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TRIBUNAL DE JUSTICIA DE LA UNIÓN EUROPEA
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ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
COURT OF JUSTICE OF THE EUROPEAN UNION
COUR DE JUSTICE DE L'UNION EUROPÉENNE
CÚIRT BHREITHIÚNAIS AN AONTAIS EORPAIGH
SUD EUROPSKE UNIE
CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA



EIROPAS SAVIENĪBAS TIESA
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AZ EURÓPAI UNIÓ BÍRÓSÁGA
IL-QORTI TAL-ĠUSTIZZJA TAL-UNJONI EWROPEA
HOF VAN JUSTITIE VAN DE EUROPESE UNIE
TRYBUNAŁ SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ
TRIBUNAL DE JUSTIÇA DA UNIÃO EUROPEIA
CURTEA DE JUSTIȚIE A UNIUNII EUROPENE
SÚDNY DVOR EURÓPSKEJ ÚNIE
SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

JUDGMENT OF THE COURT (First Chamber)

24 January 2018 *

(Appeal — EU trade mark — Invalidity proceedings — Word mark FITNESS —
Dismissal of the application for a declaration of invalidity)

In Case C-634/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 7 December 2016,

European Union Intellectual Property Office (EUIPO), represented by
M. Rajh, acting as Agent,

applicant,

the other party to the proceedings being:

European Food SA, established in Drăgănești (Romania), represented by
I. Speciac, avocat,

applicant at first instance,

Société des produits Nestlé SA, established in Vevey (Switzerland), represented
by A. Jaeger-Lenz and S. Cobet-Nüse, Rechtsanwältinnen and by A. Lambrecht,
Rechtsanwalt,

intervener at first instance,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber,
C.G. Fernlund, J.-C. Bonichot, S. Rodin and E. Regan, Judges,

Advocate General: J. Kokott,

* Language of the case: English.

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By its appeal, the European Union Intellectual Property Office (EUIPO) asks the Court to set aside the judgment of the General Court of the European Union of 28 September 2016, *European Food v EUIPO — Société des produits Nestlé (FITNESS)* (T-476/15, EU:T:2016:568) (‘the judgment under appeal’), by which it annulled the decision of the Fourth Board of Appeal of EUIPO of 19 June 2015 (Case R 2542/2013-4) (‘the contested decision’), which was made in the context of invalidity proceedings between European Food SA and Société des produits Nestlé SA.

Legal context

Regulation No 2868/95

- 2 Rule 37(b)(iv) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1), as amended by Commission Regulation (EC) No 1041/2005 of 29 June 2005 (OJ 2005 L 172, p. 4), (‘Regulation No 2868/95’) states:

‘An application to the Office for revocation or for a declaration of invalidity pursuant to Article 55 of the Regulation shall contain:

...

(b) as regards the grounds on which the application is based,

...

(iv) an indication of the facts, evidence and arguments submitted in support of those grounds.’

- 3 Rule 40 of that regulation provides:

‘(1) Every application for revocation or for declaration of invalidity which is deemed to have been filed shall be notified to the proprietor of the [EU trade

mark]. When the Office has found the application admissible, it shall invite the proprietor of the [EU trade mark] to file his observations within such period as it may specify.

(2) If the proprietor of the [EU trade mark] files no observations, the Office may decide on the revocation or invalidity on the basis of the evidence before it.

(3) Any observations filed by the proprietor of the [EU trade mark] shall be communicated to the applicant, who shall be requested by the Office, if it sees fit, to reply within a period specified by the Office.’

4 Rule 50(1) of that regulation provides:

‘Unless otherwise provided, the provisions relating to proceedings before the department which has made the decision against which the appeal is brought shall be applicable to appeal proceedings *mutatis mutandis*.

In particular, when the appeal is directed against a decision taken in opposition proceedings, Article 78a of the Regulation shall not be applicable to the time limits fixed pursuant to Article 61(2) of the Regulation.

