Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber, Extended Composition)

21 April 2021 *

(EU trade mark – Invalidity proceedings – EU word mark MONOPOLY – Absolute ground for refusal – Bad faith – Article 52(1)(b) of Regulation (EC) No 207/2009 (now Article 59(1)(b) of Regulation (EU) 2017/1001))

In Case T-663/19,

**Hasbro, Inc**., established in Pawtucket, Rhode Island (United States), represented by J. Moss, Barrister,

applicant,

v

**European Union Intellectual Property Office (EUIPO)**, represented by P. Sipos and V. Ruzek, acting as Agents,

defendant,

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

**Kreativni Događaji d.o.o**., established in Zagreb (Croatia), represented by R. Kunze, lawyer,

ACTION brought against the decision of the Second Board of Appeal of EUIPO of 22 July 2019 (Case R 1849/2017-2), relating to invalidity proceedings between Kreativni Događaji and Hasbro,

THE GENERAL COURT (Sixth Chamber, Extended Composition),

composed of A. Marcoulli, President, S. Frimodt Nielsen, J. Schwarcz (Rapporteur), C. Iliopoulos and R. Norkus, Judges,

Registrar: A. Juhász-Tóth, Administrator,

having regard to the application lodged at the Court Registry on 30 September 2019,

having regard to the response of EUIPO lodged at the Court Registry on 8 January 2020,

having regard to the response of the intervener lodged at the Court Registry on 7 January 2020,

further to the hearing on 9 October 2020,

gives the following

* Language of the case: English.

## Judgment

### Background to the dispute

1 On 30 April 2010, the applicant, Hasbro, Inc., filed an application for registration of an EU trade mark with the European Union Intellectual Property Office (EUIPO) pursuant to Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended (replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1)).

2 Registration as a mark was sought for the word sign MONOPOLY.

3 The goods and services in respect of which registration was sought are, following the restriction made in the course of the proceedings before EUIPO, in Classes 9, 16, 28 and 41 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond, for each of those classes, to the following description:

– Class 9: 'Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus; electronic amusement apparatus; electronic games; computer games; computer hardware; computer software; controls for use of the aforesaid goods; cards, disks, tapes, wires and circuits all carrying or for carrying data and/or computer software; arcade games; interactive entertainment software, namely, computer game software, computer game programs, computer game cartridges, computer game discs; interactive video games of virtual reality comprised of computer hardware and software; interactive multi-media game programs; downloadable software for use in connection with computers and computer games, portable gaming devices, console gaming devices, communication gaming devices and mobile telephones; electronic games, video games; video game software, video game programs, video game cartridges, video game discs, all for use in connection with computers, portable gaming devices, console gaming devices, communication devices and mobile telephones; video lottery terminals; computer and video game apparatus, namely video game machines for use with televisions; games apparatus adapted for use with television receivers; audio and/or video recordings; laser discs, video discs, phonograph records, compact discs, CD ROMs featuring games, films, entertainment and music; console gaming devices; communication devices and mobile telephones; pre-recorded films; pre-recorded television, radio and entertainment programmes and material; parts and fittings for all the aforesaid goods';

– Class 16: 'Paper and cardboard and goods made from these materials, not included in other classes; printed matter; book binding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); printers' type; printing blocks; parts and fittings for all the aforesaid goods';

– Class 28: 'Games and playthings; gymnastic and sporting articles not included in other classes; decorations for Christmas trees; gaming machines; slot machines; playing cards; parts and fittings for all the aforesaid goods';

– Class 41: ‘Education; providing of training; entertainment; entertainment in the form of films, television programmes and radio programmes; sporting and cultural activities’.

4 The trade mark application was published in *Community Trade Marks Bulletin* No 2010/146 of 9 August 2010.

5 The contested mark was registered on 25 March 2011, under the number 9071961.

6 Furthermore, the applicant was also the proprietor of three EU word marks MONOPOLY, the first of which was registered on 23 November 1998 under the number 238 352 (‘earlier mark No 238 352’), the second of which was registered on 21 January 2009 under the number 6 895 511 (‘earlier mark No 6 895 511’) and the third of which was registered on 2 August 2010 under the number 8 950 776 (‘earlier mark No 8 950 776’).

7 Earlier mark No 238 352 covers goods in Classes 9, 25 and 28 which correspond, for each of those classes, to the following description:

– Class 9: ‘Electronic amusement apparatus; electronic games; computer games; computer hardware; computer software; controls for use of the aforesaid goods; cards, disks, tapes, wires and circuits all carrying or for carrying data and/or computer software; arcade games; parts and fittings for all the aforesaid goods’;

– Class 25: ‘Clothing, footwear, headgear; parts and fittings for all the aforesaid goods’;

– Class 28: ‘Toys, games and playthings; gymnastic and sporting articles not included in other classes; decorations for Christmas trees; parts and fittings for all the aforesaid goods’.

8 Earlier mark No 6 895 511 covers ‘entertainment services’ in Class 41.

9 Earlier mark No 8 950 776 covers goods in Class 16 which correspond to the following description: ‘Paper and cardboard and goods made from these materials, not included in other classes; printed matter; book binding material; photographs; stationery; adhesives for stationery or household purposes; artists’ materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); printers’ type; printing blocks’.

10 On 25 August 2015, the intervener, Kreativni Događaji d.o.o., filed an application, pursuant to Article 52(1)(b) of Regulation No 207/2009 (now Article 59(1)(b) of Regulation 2017/1001), for a declaration that the contested mark was invalid in respect of all the goods and services covered by that mark. According to the intervener, the applicant acted in bad faith when it filed the application for registration of the contested mark on the ground that that application was a repeat filing of earlier marks Nos 238 352, 6 895 511 and 8 950 776 (taken together, ‘the earlier marks’) and was aimed at circumventing the obligation to prove genuine use of those marks.

11 On 22 June 2017, the Cancellation Division rejected the application for a declaration of invalidity. It found, inter alia, first, that protecting the same mark over a period of 14 years was not, per se, an indication of an intention to evade the obligation of proving genuine use of the earlier marks and, secondly, that the intervener’s allegations were not supported by evidence proving that there was bad faith on the part of the applicant when it filed the application for registration of the contested mark.

12 On 22 August 2017, the intervener filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009 (now Articles 66 to 71 of Regulation 2017/1001), against the decision of the Cancellation Division.

13 On 3 August 2018, the parties were informed that oral proceedings were to be held in order better to understand the particular circumstances underlying the applicant's strategy when it filed the contested mark.

14 On 12 November 2018, the applicant filed a witness statement from a person working for its company ('the witness statement'), together with exhibits.

15 The oral hearing took place on 19 November 2018 at EUIPO's premises.

16 On 21 January 2019, the intervener filed observations on the minutes and content of the oral proceedings, which included a request to disregard the witness statement. The applicant replied to those observations on 22 February 2019.

