

JUDGMENT OF THE COURT (Ninth Chamber)

28 February 2019 (*)

(Appeal — EU trade mark — Regulation (EC) No 207/2009 — Article 8(1)(b) and Article 8(5) — Figurative mark containing the word elements ‘SO’BiO ētic’ — EU and national word and figurative marks containing the word element ‘SO...?’ — Opposition by the proprietor — Refusal of registration)

In Case C-505/17 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 18 August 2017,

Groupe Léa Nature SA, established in Périgny (France), represented by E. Baud, Avocat,

applicant,

the other parties to the proceedings being:

European Union Intellectual Property Office (EUIPO), represented by E. Markakis and D. Botis, acting as Agents,

defendant at first instance,

Debonair Trading Internacional Lda, established in Funchal (Portugal), represented by T. Alkin, Barrister,

intervener at first instance,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Chamber, D. Šváby (Rapporteur) and S. Rodin, Judges,

Advocate General: E. Tanchev,

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, Groupe Léa Nature SA seeks to have set aside the judgment of the General Court of the European Union of 8 June 2017, *Groupe Léa Nature v EUIPO — Debonair Trading Internacional (SO’BiO ētic)* (T-341/13 RENV, not published, EU:T:2017:381) (‘the judgment under appeal’), by which the General Court dismissed its action for annulment of the decision of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 26 March 2013 (Case R 203/2011-1) (‘the decision at issue’), relating to opposition proceedings between Groupe Léa Nature and Debonair Trading Internacional Lda (‘Debonair’).

Legal context

- 2 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) was repealed and replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), which entered into force on 13 April 2009.
- 3 Article 8 of Regulation No 207/2009, entitled ‘Relative grounds for refusal’, provides in paragraphs 1 and 5 thereof:
- ‘1. Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:
- ...
- (b) if, because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark.
- ...
5. Furthermore, upon opposition by the proprietor of an earlier trade mark within the meaning of paragraph 2, the trade mark applied for shall not be registered where it is identical with or similar to the earlier trade mark and is to be registered for goods or services which are not similar to those for which the earlier trade mark is registered, where in the case of an earlier EU trade mark the trade mark has a reputation in the [European Union] and, in the case of an earlier national trade mark, the trade mark has a reputation in the Member State concerned and where the use without due cause of the trade mark applied for would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.’

Background to the dispute

- 4 The facts behind the dispute are set out in paragraphs 1 to 10 of the judgment under appeal as follows:
- ‘1 On 27 March 2008, the applicant, Groupe Léa Nature, filed an application for registration of an EU trade mark with [EUIPO under Regulation No 40/94].
- 2 Registration was sought for the following figurative sign:



3 The goods in respect of which registration was sought are in, inter alia, Classes 3 and 25 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 3: “Bleaching preparations and other substances for laundry use; cleaning, polishing, degreasing and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions;

dentifrices; eau de toilette, products for perfuming linen, perfumery, bases for flower and plant perfumes, perfumed micro-capsules, incense, scented water, oils for perfumes and scents, shampoos, oils for cosmetic purposes, cosmetic creams, milks for the face and body, cleansing milk, ointments for cosmetic purposes, cosmetic preparations for baths, not for medical purposes, bath salts, not for medical purposes; deodorants for personal use; aromatics [essential oils], scented wood, eau de Cologne, disinfectant soaps and air fresheners, lavender water, fumigation preparations [perfumes], foam baths, not for medical purposes, cosmetic preparations for slimming purposes, beauty masks, sun-tanning preparations [cosmetics], depilatory preparations, cosmetics for animals, make-up removing preparations, lotions for cosmetic purposes, make-up preparations, nail care preparations, exfoliating cosmetic preparations, mint for perfumery, perfumed potpourris, soaps for foot perspiration, tissues impregnated with cosmetic lotions, scented water, extracts of flowers and plants (perfumery), mint essence for perfumery, pastilles and chewing gum for cosmetic purposes, all the aforesaid products being derived from organic farming or made from products derived therefrom”;

- Class 25: “Clothes (clothing), footwear (except orthopaedic footwear), headgear, dressing gowns, shirts, T-shirts, scarves, bandanas, hats, helmets, overcoats, parkas, all the aforesaid products being derived from organic farming or made from goods derived from organic farming”.