Where the appeal is directed against a decision of an Opposition Division, the Board shall limit its examination of the appeal to facts and evidence presented within the time limits set in or specified by the Opposition Division in accordance with the Regulation and these Rules, unless the Board considers that additional or supplementary facts and evidence should be taken into account pursuant to Article 74(2) of the Regulation.’

Regulation (EC) No 207/2009

5 Article 7 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the [EU trade mark] (OJ 2009 L 78, p. 1), headed ‘Absolute grounds for refusal’, provides, in paragraph 1:

‘1. The following shall not be registered:

...

(b) trade marks which are devoid of any distinctive character;

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service;

...’

6 Article 41(1) of that regulation provides:

‘Within a period of three months following the publication of an [EU trade mark] application, notice of opposition to registration of the trade mark may be given on the grounds that it may not be registered under Article 8 ...

...’

- 7 In Section 3, headed ‘Grounds for invalidity’, under Title VI of that regulation, Article 52, headed ‘Absolute grounds for invalidity’, states:

‘1. An [EU trade mark] shall be declared invalid on application to the Office or on the basis of a counterclaim in infringement proceedings:

- (a) where the [EU trade mark] has been registered contrary to the provisions of Article 7;
- (b) where the applicant was acting in bad faith when he filed the application for the trade mark.

2. Where the [EU trade mark] has been registered in breach of the provisions of Article 7(1)(b), (c) or (d), it may nevertheless not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

...’

- 8 Article 57(1) of that regulation provides:

‘On the examination of the application for revocation of rights or for a declaration of invalidity, the Office shall invite the parties, as often as necessary, to file observations, within a period to be fixed by the Office, on communications from the other parties or issued by itself.’

- 9 Article 60 under Title VII, ‘Appeals’, of Regulation No 207/2009 provides:

‘Notice of appeal must be filed in writing at the Office 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. Within four months after the date of notification of the decision, a written statement setting out the grounds of appeal must be filed.’

- 10 Article 63 of that regulation, headed ‘Examination of appeals’, provides in paragraph 2:

‘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.’

11 Article 76, headed ‘Examination of the facts by the Office of its own motion’, which appears in Section 1, headed ‘General provisions’, of Title IX, ‘Procedure’, of that regulation provides:

‘1. In proceedings before it the Office 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.

2. The Office may disregard facts or evidence which are not submitted in due time by the parties concerned.’

12 Article 78(1) of that regulation states:

‘In any proceedings before the Office, the means of giving or obtaining evidence shall include the following:

- (a) hearing the parties;
- (b) requests for information;
- (c) the production of documents and items of evidence;
- (d) hearing witnesses;
- (e) opinions by experts;
- (f) statements in writing sworn or affirmed or having a similar effect under the law of the State in which the statement is drawn up.’

Background of the dispute

13 In the judgment under appeal, the General Court summarised the factual background to the dispute before it as follows:

‘1 On 20 November 2001, the intervener, [Société des produits Nestlé], filed an application for registration of an EU trade mark with [EUIPO] pursuant to [Regulation No 207/2009].

