Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 1 March 2016[1]

Case C-43/15 P

BSH Bosch und Siemens Hausgeräte GmbH
v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

(Appeal — Community trade mark — Opposition proceedings — Partial refusal to register — Procedural rules concerning the bringing of an appeal seeking revision of a decision of the Opposition Division — Principal appeal brought by the applicant under Articles 58 to 64 of Regulation (EC) No 207/2009 — Cross-appeal brought by the opponent in its response under Article 8(3) of Regulation (EC) No 216/96 — Admissibility of the cross-appeal — Scope of Article 8(3) of Regulation No 216/96 — No procedural guarantees — Infringement of the right to be heard and of the adversarial principle — Infringement of the principle of *res judicata* — Role of the judicature — Plea involving a matter of public policy which must be raised by the EU judicature of its own motion)

I – Introduction

1. The present appeal relates to opposition proceedings brought by LG Electronics Inc.[2] in connection with the application for registration of the Community trade mark 'compressor technology', which had been filed at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) by BSH Bosch und Siemens Hausgeräte GmbH.[3] The appeal seeks to have set aside the judgment of the General Court of the European Union of 4 December 2014 in *BSH* v *OHIM — LG Electronics (compressor technology)*.[4]

2. The appeal is made up of two limbs.

3. First, it should enable the Court to define once again the sets of circumstances in which the EU judicature, in order to fulfil its task as arbiter of legality, is required to raise a plea in law of its own motion.

4. Secondly, it should enable the Court to rule on the architecture and exercise of the legal remedies pursued before OHIM with a view to the revision of Opposition Division decisions. In particular, the Court will have to define the scope and detailed rules for the application of Article 8(3) of Commission Regulation (EC) No 216/96 of 5 February 1996 laying down the rules of procedure of the Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs).[5]

1 — Original language: French.

2 — 'LG' or 'the opponent'.

3 — 'BSH' or 'the applicant'.

4 — T-595/13, EU:T:2014:1023, 'the judgment under appeal'.

5 — OJ 1996 L 28, p. 11. Regulation as amended by Commission Regulation (EC) No 2082/2004 of 6 December 2004 (OJ 2004 L 360, p. 8, 'Regulation No 216/96').

5. That provision provides as follows:

‘In inter partes proceedings, the defendant may, in his or her response, seek a decision annulling or altering the decision at issue on a point not raised in the appeal. Such submissions shall cease to have effect should the appellant discontinue the proceedings.’

6. In the present case, whereas BSH had brought an appeal, under Articles 58 to 64 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark,[6] seeking to have the Opposition Division’s decision revised in relation to a very limited list of goods, LG brought a cross-appeal, formulated in its response under Article 8(3) of Regulation No 216/96, seeking to have that decision revised in relation to a much longer list of goods.

7. By decision of 5 September 2013,[7] the First Board of Appeal of the Office for Harmonisation in the Internal Market (‘the Board of Appeal’) dismissed the appeal brought by BSH and partially upheld LG’s claim.

8. It is the legality of that decision which is at issue in the present case.

9. Whereas the action for annulment brought before the General Court related solely to the substantive assessment of the likelihood of confusion between the signs at issue for the purposes of registration of the trade mark ‘compressor technology’, the appeal brought before the Court of Justice raises two questions of pure process, the first concerning the role of the EU judicature and the second the existence and lawfulness of a legal remedy.

10. As regards the role of the EU judicature, I shall propose that the Court set aside the judgment under appeal not on the basis of the grounds of appeal relied on by BSH before the Court but because the General Court failed to raise of its own motion two pleas involving a matter of public policy, to the effect, first, that the Board of Appeal was not competent to revise the Opposition Division’s decision in respect of goods other than those referred to by the applicant in the principal appeal and, secondly, that the applicant’s right to be heard was infringed in those proceedings.

11. In so far as those two grounds of appeal have been the subject of an exchange of arguments before the Court of Justice, I shall suggest that that court raise them of its own motion and itself give final judgment in the matter.

12. It is in that context that the Court will have to determine, in particular, whether, in the light both of the rules laid down in Articles 58 to 64 of Regulation No 207/2009 and the procedural guarantees established in the Charter of Fundamental Rights of the European Union (‘the Charter’), Article 8(3) of Regulation No 216/96 is indeed intended to create a legal remedy parallel to that provided for in Regulation No 207/2009.

13. It will thus fall to the Court to put an end to the current legal uncertainty arising from the lack of uniformity in the approaches taken by the various OHIM Boards of Appeal and the different chambers of the General Court when it comes to interpreting such a provision.

6 — OJ 2009 L 78, p. 1.

7 — Case R 1176/2012-1. Decision as amended by the corrigendum of 3 December 2013, ‘the decision at issue’.

14. In this Opinion, I shall explain the reasons why Article 8(3) of Regulation No 216/96 manifestly cannot be intended to make available a legal remedy independent of that provided for in Article 58 et seq. of Regulation No 207/2009. I shall therefore submit that, in allowing and upholding an appeal that was manifestly inadmissible, the Board of Appeal was not entitled to revise the Opposition Division's decision with respect to goods other than those forming the subject matter of the principal appeal and exceeded the limits of its competence.

15. In the alternative, I shall also explain that the Board of Appeal infringed BSH's rights of defence in not allowing it to lodge its observations following the cross-appeal brought by LG.

16. I shall therefore suggest that the Court annul the decision at issue and order OHIM to bear the costs of the proceedings at both instances.

II – EU legal framework

A – *Regulation No 207/2009*

17. Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark [8] was repealed and replaced by Regulation No 207/2009, which entered into force on 13 April 2009. Nonetheless, in view of the date on which the application for registration at issue was filed, in this case 24 November 2008, which is decisive for the purposes of identifying the applicable substantive law, the present dispute is governed, first, by the procedural provisions of Regulation No 207/2009 and, secondly, by the substantive provisions of Regulation No 40/94.

