunications, computer-aided transmission of messages and images, interactive television broadcasting services relating to the presentation of products, communications by computer terminals, communications (transmissions) on the open and closed world wide web’.

13. The judgments under appeal state that evidence was produced by The Tea Board before the Board of Appeal attesting to the fact that the word element 'darjeeling' — the word element common to the signs at issue — is a protected geographical indication for tea, registered through Commission Implementing Regulation (EU) No 1050/2011 of 20 October 2011 entering a name in the register of protected designations of origin and protected geographical indications (Darjeeling (PGI))[4] following an application received on 12 November 2007. That implementing regulation was adopted on the basis of Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs,[5] since replaced by Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs.[6]

14. By four decisions adopted on 31 May, 11 June and 10 July 2012, the Opposition Division rejected the oppositions. On 27 July and 10 August 2012, The Tea Board filed notices of appeal with OHIM against those decisions.

15. By the decisions at issue, the Second Board of Appeal of OHIM dismissed the appeals and upheld the Opposition Division's decisions. In particular, it concluded that, in view of the lack of similarity between the goods and services covered by the signs at issue, there was no likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 207/2009. Similarly, it dismissed the alleged infringement of Article 8(5) of that regulation, on the ground that the evidence provided by The Tea Board was insufficient to establish that the conditions for applying that provision were met.

III. The judgments under appeal

16. The Tea Board brought four actions before the General Court, seeking annulment of the four decisions at issue.

17. In support of its actions, it raised two pleas in law. By its first plea in law, The Tea Board argued that the Board of Appeal had wrongly ruled out a likelihood of confusion within the meaning of Article 8(1) of Regulation No 207/2009 after finding that the goods and services covered by the signs at issue were entirely dissimilar. In that plea, it complained, in particular, that the Board of Appeal had misjudged the extent of the protection conferred on collective marks falling under Article 66(2) of Regulation No 207/2009 — the essential function of which is to guarantee that the goods or services come from an undertaking located in the area of geographical origin indicated — and that the Board of Appeal had carried out, in the present case, the same type of assessment as it would have used to ascertain whether there was a likelihood of confusion between two individual marks. By its second plea, alleging infringement of Article 8(5) of the regulation, The Tea Board argued that the Board of Appeal had wrongly held that the conditions for applying that provision were not met in the present case.

18. The General Court held that the first plea was unfounded. It considered, in essence, that since none of the provisions in the chapter of Regulation No 207/2009 dedicated to EU collective marks allows it to be inferred that the essential function of such marks, including those consisting of an indication which may serve to designate the geographical origin of the goods and services covered, is different from the essential function of EU individual marks, it had to be held that the essential function of the former — as it is for the latter — is to distinguish the goods or services covered according to the specific body from which they originate and not according to their geographical origin. In rejecting the arguments to the contrary submitted by The Tea Board, the General Court concluded that where, in the context of opposition proceedings, the signs at issue are collective marks

4 OJ 2011 L 276, p. 5.

5 OJ 2006 L 93, p. 12.

6 OJ 2012 L 343, p. 1.

on the one hand and individual marks on the other, the comparison of the goods and services covered must be carried out using the same criteria as those which apply to an assessment of the similarity or identity of the goods and services covered by two individual marks. Applying those criteria, the General Court considered that the conclusion reached by the Board of Appeal should be upheld, according to which there is no link between the goods and services covered by the trade mark applications and the goods covered by the earlier marks, since the mere possibility that the relevant public might believe that the goods and services covered by the signs at issue have the same geographical origin is not sufficient to establish their similarity or identity for the purpose of applying Article 8(1)(b) of Regulation No 207/2009. Lastly, the General Court held that, even in an assessment of the likelihood of confusion between collective marks and individual marks, the similarity of the signs at issue cannot offset the lack of similarity between the goods or services covered by those signs.

19. So far as the second plea was concerned, the General Court first noted that the parties agreed on the fact that the signs at issue are identical aurally and highly similar visually. It then stated that the Board of Appeal had not definitively concluded that the earlier marks had a reputation, or that the relevant public would establish a link between the signs at issue, but that it had relied, in its analysis, on two hypothetical premisses, the first being that the earlier marks had been shown to have an exceptionally strong reputation, and the second being that it was possible that the relevant public would establish a link between the signs at issue. With regard to the risks referred to in Article 8(5) of Regulation No 207/2009, the General Court held that the Board of Appeal rightly concluded that there was no risk of detriment to the distinctive character of the earlier marks and that it had excluded the risk that the use of the marks applied for would be detrimental to the reputation of the earlier marks. However, with regard to the risk that unfair advantage would be taken of the distinctive character or the repute of the earlier marks by the marks applied for, the General Court considered that, given that the decisions at issue were based on the hypothetical premiss of the earlier marks' exceptional reputation, the positive qualities evoked by the word element 'darjeeling', common to the signs at issue, were capable of being transferred to certain goods and services covered by the marks applied for, and, consequently, of strengthening the power of attraction of those marks. The General Court therefore concluded that the decisions at issue had to be annulled in part to the extent that the Board of Appeal had ruled out the application of Article 8(5) of Regulation No 207/2009, excluding, as regards all the goods in Class 25 and the retail services in Class 35 covered by the marks applied for, the existence of a risk of an advantage resulting from the use without due cause of those marks.

IV. The appeals

A. Procedure

20. By applications lodged on 14 December 2015, The Tea Board brought four appeals against the judgments under appeal. By decision of the President of the Court of Justice of 12 February 2016, the cases were joined for the purposes of the written and oral procedure and the judgment.