4 The EU trade mark application was published in *Community Trade Marks Bulletin* No 23/2008 of 9 June 2008.

5 On 9 September 2008, [Debonair] filed a notice of opposition pursuant to Article [41 of Regulation No 207/2009] to registration of the mark applied for in respect of the goods referred to in paragraph 3 above.

6 The opposition was based, inter alia, on the following earlier rights:

- the EU word mark SO...?, which was filed on 7 March 1997, registered on 26 February 2001 under the number 485078 and covers goods in Class 3 corresponding to the following description: “Toilet preparations; preparations for the care of the skin, scalp and the body; suntanning preparations; preparations for reinforcing and strengthening nails; preparations for use in the shower and the bath; toilet soaps; preparations for toning the body; all being non-medicated; perfumes; fragrances; aftershaves, milks, oils, creams, gels, powders and lotions; shaving foams; cosmetics; eau de cologne; toilet waters; essential oils; shampoos; conditioners; hair lotions; preparations for the hair; hair styling products; anti-perspirants; deodorants for personal use; dentifrices”;
- the earlier national word mark SO...?, which was filed on 18 March 2008, registered on 1 August 2008 in the United Kingdom under the number 2482729 and covers goods in Class 25 corresponding to the following description: “Clothing, footwear, headgear, T-shirts, caps”.

7 The grounds relied on in support of the opposition were those referred to in Article 8(1)(b) and Article 8(4) and (5) of Regulation [No 207/2009].

8 On 23 November 2010, the Opposition Division rejected the opposition in its entirety.

9 On 21 January 2011, [Debonair] filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009, against the decision of the Opposition Division.

10 By [the decision at issue], the First Board of Appeal of EUIPO annulled the decision of the Opposition Division and rejected the application for registration. In particular, the Board of Appeal stated, at the outset, that, since the Opposition Division had based its decision on a comparison of the mark applied for with the earlier marks, it would review that decision on the basis of those earlier rights. In that regard, the Board of Appeal found, first, that, with the exception of the “bleaching preparations and other substances for laundry use” in Class 3, the goods covered by the mark applied for and the goods covered by the earlier marks were similar or identical and, secondly, that the signs at issue were highly similar visually, on account of the presence of the element “so”, which those signs

had in common and which was the dominant element in those signs, and that they were phonetically similar to a certain extent. Consequently, in the light of the at least normal degree of inherent distinctiveness of the element “so” in relation to the goods at issue, the enhanced distinctiveness and reputation which the earlier marks had acquired in connection with cosmetics in a substantial part of the European Union and the fact that the intervener was the proprietor of a family of marks containing the element “SO...?” in the same sector, the Board of Appeal found that there was a likelihood of confusion between the signs at issue with regard to the goods which were identical or similar. Lastly, it found that, as regards “bleaching preparations and other substances for laundry use”, in relation to which the opposition had not been upheld on the basis of Article 8(1)(b) of Regulation No 207/2009, there was a risk that the sale thereof would be detrimental to the repute of the earlier marks within the meaning of Article 8(5) of Regulation No 207/2009.’

The procedure before General Court and the Court of Justice, and the judgment under appeal