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

3 The goods in respect of which registration was sought are in Classes 29, 30 and 32 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 29: “Milk, cream, butter, cheese, yoghurts and other milk-based food preparations, substitutes for dairy products, eggs, jellies, fruit, vegetables, protein preparations for human consumption”;
 - Class 30: “Cereals and cereal preparations; ready-to-eat cereals; breakfast cereals; foodstuffs based on rice or flour”;
 - Class 32: “Still water, aerated or carbonated water, spring water, mineral water, flavoured water, fruit drinks, fruit juices, nectars, lemonades, sodas and other non-alcoholic drinks, syrups and other preparations for making syrups and other preparations for making beverages”.
- 4 On 30 May 2005, the mark applied for was registered as an EU trade mark under number 2470326 in respect of the goods referred to in paragraph 3 above (“the contested mark”).
 - 5 On 2 September 2011, the applicant, [European Food], filed an application for a declaration that the contested mark was invalid under Article 52(1)(a) of Regulation No 207/2009, read in conjunction with Article 7(1)(b) and (c) of that regulation.
 - 6 On 18 October 2013, the Cancellation Division rejected the application for a declaration of invalidity in its entirety.
 - 7 On 16 December 2013, the applicant filed a notice of appeal with EUIPO against the decision of the Cancellation Division.
 - 8 By decision of 19 June 2015 (“the contested decision”), the Fourth Board of Appeal of EUIPO dismissed that appeal.
 - 9 The Board of Appeal held that, in cancellation proceedings, the burden of proving that the contested mark was devoid of any distinctive character or was descriptive, for the purposes of Article 7(1)(b) and (c) of Regulation No 207/2009 lay on the cancellation applicant. It added that the relevant point in time to which the evidence had to refer was the date of filing of the contested mark, namely 20 November 2001. In addition, the Board of Appeal found that since the goods in question were low priced mass consumption goods, the attentiveness of the relevant public was below average.
 - 10 As regards the alleged descriptiveness [of the contested mark], the Board of Appeal found that most of the evidence produced before the Cancellation Division post-dated the relevant point in time or concerned the territory of Romania before its accession to the European Union. As regards the copies from dictionaries concerning the term “fitness”, it found that that term did not designate an inherent characteristic of the goods concerned in the eyes of consumers in 2001. It considered that, in relation to the goods in question,

that term was suggestive and “a vague evocation”. Therefore, according to the Board of Appeal, the evidence produced before the Cancellation Division was not sufficient to prove the descriptiveness of the contested mark.

- 11 Moreover, the Board of Appeal rejected as being belated, without taking it into consideration, some further evidence submitted for the first time before the Board of Appeal. It applied by analogy the third subparagraph of Rule 50(1) of [Regulation No 2868/95], read in conjunction with Rule 37(b)(iv) of that regulation.
- 12 The Board of Appeal also found that since the term “fitness” had an evocative and ambiguous content, it was capable of identifying the goods covered by the contested mark as coming from the intervener and therefore of distinguishing them from those of other undertakings. Therefore, it concluded that the applicant had not established that that mark lacked distinctive character.’

The procedure before the General Court and the judgment under appeal

- 14 By application lodged at the Registry of the General Court on 19 August 2015, European Food brought an action for the annulment of the decision at issue.
- 15 In support of its action, European Food put forward three pleas in law, the first relating to the Board of Appeal’s refusal to take account of the evidence submitted for the first time before it; the second relating to the descriptiveness of the contested mark; and the third relating to the lack of distinctive character of that mark.
- 16 By the judgment under appeal, the General Court annulled the decision at issue and ordered EUIPO to bear its own costs and to pay those incurred by European Food.

Forms of order sought by the parties before the Court

- 17 By its appeal, EUIPO claims that the Court should:
 - set aside the judgment under appeal; and
 - order European Food to pay the costs.
- 18 European Food contends that the Court should:
 - dismiss the appeal; and
 - order EUIPO to pay the costs of the current proceedings.

The appeal

First ground of appeal alleging infringement of Article 76(2) of Regulation No 207/2009, read in conjunction with Rule 50(1) of Regulation No 2868/95