17 By decision of 22 July 2019 ('the contested decision'), the Second Board of Appeal of EUIPO partially annulled the decision of the Cancellation Division, declared the contested mark invalid for some of the goods and services covered, dismissed the appeal as to the remainder and ordered the parties to bear their own costs relating to the invalidity and appeal proceedings. In essence, the Board of Appeal found that the evidence gathered showed that, with regard to the goods and services covered by the contested mark which were identical to the goods and services covered by the earlier marks, the applicant had acted in bad faith when it filed the application for registration of the contested mark.

## Forms of order sought

18 The applicant claims that the Court should:

– annul the contested decision;

– order the intervener to pay the costs.

19 EUIPO contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

20 The intervener contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs, including the costs of the proceedings before the Board of Appeal that were incurred by the intervener.

## Law

### *The determination of the applicable substantive law*

21 Given the date on which the application for registration of the contested mark was filed, namely 30 April 2010, which is decisive for the purposes of identifying the applicable substantive law, the facts of the case are governed by the substantive provisions of Regulation No 207/2009 (see, to that effect, order of 5 October 2004, *Alcon* v *OHIM*, C-192/03 P, EU:C:2004:587, paragraphs 39 and 40, and judgment of 23 April 2020, *Gugler France* v *Gugler and EUIPO*, C-736/18 P, not published, EU:C:2020:308, paragraph 3 and the case-law cited). Consequently, in the present case, so far as

concerns the substantive rules, the references to Article 59(1)(b) of Regulation 2017/1001 made by the Board of Appeal in the contested decision and by the parties in their written pleadings must be understood as referring to Article 52(1)(b) of Regulation No 207/2009, the wording of which is identical.

***The subject matter of the dispute***

22 Although the applicant claims that the Court should annul the contested decision in its entirety, it must be pointed out that, in reply to a question put to it by the Court at the hearing, it admitted that the subject matter of the dispute had to be confined to the annulment of the contested decision to the extent that that decision declared the contested mark invalid in so far as it covers the goods and services in Classes 9, 16, 28 and 41 referred to in point 1 of the operative part of the contested decision, which were identical to the goods and services covered by the earlier marks.

***The issue of whether the action is admissible***

23 In paragraphs 17 to 19 of its response and at the hearing, the intervener submitted, in essence that, under Articles 172 and 177 of the Rules of Procedure of the General Court, the action was manifestly inadmissible, on the ground that the application did not mention EUIPO as being the party against which the action was brought and that the putting in order of the application by letter lodged at the Court Registry on 17 October 2019 was not capable of remedying that deficiency in sufficient time.

24 In that regard, and as is, moreover, stated by the intervener in paragraph 20 of its response, it must be pointed out that the Courts of the European Union are entitled to assess, depending on the circumstances of each case, whether the sound administration of justice justifies the dismissal of the action on the merits, without first ruling on its admissibility (see, to that effect, judgment of 26 February 2002, *Council* v *Boehringer*, C-23/00 P, EU:C:2002:118, paragraphs 51 and 52).

25 In the circumstances of the present case, the Court takes the view that, in the interests of the sound administration of justice, it is appropriate to consider at the outset the merits of the action, without first ruling on its admissibility, since the action is, in any event and for the reasons set out below, unfounded.

***Substance***

26 In support of its action, the applicant relies, in essence, on two pleas in law, alleging, first, infringement of Article 52(1)(b) of Regulation No 207/2009 and, secondly, infringement of the right to a fair hearing.

*The first plea, alleging infringement of Article 52(1)(b) of Regulation No 207/2009*

27 By the first plea, the applicant calls into question the Board of Appeal's assessment that it was acting in bad faith when it filed the application for registration of the contested mark.

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

29 It should be noted at the outset that Article 52(1)(b) of Regulation No 207/2009 provides that an EU trade mark must be declared invalid on application to EUIPO or on the basis of a counterclaim in infringement proceedings where the trade mark applicant was acting in bad faith when he or she filed the application for registration of that trade mark.

30 In that regard, it must be pointed out to begin with that, if a concept set out in Regulation No 207/2009 is not defined by that regulation, its meaning and scope must be determined by considering its usual meaning in everyday language, whilst also taking into account the context in which it occurs and the objectives pursued by that regulation (see judgment of 12 September 2019, *Koton Mağazacilik Tekstil Sanayi ve Ticaret* v *EUIPO*, C-104/18 P, EU:C:2019:724, paragraph 43 and the case-law cited).

31 That applies to the concept of 'bad faith' referred to in Article 52(1)(b) of Regulation No 207/2009, in the absence of any definition of that concept by the EU legislature.

32 While, in accordance with its usual meaning in everyday language, the concept of 'bad faith' presupposes the presence of a dishonest state of mind or intention, that concept must also be understood in the context of trade mark law, which is that of the course of trade. In that regard, Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), Regulation No 207/2009 and Regulation 2017/1001, which were adopted successively, have the same objective, namely the establishment and functioning of the internal market. The rules on the EU trade mark are aimed, in particular, at contributing to the system of undistorted competition in the European Union, in which each undertaking must, in order to attract and retain customers through the quality of its goods or services, be able to have registered as trade marks signs which enable the consumer, without any possibility of confusion, to distinguish those goods or services from others which have a different origin (see judgment of 12 September 2019, *Koton Mağazacilik Tekstil Sanayi ve Ticaret* v *EUIPO*, C-104/18 P, EU:C:2019:724, paragraph 45 and the case-law cited).

33 Consequently, the absolute ground for invalidity referred to in Article 52(1)(b) of Regulation No 207/2009 applies where it is apparent from relevant and consistent indicia that the proprietor of an EU trade mark has filed the application for registration of that mark not with the aim of engaging fairly in competition but with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties, or with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, in particular the essential function of indicating origin (judgment of 12 September 2019, *Koton Mağazacilik Tekstil Sanayi ve Ticaret* v *EUIPO*, C-104/18 P, EU:C:2019:724, paragraph 46).

34 Furthermore, it must be added that, in the judgment of 11 June 2009 *Chocoladefabriken Lindt & Sprüngli* (C-529/07, EU:C:2009:361), the Court of Justice provided some clarification regarding the way in which the concept of bad faith, as referred to in Article 52(1)(b) of Regulation No 207/2009, should be interpreted.