21. By a separate application lodged on 11 April 2016, Delta Lingerie, intervener before the General Court, filed a cross-appeal against the judgments under appeal. The Tea Board, the European Union Intellectual Property Office (EUIPO) and Delta Lingerie presented their oral arguments at the hearing on 25 January 2017.

B. Forms of order sought by the parties to the main appeal

22. In each case, The Tea Board claims that the Court should (i) set aside in part the judgment under appeal in so far as the General Court dismissed the action with regard to the services covered by the marks applied for in Class 35 other than 'retailing of women's underwear and lingerie, perfumes, toilet water and cosmetic lotions, household and bath linen' and in Class 38, (ii) if necessary, refer the case back to the General Court and (iii) order EUIPO to pay the costs.

23. In each case, EUIPO and Delta Lingerie contend that the Court should dismiss the appeal and order The Tea Board to pay the costs.

C. Forms of order sought by the parties to the cross-appeal

24. In each case, Delta Lingerie claims that the Court should (i) set aside in part the judgments under appeal in so far as the General Court annulled the decisions at issue with regard to the goods covered by the marks applied for and falling in Class 25 and to the 'retailing of women's underwear and lingerie, perfumes, toilet water and cosmetic lotions, household and bath linen' covered by the marks applied for and falling in Class 35, (ii) if necessary, refer the case back to the General Court and (iii) order The Tea Board to pay the costs.

25. In each case, EUIPO and The Tea Board contend that the Court should dismiss the cross-appeal and order Delta Lingerie to pay the costs.

V. Analysis

A. The main appeals

26. In support of each of its appeals, The Tea Board relies on two grounds of appeal: (i) infringement of Article 8(1)(b) of Regulation No 207/2009 and (ii) infringement of Article 8(5) of that regulation.

1. The first ground of appeal, alleging infringement of Article 8(1)(b) of Regulation No 207/2009

27. The first ground of each of the appeals brought by The Tea Board is divided into three parts. The first part alleges an incorrect assessment as regards the essential function of collective marks falling under Article 66(2) of Regulation No 207/2009. The second part alleges that an error was made as to the criteria to be applied in an assessment of the similarity of goods and services in the event of conflict between a collective mark and a sign for which registration as an individual mark is sought. By the third part, The Tea Board submits that the General Court incorrectly assessed the nature of the likelihood of confusion where such a conflict arises.

28. I will begin by examining the first of the three parts before turning, as logic dictates, to the third part on the nature of the likelihood of confusion, then, lastly, to the second part.

(a) The first part of the first ground of appeal, alleging an incorrect assessment of the essential function of collective marks falling under Article 66(2) of Regulation No 207/2009

29. By the first part of the first ground of appeal, The Tea Board submits that the General Court erred in law and/or distorted the facts of the case by concluding that the essential function of a collective mark within the meaning of Article 66(2) of Regulation No 207/2009, which consists of an indication designating the geographical origin of the goods in question, is not different from the essential function of a collective mark within the meaning of Article 66(1) of that regulation and that therefore, in both cases, the marks' function is to serve as an indication of commercial origin.

30. The Tea Board puts forward four arguments in support of that part.

31. First, it seeks to rely on the fact that Article 66(2) of Regulation No 207/2009 constitutes an exception to the absolute ground for refusal laid down in Article 7(1)(c) of that regulation, without however explaining how that fact is capable of supporting its contention that the essential function of collective marks as referred to in Article 66(2) is different from that of other collective marks.

32. Although the first argument contains little in the way of detail, it is appropriate to consider more closely the relationship between the two abovementioned provisions of Regulation No 207/2009 in order to better understand the rationale of the derogation in Article 66(2) of the regulation.

33. In that regard, I observe that, as has been made clear by the Court, each of the grounds for refusal to register listed in Article 7(1) of Regulation No 207/2009 is independent of the others [7] and the public interest taken into account in the examination of each of those grounds for refusal may, or even must, reflect different considerations, depending upon which ground for refusal is at issue. [8]

34. As regards the interpretation of Article 3(1)(c) of First Council Directive 89/104/EEC [9] — the content of which, for our purposes, was the same as that of Article 7(1)(c) of Regulation No 207/2009 — the Court has stated that the provision 'pursues an aim which is in the public interest, namely that descriptive signs or indications relating to the categories of goods or services in respect of which registration is applied for may be freely used by all, including as collective marks or as part of complex or graphic marks', preventing 'such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks'. [10] In the judgment of 4 May 1999, *Windsurfing Chiemsee* (C-108/97 and C-109/97, EU:C:1999:230, paragraph 26), as regards, more specifically, signs or indications which may serve to designate the geographical origin of goods in respect of which registration of the mark is applied for, geographical names especially, the Court noted that 'it is in the public interest that they remain available, not least because they may be an indication of the quality and other characteristics of the categories of goods concerned, and may also, in various ways, influence consumer tastes by, for instance, associating the goods with a place that may give rise to a favourable response'.

7 See, in particular, judgment of 21 October 2004, *OHIM* v *Erpo Möbelwerk* (C-64/02 P, EU:C:2004:645, paragraph 39).

8 See, in particular, judgment of 29 April 2004, *Henkel* v *OHIM* (C-456/01 P and C-457/01 P, EU:C:2004:258, paragraphs 45 and 46).