- 5 By application lodged at the Registry of the General Court on 27 June 2013, Groupe Léa Nature brought an action for annulment of the contested decision.
- 6 In support of its action, Groupe Léa Nature had relied on four pleas in law, alleging, in essence, first, an error of law in the choice of the legal basis of the contested decision and breach of the principles of legal certainty, protection of legitimate expectations and the right to a fair hearing; secondly, an error of law in the assessment of the genuine use of the earlier marks; thirdly, infringement of Article 8(1)(b) of Regulation No 207/2009; and, fourthly, infringement Article 8(5) of Regulation No 207/2009.
- 7 By its judgment of 23 September 2014, *Groupe Léa Nature v OHIM — Debonair Trading Internacional (SO’BiO ětic)* (T-341/13, not published, EU:T:2014:802), the General Court, after rejecting the first and second pleas, upheld the action on the basis of the third and fourth pleas and annulled the contested decision.
- 8 In order to rule to that effect, the General Court found, in essence, in the context of the comparison of the signs at issue carried out with regard to the third plea, that, despite their phonetic similarity, which was, moreover, low in degree, the signs at issue were not similar and that, since one of the conditions for the application of Article 8(1)(b) of Regulation No 207/2009 was not satisfied, that plea had to be upheld. That finding led the General Court to hold that the cumulative conditions for the application of Article 8(5) of that regulation were not satisfied and thus to uphold the fourth plea as well.
- 9 By application lodged at the Registry of the Court of Justice on 21 November 2014, Debonair brought an appeal against the judgment of the General Court of 23 September 2014, *Groupe Léa Nature v OHIM — Debonair Trading Internacional (SO’BiO ětic)* (T-341/13, not published, EU:T:2014:802). In support of its appeal, it put forward two grounds of appeal alleging, first, infringement of Article 8(1)(b) and (5) of Regulation No 207/2009 and, secondly, that various errors had been made in assessing the visual impact of the element ‘so’, which the marks have in common.
- 10 By its cross-appeal, EUIPO also applied to have set aside the judgment of the General Court of 23 September 2014, *Groupe Léa Nature v OHIM — Debonair Trading Internacional (SO’BiO ětic)* (T-341/13, not published, EU:T:2014:802). In that regard, EUIPO put forward two grounds of appeal alleging, first, failure to state reasons for that judgment, as regards the distinctiveness of the element ‘so’, and, secondly, infringement of Article 8(5) of Regulation No 207/2009.
- 11 By judgment of 27 October 2016, *Debonair Trading Internacional v EUIPO* (C-537/14 P, not published, EU:C:2016:814), the Court of Justice set aside the judgment of the General Court of 23 September 2014, *Groupe Léa Nature v OHIM — Debonair Trading Internacional (SO’BiO ětic)* (T-341/13, not published, EU:T:2014:802), referred the case back to that court and reserved the costs.
- 12 Following the judgment of 27 October 2016, *Debonair Trading Internacional v EUIPO* (C-537/14 P, not published, EU:C:2016:814), the parties were invited to submit their observations.
- 13 As a preliminary matter, the General Court pointed out that it was not necessary to rule on the first and second pleas, since neither the main appeal nor the cross-appeal related to those two pleas.

- 14 The General Court therefore examined, in the first place, the third plea in law, alleging infringement of Article 8(1)(b) of Regulation No 207/2009, namely the existence of a likelihood of confusion as regards identical or similar goods designated by the marks at issue and, in the second place, the fourth plea, alleging infringement of Article 8(5) of Regulation No 207/2009, as regards goods that are not similar.
- 15 By the judgment under appeal, the General Court rejected the third and fourth pleas raised by Groupe Léa Nature and, consequently, dismissed the latter's action in its entirety.

Forms of order sought by the parties

- 16 Groupe Léa Nature claims that the Court should:
- set aside the judgment under appeal;
 - refer the case back to the General Court;
 - order Debonair to pay the costs.
- 17 EUIPO contends that the action should be dismissed in its entirety and that Groupe Léa Nature should be ordered to pay the costs.
- 18 Debonair requests that the Court dismiss the appeal and order Groupe Léa Nature to pay the costs.

The appeal

- 19 Groupe Léa Nature relies on two grounds in support of its appeal alleging, first, infringement of Article 8(1)(b) of Regulation No 207/2009 and, second, infringement of Article 8(5) of that regulation.

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

- 20 The first ground of appeal is divided into four branches, alleging (i) the incorrect assessment of the relevant public, (ii) the similarity between the signs, (iii) the existence of distinctive character of the earlier marks and (iv) the likelihood of confusion between the marks at issue.