35 According to the Court of Justice, in order to determine whether the trade mark applicant is acting in bad faith, within the meaning of Article 52(1)(b) of Regulation No 207/2009, account must be taken of all the relevant factors specific to the particular case which obtained at the time of filing the application for registration of a sign as an EU trade mark, in particular: (i) the fact that the applicant knows or must know that a third party is using, in at least one Member State, an identical or similar sign for an identical or similar product or service capable of being confused with the sign for which registration is sought; (ii) the applicant's intention to prevent that third party from continuing to use such a sign; and (iii) the degree of legal protection enjoyed by the third party's sign and by the sign for which registration is sought (see, to that effect, judgment of 11 June 2009, *Chocoladefabriken Lindt & Sprüngli*, C-529/07, EU:C:2009:361, paragraph 53).

36 That said, it is apparent from the wording used by the Court of Justice in the judgment of 11 June 2009, *Chocoladefabriken Lindt & Sprüngli* (C-529/07, EU:C:2009:361, paragraph 53), that the factors listed in it are only examples drawn from a number of factors which can be taken into account in order to decide whether an applicant for registration was acting in bad faith at the time when the trade mark application was filed (see judgment of 26 February 2015, *Pangyrus* v *OHIM – RSVP Design (COLOURBLIND)*, T-257/11, not published, EU:T:2015:115, paragraph 67 and the case-law cited). In

that judgment, the Court of Justice confined itself to answering the questions of the national court which related, in essence, to the question of whether such factors were relevant (see, to that effect, judgment of 11 June 2009, *Chocoladefabriken Lindt & Sprüngli*, C-529/07, EU:C:2009:361, paragraphs 22 and 38). Consequently, the fact that any one of those factors is not present does not necessarily preclude, depending on the particular circumstances of the case, a finding that the trade mark applicant acted in bad faith (see, to that effect, judgment of 7 July 2016, *Copernicus-Trademarks* v *EUIPO – Maquet (LUCEO)*, T-82/14, EU:T:2016:396, paragraph 147).

37 In that regard, it should be noted that, in point 60 of her Opinion in *Chocoladefabriken Lindt & Sprüngli* (C-529/07, EU:C:2009:148), Advocate General Sharpston pointed out that the concept of bad faith, within the meaning of Article 52(1)(b) of Regulation No 207/2009, cannot be confined to a limited category of specific circumstances. The public interest objective of that provision, which is that of preventing trade mark registrations that are abusive or contrary to honest commercial and business practices, would be compromised if bad faith could be established only in the circumstances exhaustively listed in the judgment of 11 June 2009, *Chocoladefabriken Lindt & Sprüngli* (C-529/07, EU:C:2009:361) (see, to that effect and by analogy, judgment of 3 June 2010, *Internetportal und Marketing*, C-569/08, EU:C:2010:311, paragraph 37).

38 Accordingly, it is settled case-law that, in the context of the overall analysis undertaken pursuant to Article 52(1)(b) of Regulation No 207/2009, account may also be taken of the origin of the contested sign and its use since its creation, the commercial logic underlying the filing of the application for registration of that sign as an EU trade mark, and the chronology of events leading up to that filing (see judgment of 26 February 2015, *COLOURBLIND*, T-257/11, not published, EU:T:2015:115, paragraph 68 and the case-law cited).

39 Consideration must also be given to the trade mark applicant's intention at the time when he or she filed the application for registration (judgment of 11 June 2009, *Chocoladefabriken Lindt & Sprüngli*, C-529/07, EU:C:2009:361, paragraph 41).

40 In that regard, it has been pointed out that the trade mark applicant's intention at the relevant time is a subjective factor which must be determined by reference to the objective circumstances of the particular case (judgment of 11 June 2009, *Chocoladefabriken Lindt & Sprüngli*, C-529/07, EU:C:2009:361, paragraph 42).

41 The concept of bad faith thus relates to a subjective motivation on the part of the trade mark applicant, namely a dishonest intention or other sinister motive. It involves conduct which departs from accepted principles of ethical behaviour or honest commercial and business practices (judgment of 7 July 2016, *LUCEO*, T-82/14, EU:T:2016:396, paragraph 28).

42 It is for the applicant for a declaration of invalidity who intends to rely on Article 52(1)(b) of Regulation No 207/2009 to prove the circumstances which make it possible to conclude that an application for registration of an EU trade mark was filed in bad faith, the good faith of the trade mark applicant being presumed until proven otherwise (see, to that effect, judgment of 8 March 2017, *Biernacka-Hoba* v *EUIPO – Formata Bogusław Hoba (Formata)*, T-23/16, not published, EU:T:2017:149, paragraph 45 and the case-law cited).

43 Where EUIPO finds that the objective circumstances of the particular case which were relied on by the applicant for a declaration of invalidity may lead to the rebuttal of the presumption of good faith which the proprietor of the mark at issue enjoys when he or she files the application for registration of that mark, it is for the proprietor of that mark to provide plausible explanations regarding the objectives and commercial logic pursued by the application for registration of that mark.

44 The proprietor of the trade mark at issue is best placed to provide EUIPO with information regarding his or her intentions at the time of applying for registration of that mark and to provide it with evidence capable of convincing it that, in spite of the existence of objective circumstances, those intentions were legitimate (see, to that effect, judgment of 5 May 2017, *PayPal* v *EUIPO – Hub Culture (VENMO)*, T-132/16, not published, EU:T:2017:316, paragraphs 51 to 59, and, to that effect and by analogy, judgment of 9 November 2016, *Birkenstock Sales* v *EUIPO (Representation of a pattern of wavy, crisscrossing lines)*, T-579/14, EU:T:2016:650, paragraph 136).

45 It is in the light of the foregoing considerations that the various complaints which the applicant has put forward in the context of the first plea, which consists, in essence, of six parts, must be examined.

*– The first part of the first plea, alleging that the rules relating to the assessment of whether there is bad faith were incorrectly applied*

46 In the context of the first part of the first plea, first, the applicant complains that the Board of Appeal did not carry out an overall assessment of all the relevant factors in the case. It submits that the Board of Appeal improperly focused on one aspect, namely the administrative advantage of not having to prove genuine use of the re-filed mark, and ignored the many other good reasons that it had put forward in order to justify its trade mark filing strategy.

47 Secondly, the applicant complains that the Board of Appeal found, in paragraph 66 of the contested decision, that any re-filing of a trade mark automatically amounted to a filing made in bad faith. It submits that that is at variance with the principles set out in the judgment of 13 December 2012, *pelicantravel.com* v *OHIM – Pelikan (Pelikan)* (T-136/11, not published, EU:T:2012:689), and in the Opinion of Advocate General Sharpston in *Chocoladefabriken Lindt & Sprüngli* (C-529/07, EU:C:2009:148). Thirdly, it argues that the Board of Appeal's statement in paragraph 79 of the contested decision that it '[had] also admitted that the advantage of [its] strategy was that it would not have to prove genuine use of the [contested] mark in opposition proceedings' is incorrect. It submits that the evidence showed that one of the advantages of its trade mark filing practice might be administrative efficiency, but that that was not the main reason or even a substantial reason.