9 First Council Directive of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

10 See judgments of 4 May 1999, *Windsurfing Chiemsee* (C-108/97 and C-109/97, EU:C:1999:230, paragraph 25); of 8 April 2003, *Linde and Others* (C-53/01 to C-55/01, EU:C:2003:206, paragraph 73); and of 15 March 2012, *Strigl and Securvita* (C-90/11 and C-91/11, EU:C:2012:147, paragraph 31). Regarding Article 7(1)(c) of Regulation (EC) No 40/94 of the Council of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) preceding Regulation No 207/2009, see judgment of 10 March 2011, *Agencja Wydawnicza Technopol* v *OHIM* (C-51/10 P, EU:C:2011:139, paragraph 37).

35. The absolute ground for refusal in Article 7(1)(c) of Regulation No 207/2009 therefore has an essentially 'anti-monopolistic' purpose, in particular in relation to indications which may serve to designate the geographical origin of the goods or services covered and which are perceived by the relevant public as indicating that origin.[11]

36. It may be inferred from such a purpose that the rationale for the derogation in Article 66(2) of Regulation No 207/2009 from Article 7(1)(c) thereof, and from the absolute ground for refusal that the latter sets out, is the collective nature of the marks in question, which precludes any single undertaking from monopolising the use of the signs and indications of which such marks are composed in a way contrary to the public interest in those signs and indications being freely available for use.[12]

37. Contrary to what The Tea Board asserts, no argument in support of the contention that the essential function of collective marks consisting of a geographical indication differs from that of the other collective marks can be drawn from that rationale, nor, more generally, from the relationship between Article 66(2) of Regulation No 207/2009 and Article 7(1)(c) of that regulation.

38. The Tea Board asserts, secondly, that the essential function of a collective mark protecting a geographical indication is to guarantee the geographical origin of the goods and/or services it designates, and not their commercial origin. Such a mark can only serve to guarantee the 'collective origin' of the goods or services sold or offered under the collective mark, that is to say, that the goods or services come from an undertaking located in the geographical region concerned, without however indicating from which specific undertaking they come.

39. This argument appears to me, at the very least in part, to stem from a misunderstanding of the 'distinguishing function' attributed to individual marks and collective marks, respectively. That function operates differently in each case. Thus, an individual mark must be capable of distinguishing the goods or services of a given undertaking, whereas a collective mark is intended to distinguish the goods or services coming from members of an association which is the proprietor of the mark. In other words, a collective mark cannot ever serve to identify the goods or services of an individual undertaking, but distinguishes them according to their collective origin. This is also clear from the actual wording of Article 66(1) of Regulation No 207/2009.

40. The Tea Board maintains, however, that a collective mark under Article 66(2) of Regulation No 207/2009 is, by its very nature, incapable of performing even a distinguishing function of that kind. In support of its argument it refers, first, to Article 67(2) of that regulation, which provides that the regulations governing use of a collective mark consisting of a geographical indication, submitted in accordance with paragraph 1 of that article,[13] must authorise any person whose goods or services originate in the geographical area concerned to become a member of the association which is the proprietor of the mark and, secondly, to paragraph 147 of the judgment of 29 March 2011, *Anheuser-Busch* v *Budějovický Budvar* (C-96/09 P, EU:C:2011:189).

11 This aim is different to that pursued by the ground for refusal in Article 7(1)(b) of Regulation No 207/2009, which is intended to exclude from registration signs which are devoid of any distinctive character and which are therefore not capable of performing the essential function of a trade mark as indicating the commercial origin of the goods or service designated, the public interest underlying that absolute ground for refusal being, to use the Court's expression, indissociable from the essential function of the mark. See, to that effect, judgments of 16 September 2004 *SAT.1* v *OHIM* (C-329/02 P, EU:C:2004:532, paragraph 27), and of 15 September 2005, *BioID* v *OHIM* (C-37/03 P, EU:C:2005:547, paragraph 60). See, however, to the contrary, judgment of 20 September 2001, *Procter & Gamble* v *OHIM* (C-383/99 P, EU:C:2001:461, paragraph 37), which has remained, as concerns this aspect, isolated.

12 The Court also ruled to that effect in the judgment of 4 May 1999, *Windsurfing Chiemsee* (C-108/97 and C-109/97, EU:C:1999:230, paragraph 27), when it emphasised that the public interest underlying Article 3(1)(c) of First Directive 89/104 was 'evident in the fact that it is open to the Member States, under Article 15(2) of the Directive, to provide, by way of derogation from Article 3(1)(c), that signs or indications which may serve to designate the geographical origin of the goods may constitute collective marks'. See also judgment of 20 July 2016, *Internet Consulting* v *EUIPO — Provincia Autonoma di Bolzano-Alto Adige (SUEDTIROL)* (T-11/15, EU:T:2016:422, paragraph 55).

13 Article 67(1) of Regulation No 207/2009 provides that the applicant for a collective mark must submit regulations for use of the mark specifying 'the persons authorised to use the mark, the conditions of membership of the association and, where they exist, the conditions of use of the mark, including sanctions'.

41. I admit that I fail to understand how Article 67(2) of Regulation No 207/2009 demonstrates the alleged inability of collective marks consisting of geographical indications to distinguish the goods and services coming from members of the body which is the proprietor of the mark from those which do not have the same collective origin. That provision in fact aims to ensure that all undertakings that are entitled to use the geographical indication in question for the goods or services covered by the collective mark are able to acquire the right to use that mark, by joining the association which is the proprietor of the mark, and thus to prevent the creation of a monopoly over that indication (in its trade mark function) in favour of a closed group of undertakings.