18. Article 8 of Regulation No 40/94, entitled 'Relative grounds for refusal', the wording of which was reproduced without any amendment by Regulation No 207/2009, provided, in paragraph 1 thereof:

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

…

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

19. Article 59 of Regulation No 207/2009, entitled 'Persons entitled to appeal and to be parties to appeal proceedings', forms part of Title VII of that regulation, entitled, 'Appeals'. Under that article:

'Any party to proceedings adversely affected by a decision may appeal …'

20. Article 60 of that regulation, entitled 'Time limit and form of appeal', which also forms part of Title VII, provides:

'Notice of appeal must be filed in writing at [OHIM] within two months after the date of notification of the decision appealed from. The notice shall be deemed to have been filed only when the fee for appeal has been paid …'

8 — OJ 1994 L 11, p. 1.

21. Article 63 of that regulation, entitled ‘Examination of appeals’, provides, in paragraph 2 thereof:

‘In the examination of the appeal, the Board of Appeal shall invite the parties, as often as necessary, to file observations, within a period to be fixed by the Board of Appeal, on communications from the other parties or issued by itself.’

22. Article 64 of Regulation No 207/2009, entitled ‘Decisions in respect of appeals’, provides, in paragraph 1 thereof:

‘Following the examination as to the allowability of the appeal, the Board of Appeal shall decide on the appeal. The Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department …’

23. Furthermore, the second sentence of Article 75 of that regulation states that OHIM decisions ‘shall be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments’.

24. Lastly, Article 76 of that regulation, entitled ‘Examination of the facts by the Office of its own motion’, provides, in paragraph 1 thereof:

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

B – *Regulation (EC) No 2868/95*

25. In accordance with its fifth and sixth recitals, Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94[9] establishes the rules necessary for implementing the provisions of Regulation No 207/2009 in such a way as to ensure the smooth and efficient operating of trade mark proceedings before OHIM.

26. As regards the procedural rules, that regulation thus supplements, in Title X thereof, the rules relating to the bringing and examination of an appeal.

27. Rule 49 of Regulation No 2868/95, entitled ‘Rejection of the appeal as inadmissible’, thus states as follows:‘1. If the appeal does not comply with Articles [58 to 60 of Regulation No 207/2009] and Rule 48(1)(c) and (2) [relating to the content of the notice of appeal], the Board of Appeal shall reject it as inadmissible …

…

3. If the fee for appeal has been paid after expiry of the period for the filing of appeal pursuant to Article [60 of Regulation No 207/2009], the appeal shall be deemed not to have been filed …’

C – *Regulation No 216/96*

28. Article 8 of Regulation No 216/96, entitled ‘Procedure’, provides as follows:

‘…

9 — OJ 1995 L 303, p. 1.

2. In inter partes proceedings, and without prejudice to Article [63(2) of Regulation No 207/2009], the statement setting out the grounds of appeal and the response to it may be supplemented by a reply from the appellant, lodged within two months of the notification of the response, and a rejoinder by the defendant, lodged within two months of notification of the reply.

3. In inter partes proceedings, the defendant may, in his or her response, seek a decision annulling or altering the decision at issue on a point not raised in the appeal. Such submissions shall cease to have effect should the appellant discontinue the proceedings.'

III – Background to the case

29. By decision of 3 May 2012, the Opposition Division partially rejected the application for registration of the Community trade mark 'compressor technology' which had been filed by BSH. It held that there was a likelihood of confusion with the earlier trade mark 'KOMPRESSOR', owned by LG, in the case of some of the goods applied for in classes 7, 9 and 11 of the Nice Agreement,[10] in particular electric household cleaning equipment, including vacuum cleaners and wet and dry vacuuming apparatus.[11]

30. In the case of the other goods applied for in classes 7, 9 and 11, the Opposition Division rejected the opposition filed by LG on the ground that there was no likelihood of confusion.

31. That decision was notified to the parties on 3 May 2012.

32. On 26 June 2012, BSH made an application for the annulment of that decision by completing the appeal form provided for that purpose, and filed a statement setting out the grounds of its appeal on 3 September 2012. BSH sought to have the Opposition Division's decision revised in so far as it concerned the assessment of the likelihood of confusion in the case of electric household cleaning equipment, including vacuum cleaners and wet and dry vacuuming apparatus, in class 7, the remaining goods being unaffected.

33. Consequently, on 31 October 2012, by a single document entitled 'Observations in reply', LG, first, submitted its response to the arguments set out by BSH in support of its appeal and, secondly, sought to have the Opposition Division's decision revised in such a way as to reject more extensively the application for registration of the trade mark 'compressor technology'. In particular, LG submitted that, contrary to the decision given by the Opposition Division, there was a likelihood of confusion with the following goods:

— Class 7: electrical waste disposers, namely waste grinders and waste compacting machines;

— Class 9: bathroom scales; electrical foil sealing devices; remote operating, signalling and control apparatus (electric/electronic) for household or kitchen machines and utensils; recorded and unrecorded machine-readable data carriers for household equipment; electric vending machines for beverages or foods, automatic vending machines; parts included in class 9 for all the aforementioned goods.

Parts included in class 9 for electric apparatus and instruments included in class 9, namely electric irons; kitchen scales;

10 — 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.

11 — See the full list of the goods concerned in paragraph 3 of the judgment under appeal.

— Class 11: infrared lamps (other than for medical use); heating pads (not for medical purposes), electric blankets (not for medical purposes); mechanical taps (dispensers) for dispensing chilled beverages for use in combination with apparatus for chilling beverages.

34. By its letter of 8 November 2012, entitled 'Communication of observations', OHIM sent BSH the 'observations' lodged by LG and informed it that the written procedure had been closed, that therefore the attached observations were sent for information purposes only, that the file would be sent to the Board of Appeal in due course and that the latter would then decide on the case.

35. In paragraph 13 of the decision at issue, the Board of Appeal held that the appeal brought by BSH was admissible because it had been brought in accordance with Articles 58 to 60 of Regulation No 207/2009 and Rule 48 of Regulation No 2868/95.

36. In paragraph 14 of the decision at issue, the Board of Appeal, examining the scope of the appeal, pointed out that, in its response to BSH's statement setting out the grounds of its appeal, LG had filed an 'ancillary' appeal, under Article 8(3) of Regulation No 216/96, by which it sought to have the Opposition Division's decision revised in relation to the abovementioned goods in classes 7, 9 and 11.

37. Following its examination, the Board of Appeal dismissed BSH's appeal and partially upheld LG's cross-appeal.

38. Consequently, BSH brought an action for annulment before the General Court, raising a single plea in law alleging that the Board of Appeal had infringed Article 8(1)(b) of Regulation No 207/2009, relating to the assessment of the likelihood of confusion between the conflicting signs.