48 EUIPO and the intervener dispute the merits of that part.

49 In order to examine the merits of the arguments put forward in the context of the first part of the first plea, in the first place, it is necessary to refer to the principles which govern EU trade mark law and to the rule relating to proof of use of those marks. In that regard, first, it must be pointed out, as the Board of Appeal observed in paragraph 29 of the contested decision, that it is apparent, in essence, from recital 2 of Regulation No 207/2009 (now recital 3 of Regulation 2017/1001) that Regulation No 207/2009 aims to ensure undistorted competition. Furthermore, it has been held that trade mark rights constitute an essential element in the system of undistorted competition which the treaty seeks to establish and maintain and that the rights and powers that EU trade marks confer on their proprietors must be considered in the light of that objective (see, to that effect, judgment of 6 May 2003, *Libertel*, C-104/01, EU:C:2003:244, paragraph 48 and the case-law cited).

50 Secondly, as the Board of Appeal stated, in essence, in paragraphs 31 and 32 of the contested decision, although it is clear from Article 9(1) of Regulation No 207/2009 (now Article 9(1) of Regulation 2017/1001) that the registration of an EU trade mark confers on the proprietor exclusive rights therein, it follows from recital 10 of Regulation No 207/2009 (now recital 24 of Regulation 2017/1001) that there is no justification for protecting EU trade marks or, as against them, any trade mark which has been registered before them, except where the trade marks are actually used. An EU trade mark which is not used could obstruct competition by limiting the range of signs which can be registered as trade marks by others and by denying competitors the opportunity to use that trade mark or a similar one when putting onto the internal market goods or services which are identical or similar to

those covered by the mark in question. Consequently, non-use of an EU trade mark also risks restricting the free movement of goods and services (see, to that effect, judgment of 19 December 2012, *Leno Merken*, C-149/11, EU:C:2012:816, paragraph 32).

51 Thirdly, as regards genuine use of an EU trade mark, it must be borne in mind that Article 15(1) of Regulation No 207/2009 (now Article 18(1) of Regulation 2017/1001) provides that 'if, within a period of five years following registration, the proprietor has not put the EU trade mark to genuine use in the Union in connection with the goods or services in respect of which it is registered, or if such use has been suspended during an uninterrupted period of five years, the EU trade mark shall be subject to the sanctions provided for in this Regulation, unless there are proper reasons for non-use'.

52 Furthermore, Article 51(1)(a) of Regulation No 207/2009 (now Article 58(1)(a) of Regulation 2017/1001) provides that 'the rights of the proprietor of the EU trade mark shall be declared to be revoked on application to [EUIPO] or on the basis of a counterclaim in infringement proceedings[,] if, within a continuous period of five years, the trade mark has not been put to genuine use in the Union in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use'.

53 In that regard, Article 51(2) of Regulation No 207/2009 (now Article 58(2) of Regulation 2017/1001) provides that, 'where the grounds for revocation of rights exist in respect of only some of the goods or services for which the EU trade mark is registered, the rights of the proprietor shall be declared to be revoked in respect of those goods or services only'.

54 The *ratio legis* for the requirement that a mark must have been put to genuine use in order to be protected under EU law is that the entry of an EU trade mark in EUIPO's register cannot be regarded as a strategic and static filing granting an inactive proprietor a legal monopoly for an unlimited period. On the contrary, that register must faithfully reflect what companies actually use on the market to distinguish their goods and services in economic life (see, to that effect, judgment of 15 July 2015, *Deutsche Rockwool Mineralwoll* v *OHIM – Recticel (λ)*, T-215/13, not published, EU:T:2015:518, paragraph 20 and the case-law cited).

55 As the Board of Appeal pointed out in paragraph 35 of the contested decision, it therefore follows from the principles governing EU trade mark law and from the rule relating to proof of use set out in paragraphs 49 to 53 above that, although an exclusive right is conferred on the proprietor of a mark, that exclusive right can be protected only if, on expiry of the five-year grace period, that proprietor is able to prove genuine use of its mark. Such a system balances out the legitimate interests of the trade mark proprietor, on the one hand, and those of its competitors, on the other hand.

56 In the second place, it must be borne in mind that it is apparent from the case-law referred to in paragraph 36 above that the absence of a factor which the Court of Justice or the General Court has held to be relevant for the purposes of establishing that there was bad faith on the part of a trade mark applicant in the specific context of a case brought before them or of a question referred for a preliminary ruling does not necessarily preclude a finding that another trade mark applicant acted in bad faith in different circumstances. As has been pointed out in paragraph 37 above, the concept of bad faith, within the meaning of Article 52(1)(b) of Regulation No 207/2009, cannot be confined to a limited category of specific circumstances.

57 In the third place, although repeat filings of a mark are not prohibited, the fact remains that such a filing which is carried out in order to avoid the consequences entailed by non-use of earlier marks may constitute a relevant factor which is capable of establishing bad faith on the part of the person who filed that mark (see, to that effect, judgment of 13 December 2012, *Pelikan*, T-136/11, not published, EU:T:2012:689, paragraph 27).

58 Lastly, in the fourth place, it is necessary to point out the factors which led the Board of Appeal to find that the repeat filing of the earlier marks was indicative of bad faith on the part of the applicant.

59 First, in paragraph 71 of the contested decision, the Board of Appeal noted that the applicant had relied on the contested mark and on the earlier marks in the context of two sets of opposition proceedings. It stated, in that regard, that the decisions by which the applicant had been successful in those proceedings were based on the contested mark, as, for that mark, it was not necessary to provide proof of genuine use.

60 Secondly, in paragraph 72 of the contested decision, the Board of Appeal stated that, as regards the possible reasons which justified the application for a new registration of the same mark, the applicant had, before the adjudicating bodies of EUIPO, mentioned the reduction of the administrative burden. The Board of Appeal added, in essence, that, according to the testimony given at the oral hearing on 19 November 2018 by a person working for its company, the applicant re-filed for a number of reasons which might make its management of those marks easier in terms of administration, but that those filings were not identical repeat filings, since they were broader and there were good commercial reasons for them. Furthermore, the Board of Appeal found, in paragraph 73 of the contested decision, that, since the earlier marks had not been surrendered, it was difficult, on account of the additional work and increased investment entailed by the amassing of identical marks, to establish that there was an interest in such filings which was connected with the reduction of the administrative burden.

61 Thirdly, in paragraph 75 of the contested decision, the Board of Appeal stated, in essence, that it was apparent from the testimony given at the oral hearing on 19 November 2018, first of all, that being able to rely on the registration of one mark without the need to prove use was a benefit to the applicant and that it was something that was considered by all brand owners, next, that it was not the sole motivator in any of the successive filings carried out by the applicant and, lastly, that, if a company owned multiple marks of different ages, it was sensible for it to oppose a mark filed later on the basis of a recent mark that was not subject to proof of use in order to reduce the costs of providing evidence and attending hearings, that is to say, that it was more administratively efficient not to have to provide that proof.