42. As to The Tea Board's reference to paragraph 147 of the judgment of 29 March 2011, *Anheuser-Busch* v *Budějovický Budvar* (C-96/09 P, EU:C:2011:189), I would point out that, in that paragraph, the Court ruled on the essential function of a protected geographical indication (under national and international rules) and not on that of a collective mark consisting of a geographical indication. As explained later in this Opinion, the function and the extent of the protection of those two signs are different. That is also evident from the judgment of 29 March 2011, *Anheuser-Busch* v *Budějovický Budvar* (C-96/09 P, EU:C:2011:189), in which the Court explained that a sign relied on under Article 8(4) of Regulation No 207/2009 in opposition to an application for registration of an EU mark necessarily had to be used 'as a trade mark', and therefore indicate the commercial origin of the goods covered, and that the use of that sign as a geographical indication, that is, with a function of guaranteeing the geographical origin of those goods, was not accepted. [14]

43. On a more general level, The Tea Board's contention is precluded by the wording of Article 66(1) of Regulation No 207/2009 read in conjunction with paragraph 2 of that article, and by the EU trade mark system as a whole.

44. First, under Article 66(1) of Regulation No 207/2009, only marks 'capable of distinguishing the goods or services of the members of the association which is the proprietor of the mark from those of other undertakings' may constitute EU collective marks. Paragraph 2 of that article provides that signs or indications which may serve, in trade, to designate the geographical origin of the goods or services may, by way of derogation from Article 7(1)(c) of the regulation, constitute collective marks 'within the meaning of paragraph 1'. The collective marks referred to in Article 66(2) of Regulation No 207/2009 are therefore only a category of EU collective marks as defined in Article 66(1). To uphold The Tea Board's contention would be to disregard the relationship that the EU legislature intended to establish between the signs falling under those two provisions.

45. Secondly, under Article 66(3) of Regulation No 207/2009, the provisions of that regulation apply, except where otherwise provided, to EU collective marks. [15] Under Article 4 of Regulation No 207/2009, a sign may constitute an EU mark only if it is capable 'of distinguishing the goods or services of one undertaking from those of other undertakings'. This distinguishing function must be understood as referring to the commercial origin of the goods and services covered by the mark. Indeed, it is settled case-law that the essential function of the trade mark is 'to guarantee the identity of the origin of the marked product [or service] to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin'. [16] None of the provisions of Regulation No 207/2009 on collective marks calls into question that function, which, according to the Court, is the function of the protection conferred by

14 See paragraphs 147 to 150 of the judgment of 29 March 2011, *Anheuser-Busch* v *Budějovický Budvar* (C-96/09 P, EU:C:2011:189).

15 Regulation 2015/2424 reworded, with effect from 1 October 2017, Article 66(3) of Regulation No 207/2009 without amending the substance of the provision.

16 See judgment of 29 September 1998, *Canon* (C-39/97, EU:C:1998:442, paragraph 28).

the mark.[17] On the contrary, Article 66(1) of Regulation No 207/2009 confirms that the same function is performed by collective marks, making clear that, in the case of those signs, that function is intended to enable the designated goods or services to be traced back to the association which is the proprietor of the mark.

46. It is true that collective marks may perform other functions too. While remaining distinct from certification marks,[18] they may attest to a specific characteristic or quality of the goods or services they designate.[19] With regard, more specifically, to the collective marks referred to in Article 66(2) of Regulation No 207/2009, they provide the consumer with an indication of the geographical origin of the goods and services that they designate and may perform a descriptive function of qualities associated with the land or with a certain tradition of local production or, more generally, convey the positive qualities associated with the geographical area they refer to.[20] However, this does not alter the fact that the essential function of collective marks –– whether it is those referred to in paragraph 1 or those referred to in paragraph 2 of Article 66 of Regulation No 207/2009 –– is, as for any mark governed by the regulation,[21] to distinguish the goods and services of their proprietor from those that have a different origin. As I have already pointed out, with regard to collective marks, that distinguishing function operates by identifying the association that is the proprietor of the mark, which informs the consumer of the origin, common to the members of that association, of the goods and services covered by the mark.

47. Thirdly and lastly, The Tea Board argues that Regulation No 207/2009 must be interpreted in the light of Regulation No 1151/2012 and the Agreement on Trade-Related Aspects of Intellectual Property Rights.[22] It submits that those two acts recognise that geographical indications may serve to identify a product as coming from a certain place when, as is the case for the collective mark Darjeeling, a quality, reputation or other characteristic of the product in question may essentially be attributed to that geographical origin, and afford those indications a high level of protection.[23]

48. It should be noted at the outset that, in 2011, the name 'Darjeeling' was registered as a protected geographical indication pursuant to Regulation No 510/2006. The application for registration of the name was lodged with the European Commission on 12 November 2007, namely before Delta Lingerie filed its application for registration of a mark.

17 See, in particular, judgment of 29 September 1998, *Canon* (C-39/97, EU:C:1998:442, paragraph 27).

18 Regulation 2015/2424 inserted Articles 74a to 74k into Regulation No 207/2009, which will enter into force on 1 October 2017, and which regulate EU certification marks. Those marks will enable certification institutions or bodies to authorise members of the certification system to use the mark as a sign for goods or services which satisfy the certification criteria. Article 74a specifies that certification may not cover the geographical origin of the goods or services concerned.

19 In that regard, Article 67 of Regulation No 207/2009 provides that, when the use of a mark is subject to conditions, which may for example concern adherence to certain quality standards or the use of a specific method of production, the regulations governing use of the mark must specify those conditions. It also falls to the proprietor of the collective mark, under Article 73 of Regulation No 207/2009, if he wishes to avoid revocation of his rights, to take reasonable steps to prevent the mark being used in a manner incompatible with the conditions of use.