Arguments of the parties

- 21 By the first branch of the first ground, Groupe Léa Nature criticises, with reference only to paragraph 34 of the judgment under appeal, the General Court for having, first, misconstrued the Court's settled case-law regarding the determination of the relevant public by finding that only English-speaking consumers must be taken into consideration and not the public of the European Union as a whole and, secondly, in essence, distorted the finding of the Board of Appeal regarding the relevant public and also certain elements on the case file in that it stated, wrongly, that the determination of the relevant public was not contradicted by the parties.
- 22 By the second branch of the first ground, Groupe Léa Nature submits that the General Court did not follow the settled case-law regarding the assessment of the similarity between the signs at issue. In that regard, it puts forward four arguments.
- 23 First, Groupe Léa Nature alleges that the General Court infringed the settled case-law of the Court in so far as it rejected any form of assessment of the distinctive and dominant character of the element 'so', even though it was, according to Groupe Léa Nature, the only element common to the marks at issue.
- 24 Secondly, it alleges that the General Court found that the marks at issue were similar without assessing the character or role of the element 'so' within the composite mark. According to Groupe Léa Nature, the General Court should have assessed whether that element played a dominant or negligible role in the overall impression given by the mark applied for.

- 25 Thirdly, Groupe Léa Nature submitted that the General Court had not assessed the overall impression generated by the marks at issue, observing, in particular, that it had failed (i) to assess the visual impression produced by the earlier marks in that it had not analysed the role played by certain elements of the earlier marks, namely the word element ‘so’, the dots and the question mark, (ii) to examine the overall appearance of the mark applied for, and (iii) to compare the overall impressions given by the signs at issue, with regard, in particular, to their different lengths and structures.
- 26 Fourthly, it considers that the General Court breached its duty to state reasons by merely finding, in paragraphs 47 and 48 of the judgment under appeal, without further explanation, that the apostrophe added to the element ‘so’ and to the element ‘ētic’ of the mark applied for was negligible in the overall visual impression created by the two marks at issue.
- 27 By the third branch of the first ground, Groupe Léa Nature alleges that the General Court did not follow the established case-law regarding the assessment of distinctive character acquired through use. It submits, first, with reference to paragraphs 64 to 68 of the judgment under appeal, that the General Court did not take into account certain relevant factors in its assessment of the distinctive character of the earlier marks, in particular, the market share held by those marks and the proportion of the relevant section of the public who would identify the goods and services as originating from the intervener. Second, Groupe Léa Nature submits that, by refusing to assess whether there was a family of marks belonging to the intervener, the General Court wrongly concluded that the earlier marks were distinctive.
- 28 By the fourth branch of the first ground, Groupe Léa Nature submits that the General Court did not follow the settled case-law as regards the global assessment of the likelihood of confusion. According to Groupe Léa Nature, the General Court did not make a global assessment of the likelihood of confusion between the signs at issue in that it did not take into account all of the relevant factors in the present case. In addition, it reproaches the General Court for having refused, in paragraph 64 of the judgment under appeal, to take into account the market study on the use, by third parties, of registered trade marks containing the term ‘so’ within the EU and in the same field.
- 29 Debonair and EUIPO contest the arguments of Groupe Léa Nature and submit that the first ground of appeal must be rejected.

Findings of the Court

- 30 As regards the first branch concerning the relevant public, Groupe Léa Nature alleges that the General Court did not take into consideration all the relevant public at the European Union level, contrary to the case-law of the Court.
- 31 In that regard, it should be observed that according to settled case-law, to allow a party to put forward for the first time before the Court of Justice pleas and arguments which it did not raise before the General Court would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas and arguments debated before the General Court (judgment of 25 July 2018, *QuaMa Quality Management v EUIPO*, C-139/17 P, not published, EU:C:2018:608, paragraph 44 and the case-law cited).
- 32 In the present case, Groupe Léa Nature did not challenge before the General Court the considerations in the decision at issue regarding the determination of the relevant public, and it raised that argument for the first time before the Court of Justice in the context of its appeal even though the General Court merely repeated the considerations of the decision at issue.
- 33 In addition, in so far as Groupe Léa Nature submits that there was a distortion by the General Court of the finding by the Board of Appeal regarding the relevant public and certain elements on the case file, it suffices to observe that that argument is based on a misreading of paragraph 34 of the judgment under appeal.
- 34 It follows from the foregoing that the first branch of the first ground of appeal must be rejected as partly inadmissible and partly unfounded.