39. The General Court dismissed that action.

IV – Forms of order sought by the parties before the Court of Justice

40. By its appeal, BSH asks the Court of Justice to set aside the judgment under appeal and annul the decision at issue and, in the alternative, to refer the case back to the General Court and order OHIM to bear the costs of the proceedings at both instances.

41. OHIM contends that the appeal should be dismissed and BSH ordered to pay the costs.

V – The appeal

42. In support of its appeal, BSH relies on two grounds of appeal.

43. The first ground of appeal is raised for the first time before the Court of Justice. It alleges that OHIM infringed Article 60 of Regulation No 207/2009, which lays down the procedural rules applicable to the filing of an appeal before the OHIM Boards of Appeal. BSH submits that the cross-appeal filed by LG was inadmissible in so far as it did not comply with any of the conditions relating to time limit and form laid down in that article.

44. The second ground of appeal alleges infringement of Article 8(1)(b) of Regulation No 40/94 in the assessment of the likelihood of confusion between the signs 'compressor technology' and 'KOMPRESSOR'.

45. I do not think there is any need, at this stage, to assess whether the decision at issue is vitiated by the defects set out by BSH in its appeal. It seems clear to me from the outset that the judgment under appeal must be set aside on the ground that the General Court failed to point out of its own motion that the decision at issue was adopted by an authority not competent to do so, in breach of the applicant's rights of defence.

46. I take the view that the cross-appeal brought by the opponent was manifestly inadmissible and that, consequently, the Board of Appeal was not competent to revise the Opposition Division's decision concerning the goods referred to in that appeal.

47. Furthermore, I note that the Board of Appeal altered the Opposition Division's decision, thus upholding the opponent's claims, without having first provided BSH with an opportunity to make its point of view effectively known, thus infringing its rights of defence.

48. Lack of competence and infringement of essential procedural requirements are matters of public policy which the EU judicature may or must raise of its own motion where the parties fail to do so.

49. It is apparent from the rules governing the procedure before the EU judicature, in particular Article 21 of the Statute of the Court of Justice of the European Union and Article 177 of the Rules of Procedure of the General Court, that a dispute is determined and circumscribed by the parties. It follows that the EU judicature may not, in principle, grant relief beyond that sought by the parties and must also rule on the parties' claims within the legal and factual framework set out by them.

50. Nonetheless, the role of the EU judicature is not passive. In proceedings relating to Community trade marks, its judicial review function is not confined to a mere repetition of a review previously carried out by the Board of Appeal of OHIM.[12] Nor is its role confined to assessing the merits of the positions taken by each of the parties to the dispute in strict adherence to the pleas in law and arguments put forward by the parties. The EU judicature does not merely act as a referee between the parties. It must also enforce EU law, in particular the fundamental guarantees established in the Charter.

51. The rules relating to the procedure before each EU Court, as well as the case-law, have thus identified several sets of circumstances in which the EU judicature, in order to fulfil its task as arbiter of legality, has jurisdiction to raise a plea in law of its own motion.

52. Thus, according to its Rules of Procedure, the General Court may raise of its own motion its manifest lack of jurisdiction to hear and determine an action or the manifest inadmissibility of an action or, if appropriate, the fact that the action manifestly lacks any foundation in law.[13] It may thus raise of its own motion an absolute bar to proceeding with a case,[14] that is to say infringements of a condition essential to the admissibility of an action, such as the existence of a challengeable act,[15] *locus standi*[16] or compliance with procedural time limits.[17]

12 — Judgment in *OHIM* v *Kaul* (C-29/05 P, EU:C:2007:162, paragraph 55).

13 — See Article 126 of the Rules of Procedure of the General Court.

14 — See Article 129 of the Rules of Procedure of the General Court.

15 — Order in *ISAE* v *VP* and *Interdata* v *Commission* (C-130/91, EU:C:1992:7, paragraph 11).

16 — Judgments in *Italy* v *Commission* (C-298/00 P, EU:C:2004:240, paragraph 35) and *Regione Siciliana* v *Commission* (C-417/04 P, EU:C:2006:282, paragraph 36).

17 — Judgments in *Politi* v *ETF* (C-154/99 P, EU:C:2000:354, paragraph 15 and the case-law cited) and *Evropaïki Dynamiki* v *Commission* (C-469/11 P, EU:C:2012:705, paragraph 50 and the case-law cited).

53. Furthermore, the Court of Justice has drawn a distinction between pleas relating to the substantive legality of the contested measure, which are concerned with the infringement of a rule of law relating to the application of the FEU Treaty and can be examined by the EU judicature only if they are raised by the parties, on the one hand, and pleas challenging the formal legality of the contested measure, which are concerned with a breach of essential procedural requirements, involve a matter of public policy and must be raised by the EU judicature of its own motion, on the other. [18] In the latter situation, the irregularities attaching to the form of the measure or the procedure followed adversely affect the rights of third parties or persons concerned by that measure or may have an impact on the content of that measure. [19] Such irregularities include, for example, the fact that the measure has not been properly authenticated [20] or has not been notified. [21]

54. Thus, the Court has confirmed that a lack of competence on the part of the author of the contested measure [22] and an absence of or inadequate statement of reasons for that measure [23] constitute pleas involving a matter of public policy which may, and even must, be raised by the EU judicature of its own motion, even though none of the parties has asked it to do so.

55. The EU judicature, when dealing with an action for annulment, cannot therefore be criticised for going outside the scope of the dispute, exceeding its jurisdiction, ruling *ultra petita* or infringing its Rules of Procedure where it raises of its own motion such a plea, which relates to the lawfulness of the very measure whose annulment is sought. [24]

56. In the various situations referred to in the case-law, the defect which vitiates the contested measure is sufficiently serious to justify censure by the EU judicature, even though that defect has not been raised by the applicant. In other words, where the contested measure infringes the principle of *res judicata* or arises from the infringement of an essential procedural requirement or fundamental right, it makes little difference whether that measure is also vitiated by the defects referred to by the applicant in support of his claim for annulment. Defence of the EU legal order and protection of fundamental rights allow and, where appropriate, require the Court, as arbiter of legality, to find that that measure is vitiated by a defect which, in any event, calls for its annulment.