62 Fourthly, the Board of Appeal pointed out, in paragraph 77 of the contested decision, that, according to the witness statement, it was an accepted industry practice at the relevant time for companies to file applications for registration of trade marks that were already the subject of existing EU registrations and to include in those new applications goods or services that were covered by the earlier marks.

63 Fifthly, in the light of the considerations referred to in paragraphs 71 to 78 of the contested decision, the Board of Appeal found, in paragraph 79 of that decision, that the applicant had knowingly re-filed an application for registration of the mark MONOPOLY so that it also covered goods and services which were already covered by the earlier marks. Furthermore, it stated that the applicant had admitted that the advantage of that strategy was that it would not have to prove genuine use of the contested mark in opposition proceedings, which was one of the factors which the applicant considered when it filed a mark, and added that it saw no other commercial logic as regards the reason for such a filing strategy.

64 Sixthly, the Board of Appeal took the view, in paragraph 80 of the contested decision, that the fact that the applicant had argued that that was normal industry practice clearly implied that using such a strategy was intentional.

65 Taking into account all of those circumstances, first, the Board of Appeal concluded, in paragraph 81 of the contested decision, that the applicant's intention was indeed to take advantage of the rules of EU trade mark law by artificially creating a situation in which it would not have to prove genuine use

of the earlier marks for the goods and services covered by the contested mark. Secondly, it found, in paragraph 82 of the contested decision, that the applicant's conduct had to be considered to be the result of an intention to distort and unbalance the system resulting from that law as established by the EU legislature.

66 It is in the light of the considerations referred to in paragraphs 49 to 65 above that the applicant's arguments must be examined.

67 In the first place, the argument that the Board of Appeal erred in finding, in paragraph 66 of the contested decision, that any re-filing of an EU trade mark automatically amounted to a filing made in bad faith must be rejected because it is the result of a misreading of the contested decision. It must be stated that, in paragraphs 66 to 70 of the contested decision, the Board of Appeal confined itself to referring to the case-law which is applicable in assessing whether there was bad faith on the part of the proprietor of an EU trade mark. It is only in paragraph 71 et seq. of the contested decision that the Board of Appeal examined the circumstances of the present case in the light of the case-law and concluded that the applicant was acting in bad faith when it filed the application for registration of the contested mark.

68 Furthermore, even if the applicant's argument were to be understood as meaning that it is complaining that the Board of Appeal found generally in the contested decision that any re-filing was necessarily made in bad faith, it must also be rejected.

69 The Board of Appeal's reasoning, as summarised in paragraphs 59 to 64 above, unambiguously shows that it is not the fact that an EU trade mark is re-filed that was found to be indicative of bad faith on the part of the applicant, but the fact that the information in the case file showed that the applicant had intentionally sought to circumvent a fundamental rule of EU trade mark law, namely that relating to proof of use, in order to derive an advantage therefrom to the detriment of the balance of the EU trade mark system established by the EU legislature.

70 In that regard, it must be stated there is no provision in the legislation relating to EU trade marks which prohibits the re-filing of an application for registration of a trade mark and that, consequently, such a filing cannot, in itself, establish that there was bad faith on the part of the trade mark applicant, unless it is coupled with other relevant evidence which is put forward by the applicant for a declaration of invalidity or EUIPO. However, it must be stated that, in the present case, it is apparent from the Board of Appeal's findings that the applicant admitted, and even submitted, that one of the advantages justifying the filing of the contested mark was based on the fact that it would not have to furnish proof of genuine use of that mark. Such conduct cannot be held to be lawful conduct, but must be held to be contrary to the objectives of Regulation No 207/2009, to the principles governing EU trade mark law and to the rule relating to proof of use, as referred to in paragraphs 49 to 55 above.

71 In the specific circumstances of the present case, the aim of the applicant's repeat filing was, inter alia, by its own admission, that of not having to prove use of the contested mark, thus extending, with regard to the earlier marks, the five-year grace period provided for in Article 51(1)(a) of Regulation No 207/2009.

72 Consequently, it must be held that not only is the filing strategy practised by the applicant, which seeks to circumvent the rule relating to proof of use, inconsistent with the objectives pursued by Regulation No 207/2009, but it calls to mind a case of an abuse of law, which is characterised by the fact that, first, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved, and that, secondly, there is an intention to obtain an advantage from those rules by creating artificially the conditions laid down for obtaining it (see, to that effect, judgment of 21 July 2005, *Eichsfelder Schlachtbetrieb*, C-515/03, EU:C:2005:491, paragraph 39 and the case-law cited).

73 In the second place, as regards the applicant's argument that the Board of Appeal improperly focused on one aspect, namely the administrative advantage of not having to prove genuine use of the re-filed mark, and ignored the many other good reasons that the applicant had put forward in order to justify its trade mark filing strategy (see paragraph 46 above), it must be held that, in the light of the details referred to in paragraphs 59 to 64 above, it cannot validly be claimed that the Board of Appeal focused solely on that aspect.

74 As EUIPO points out, notwithstanding the evidence showing that the applicant's intention was, inter alia, to avoid having to furnish proof of use of the contested mark, the Board of Appeal took other circumstances into account. Accordingly, it stated, in paragraphs 71 and 80 of the contested decision, that the applicant had actually derived an advantage from its repeat filing strategy in the context of two sets of opposition proceedings by having avoided having to prove use of the contested mark.

75 Furthermore, contrary to the applicant's unsubstantiated claim in the application, the Board of Appeal did not ignore the many other reasons that it had put forward in order to justify its trade mark filing strategy. As is apparent from paragraphs 61 to 64 of the contested decision, it examined and regarded as legitimate the applicant's explanations that, in essence, it was seeking to protect the mark MONOPOLY with regard to other goods and services in order to keep up with developments in technology and its expanding business. That is the reason why the Board of Appeal did not declare the contested mark invalid in respect of the goods and services which were not covered by the earlier marks. However, as EUIPO correctly submits, the Board of Appeal did not find that those explanations were capable of justifying the filing of the contested mark in respect of goods and services that were identical to those covered by the earlier marks. It found, in particular, in that regard, in paragraphs 72 to 74 of the contested decision, that the alleged reduction of the administrative burden resulting from the filing of the contested mark was difficult to reconcile with the additional costs and administrative burden of maintaining the earlier marks.

76 It follows that the applicant's argument that the Board of Appeal did not carry out an overall assessment of all the relevant factors in the case inasmuch as it improperly focused on one single aspect must be rejected.