- 35 As regards the second branch of the first ground of appeal, concerning the similarity of the signs at issue, Groupe Léa Nature criticises the General Court, in essence, for not having followed the case-law of the Court on the assessment of the similarity of the signs with regard to Article 8(1)(b) of Regulation No 207/2009.
- 36 As regards the first argument under that second branch, alleging the assessment of the distinctive and dominant character of the element ‘so’, it is established case-law that the global assessment of the likelihood of confusion must, as regards the visual, phonetic or conceptual similarity of the marks in question, be based on the overall impression given by them, bearing in mind, in particular, their distinctive and dominant elements (judgment of 18 September 2014, *Società Italiana Calzature v OHIM*, C-308/13 P and C-309/13 P, not published, EU:C:2014:2234, paragraph 41 and the case-law cited).
- 37 In particular, the Court has held that in the context of examination of the likelihood of confusion, assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components (judgment of 18 September 2014, *Società Italiana Calzature v OHIM*, C-308/13 P and C-309/13 P, not published, EU:C:2014:2234, paragraph 42 and the case-law cited).
- 38 It is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of a dominant element (judgment of 18 September 2014, *Società Italiana Calzature v OHIM*, C-308/13 P and C-309/13 P, not published EU:C:2014:2234, paragraph 43 and the case-law cited).
- 39 In the present case, the General Court stated, in paragraph 44 of the judgment under appeal, that it was not necessary to ascertain whether the Board of Appeal was correct to have classified the element ‘so’ in the signs at issue as dominant in order to reach the conclusion that those signs were similar.
- 40 However, contrary to the argument made by Groupe Léa Nature, that finding did not lead the General Court to take no account of the element ‘so’, or of the role or position of that element, in the marks in issue.
- 41 The General Court recognised, in paragraph 44 of the judgment under appeal, the importance of the element ‘so’ in the context of the earlier marks by noting that that element, which is the first element of the earlier marks, is fully included in the mark applied for and is also in the first position in the upper part of that mark. It also considered that the consumer generally pays greater attention to the beginning of a mark than to its end, the initial part of a mark normally having a greater impact, both visually and phonetically, than its final part.
- 42 In addition, in the context of the assessment of the sign for which registration is sought, the General Court carried out an assessment of its other word and figurative elements and found, in paragraph 47 of the judgment under appeal, that the element ‘bio’, having regard to its size, which is equal to the element ‘so’, and its position in the centre of the sign, is likely to be remembered by the relevant public in the same way as the element ‘so’. Thus, the General Court therefore found that the element ‘bio’ had the same importance as the element ‘so’.
- 43 The conclusion must therefore be drawn that in this case, contrary to what the Groupe Léa Nature claims, the General Court correctly applied the rule regarding a global assessment, as laid down in the established case-law referred to in paragraphs 36 to 38 above, in the determination of whether there was a likelihood of confusion between the marks at issue.
- 44 Consequently, the first argument relied on by Groupe Léa Nature in support of the second branch of the first ground is unfounded.
- 45 By its second argument, Groupe Léa Nature submits that, without analysing, in the assessment of the visual impression of the composite signs at issue, whether the element common to the signs at issue

was dominant or negligible, the General Court could not conclude that there was a similarity between the signs at issue.

46 In that regard, Groupe Léa Nature's argument that, where the common element was not dominant, it is not possible to conclude that there was a similarity between the marks at issue cannot succeed.

47 It must be observed that the finding that there is a likelihood of confusion cannot be subject to a condition that the overall impression produced by the composite sign be dominated by the part of it which is represented by the earlier mark (judgment of 6 October 2005, *Medion*, C-120/04, EU:C:2005:594, paragraph 32).