Arguments of the parties

- 19 The first ground of appeal may be divided, in essence, into four parts.
- 20 By the first part of this ground of appeal, EUIPO submits that the General Court was wrong to state, in paragraph 56 of the judgment under appeal, that Regulations No 207/2009 and No 2868/95 do not contain any provisions setting a time limit for the production of evidence in the context of an application for a declaration of invalidity based on absolute grounds for invalidity.
- 21 Although there is no predefined period expressly provided for in Regulations No 207/2009 and No 2868/95, EUIPO does nevertheless, pursuant to Article 57(1) of Regulation No 207/2009 and Rule 40 of Regulation No 2868/95, have the power to set time limits under measures of organisation of procedure.
- 22 Therefore, the opportunity afforded to EUIPO, pursuant to Article 76(2) of Regulation No 207/2009, to disregard facts or evidence that the parties have not submitted in due time does apply both to time limits set directly by Regulations No 207/2009 and No 2868/95 and to those established by EUIPO pursuant to measures of organisation of procedure.
- 23 Furthermore, that article applies to all types of proceedings before EUIPO and, therefore, does not establish any distinction between opposition and invalidity proceedings.
- 24 By the second part of that ground of appeal, EUIPO submits that the General Court was wrong to hold, in paragraphs 57 and 58 of the judgment under appeal, that, in the absence of time limits, evidence may be submitted at any time, including at the appeal stage.
- 25 By the third part of the first ground of appeal, EUIPO submits that the scope of Rule 50(1) of Regulation No 2868/95 is not limited to opposition proceedings, inasmuch as that provision does not specify the nature of the proceedings in question. By focusing its reasoning on the third subparagraph of Rule 50(1) of Regulation No 2868/95, which expressly refers to opposition proceedings, the General Court failed to have regard to the rule in the first subparagraph of that provision, according to which, unless otherwise provided, the provisions relating to proceedings before the department which has made the decision against which the appeal is brought shall be applicable to appeal proceedings *mutatis mutandis*. Consequently, Article 76(2) of Regulation No 207/2009 is also applicable in the context of invalidity proceedings.

- 26 Finally, in the context of the fourth part of the first ground of appeal, EUIPO claims that the judgment under appeal deprives the Board of Appeal of the discretion conferred on it by Article 76(2) of Regulation No 207/2009. In that regard, EUIPO argues that the admissibility of all additional evidence produced before the Cancellation Division, after the close of the written part of the procedure, is subject to the exercise, by the Cancellation Division, of the discretion conferred by Article 76(2) of Regulation No 207/2009.
- 27 According to EUIPO, having regard to the time limits set by the Cancellation Division and in order to enable European Food to respond to the facts and arguments submitted by Société des produits Nestlé, the Board of Appeal was required to exercise its discretion under Article 76(2) of Regulation No 207/2009, in order to decide whether it was necessary to take account of the evidence produced for the first time before it. EUIPO states that, after a careful analysis of all the relevant circumstances of the case, the Board of Appeal found that the respective evidence was neither supplementary nor additional, but merely new and, therefore, inadmissible.
- 28 Accordingly, the Board of Appeal was not required to take into account evidence relating to the ground of invalidity since that evidence had not been submitted in due time in the context of the invalidity proceedings.
- 29 European Food disputes EUIPO's arguments.

Findings of the Court

- 30 By the first and second parts of the first ground, which should be dealt with together, EUIPO submits, first, that the General Court was wrong to find, in paragraph 56 of the judgment under appeal, that Regulations No 207/2009 and No 2868/95 do not contain any provision setting a time limit for the production of evidence in the context of an application for a declaration of invalidity based on absolute grounds for invalidity and, second, that the General Court made an error in law in paragraphs 57 and 58 of the judgment under appeal, in finding that, in the absence of time limits for the production of evidence in the context of an application for a declaration of invalidity based on absolute grounds for invalidity, the evidence could be introduced at any time, including at the appeal stage.
- 31 According to Article 52 of Regulation No 207/2009, after the registration of a mark as an EU trade mark, that trade mark may be declared invalid on application to EUIPO in certain circumstances and, in particular, where that trade mark has been registered contrary to the provisions of Article 7 of that regulation. That application, in accordance with Rule 37(b)(iv) of Regulation No 2868/95, must contain the facts, evidence and arguments submitted in support of the application. Furthermore, in accordance with Articles 57 and 78 of Regulation No 207/2009, during the course of such proceedings, EUIPO is to invite the parties, as often as necessary, to file, within the prescribed time limits, their observations and may

also decide on measures of inquiry, including the production of matters of fact or evidence.