77 Lastly, in the third place, it is necessary to reject the applicant's argument that, in essence, the Board of Appeal erred in stating in paragraph 79 of the contested decision that the applicant had admitted that the only advantage of its filing practice was not having to prove genuine use of the mark in opposition proceedings (see paragraph 47 above). In that regard, it is sufficient to state that it is clear from paragraphs 75, 76 and 79 of the contested decision that the Board of Appeal pointed out that it was only one of the benefits of, or one of the motivations for, the applicant's filing strategy. The Board of Appeal also expressly stated, in paragraph 76 of the contested decision, that 'the fact that a filing is not only motivated by the advantage of not having to prove the genuine use of the mark, but other reasons as well, d[id] not, in itself, make such a strategy acceptable'.

78 In the light of the foregoing considerations, the first part of the first plea must be rejected.

*– The second part of the first plea, alleging that no harm was caused by the applicant's activity*

79 In the context of the second part of the first plea, first, the applicant submits that no advantage has been conferred on it by its conduct in relation to obtaining, and keeping, any trade mark that it is not entitled to. Secondly, it states that the board game 'Monopoly' is so famous that it would be fanciful to suggest that it has not used the trade mark MONOPOLY in connection with games. It argues that requiring it to prove use of that mark in connection with board games in invalidity proceedings would result in its incurring significant costs. Thirdly, it claims that, if the contested decision were allowed to stand, that would lead to the Cancellation Division of EUIPO being swamped in cases in which bad faith would be invoked with regard to any re-filed mark covering identical or similar goods or

services. Lastly and fourthly, the applicant submits, regarding the examination of whether there was harm, that the contested decision does not contain any finding that there is any actual harm, but only the implicit finding that there could theoretically be harm due to a potential extension of the five-year grace period. However, according to the applicant, such theoretical harm should not, in any way, lead to the finding that it has acted fraudulently.

80 EUIPO and the intervener dispute the merits of that part.

81 To begin with, it is necessary to reject the first and fourth of the applicant's arguments, according to which, in essence, its conduct did not confer any advantage on it and did not result in any harm (see paragraph 79 above). As is submitted, in essence, by the intervener, the fact remains that neither Regulation No 207/2009 nor the case-law provides any basis that permits the inference that, in the present case, obtaining an advantage or causing harm is relevant for the purposes of assessing whether there was bad faith on the part of the applicant when it filed the application for registration of the contested mark.

82 As regards the second argument, relating to the use of the mark MONOPOLY in connection with games, the Board of Appeal was right in finding, in paragraph 81 of the contested decision, that whether or not the applicant could have actually proved such use was irrelevant, as it is the intention of the applicant for a mark which is to be evaluated. Furthermore and in any event, as EUIPO points out, the proven use of that mark to which the applicant refers applies only to board games and not to all the goods and services in respect of which the contested mark has been declared invalid.

83 Lastly, the argument that the Cancellation Division would be swamped in cases in which bad faith would be invoked if the contested decision were upheld must be rejected, since it is ineffective. In any event, that argument is not substantiated by any specific evidence and is therefore mere speculation.

84 It follows that the second part of the first plea must be rejected.

*– The third part of the first plea, alleging that there was no specific examination of each of the earlier marks*

85 In the context of the third part of the first plea, first, the applicant submits that the filing of the contested mark does not, in any way, conform to the traditional pattern of filing a repeat mark a few months before the end of the five-year grace period. It argues that the Board of Appeal therefore erred by ignoring the fact that, in the light of the dates on which earlier marks Nos 6 895 511 and 8 950 776 were registered, the contested mark was not filed on a date near the date on which the five-year grace period enjoyed by each of those earlier marks expired. Secondly, the applicant complains that the Board of Appeal treated the filings of the earlier marks as if they were in actual fact all one filing.

86 EUIPO and the intervener dispute the merits of that part.

87 As regards the applicant's first argument, it must be pointed out that it is right in submitting that the filing of the application for registration of the contested mark did not take place on a date close to those on which the five-year grace periods in respect of earlier marks Nos 6 895 511 and 8 950 776 expired. Since earlier mark No 6 895 511 was registered on 21 January 2009 and earlier mark No 8 950 776 was registered on 2 August 2010, the registration of the contested mark extended the non-use grace period in respect of the first of those two earlier marks by two years and two months with regard to the services in Class 41 covered by that mark and extended the non-use grace period in respect of the second of those two earlier marks by almost eight months with regard to the goods in Class 16 covered by that mark.

88 However, contrary to what the applicant infers, that fact cannot on its own be sufficient for it to be held that it was not acting in bad faith at the time when it filed the application for registration of the contested mark.

89 In that regard, as stated in essence by EUIPO, regardless of the length of the extension of a grace period, what matters is the trade mark applicant's intention at the time of filing the application for registration. However, it must be borne in mind that the applicant admitted, and even submitted, that one of the advantages which justified the filing of the contested mark was not having to furnish proof of genuine use of that mark. Consequently, although the extensions of the grace periods in respect of the earlier marks are not particularly long, the fact remains that the applicant obtained the desired advantage of not having to prove use of the mark MONOPOLY for an additional period of two years and two months in connection with the services in Class 41 covered by earlier mark No 6 895 511 and for an additional period of almost eight months in connection with the goods in Class 16 covered by earlier mark No 8 950 776.

90 The second argument, according to which the Board of Appeal treated the filings of the earlier marks as if they were in actual fact all one filing, must be rejected. It is clear from paragraphs 54 to 62 of the contested decision that the Board of Appeal took into account both the various goods and services covered by the earlier marks and the various filing dates of those marks.

91 It follows from the foregoing that the third part of the first plea must be rejected.

*– The fourth part of the first plea, alleging failure to have regard to the fact that the applicant's practice was common and widely accepted*

92 In the context of the fourth part of the first plea, the applicant submits, in essence, that the Board of Appeal was not entitled to find that it had acted in bad faith in re-filing its earlier marks because it was a common and obviously accepted practice in the industry. It adds that it cannot be maintained that it acted in bad faith because it acted 'in accordance with advice from local counsel in relation to their filings in general'. Furthermore, the applicant claims that the Board of Appeal sought to make an example of it in order to show how the Board of Appeal wanted to change the law, an admission which the applicant submits the Board of Appeal made in paragraph 87 of the contested decision, in which it admitted it was making up new law unilaterally. Lastly, the applicant claims that, if the contested decision is allowed to stand, it and a large number of other proprietors of EU trade marks will have their property rights confiscated by EUIPO.