48 In the present case, the General Court correctly carried out an analysis of the respective importance of the various elements making up the sign at issue for the overall impression produced and deduced, in essence, that the elements 'so' and 'bio' had an equivalent importance. The General Court was not therefore obliged to find that the element 'so' was dominant in order to find that the signs at issue were similar.

49 It follows from the foregoing that the second argument must be rejected as unfounded.

50 Next, as regards the third argument relating to the assessment of the overall impression of the marks at issue, it must be observed that it is based on a selective and incorrect reading of the judgment under appeal.

51 It is clear from a reading of paragraphs 44 to 56 of the judgment under appeal that the General Court's analysis is based, correctly, on the overall impression given by the marks at issue. The General Court, after having examined the visual, phonetic and conceptual similarities, and weighed the relative contribution of their various elements to the overall impression produced, concluded in paragraph 56 of the judgment under appeal that, assessed as a whole, the signs in issue were similar.

52 In particular, the argument as to the failure to assess the dots and the question mark of the earlier marks must be rejected since it follows from paragraph 44 of the judgment under appeal that those elements were found to be negligible having regard to the single verbal element 'so', in so far as the General Court held in the same paragraph that the consumer is deemed generally to pay greater attention to the beginning of a mark than to its end.

53 Consequently, and having regard to the foregoing, the third argument must be rejected as unfounded.

54 As regards the fourth argument, alleging the failure by the General Court to state reasons, it is established case-law that the reasoning of the General Court in a judgment or an order must be disclosed clearly and unequivocally, in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review (judgments of 1 December 2016, *Klement v EUIPO*, C-642/15 P, not published, EU:C:2016:918, paragraph 24, and of 30 May 2018, *L'Oréal v EUIPO*, C-519/17 P and C-522/17 P to C-525/17 P, not published, EU:C:2018:348, paragraph 67).

55 That said, it is clear from settled case-law that the General Court's reasoning may be implicit on condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (judgment of 5 July 2011, *Edwin v OHIM*, C-263/09 P, EU:C:2011:452, paragraph 64 and the case-law cited).

56 That condition is fulfilled in this case.

57 As regards the element 'étic', it must be noted in the first place that the General Court found, in paragraph 47 of the judgment under appeal, that that element was smaller in size and was in the lower part of the sign, and was therefore not likely to be remembered by the relevant public and appeared negligible in the overall impression created by that sign.

- 58 In the second place, as regards the apostrophe added to the element ‘so’ of the sign for which registration is sought, the General Court held, in paragraph 48 of the judgment under appeal, that it was negligible in the perception of the sign notwithstanding the fact that it did not appear in the earlier marks and, therefore, did not make it possible to differentiate the marks at issue.
- 59 It follows from the foregoing that the General Court thus provided sufficient reasoning in that it enables the appellant to know the reasons why the General Court has not upheld its arguments and the Court of Justice to exercise its power of review. Accordingly, the fourth argument must be rejected as unfounded.
- 60 In those circumstances, the second branch of the first ground of appeal must be dismissed.
- 61 As regards the third branch of the first ground of appeal, which concerns the assessment of the distinctive character of the earlier marks, it must be observed that, by its argument, Groupe Léa Nature in reality merely contests the assessment of the evidence made by the General Court.
- 62 Under the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on points of law only. The General Court thus has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts and evidence are distorted, constitute a point of law which is subject, as such, to review by this Court on appeal (judgment of 25 July 2018, *QuaMa Quality Management v EUIPO*, C-139/17 P, not published, EU:C:2018:608, paragraph 33 and the case-law cited).
- 63 Since, in that regard, no allegation is made of a distortion of the facts or evidence submitted to the General Court, it is necessary, in accordance with the case-law cited in the preceding paragraph, to reject this branch as inadmissible.
- 64 As regards the fourth branch concerning the global assessment of the likelihood of confusion, Groupe Léa Nature relies on the same arguments as those advanced in support of the second branch of this ground, relating to the assessment of the similarity between the marks at issue in the context of the determination of whether there is a likelihood of confusion between them. In that regard, it suffices to refer to the reasoning made by the Court in paragraph 43 of this judgment. Consequently, those arguments must be rejected for the same reasons.
- 65 Furthermore, in so far as Groupe Léa Nature criticises the General Court for having refused, in paragraph 64 of the judgment under appeal, to take account of the market study on the use, by third parties, of registered trade marks containing the term ‘so’ within the European Union and in the same field, it must be held that it is for the General Court alone to assess the value which should be attached to evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, to that effect, judgment of 8 May 2008, *Eurohypo v OHIM*, C-304/06 P, EU:C:2008:261, paragraph 33 and the case-law cited). Therefore, such an argument must be rejected as inadmissible.
- 66 In the light of the foregoing, the fourth branch must be rejected as in part inadmissible and in part unfounded.
- 67 Since none of the branches of argument in support of the first ground, alleging infringement of Article 8(1)(b) of Regulation No 207/2009, has been upheld, that plea must be rejected.