- 32 It follows from those provisions that, even if, in the context of invalidity proceedings based on absolute grounds for invalidity, no time limit is set by which to apply for the cancellation of the registration of a mark — unlike what is laid down in Article 41 of Regulation No 207/2009, on opposition to the registration of a trade mark on relative grounds for refusal, which states that the time limit for opposition shall be three months — a time limit is nevertheless set for the submission of evidence in the context of the application for a declaration of invalidity or may be set by EUIPO, by virtue of its competence to organise the procedure.
- 33 Accordingly, in stating, in paragraph 56 of the judgment under appeal, that Regulation No 207/2009 contains no provision fixing a time limit for the submission of evidence, the General Court made an error of law. However, it follows from settled case-law of the Court of Justice that if the grounds of a judgment of the General Court are an infringement of EU law but its operative part is shown to be well founded for other legal reasons, the appeal must be dismissed (judgment of 21 July 2016, *EUIPO v Grau Ferrer*, C-597/14 P, EU:C:2016:579, paragraph 29 and the case-law cited).
- 34 That is the case here. In particular, the General Court based the annulment of the decision at issue not on the fact that there was no time limit for the submission of evidence, but on the fact that the Board of Appeal erred in deciding that the evidence produced by the applicant for the first time before the Board of Appeal did not have to be taken into consideration because of its late submission.
- 35 In that regard, it should be noted, first of all, contrary to what is claimed by EUIPO, that the General Court held, in paragraph 58 of the judgment under appeal, that Article 76(2) of Regulation No 207/2009, read in conjunction with Rule 37(b)(iv) of Regulation No 2868/95, does not imply that evidence submitted for the first time before the Board of Appeal must be regarded by the Board as belated.
- 36 Second, it follows from case-law that no reason of principle relating to the nature of the proceedings under way before the Board of Appeal or to the jurisdiction of that department precludes it, for the purpose of deciding on the appeal before it, from taking into account facts and evidence produced for the first time at the appeal stage (judgment of 13 March 2007, *OHIM v Kaul*, C-29/05 P, EU:C:2007:162, paragraph 49).
- 37 Indeed, it follows from Article 64(1) of Regulation No 207/2009 that, through the effect of the appeal brought before it, the Board of Appeal may exercise any power within the competence of the department which was responsible for the contested decision and is therefore called upon, in this respect, to conduct a new, full examination as to the merits of the appeal, in terms of both law and fact

(judgment of 13 March 2007, *OHIM v Kaul*, C-29/05 P, EU:C:2007:162, paragraph 57).

- 38 As follows from Articles 63 and 78 of Regulation No 207/2009, for the purposes of the examination as to the merits of the appeal brought before it, the Board of Appeal is to invite the parties, as often as necessary, to file observations, within a period to be fixed by the Board, on communications from the other parties or issued by itself and may also decide on measures of inquiry, including the production of factual or evidential material. Such provisions demonstrate the possibility of seeing the underlying facts of a dispute multiply at various stages of the proceedings before EUIPO (judgment of 13 March 2007, *OHIM v Kaul*, C-29/05 P, EU:C:2007:162, paragraph 58).
- 39 It is true that, in paragraphs 60 and 61 of the judgment of 13 March 2007, *OHIM v Kaul* (C-29/05 P, EU:C:2007:162), the Court found that Article 59 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), which is identical in content to that of Article 60 of Regulation No 207/2009, which lays down the conditions for bringing an appeal before the Board of Appeal, refers not to the submission of facts or evidence, but only to the filing, within a time limit of four months, of a written statement setting out the grounds of appeal and therefore cannot be interpreted as giving the person bringing the appeal a new time limit for submitting facts and evidence in support of his opposition.
- 40 However, it cannot be inferred from the judgment of 13 March 2007, *OHIM v Kaul* (C-29/05 P, EU:C:2007:162) that all the evidence adduced before the Board of Appeal must be regarded as belated in all circumstances.
- 41 First, it is clear that, unlike in the present case, the case that gave rise to the judgment of 13 March 2007, *OHIM v Kaul* (C-29/05 P, EU:C:2007:162), concerned proceedings for opposition to registration of a trade mark. In accordance with the third subparagraph of Rule 50(1) of Regulation No 2868/95, where an appeal is directed against a decision of an Opposition Division, the Board of Appeal is to limit its examination of the appeal to facts and evidence presented within the time limits set or specified by the Opposition Division. Therefore, in that context, the evidence submitted before the Board of Appeal is regarded as being belated but may, nevertheless, be taken into account, where appropriate, pursuant to Article 76(2) of Regulation No 207/2009.
- 42 Second, without prejudice to the special rule applicable to opposition proceedings referred to in the third subparagraph of Rule 50(1) of Regulation No 2868/95, it is always possible to submit evidence in time for the first time before the Board of Appeal in so far as such evidence is intended to challenge the reasons given by the Cancellation Division in the contested decision. That evidence is, therefore, either evidence supplementary to that submitted in the proceedings before the Cancellation Division or evidence on a new matter which could not be raised during those proceedings.