57. It is clear that that power cannot be made conditional upon a connection between it and the pleas and arguments put forward by the parties. After all, compliance with such a condition would run counter to the very purpose of the judicature's power to raise pleas of its own motion, which is specifically intended to make up for any omission by the parties where a rule of public policy has been infringed.

58. In the present case, it is clear from the documents submitted to the General Court that the cross-appeal brought by LG on the basis of Article 8(3) of Regulation No 216/96 did not meet any of the conditions relating to time limit and form to which that cross-appeal must be subject in order to be admissible.

59. It is also clear from the decision at issue that, although the Board of Appeal expressly ruled, in paragraph 13, on the admissibility of the principal appeal brought by BSH, it did not at any point examine the admissibility of the cross-appeal brought by LG, even though the decision at issue is based on matters relied on by LG.

18 — Judgments in *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 67 and the case-law cited) and *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraph 40).

19 — This definition has been taken from Rideau J., 'Recours en annulation', *Jurisclasseur Europe*, 2008, fascicule 331, paragraph 22.

20 — Judgment in *Commission* v *Solvay* (C-287/95 P and C-288/95 P, EU:C:2000:189, paragraph 55).

21 — Judgment in *Hoechst* v *Commission* (C-227/92 P, EU:C:1999:360, paragraph 72).

22 — Judgment in *Salzgitter* v *Commission* (C-210/98 P, EU:C:2000:397, paragraph 56 and the case-law cited) and order in *Planet* v *Commission* (T-320/09, EU:T:2011:172, paragraph 41 and the case-law cited).

23 — Judgment in *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraph 34 and the case-law cited).

24 — Judgment in *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraph 35).

60. How can an appeal be upheld if its admissibility has not been assessed first?

61. There is no getting away from the fact that the exercise is a difficult one given the extensive confusion that exists with respect to the scope of Article 8(3) of Regulation No 216/96 and the procedural rules governing the bringing of such an appeal.

62. Nonetheless, whatever the circumstances, by failing to rule on the admissibility of the appeal brought by LG, the Board of Appeal infringed Rule 49(1) of Regulation No 2868/95, which, we should recall, provides that, '[i]f the appeal does not comply with Articles [58 to 60 of Regulation No 207/2009] and Rule 48(1)(c) and (2) [relating to the content of the notice of appeal], the Board of Appeal shall reject it as inadmissible'.

63. Furthermore, by ruling on that appeal, the Board of Appeal also failed to observe the limits of its competence, since an appeal exists only if it is brought lawfully.

64. Prior to the assessment of the pleas in annulment raised by the parties, the General Court was therefore required to examine of its own motion whether the Board of Appeal was competent to adopt the decision at issue.

65. Moreover, it is clear from the information in the documents before the Court that the decision at issue was adopted without BSH having first been given an opportunity to submit its observations on the cross-appeal brought by LG, a fact which undoubtedly vitiated the statement of reasons for that decision. That breach was all the more flagrant given that the matters raised by LG in its cross-appeal were manifestly decisive for the outcome of the proceedings, the Board of Appeal having revised the Opposition Division's decision to BSH's detriment.

66. On the basis of the case-law to which I have just referred, the Court of Justice has repeatedly held that a basic principle of law is infringed where a judicial decision is founded on facts and documents which the parties, or one of them, have not had an opportunity to examine and on which they have therefore been unable to comment.

67. The General Court was therefore required, in the absence of any examination as to the competence of the Board of Appeal, to carry out of its own motion a review of the lawfulness of the decision at issue in the light of the fundamental principle of the right to be heard and the adversarial principle, on the one hand, and of Article 63(2) and the second sentence of Article 75 of Regulation No 207/2009, on the other.

68. Consequently, I shall propose that the Court set aside the judgment under appeal on those grounds.

VI – The consequences of setting aside the judgment under appeal

69. Where a judgment is set aside on appeal, Article 61 of the Statute of the Court of Justice of the European Union provides that the Court may either refer the case back to the General Court for judgment or itself give final judgment in the matter, where the state of the proceedings so permits.

70. I am of the opinion that the state of the proceedings permits judgment to be given on the two grounds of appeal which I am proposing that the Court raise of its own motion.

71. As regards, first, the question whether the Board of Appeal was competent to revise the Opposition Division's decision with respect to the goods forming the subject matter of LG's cross-appeal, this relates to the admissibility of that appeal and was debated by BSH and OHIM in their written pleadings and at the hearing before the Court.

72. As regards, secondly, the question whether the decision at issue is vitiated by an infringement of BSH's rights of defence, in so far as the latter was not heard, this too was the subject of an exchange of arguments between the parties before the Court.

73. I therefore propose that the Court raise of its own motion the ground of appeal to the effect that the Board of Appeal was not competent to adopt the decision at issue.

74. In the context of this Opinion, I shall therefore examine in the alternative the ground of appeal to the effect that the applicant's right to be heard and the adversarial principle were infringed in the proceedings leading to the adoption of that decision.

A – *The Board of Appeal's lack of competence to adopt the decision at issue*

1. Arguments of the parties

75. BSH submits that there was no admissible appeal, and that this alone could have justified extending the rejection of the application for registration of the trade mark beyond the Opposition Division's decision. It takes the view that LG neither brought an appeal within the time limit laid down in Article 60 of Regulation No 207/2009 nor paid the fee laid down for that purpose.

76. OHIM argues, first of all, that BSH's argument that LG did not make any express claim in its response of 31 October 2012 has no basis in fact, since such a claim was made clearly and unambiguously. Furthermore, there is no need to make express use of the word 'claim' or to rely explicitly on Article 8(3) of Regulation No 216/96. It is sufficient for the response as a whole to make clearly apparent the intention of the party concerned to challenge the Opposition Division's decision and the extent of that intention.