20 See, to that effect, judgment of 4 May 1999, *Windsurfing Chiemsee* (C-108/97 and C-109/97, EU:C:1999:230, paragraph 26).

21 Article 74a of Regulation No 207/2009 introduced by Regulation 2015/2424 describes the function of certification marks differently. This provision states that those marks must be 'capable of distinguishing goods or services which are certified by the proprietor of the mark in respect of material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, with the exception of geographical origin, from goods and services which are not so certified'. The distinctive function of those marks does therefore not cover the commercial origin of goods or services, but rather their certification.

22 Agreement in Annex 1C to the Marrakesh Agreement establishing the World Trade Organisation, approved on behalf of the European Community by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1) ('the TRIPS Agreement').

23 The Tea Board refers in particular to Article 13(a) to (d) of Regulation No 1151/2012 and to Article 22 of the TRIPS Agreement. Those provisions extend the protection of protected geographical indications to their misuse, imitation or evocation, concerning goods as well as services.

49. At the time when The Tea Board gave notice of opposition, Regulation 2015/2424[24] had not yet been adopted. That regulation added a new paragraph 4a to Article 8 of Regulation No 207/2009, authorising the filing of an opposition on the basis of an application for a geographical indication which has been submitted, in accordance with EU legislation or national law, prior to the application for registration of an EU trade mark and which has resulted in subsequent registration.[25]

50. Moreover, although, in accordance with Article 7(1)(k) of Regulation No 207/2009, OHIM was obliged to comply with the prohibition of registration of trade marks laid down in Article 14(1) of Regulation No 510/2006,[26] that prohibition covered only applications for registration concerning the same class of goods as that covered by the geographical indication.

51. It follows that in the present case it was not possible for The Tea Board to rely before OHIM on the registration of the name 'Darjeeling' as a protected geographical indication for the purpose of opposing the registration of the trade mark applications lodged by Delta Lingerie, despite the fact that the application for registration of that name had been lodged prior to the application for registration of the marks.

52. Having clarified that point, I am of the view that the argument of The Tea Board outlined at point 47 above cannot prosper either.

53. Protected geographical indications and collective marks consisting of a geographical indication are subject to regimes which, although they share certain common elements such as, for example, the obligation to register and the existence of regulations setting out the conditions of use of the sign, are otherwise very different. Some of the most significant differences are the type of signs under protection,[27] the goods that can be covered by the signs,[28] the stringent requirements concerning the link between the product and the territory, to which the registration of geographical indications is subject,[29] the rules concerning the acquisition of generic character, the renewal of registration and the revocation of rights for lack of genuine use — provided for only for marks — as well as the extent of the protection, geographical indications enjoying appreciably wider protection. Collective marks consisting of geographical indications and protected geographical indications are different signs which have different objectives and which are subject to different rules.

54. The Tea Board is therefore not able to rely on regulations governing geographical indications in order to construct arguments in support of its contention that the essential function of the collective marks referred to in Article 66(2) of Regulation No 207/2009 differs from that of collective marks within the meaning of paragraph 1 of that article and is similar to that of protected geographical indications.

24 Regulation (EU) of the European Parliament and of the Council of 16 December 2015 amending Regulation No 207/2009 (OJ 2015 L 341, p. 21).

25 That amendment entered into force on 23 March 2016. Moreover, at the time when the oppositions were filed, the name 'Darjeeling' had not yet been registered as a geographical indication.

26 That provision, the content of which corresponds, in essence, to that of the current Article 14(1) of Regulation No 1151/2012, provides that when a geographical indication is registered under this regulation, the registration of a trade mark the use of which would contravene Article 13(1) and which relates to a product of the same type is to be refused if the application for registration of the trade mark is submitted after the date of submission to the Commission of the registration application in respect of the geographical indication.

27 In accordance with Article 5(2) of Regulation No 1151/2012, only names (and not any sign that may be graphically represented) may be registered as geographical indications.

28 The protection of geographical indications is provided for only for agricultural products and foodstuffs, by Regulation No 1151/2012, for wines, by Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671), and for spirit drinks, by Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89 (OJ 2008 L 39, p. 16).

29 Under Article 5 of Regulation No 1151/2012, geographical indications concerning agricultural products and foodstuffs identify a product as originating in a specific place, region or country, whose specific quality, reputation or other characteristic is essentially attributable to its geographical origin and at least one of whose production steps takes place in the defined geographical area. The same requirements do not apply to collective marks under Article 66(2) of Regulation No 207/2009.

55. As to The Tea Board's references to the judgments of 16 November 2004, *Anheuser-Busch* (C-245/02, EU:C:2004:717, paragraphs 42 and 55), and of 14 June 2007, *Häupl* (C-246/05, EU:C:2007:340, paragraph 48), it should be noted that, in those two judgments, the Court interpreted concepts of EU trade mark law in the light of the corresponding concepts of the TRIPS Agreement. In the present case, The Tea Board contends, on the contrary, that the provisions of Regulation No 207/2009 should be interpreted on the basis of provisions of the TRIPS Agreement concerning signs other than trade marks.

56. In the light of all the above considerations, I am of the view that the first part of The Tea Board's first ground of appeal must be rejected as unfounded.