- 43 Moreover, it should be noted that it is for the party presenting the evidence for the first time before the Board of Appeal to justify why that evidence is being submitted at that stage of the proceedings and demonstrate that submission during the proceedings before the Cancellation Division was impossible.
- 44 Finally, as has been pointed out in paragraph 38 of the present judgment, the evidence submitted for the first time before the Board of Appeal may be delivered to it on its request, as measures of inquiry and within the time limits imposed on the parties.
- 45 It follows that the General Court was correct in holding, in paragraph 58 of the judgment under appeal, that the evidence submitted for the first time before the Board of Appeal did not have to be considered to be out of time by the Board in all circumstances.
- 46 The first and second parts of the first ground of appeal must therefore be rejected.
- 47 By the third part of the first ground of appeal, EUIPO claims that the judgment under appeal is vitiated by an error of law in that the General Court finds in paragraph 60 of that judgment that the scope of the third subparagraph of Rule 50(1) of Regulation No 2868/95 is limited to opposition proceedings.
- 48 In that respect, it should be noted that, although the first subparagraph of Rule 50(1) of Regulation No 2868/95, contained in Title X, ‘Appeals’, lays down the principle that the provisions relating to proceedings before the department which has made the decision against which the appeal is brought are to be applicable to the appeal proceedings *mutatis mutandis*, the third subparagraph of that same provision constitutes a special rule derogating from that principle. That special rule is specific to appeal proceedings brought against the decision of the Opposition Division and specifies the rules, before the Board of Appeal, governing facts and evidence submitted after the expiry of the time limits set or specified at first instance (see, to that effect, judgment of 3 October 2013, *Rintisch v OHIM*, C-120/12 P, EU:C:2013:638, paragraph 28).
- 49 Consequently, the General Court was right to hold, in paragraph 60 of the judgment under appeal, that that special rule contained in the third subparagraph of Rule 50(1) of Regulation No 2868/95 was not applicable in the context of invalidity proceedings based on absolute grounds for invalidity.
- 50 It follows that the third part of the first ground of appeal must be rejected.
- 51 By the fourth part of the first ground of appeal, EUIPO claims that the judgment under appeal deprives the Board of Appeal of the power conferred on it by Article 76(2) of Regulation No 207/2009 to assess whether the evidence produced for the first time before it could be taken into account.
- 52 EUIPO’s arguments are based on a misreading of the judgment under appeal.