93 EUIPO and the intervener dispute the merits of that part.

94 First of all, it must be pointed out that the arguments put forward by the applicant in the context of that part are not in any way substantiated. It confines itself to claiming that the re-filing of earlier marks is a common practice without providing any evidence whatsoever in support of that claim. In any event, the fact remains that neither Regulation No 207/2009 nor the case-law provides a basis which makes it possible to rule out any bad faith on the part of the applicant on the ground that it was following a practice that was common in the industry and that it acted in accordance with advice from counsel. As the Board of Appeal correctly pointed out in paragraph 78 of the contested decision, the simple fact that other companies may be using a specific filing strategy does not necessarily make that strategy legal and acceptable. Furthermore, as is stated in essence by EUIPO, it is on the basis of the circumstances of the particular case that it must be assessed whether or not such a strategy complies with Regulation No 207/2009. It is, however, apparent from what has been stated earlier that the applicant intentionally sought to circumvent a fundamental rule of EU trade mark law, namely that relating to proof of use, in order to derive an advantage therefrom to the detriment of the balance of the system resulting from that law, as established by the EU legislature. Consequently, although there is nothing to prohibit the proprietor of an EU trade mark from re-filing that mark, the applicant's

intention must be held to be contrary to the objectives of Regulation No 207/2009 (see paragraph 70 above). In the specific circumstances of the present case, the applicant cannot, in order to cast doubt on the assessment that it acted in bad faith, usefully rely, even if they were proved, either on the fact that it was common for undertakings to pursue the same trade mark filing strategy or on the fact that it had acted in accordance with advice from counsel.

95 Next, it is necessary to reject the argument that, in essence, the Board of Appeal changed the law, an admission which the applicant submits the Board of Appeal made in paragraph 87 of the contested decision. As the intervener correctly observes and contrary to what the applicant claims, the Board of Appeal merely applied the legislation in force and the existing case-law and by no means admitted 'changing the law'. The fact that the Board of Appeal referred, in paragraph 87 of the contested decision, to the existing case-law of the Boards of Appeal also contradicts the applicant's unsubstantiated argument.

96 Lastly, the claim that the applicant and a significant number of other proprietors of trade marks will have their property rights confiscated by EUIPO if the contested decision is upheld is not supported by any specific evidence and is therefore mere speculation which must be rejected.

97 It follows from the foregoing that the fourth part of the first plea must be rejected.

*– The fifth part of the first plea, alleging that the Board of Appeal erred in so far as it declared the contested mark invalid in respect of the 'related' goods covered by that mark, although those goods were not identical to the goods covered by the earlier marks*

98 In the context of the fifth part of the first plea, the applicant disputes, in essence, the Board of Appeal's assessment that the goods 'gaming machines; slot machines; playing cards' covered by the contested mark on the one hand, and the 'games and playthings' covered by earlier mark No 238 352 on the other hand, are identical.

99 According to the applicant, the fact that those goods were found to be identical reveals the lack of understanding of the different markets concerned. In particular, as regards 'slot machines', the applicant states that they are the subject matter of a highly regulated activity and are aimed at adults, who constitute a different public from that at which toys or board games are aimed. It adds that the question that arises is whether playing on a slot machine makes that slot machine a game or a plaything. It submits that that is why a filing system such as that at issue in the present case invariably raises questions where goods do not clearly fit into one class or another.

100 EUIPO and the intervener dispute the merits of that part.

101 It must be pointed out at the outset that the applicant does not develop any specific arguments in order to attempt to establish that the Board of Appeal erred in finding that the 'gaming machines' and 'playing cards' covered by the contested mark and the 'games and playthings' covered by earlier mark No 238 352 were identical. It confines itself to submitting, with little by way of substantiation, arguments relating to 'slot machines', which it claims are not identical to the 'games' covered by earlier mark No 238 352.

102 In the present case, it must be borne in mind that, in essence, the Board of Appeal found in paragraph 60 of the contested decision that the general terms 'games' and 'playthings', which described some of the goods covered by earlier mark No 238 352, included 'gaming machines; slot machines; playing cards'. Consequently, it found that the 'games' and 'playthings' covered by earlier mark No 238 352 and the 'gaming machines; slot machines; playing cards' covered by the contested mark were identical.

103 That assessment on the part of the Board of Appeal must be upheld.

104 Although it is true that the classification of goods or services is intended to serve exclusively administrative purposes, with the result that goods and services may not be regarded as being similar to each other on the sole ground that they appear in the same class and may not be regarded as being dissimilar from each other on the sole ground that they appear in different classes, it must, however, be pointed out that, according to settled case-law, goods can be considered to be identical when the goods covered by the trade mark application are included in a more general category covered by the earlier mark (see judgment of 7 September 2006, *Meric* v *OHIM – Arbora & Ausonia (PAM-PIM'S BABY-PROP)*, T-133/05, EU:T:2006:247, paragraph 29 and the case-law cited).

105 In the present case, as EUIPO submits, the goods 'gaming machines', 'slot machines' and 'playing cards' in Class 28 covered by the contested mark must be held to be included in the more general category of 'games' which are also in Class 28 and are covered by earlier mark No 238 352. It is clear that the very general concept of 'games' covers many types of games, including those covered by the contested mark which have been referred to above. The Board of Appeal cannot therefore validly be criticised for having found that the goods 'gaming machines; slot machines; playing cards' in Class 28 covered by the contested mark and the 'games' covered by earlier mark No 238 352, which are also in Class 28, were identical.

106 Lastly, the applicant's arguments that 'slot machines' are the subject matter of a highly regulated activity and are aimed at adults, who constitute a different public from that at which toys or board games are aimed, are irrelevant. As has already been held in paragraph 105 above, the category of 'games' covered by earlier mark No 238 352 is sufficiently broad for it to include the 'gaming machines', 'slot machines' and 'playing cards' covered by the contested mark and, consequently, for it to be held that those goods covered by those two marks are identical.

107 It follows from the foregoing that the fifth part of the first plea must be rejected.

*– The sixth part of the first plea, alleging that the Board of Appeal erred in finding that the applicant's conduct had not made administrative efficiencies possible*

108 In the context of the sixth part of the first plea, the applicant disputes the assessment in paragraph 73 of the contested decision, that, in essence, it was difficult to see how the administrative burden placed on it could be reduced by the re-filing of a mark which was identical to the earlier marks. It submits that it provided numerous items of evidence, inter alia the witness statement, proving that that practice enabled it to be more efficient administratively, whereas the Board of Appeal's assessment to the contrary was not based on any evidence.

109 EUIPO and the intervener dispute the merits of that part.

110 In the present case, it must be pointed out that the assessment in paragraph 73 of the contested decision is based on the finding of fact that the applicant has not surrendered any of its earlier marks, which are now covered by the contested mark. Furthermore, the Board of Appeal stated that, as the intervener had pointed out, 'maintaining the existing identical trade marks result[ed] in amassing … trade marks, which require[d] more administrative work and increased investment caused by, for example, the payment of filing fees and filing costs of the legal representatives for each mark applied for and registered, the costs of renewal fees for each mark, the administrative maintenance costs at the proprietor's company and for the law firm, the costs for the surveillance and monitoring of the various trade marks in order to assure that no identical and/or similar trade marks [we]re filed and the costs of filing oppositions in order to defend each of these various trade marks'.