(b) On the third part of the first ground of appeal, alleging an incorrect assessment of the nature of the likelihood of confusion between an earlier collective mark consisting of a geographical indication and a sign for which registration as an individual mark is sought

57. According to The Tea Board, the General Court made an error of law and/or distorted the facts of the case by concluding, in the judgments under appeal, that, in the case of a collective mark within the meaning of Article 66(2) of Regulation No 207/2009, the origin, actual or potential, of the goods or services covered cannot be taken into account in the context of a global assessment of a likelihood of confusion for the purposes of Article 8(1)(b) of Regulation No 207/2009, and that the question as to whether or not the public might believe that the goods in question, or the raw materials used to produce them, or the services covered by the marks in question, may have the same geographical origin, is irrelevant.

58. In that regard, I would observe that the Court interprets the concept of 'likelihood of confusion' under Article 8(1)(b) of Regulation No 207/2009 in accordance with the distinguishing function assigned to the mark. Thus, it is settled case-law that such a likelihood of confusion exists where the public can be mistaken as to the origin of the goods or services in question. [30]

59. That concept does therefore not include the likelihood that the consumer will be misled on aspects other than the commercial origin of the goods or services concerned, including their geographical origin. In the judgment of 29 September 1998, *Canon* (C-39/97, EU:C:1998:442, paragraph 29), the Court explained in that regard that it was not sufficient 'in order to demonstrate that there is no likelihood of confusion … to show simply that there is no likelihood of the public being confused as to the place of production of the goods or services'. [31]

60. The Tea Board's contention amounts, in essence, to a request that the Court reinterpret the concept of 'likelihood of confusion' in the event of conflict between an individual mark and a collective mark as referred to in Article 66(2) of Regulation No 207/2009 in the light of the –– in its view –– different function assigned to a collective mark of indicating the geographical origin of the goods or the services it designates. However, given that the collective marks which fall under Article 66(2) perform the same distinguishing function as the collective marks mentioned in paragraph 1 of that article, such a reinterpretation cannot be justified.

61. I would also point out that, given that OHIM did not refuse registration of the marks applied for on absolute grounds, it must necessarily have considered that the term 'Darjeeling', the sole constituent element of those marks, could not be considered to be an indication which may serve, in trade, to designate the geographical origin of the goods and services in question within the meaning of

30 See, on Article 4(1)(b) of First Directive 89/104, judgment of 29 September 1998, *Canon* (C-39/97, EU:C:1998:442, paragraph 26).

31 On the lack of relevance, for the purposes of the assessing whether there is a likelihood of confusion, of considerations unrelated to the commercial origin of the product in question, see judgment of 5 April 2006, *Madaus* v *OHIM — Optima Healthcare* (*ECHINAID*) (T-202/04, EU:T:2006:106, paragraph 31).

Article 7(1)(c) of Regulation No 207/2009.[32] The General Court itself stated in paragraph 111 of the judgments under appeal that The Tea Board had not provided any evidence to establish that the geographical name in question is, in the mind of the relevant class of persons, associated with the goods or services covered by the mark applied for or that that name might be used by the undertakings concerned as an indication of the geographical origin of those goods or services.

62. It follows that, even if the interpretation of the likelihood of confusion argued for by The Tea Board were to be accepted, the marks applied for are not in any event such as to mislead the consumer as to the geographical origin of the goods or services which they cover, given that the term 'darjeeling' in the marks applied for will not be perceived by the consumer of those goods and services as a geographical indication.

63. In those circumstances, The Tea Board is in fact requesting that it be granted, on the basis of its collective mark, a right to oppose, under Article 8(1)(b) of Regulation No 207/2009, the registration of a mark applied for even in the absence of any likelihood of confusion, which would run counter to the clear wording of that provision.

64. For those reasons, I am of the view that the third part of the first ground of appeal should be rejected as unfounded.

(c) The second part of the first ground of appeal, alleging an error as to the criteria to be applied in assessing the similarity of goods and services in the event of conflict between an earlier collective mark consisting of a geographical indication and a sign for which registration as an individual mark is sought

65. The second part of the first ground of appeal alleges that the General Court erred in law and/or distorted the facts of the case when it held that, in the case of a collective mark within the meaning of Article 66(2) of Regulation No 207/2009, the origin, actual or potential, of the goods and services in question cannot be taken into account when those goods and services are compared for the purpose of applying Article 8(1)(b) of that regulation and that the comparison must rather be made using the same criteria as those which apply when an assessment is made of the similarity or the identity of goods and services covered by individual marks. In the present case, in order to assess the similarity between the product covered by the earlier marks and the goods and services designated by the marks applied for, it must be asked whether or not those goods and services might have the same geographical origin. According to The Tea Board, the answer to that question is in the affirmative.

66. It should be borne in mind that, according to settled case-law, in assessing the similarity of the goods or services in question, all the relevant factors relating those goods or services should be taken into account. Those factors include, in particular, their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary,[33] and their distribution channels.[34]

32 Furthermore, if OHIM had considered that the word 'Darjeeling' in the marks applied for was used to identify the geographical origin of the goods and services in question, those marks should have been refused registration as deceptive, under Article 7(1)(g) of Regulation No 207/2009.

33 See, concerning Article 4(1)(b) of First Directive 89/104, judgment of 29 September 1998, *Canon* (C-39/97, EU:C:1998:442, paragraph 23).

34 See, inter alia, judgment of 11 July 2007, *El Corte Inglés* v *OHIM — Bolaños Sabri* (*PiraÑAM diseño original Juan Bolaños*) (T-443/05, EU:T:2007:219, paragraph 37).