77. OHIM maintains, next, that it follows from the wording of Article 8(3) of Regulation No 216/96 that, in the context of proceedings before the OHIM Board of Appeal, the defendant may, in its submissions, exercise its right to challenge the decision that is contested. Thus, simply by virtue of its status as a defendant, it is allowed to challenge the validity of the Opposition Division's decision. Nor does that provision limit that right to the pleas in law already raised in the appeal: it provides, in fact, that the submissions are to relate to a point not raised in the appeal. Moreover, that provision does not make any reference to the fact that the defendant could itself have brought an appeal against the decision at issue. Both remedies are available for challenging the decision upholding an opposition and refusing an application for registration of a Community trade mark, as was confirmed, moreover, in the judgment in *Intesa Sanpaolo* v *OHIM — MIP Metro (COMIT)*.[25]

78. OHIM submits, lastly, that that conclusion does not call into question the procedural rules laid down in Regulation No 207/2009, in particular the rule that any party to proceedings adversely affected by a decision at first instance may appeal. In so far as the defendant chooses to bring a 'cross-appeal' under Article 8(3) of Regulation No 216/96, the continuation of the cross-appeal is inseparably linked to the continuation of the appellant's appeal, unlike in the case of an appeal brought under the provisions of Regulation No 207/2009. The defendant therefore carries the risk that its 'cross-appeal' will share the fate of the appellant's appeal and that, if the appellant's appeal is withdrawn, its cross-appeal will thus lapse 'incidentally', so to speak.

25 — T-84/08, EU:T:2011:144, paragraph 23.

2. My assessment

79. It is accepted by all of the parties to the dispute, first, that the cross-appeal brought by the opponent sought to have the Opposition Division's decision revised in relation to goods that did not form part of the subject matter of the principal appeal brought by the applicant, secondly, that the latter appeal was brought nearly six months after the applicant had been notified of the Opposition Division's decision,[26] thirdly, that no appeal fee had been paid either, and, fourthly, that the Board of Appeal partially allowed LG's claim on cross-appeal, thus finding against BSH without having first obtained its observations.

80. Such a procedure is not only contrary to the procedural rules laid down in Regulation No 207/2009 and its implementing regulations, but also seriously infringes the applicant's rights and procedural guarantees as established in the Charter.

81. That procedure is actually the result of extensive confusion as to the scope of Article 8(3) of Regulation No 216/96.

82. On that point, at least, I share the view expressed by the European Commission at the hearing when it contended that that provision exhibits a degree of 'legal woolliness' and may even 'be described as "somewhat rudimentary"'. This explains not only the defects vitiating the lawfulness of the decision at issue, but also, and more broadly, the inconsistencies that we find in OHIM's decision-making practice.[27]

83. Furthermore, for the purposes of the recast of Regulation No 207/2009 effected by Regulation (EU) 2015/2424,[28] which will enter into force on 23 March 2016, the Commission placed the provisions of Article 8(3) of Regulation No 216/96 in Article 60 of Regulation No 207/2009 noting, in recital 28 of Regulation 2015/2424, that 'the experience gained in the application of the current system of EU trade marks has revealed the potential for improvement of certain aspects of procedure' and that 'consequently, certain measures should be taken … to reinforce legal certainty and predictability'.

84. I have to concede that those inconsistencies are also the product of the conflicting case-law of the various chambers of the General Court.

85. After all, in its judgment in *Intesa Sanpaolo* v *OHIM — MIP Metro (COMIT)*,[29] on which OHIM relies, the Fourth Chamber of the General Court held that Article 8(3) of Regulation No 216/96 establishes a remedy which is parallel to that set out in Article 60 of Regulation No 207/2009. That conclusion is based on a particularly brief analysis the wording of which I shall reproduce here:[30]

'… Article 8(3) of Regulation No 216/96 [does not] limit the right [of the defendant to challenge the validity of the Opposition Division's decision] to the pleas in law already raised in the appeal: it provides, in fact, that the submissions are to relate to a point not raised in the appeal. Moreover, that provision does not make any reference to the fact that the defendant could itself have brought an appeal against the decision at issue. Both remedies are available for challenging the decision upholding an opposition and refusing an application for registration of a Community trade mark.'

26 — The Opposition Division's decision was notified, it should be recalled, on 3 May 2012.

27 — Decision of the Fourth Board of Appeal of OHIM of 9 August 2012, Zoo Sport, paragraph 10 ('cross-appeal').

28 — Regulation of the European Parliament and of the Council of 16 December 2015 amending Regulation No 207/2009 and Regulation No 2868/95, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OJ 2015 L 341, p. 21).

29 — T-84/08, EU:T:2011:144.

30 — Paragraph 23.

86. That analysis was confirmed by the General Court in its judgment in *Meica* v *OHIM – Salumificio Fratelli Beretta (STICK MiniMINI Beretta)*.[31] Although the General Court conducted a more detailed assessment of Article 8(3) of Regulation No 216/96 and a rigorous assessment of the relationship between that provision and the legal remedy referred to in Article 60 of Regulation No 207/2009, I am nevertheless not convinced that Article 8(3) of Regulation No 216/96 may provide, given its current wording, for a parallel legal remedy.

87. In my opinion, several factors militate against that view, namely the wording of Article 8(3) of Regulation No 216/96, the scheme of legislation of which it forms part and the absence of sufficient procedural rules and guarantees for ensuring effective judicial protection for the parties.

88. First of all, the scope and detailed rules for the application of Article 8(3) of Regulation No 216/96 must be determined by reference to the provisions governing the bringing of an appeal before the OHIM Boards of Appeal under Regulations Nos 207/2009 and 2868/95.

89. Title VII of Regulation No 207/2009, entitled 'Appeals', defines the basic principles applicable to appeals brought, inter alia, against Opposition Division decisions. Article 60 of that regulation establishes the conditions relating to time limit and form to which the bringing of such appeals is subject. Notice of appeal must thus be filed in writing within two months after the date of notification of the decision appealed from and the notice is deemed to have been filed only when the fee for appeal has been paid. Those principles are reiterated in the form which appellants may use for the purposes of bringing their appeal.[32]

90. In accordance with the fifth recital of Regulation No 2868/95, that regulation lays down the rules necessary for implementing the provisions of Regulation No 207/2009. As regards procedural rules, Title X thereof supplements the rules relating to the bringing and examination of an appeal.

91. Thus, as regards the conditions relating to time limit and form referred to in Article 60 of Regulation No 207/2009, the EU legislature states, in Rule 49 of Regulation No 2868/95, that non-compliance will render the appeal inadmissible. As regards the appeal fee, the legislature further states that this must be paid prior to the expiry of the time limit for bringing an appeal referred to in the aforementioned Article 60, failing which the appeal will be deemed not to have been brought.