111 In those circumstances, the applicant cannot validly claim that the Board of Appeal made the assessment in paragraph 73 of the contested decision without having any evidence before it and on the basis solely of its own conviction.

112 As regards the applicant's argument that it provided evidence proving the administrative efficiency connected with the filing of the application for registration of the contested mark, it must be stated that that argument is not in any way substantiated. The applicant confines itself to stating, first, that the filing of the contested mark 'is how the [applicant] administers their huge portfolio of marks' and, secondly, that it uses a computerised records system, with the result that the entry of an additional mark on to that system is not administratively burdensome.

113 Lastly, as regards the argument that, in the context of the assessment concerned, the Board of Appeal did not take into account the importance of the issue of the priority attached to earlier trade marks when the proprietor of those marks is deciding whether to renew them, that argument must be rejected on the ground that it is irrelevant with regard to the question of whether the administrative burden placed on the applicant could be reduced by the re-filing of a mark which was identical to the earlier marks.

114 It follows from the foregoing that the sixth part of the first plea must be rejected and that the first plea must therefore be rejected in its entirety.

*The second plea, alleging infringement of the right to a fair hearing*

115 In the context of the second plea, the applicant complains that the Board of Appeal, first, infringed its right to a fair hearing, on the ground that it based its assessment on certain aspects of the case that were not put to the applicant, in infringement of the right to a fair hearing, secondly, acted as a first-instance court, thus depriving it of a level of appeal, and, thirdly, took into consideration other cases involving the earlier marks without informing the applicant.

116 EUIPO and the intervener dispute the merits of the second plea.

117 It must be pointed out at the outset, regarding the applicant's allegation of infringement of the right to a fair hearing, that, according to the case-law, the possibility of relying on the right to a fair 'hearing' in proceedings before the Boards of Appeal of EUIPO is precluded, since those proceedings are administrative and not judicial in nature (see, to that effect, judgments of 12 December 2014, *Comptoir d'Épicure* v *OHIM – A-Rosa Akademie (da rosa)*, T-405/13, not published, EU:T:2014:1072, paragraph 71, and of 3 May 2018, *Raise Conseil* v *EUIPO – Raizers (RAISE)*, T-463/17, not published, EU:T:2018:249, paragraph 22 and the case-law cited). It follows that the applicant's second plea, in so far as it alleges infringement of the right to a fair hearing, must be rejected as unfounded.

118 Even if the second plea were to be interpreted as meaning that the applicant is alleging infringement of its right to be heard under Article 75 of Regulation No 207/2009 (now Article 94(1) of Regulation 2017/1001), it must also be rejected.

119 In that regard, it should be borne in mind that, according to Article 75 of Regulation No 207/2009, decisions of EUIPO are to be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments. That provision constitutes a specific application of the general principle of protection of the rights of the defence, guaranteed, furthermore, by Article 41(2)(a) of the Charter of Fundamental Rights of the European Union, according to which a person whose interests are affected by a decision of a public authority must be given the opportunity effectively to make his or her point of view known (see judgment of 8 February 2013, *Piotrowski* v *OHIM (MEDIGYM)*, T-33/12, not published, EU:T:2013:71, paragraph 16 and the case-law cited).

120 The right to be heard set out in Article 75 of Regulation No 207/2009 extends to all the factual and legal material which forms the basis of the decision, but not to the final position which the authority intends to adopt (see order of 8 September 2015, *DTL Corporación* v *OHIM*, C-62/15 P, not published, EU:C:2015:568, paragraph 45 and the case-law cited).

121 It must be added that, in the present case, as is submitted, in essence, both by EUIPO and by the intervener, it is apparent from the proceedings which took place before the adjudicating bodies of EUIPO that the parties had the opportunity to debate the various aspects of the present case. Accordingly, on 12 November 2018, the applicant filed the witness statement. The hearing before the Board of Appeal took place on 19 November 2018. On 21 January 2019, the intervener filed observations on the minutes and content of the oral proceedings, which included a request to disregard the witness statement, and the applicant replied to those observations on 22 February 2019.

122 It must be stated that the applicant has not proved that it was deprived of the opportunity of expressing its views on certain aspects of the case on which the Board of Appeal based its final position. Consequently, apart from the fact that there is little to substantiate it, the applicant's argument that it was not specifically asked about certain aspects of the case cannot succeed.

123 Lastly and in any event, it follows from the case-law that the rights of the defence are infringed by reason of a procedural irregularity only in so far as the irregularity actually has an effect on the ability of the undertakings involved to defend themselves. Consequently, non-compliance with rules in force, the purpose of which is to protect the rights of the defence, can vitiate the administrative proceedings only if it is shown that the latter could have had a different outcome if the rules had been observed (see judgment of 12 May 2009, *Jurado Hermanos* v *OHIM (JURADO)*, T-410/07, EU:T:2009:153, paragraph 32 and the case-law cited).

124 However, in the present case, the applicant does not rely on any fact or submit any argument capable of proving that, if it had been consulted by the Board of Appeal about certain aspects of the case, the administrative proceedings could have had a different outcome. It does not provide any information regarding the opportunities to defend itself, of which it was, in its view, deprived, or regarding the evidence which it would have provided or relied on if it had had the opportunity to express its views on the questions which it should, in its view, have been asked.

125 In the light of the foregoing considerations, the second plea must be rejected and the action must therefore be dismissed in its entirety, without it being necessary to rule on the intervener's argument submitting that some of the annexes which the applicant produced before the Court are inadmissible.

## Costs

126 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the forms of order sought by EUIPO and the intervener.

127 Furthermore, the intervener has claimed that the applicant should be ordered to repay to it the costs which it incurred for the purposes of the proceedings before the Board of Appeal of EUIPO. In that regard, it must be borne in mind that, under Article 190(2) of the Rules of Procedure, costs necessarily incurred by the parties for the purposes of the proceedings before the Board of Appeal are to be regarded as recoverable costs. Accordingly, the intervener's request that the applicant should be ordered to repay the costs necessarily incurred by the intervener for the purposes of the proceedings before the Second Board of Appeal of EUIPO must be allowed.

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Hasbro, Inc., to pay the costs, including those incurred by Kreativni Događaji d.o.o. for the purposes of the proceedings before the Second Board of Appeal of the European Union Intellectual Property Office (EUIPO).**

Marcoulli Frimodt Nielsen Schwarcz

Iliopoulos Norkus

Delivered in open court in Luxembourg on 21 April 2021.

E. Coulon
Registrar

S. Papasavvas
President