67. It should also be noted that, although the case-law might seem to require that the assessment of the similarity of the goods or services concerned be carried out on the basis of strictly commercial criteria, such an assessment forms part of the larger context of the evaluation of whether there is a likelihood of confusion within the meaning stated above. It follows that, in addition to the application of a certain number of predetermined factors, account must be taken, in each case, of the possibility that the consumer might, in actual fact, attribute the goods or services in question to a common commercial origin.

68. The possibility therefore remains that, in some circumstances, a mere proximity between the goods or services in question may suffice to convince the target public, if the goods bear an identical or similar sign, that they have been produced under the control of a single undertaking or interconnected undertakings.

69. On the basis of the preceding observation in particular, I do not rule out the possibility that, when an opposition under Article 8(1)(b) of Regulation No 207/2009 is founded on a collective mark (whether under Article 66(1) or (2) of that regulation), the assessment of the similarity between the goods or services concerned — although it must be conducted on the basis of the same criteria that are applied in the case of a conflict between two individual marks — can take account of the specific nature of these marks, in so far as such a factor is capable of influencing the consumer's perception of the relationship between those goods or those services.

70. The fact remains that, even in such a case, the assessment of that relationship seeks, lastly, to ascertain whether there is a likelihood of confusion between the signs at issue under Article 8(1)(b) of Regulation No 207/2009 and whether, as seen above, that likelihood concerns the commercial origin of the goods or services in question.

71. It is clear that the criterion of the possible geographical origin of the services covered by the marks applied for cannot provide indications as to the likelihood of the relevant public being led to believe that those services come from one of the members of the association that is the proprietor of the earlier collective marks, at least in the circumstances of this case, in which the term 'darjeeling' is not used in the marks applied for as a geographical indication.

72. The second part of the first ground of appeal must therefore also be rejected as unfounded.

(d) Conclusions on the first ground of appeal

73. On the basis of all the above considerations, The Tea Board has not, in my view, established that the judgments under appeal are, as regards the aspects examined, vitiated by errors of law. As to the objections alleging distortion of the facts, it suffices to note that they have not been substantiated in any way.

74. The first ground of appeal must therefore be rejected in its entirety.

2. Second ground of appeal, alleging infringement of Article 8(5) of Regulation No 207/2009

75. According to The Tea Board, the General Court made an error of law and distorted the facts in concluding, in the judgments under appeal, that the positive qualities brought to mind by the word element 'darjeeling' could not be transferred to a part of the services in Class 35, nor to any of the services in Class 38, covered by the marks applied for and that, therefore, the use of those marks would not have conferred a commercial advantage on Delta Lingerie with regard to those services. The General Court also failed to give reasons for that conclusion.

76. In that regard, it suffices to note that The Tea Board does not give any explanation of the error of law which allegedly vitiates that conclusion; nor does it substantiate its claim alleging a distortion of the facts. Those two arguments must therefore be rejected.

77. As for the alleged failure to give reasons, I would observe that, in each of the judgments under appeal, the General Court pointed out that no reason could be gleaned from the case file as to why the marks applied for would have conferred a commercial advantage on Delta Lingerie with regard to the services in Class 35 other than the retailing of women's underwear and to the services in Class 38 and that The Tea Board had submitted no specific evidence capable of proving the existence of such an advantage. Referring to the absence of evidence capable of showing the transfer of positive qualities associated with the word element 'darjeeling' to the services in question, the General Court gave sufficient reasons for its conclusion that the existence of such a transfer could not be established in the present case.

78. The second ground of appeal must therefore be rejected.

3. Conclusions on the appeal

79. Given that the two grounds put forward in support of the appeal must, for the reasons set out above, be rejected as partly inadmissible and partly unfounded, the appeal cannot, in my view, be upheld. I therefore suggest that the Court should dismiss it in its entirety.

B. The cross-appeals

80. Delta Lingerie submits two grounds of appeal in support of each of its cross-appeals. The first alleges that the General Court erred in law by distorting the respective functions of trade marks on the one hand and protected geographical indications on the other. The second ground of appeal alleges inconsistency in the General Court's reasoning and an error of law in the application of Article 8(5) of Regulation No 207/2009.

1. The first ground of appeal in the cross-appeals, alleging distortion of the respective functions of trade marks and protected geographical indications

81. According to Delta Lingerie, by relying on a hypothetical premiss that the reputation of the earlier marks had been established and by founding that premiss on the — erroneous — conclusion that the reputation enjoyed by the name 'Darjeeling' as a protected geographical indication for tea could be transferred to that protected sign as a collective mark for identical goods, the General Court made an error of law by distorting the respective functions of those two types of signs.

82. This ground of appeal is, to my mind, based on a misreading of the judgments under appeal.

83. It should be borne in mind that, in paragraph 79 of the judgments under appeal, the General Court pointed out that, as far as the question whether the earlier marks have a reputation within the meaning of Article 8(5) of Regulation No 207/2009 is concerned, the wording of the decisions at issue is 'ambiguous to say the least' and that 'the only unambiguous sentence' in the part of those decisions dealing with the analysis of that question shows that the Board of Appeal had not definitively concluded that the earlier marks had a reputation. Noting that the Board of Appeal had nonetheless continued its analysis pursuant to Article 8(5) of Regulation No 207/2009, the General Court held, in paragraph 80 of the judgments under appeal, that the Board's analysis must necessarily have been based on the hypothesis that such a reputation had been established.

84. First, contrary to what Delta Lingerie contends, the General Court did not itself formulate that hypothesis, but merely noted that the Board of Appeal had done so. Secondly, that hypothesis related to proof of the reputation of the earlier marks and not, as Delta Lingerie appears to maintain, to the elements on the basis of which such proof could have been adduced.