92. That is the scheme of legislation of which Regulation No 216/96 forms part. In accordance with the sixth recital thereof, that regulation seeks to 'supplement' the rules implementing Regulation No 207/2009 already adopted in Regulation No 2868/95, in particular as regards the organisation of the Boards of Appeal and the oral procedure. Its objective is therefore not to replace the rules laid down in Regulations Nos 207/2009 and 2868/95, or even to create a *lex specialis* for appeals brought before the OHIM Boards of Appeal. That would make no sense, since Article 60 of Regulation No 207/2009, we should recall, establishes the procedural rules applicable to such appeals.

93. Article 8 of Regulation No 216/96, entitled 'Procedure', thus lays down, in paragraphs 2 and 3 thereof, the rules applicable to the exchange of written pleadings before the Board of Appeal, be it the statement setting out the grounds of appeal, the response or the reply and rejoinder.

31 — T-247/14, EU:T:2016:64. In the case having given rise to that judgment, the applicant, as the respondent, had sought a decision altering the decision of the Opposition Division in its response submitted on the basis of Article 8(3) of Regulation No 216/96. Contrary to what the Board of Appeal has held in the present case, it declared those submissions inadmissible on the ground that they widened the scope of the appeal and did not satisfy the conditions laid down in Article 60 of Regulation No 207/2009.

32 — This form is available on the OHIM website.

94. Article 8(2) of Regulation No 216/96 thus provides that, '[i]n inter partes proceedings …, the statement setting out the grounds of appeal and the response to it may be supplemented by a reply from the appellant, lodged within two months of the notification of the response, and a rejoinder by the defendant, lodged within two months of notification of the reply'.

95. The EU legislature goes on to state, in Article 8(3) of that regulation — the scope of which must be examined here —, that '[t]he defendant may, in his or her response, seek a decision annulling or altering the decision at issue on a point not raised in the appeal. Such submissions shall cease to have effect should the appellant discontinue the proceedings'.

96. The General Court interpreted that provision as laying down, as previously mentioned, a parallel legal remedy, co-existing with the remedy laid down in Article 60 of Regulation No 207/2009 and allowing the respondent to challenge Opposition Division of OHIM decisions by raising, in its response, new pleas in law in a main appeal brought by the appellant.

97. In its judgment in *Meica* v *OHIM – Salumificio Fratelli Beretta (STICK MiniMINI Beretta)*,[33] the General Court seems implicitly to regard the operation of Article 8(3) of Regulation No 216/96 as a cross-appeal. The General Court clearly contrasts that provision with the 'separate proceeding' provided for in Article 60 of Regulation No 207/2009, which is 'the only legal remedy by which it is certain that the appellant's objections may be asserted'.[34]

98. For two main reasons, such a cross-appeal, as any type of proceedings, cannot have been established by Article 8(3) of Regulation No 216/96.

99. First, I doubt whether a Commission implementing regulation, the principal objective of which is, in accordance with the sixth recital of the regulation, to organise the Boards of Appeal and the oral procedure, provides the appropriate legal framework to establish a new legal remedy, until then not provided for in the successive Community regulations on trade marks.

100. Second, and decisively, the EU legislature has not set out the procedural rules and guarantees for the bringing of the action that it supposedly introduced, despite the fact that such rules and guarantees are systematically specified for every existing legal remedy of EU law, including cross-appeals.[35]

101. Emphasis must be placed on the lack of any reference in Regulation No 216/96 — which incidentally also applies to the General Court's analysis in the judgment in *Meica* v *OHIM – Salumificio Fratelli Beretta (STICK MiniMINI Beretta)*[36] — to the rules necessarily required for bringing an action, and, in particular, those concerning the form in which the action must be brought, the time limits in which it must be brought and the conditions under which the parties may respond to it.

102. Although Article 8(2) of Regulation No 216/96 lays down the time limit by which the appellant can submit a reply following the response submitted by the respondent, the fact remains that the time limit in which such a reply must actually be lodged, which might include a cross-appeal, is not mentioned. Furthermore, although that provision evokes the rules applicable to the exchange of

33 — T-247/14, EU:T:2016:64.

34 — Paragraphs 22 and 24.

35 — See, inter alia, the relevant provisions of the Rules of Procedure of the Court in Title V with regard to Chapter 3 entitled 'Form and content of the cross-appeal, and form of order sought' and of Chapter 4 entitled 'Pleadings consequent on the cross-appeal' (Articles 176 to 180).

36 — T-247/14, EU:T:2016:64.

written pleadings in the main appeal brought by the appellant, the possibility of responding to new factors contained in a potential cross-appeal is not mentioned. The wording of Article 8 of that regulation does not ensure, to my mind, the clarity and legal certainty nonetheless required for the purposes of such a remedy,[37] let alone effective judicial protection for the parties.

103. If we wish to secure due administration of justice and respect for the procedural rights of each of the parties, ensure that the administrative decisions and decisions of the courts become final and so protect public interests,[38] it is essential that those rules be apparent from the wording of the provision at issue, either by their express specification or by reference to other procedural rules.

104. The parties must thus be given an opportunity to acquaint themselves with the rules relating to the form in which, and time limits within which, an appeal must be brought in order to ensure that the appeal is admissible, and the parties must, also, be able to exchange their written pleadings in order to present their defence.

105. In the present case, it is common ground that the Board of Appeal granted LG an unrestricted right to amend the scope of the proceedings, by means of its response, without allowing BSH to submit a response. It is also common ground that, by being the only party to pay the fee for appeal set out in Article 60 of Regulation No 207/2009, BSH ultimately financed a *reformatio in peius*, since the Board of Appeal upheld LG's claims.

106. In the light of those factors, it may legitimately be asked whether the EU legislature intended Article 8(3) of Regulation No 216/96 to constitute a new legal remedy parallel to the appeal procedure provided for in Article 58 et seq. of Regulation No 207/2009.

107. Its ambition was more modest.

108. In its current state, the procedural rule set out in Article 8(3) of Regulation No 216/96 merely enables the defendant to present new points of fact and law concerning the goods and services forming the subject matter of the principal appeal, that is to say falling within the limits of the principal appeal brought by the appellant under Article 60 of Regulation No 207/2009.