- 53 Paragraph 66 of the judgment under appeal does not indicate that EUIPO was not entitled to use its discretion, but rather that, in considering that the evidence submitted by European Food for the first time before the Board of Appeal did not have to be taken into consideration because of its late submission, the Board of Appeal had made an error of law.
- 54 In that regard, it must be recalled that, under Article 76(2) of Regulation No 207/2009, EUIPO may disregard facts or evidence which are not submitted in due time by the parties concerned.
- 55 It can be inferred from the wording of that article that, as a general rule and unless otherwise specified, the submission of facts and evidence by the parties remains possible after the expiry of the periods governing such submission provided for in Regulation No 207/2009 and that EUIPO is in no way prohibited from taking account of facts and evidence which are submitted belatedly (see, to that effect, judgment of 13 March 2007, *OHIM v Kaul*, C-29/05 P, EU:C:2007:162, paragraph 42).
- 56 However, it is equally apparent from that wording that a party has no unconditional right to have facts and evidence which were invoked or submitted out of time taken into account by EUIPO. In stating that the latter ‘may’, in such a case, decide to disregard facts and evidence, Article 76(2) of Regulation No 207/2009 grants EUIPO a wide discretion to decide, while giving reasons for its decision in that regard, whether or not to take such information into account (see, to that effect, judgment of 13 March 2007, *OHIM v Kaul*, C-29/05 P, EU:C:2007:162, paragraph 43).
- 57 It must be noted that taking facts or evidence into account that have been submitted out of time is likely to be justified where EUIPO considers, first, that the material that has been produced late is, on the face of it, likely to be genuinely relevant and, second, that the stage of the proceedings at which that late submission takes place and the circumstances surrounding it do not argue against such matters being taken into account (see, to that effect, judgments of 13 March 2007, *OHIM v Kaul*, C-29/05 P, EU:C:2007:162, paragraph 44, and of 3 October 2013, *Rintisch v OHIM*, C-120/12 P, EU:C:2013:638, paragraph 38).
- 58 Consequently, the taking into account of that additional evidence is in no way a ‘favour’ granted to one party or the other, but rather must result from an objective, reasoned exercise of the discretion conferred on EUIPO by Article 76(2) (judgment of 26 September 2013, *Centrotherm Systemtechnik v OHIM and centrotherm Clean Solutions*, C-610/11 P, EU:C:2013:593, paragraph 111).
- 59 It follows that the fourth part of the first ground of appeal must also be rejected.
- 60 Consequently, the first ground of appeal must be rejected as unfounded.

The second ground of appeal alleging an imbalance in the parties' procedural rights and an infringement of the principles of procedural economy and sound administration

Arguments of the parties

- 61 EUIPO submits that the judgment under appeal disrupts the balance between the parties' procedural rights in *inter partes* proceedings before EUIPO and is, moreover, contrary to the principles of procedural economy and sound administration, in so far as the parties may choose not to produce evidence or observations, or to reserve certain aspects of them, by way of 'negligence or delaying tactics'.
- 62 European Food contends that the second ground is unfounded and that it is based on mere speculation without any reference to any relevant legal provision.

Findings of the Court

- 63 In accordance with Article 168(1)(b) and Article 169(2) of the Rules of Procedure of the Court of Justice, an appeal must indicate precisely the contested elements of the judgment that the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal, failing which the appeal or the ground of appeal in question will be dismissed as inadmissible (see, to that effect, judgment of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, paragraph 29).
- 64 The Court has also held that a ground of appeal that simply makes general statements and contains no specific indications as to the points of the judgment under appeal which may be vitiated by an error of law must be dismissed as manifestly inadmissible (see, to that effect, judgment of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, paragraph 30).
- 65 The second ground of appeal does not specifically refer to the paragraphs of the judgment under appeal but merely criticises it generally without stating the points which are allegedly vitiated by an error of law. Such a ground of appeal must therefore be declared inadmissible.
- 66 It follows from all the aforementioned considerations that the appeal must be dismissed in its entirety.

Costs

- 67 Under Article 184(2) of the Rules of Procedure of the Court, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1)

thereof, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.

- 68 Since EUIPO has been unsuccessful and European Food has applied for costs, EUIPO must be ordered to pay the costs of the appeal proceedings.

On those grounds, the Court (First Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders the European Union Intellectual Property Office (EUIPO) to pay the costs.**

Silva de Lapuerta

Fernlund

Bonichot

Rodin

Regan

Delivered in open court in Luxembourg 24 January 2018.

A. Calot Escobar

R. Silva de Lapuerta

Registrar

President of the First Chamber