85. In proceeding in that way, not only did the General Court not itself adopt a position on the question of whether proof of reputation of the earlier marks had been adduced, but nor did it explicitly or implicitly rule on the question of whether, for the purposes of establishing such proof, the reputation enjoyed by the name 'Darjeeling' as a protected geographical indication for tea could be transferred to the same sign protected as a collective mark for identical goods.

86. It cannot be maintained, to counter that conclusion, that the hypothetical premiss according to which the reputation of the earlier marks had been established could have been formulated only by taking into account such a transfer of reputation. First, it is not at all clear from the decisions at issue, particularly in view of their ambiguous wording, that the fact that the possibility of such a transfer was not taken into account was the only aspect of the analysis of the Opposition Division relating to the assessment of the reputation of the earlier marks that was criticised by the Board of Appeal. Secondly, the Board of Appeal did not clearly — much less definitively — adopt a position on that possibility or on the subsequent question of whether, even accepting that a reputation had been transferred, that would have sufficed, in the circumstances of the case, to establish the reputation of the earlier marks for the purposes of Article 8(5) of Regulation No 207/2009, or, at the least, that of one of them.

87. On the other hand, the conclusion that the General Court did not rule on whether the reputation of a protected geographical indication can be transferred to a collective mark as referred to in Article 66(2) of Regulation No 207/2009, for the purposes of applying Article 8(5) of that regulation, is confirmed by paragraph 147 of the judgments under appeal. In that paragraph, the General Court, having concluded that, in each case, the decisions at issue should be annulled in part, stated that it was, in the first place, for the Board of Appeal to reach a definitive conclusion regarding whether the earlier marks have a reputation and, if so, how strong that reputation is.

88. It follows from the above that the first ground of appeal in each of the cross-appeals must be rejected inasmuch as it is based on a misreading of the judgments under appeal and relates to a question of law on which the General Court did not rule.

2. The second ground of appeal in the cross-appeals, alleging inconsistency in the General Court's reasoning and an error of law in the application of Article 8(5) of Regulation No 207/2009

89. In its second ground of appeal, Delta Lingerie argues, first, that the General Court contradicted itself and disregarded its obligation to give reasons when, in paragraph 141 of the judgments under appeal, it held that there was nothing to prevent the public at whom the marks applied for are directed from being attracted by the transfer to the marks applied for of the values and positive qualities connected with the Darjeeling region, whereas, in paragraphs 107, 111 and 120 of those judgments, it held that there was no connection between the goods and services covered by the marks applied for and that region and that there was a complete lack of similarity between those goods and services and the product covered by the earlier marks.

90. That argument cannot, in my view, prosper. Paragraphs 107, 111 and 120 of the judgments under appeal to which Delta Lingerie refers are dedicated to the analysis of whether there is a serious risk of detriment to the distinctive character of the earlier marks, whereas paragraph 141 of those judgments is concerned with the examination of whether there is a risk that use without due cause of the marks applied for would allow unfair advantage to be taken of the distinctive character or reputation of the earlier marks. The assessment of whether those two risks exist requires different factors to be taken into account. Thus, when detriment to the distinctive character of the earlier mark is considered, it is

the economic behaviour of the average consumer of the goods or services in respect of which that mark is registered that must be taken into account, whereas when an assessment of a risk of 'free-riding' is to be carried out, the analysis is conducted from the standpoint of the average consumer of the goods or services covered by the mark applied for.

91. The General Court did therefore not contradict itself when it held, on the one hand, that the consumer of the product covered by the earlier collective marks would not be led to believe that the goods and services covered by the trade mark applications filed by Delta Lingerie come from the Darjeeling region and, on the other hand, that the consumer of those goods and services would be attracted by the values and positive qualities associated with that region.

92. This conclusion is not called into question by the fact, pointed out by Delta Lingerie, that consumers of the product covered by the earlier collective marks and consumers of the goods and services covered by the marks applied for overlap to a certain extent. The perception and behaviour of those consumers were analysed by the General Court from different perspectives (ability to attribute and recognise the geographical origin of the goods or services in question, on the one hand, and the propensity to be attracted by the evocative power of a geographical indication, on the other), and on the occasion of different purchases.

93. Secondly, Delta Lingerie argues that the General Court erred in law when, in applying Article 8(5) of Regulation No 207/2009, it held in the judgments under appeal that there was a risk of an advantage resulting from the use without due cause of the marks applied for, as referred to in that provision, even after finding that no specific analysis had been conducted by the Board of Appeal concerning whether there existed, on the part of the public, an association between the signs at issue.

94. In that regard, it suffices to note that it was only after finding that the Board of Appeal's analysis was based on the hypothetical premiss that there was such an association that the General Court continued its examination of the legality of the decisions at issue from the perspective of Article 8(5) of Regulation No 207/2009, before concluding, at the end of that examination, that that provision had been infringed. In so doing, the General Court, contrary to Delta Lingerie's criticism, made no error as to the conditions of application of Article 8(5) of Regulation No 207/2009.

3. Conclusions on the cross-appeals

95. Given that the examination of the grounds of appeal raised in support of the cross-appeals has not shown that the judgments under appeal are vitiated by any of the flaws invoked by Delta Lingerie, the cross-appeals should, in my view, be dismissed in their entirety.

VI. Conclusion

96. On the basis of all the foregoing considerations, I suggest that the Court should dismiss the appeals and the cross-appeals and that it should order The Tea Board to pay the costs of the appeals and order Delta Lingerie to pay the costs of the cross-appeals.