109. Where the principal appeal concerns only some of the goods or services covered by the Community trade mark application for registration, as it does here, that appeal entitles the OHIM Board of Appeal to carry out a new examination of the substance of the opposition, but only so far as concerns those goods or services.[39]

110. Where the defendant brings a cross-appeal in circumstances such as those at issue in the present case, the subject matter of which goes far beyond the limits set in the principal appeal, it manifestly misapplies the procedural rules.

111. After all, such an appeal must necessarily be brought within the time limit and in the form laid down in Article 60 of Regulation No 207/2009.

112. It should be recalled that, under that article, the defendant has two months after the date of notification of the Opposition Division's decision to bring its appeal, and must also pay an appeal fee.

37 — See, to that effect, judgments in *Moussis* v *Commission* (227/83, EU:C:1984:276, paragraph 12) and *Barcella and Others* v *Commission* (191/84, EU:C:1986:197, paragraph 12).

38 — Judgment in *Evropaïki Dynamiki* v *Commission* (C-469/11 P, EU:C:2012:705, paragraph 50 and the case-law cited).

39 — Judgment in *Völkl* v *OHIM — Marker Völkl (VÖLKL)* (T-504/09, EU:T:2011:739, paragraph 54).

113. The two-month time limit is a matter of public policy. It serves to ensure that the Opposition Division's decisions become final if uncontested, thus ensuring legal certainty and, in addition, protecting public interests. [40]

114. Once the time limit referred to in Article 60 of Regulation No 207/2009 has expired, the scope of the appeal can no longer be extended beyond that defined in the context of the principal appeal. Consequently, the Board of Appeal may no longer carry out a new examination of the substance of the opposition in relation to the goods forming the subject matter of the defendant's appeal, as the Opposition Division's decision has acquired the force of *res judicata* in that regard.

115. In the present case, LG lodged its response, by which, moreover, it sought to have the Opposition Division's decision revised in relation to the goods in classes 7, 9 and 11, on 31 October 2012, even though it had been notified of the Opposition Division's decision on 3 May 2012. Furthermore, LG did not pay any appeal fee.

116. In accordance with Rule 49(1) of Regulation No 2868/95, the Board of Appeal should have dismissed that appeal as inadmissible in so far as it did not meet any of the conditions required by Article 60 of Regulation No 207/2009.

117. The Board of Appeal was seised only of BSH's appeal against the decision of the Opposition Division, inasmuch as the latter had upheld the opposition and rejected its application for registration of a Community trade mark in relation to electric household cleaning equipment, including vacuum cleaners and wet and dry vacuuming apparatus, in class 7.

118. By allowing the appeal brought by LG and upholding the latter's claims, the Board of Appeal therefore infringed the abovementioned provisions.

119. The decision at issue must therefore be annulled on that ground.

120. I shall examine in the alternative the ground of appeal alleging infringement of the right to be heard and the adversarial principle.

B – *Infringement of the right to be heard and the adversarial principle*

121. In the present case, it is not disputed that the response sent by LG was much more than a set of pleas in defence in so far as it significantly extended the subject matter of the dispute. That is why the Board of Appeal interpreted the submissions contained in LG's response as a 'cross-appeal' under Article 8(3) of Regulation No 216/96.

122. By the decision at issue, the Board of Appeal partially upheld that cross-appeal, without for that matter having first obtained BSH's observations.

123. At the hearing before the Court of Justice, OHIM confirmed the existence of a procedural error vitiating the lawfulness of the decision at issue, in so far as the written procedure was closed after the cross-appeal had been brought by LG but before BSH had been heard.

124. The facts of the present case clearly demonstrate that the Board of Appeal did not draw all the necessary conclusions from the bringing of an appeal which it itself classified as a 'cross-appeal'. It omitted to provide the applicant with the procedural guarantees attaching to the bringing of such an action, thus infringing the applicant's rights of defence and failing to enable it, at that stage of the proceedings, to respond to the new arguments put forward by the opponent.

40 — See the case-law cited in footnote 37.

125. In so doing, the Board of Appeal infringed Article 63(2) and the second sentence of Article 75 of Regulation No 207/2009.

126. In accordance with Article 63(2) of that regulation, the OHIM Board of Appeal is required, in the examination of the appeal, to invite the parties, as often as necessary, to file observations, within a period to be fixed by the Board of Appeal, on communications from the other parties or issued by itself.

127. Furthermore, under the second sentence of Article 75 of that regulation, the Board of Appeal of OHIM may base its decisions only on reasons or evidence on which the parties concerned have had an opportunity to present their comments.

128. It is clear from settled case-law that those provisions seek to satisfy, in the context of Community trade mark law, the requirements associated with the right to fair legal process under Article 41 of the Charter, in particular those laid down in connection with respect for the rights of defence under Article 41(2)(a) of the Charter. [41]

129. Those provisions establish, in particular, the right to be heard and the requirement of compliance with the adversarial principle, which are fundamental principles of EU law. [42]

130. Those principles must be observed in any proceedings which may result in a decision by the public authorities that perceptibly affects a person's interests, [43] even if there are no specific rules.

131. The right to be heard means that that person must be given an opportunity to make his point of view effectively known, and extends to all the matters of fact or law that constitute the basis of the decision-making act. [44]

132. The adversarial principle, for its part, implies that each party has a right to a process of inspecting and commenting on the evidence and observations submitted to the court by the other party. [45] It thus precludes an authority from basing its decision on facts and documents which one of the parties has not had an opportunity to examine and on which it has therefore been unable to comment.

133. Observance of those principles entails the prior discussion of any matter on which an authority or court dealing with a case is going to base its decision. OHIM may therefore base its decisions only on matters of fact or law on which the parties have had an opportunity to submit their observations. The resolution of a dispute is necessarily founded on an assessment by the authority or the court which can only be enhanced and endorsed or, as the case may be, called into question by the observations of the parties. This enables the authority or the court to give judgment on an entirely impartial basis and with full knowledge of all matters of fact and law. For the unsuccessful party, the fact of not having been given an opportunity to put forward his observations may legitimately give him the impression, because he has been unable to defend himself, that the court was in an alliance with the other party. It also enables the authority or the court to adopt a proper statement of reasons for the decision, as is clear from Article 75 of Regulation No 207/2009.

41 — Judgments in *Moonich Produktkonzepte & Realisierung* v *OHIM — Thermofilm Australia (HEATSTRIP)* (T-184/12, EU:T:2014:621, paragraphs 35 to 37 and the case-law cited) and *DTL Corporación* v *OHIM — Vallejo Rosell (Generia)* (T-176/13, EU:T:2014:1028, paragraphs 28 and 29 and the case-law cited). See also the judgment in *Krombach* (C-7/98, EU:C:2000:164, paragraphs 25 and 26).

42 — Judgment in *Bertelsmann and Sony Corporation of America* v *Impala* (C-413/06 P, EU:C:2008:392, paragraph 61).

43 — See to that effect the judgment in *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraph 50 and the case-law cited).

44 — Order in *DTL Corporación* v *OHIM* (C-62/15 P, EU:C:2015:568, paragraph 45 and the case-law cited).

45 — Judgment in *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, point 52 and the case-law cited).

134. Compliance with those rules is particularly important in the context of proceedings relating to Community trade marks, given that, as the Court has held, an appeal brought before the OHIM Board of Appeal has the effect of requiring it to carry out a fresh full examination of the substance of the opposition, both in law and in fact. [46]

135. In accordance with settled case-law, OHIM is under a duty to exercise its powers in accordance with the general principles of EU law. [47]

136. Furthermore, the Guidelines for Examination in OHIM, Part A, Section 2 ('General Principles to be Respected in Proceedings'), Point 2 ('The Right to Be Heard'), state that, '[i]n accordance with the general principle of the right of defence, a person whose interests are affected by a decision taken by a public authority must be given the opportunity to express their point of view. Therefore, in all proceedings before [OHIM], the parties will always have the opportunity to state their positions and to put forward their grounds of defence'. It is also stated that 'decisions will only be based on reasons or evidence on which the parties have had an opportunity to present their comments'.

137. The guidelines relating to proceedings before OHIM, on the other hand, are a set of consolidated rules setting out the line of conduct which OHIM itself proposes to adopt, which means that, provided that those rules comply with the legal provisions of higher authority, they constitute a 'self-imposed restriction' on OHIM, in that OHIM must comply with the rules which it has itself laid down.

138. In the light of all of the foregoing, I consider that the Board of Appeal infringed BSH's right to be heard and the adversarial principle by revising the Opposition Division's decision on the basis of matters which had not been debated, thus adversely affecting BSH's interests.

139. I therefore conclude that there was an infringement of Article 63(2) and the second sentence of Article 75 of Regulation No 207/2009.

140. That infringement of procedural rules is particularly regrettable given that the matters raised by LG were manifestly decisive for the outcome of the proceedings, the Board of Appeal having partially upheld LG's claim, inasmuch as it revised the Opposition Division's decision in such a way as to reject more extensively the application for registration of the trade mark 'compressor technology' which had been filed by BSH.

141. At the hearing before the Court of Justice, OHIM stressed that that procedural error had now been 'repaired', in so far as BSH had had two years in which to allege infringement of its rights during the written and oral stages of the proceedings before the General Court.

142. First, that reasoning is premissed on a strange understanding of the concept of reparation.

143. The rights of defence must be observed in any procedure which may result in a decision by the public authorities, be they administrative or judicial, perceptibly affecting a person's interests, [48] a fact which is expressly acknowledged by OHIM in its guidelines. OHIM cannot therefore reasonably absolve itself by formulating the view that the right to be heard has been honoured before the judicial authorities.

46 — Order in *DTL Corporación* v *OHIM* (C-62/15 P, EU:C:2015:568, paragraph 35 and the case-law cited). It follows from Article 64(1) of Regulation No 207/2009 that, following the examination as to the allowability of the appeal, the OHIM Board of Appeal is to decide on the appeal, and that, in so doing, it may, inter alia, 'exercise any power within the competence of the department which was responsible for the decision appealed', which is to say that it may itself give a ruling on the opposition by rejecting it or declaring it to be well founded, thereby confirming or quashing the decision taken at first instance before OHIM (judgment in *DTL Corporación* v *OHIM — Vallejo Rosell (Generia)*, T-176/13, EU:T:2014:1028, paragraph 30).

47 — Judgment in *Agencja Wydawnicza Technopol* v *OHIM* (C-51/10 P, EU:C:2011:139, paragraph 73).

48 — Judgment in *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraph 50 and the case-law cited).

144. Such reparation would have required the Board of Appeal to open the new material to discussion by the parties, if need be by reopening the proceedings.

145. Secondly, that reasoning is again premissed on confusion between the procedural guarantees which must be made available when a party brings a cross-appeal and those that are to be found in the context of a mere exchange of written pleadings.

146. After all, where the defendant brings an appeal or a cross-appeal, the procedural rules automatically provide for a new exchange of written pleadings. However, where it merely submits a response, it is indeed for the appellant to make a reasoned request for leave to lodge a reply.

147. In the present case, the Board of Appeal should therefore have explicitly invited BSH to submit observations on the cross-appeal brought by LG, in accordance with Article 63(2) of Regulation No 207/2009.

148. In the light of all of the foregoing, the decision at issue must also be annulled on the ground that it infringes BSH's right to be heard and the adversarial principle, as established in Article 63(2) and the second sentence of Article 75 of Regulation No 207/2009.

VII – Costs

149. Under Article 137 of the Rules of Procedure of the Court of Justice, applicable to appeal proceedings pursuant to Article 184(1) of those rules, a decision as to costs is to be given in the judgment or order which closes the proceedings.

150. In the present case, it should be noted that, although the judgment under appeal is to be set aside, I propose that the Court uphold BSH's appeal to the Board of Appeal and annul the decision at issue. I therefore propose that OHIM be ordered to bear the costs incurred by BSH both at first instance and on appeal, in accordance with the form of order sought by BSH.

VIII – Conclusion

151. In the light of the foregoing considerations, I propose that the Court:

(1) set aside the judgment of the General Court of the European Union of 4 December 2014 in *BSH* v *OHIM — LG Electronics (COMPRESSOR TECHNOLOGY)* (T-595/13, EU:T:2014:1023);

(2) annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 5 September 2013 (Case R 1176/2012-1), as amended by the corrigendum of 3 December 2013;

(3) order OHIM to pay the costs of the proceedings both at first instance and on appeal.