The second ground, alleging an infringement of Article 8(5) of Regulation No 207/2009

- 68 The second ground of appeal is divided into four branches.

Arguments of the parties

- 69 By the first branch of the second ground of appeal, Groupe Léa Nature submits that, first, the General Court did not apply the necessary criteria established by the settled case-law of the Court in order to assess the earlier marks’ reputation. It submits that the General Court should have taken into

consideration all the relevant facts of the case, in particular (i) the market share held by the trade mark, (ii) the intensity, geographical extent and duration of its use, and (iii) the size of the investment made by the intervener in promoting the earlier marks. Second, Groupe Léa Nature criticises the General Court for having distorted the content of the decision at issue by stating that the volume of sales of products covered by the earlier marks concerned the period between 2006 and 2008, namely a period of two years rather than the period of eight years referred to in the decision at issue.

70 By the second branch of the second ground, Groupe Léa Nature alleges that the General Court did not follow the established case-law of the Court when it examined the conditions to which the application of Article 8(5) of Regulation No 207/2009 is subject, in particular the similarity of the signs at issue. In that context, it refers to the arguments it advanced in respect of the second branch of the first ground of appeal.

71 By the third branch of the second ground, Groupe Léa Nature criticises the General Court for manifestly having failed to assess whether there was a link between the marks at issue in the mind of the relevant public.

72 By the fourth branch of the second ground, Groupe Léa Nature submits, in essence, that the General Court did not give reasons for finding that there was a risk of a detrimental effect on the reputation of the earlier marks.

73 Debonair and EUIPO contest Groupe Léa Nature's arguments.

Findings of the Court

74 As regards the first branch of the second ground, concerning the reputation of the earlier marks, contrary to the submissions made by Groupe Léa Nature, the General Court set out, in paragraph 84 of the judgment under appeal, all the evidence produced by the intervener, on which the Board of Appeal relied, seeking to prove the market shares held by the earlier marks, the volume of sales of cosmetic products in a substantial part of the European Union and the investment of considerable amounts in promoting products sold under the earlier marks. Having regard to that evidence, in paragraph 85 of the judgment under appeal, the General Court confirmed the Board of Appeal's assessment that the earlier marks had a reputation in a substantial part of the European Union.

75 Moreover, it must be observed that the question of whether the information concerning the market share held is necessary for assessing whether the earlier mark had a reputation comes within the scope of the assessment of facts by EUIPO and, on appeal, by the General Court (see, by analogy, judgment of 22 June 2006, *Storck v OHIM*, C-25/05 P, EU:C:2006:422, paragraphs 76 to 78).

76 In so far as Groupe Léa Nature calls into question the assessment by the General Court of some of the evidence relating to the reputation of the earlier marks, it must be held that the assessment of the evidence, as recalled in paragraph 62 above, does not constitute, save where it is distorted, a point of law which is subject, as such, to review by the Court of Justice on appeal. Therefore, such arguments are inadmissible.

77 To the extent that, by those allegations, Groupe Léa Nature intends to rely on a distortion relating to the period of sales of products, it must be observed that the General Court, by order of 23 October 2018, *Groupe Léa Nature v EUIPO* (T-341/13 RENV, not published, EU:T:2018:738), rectified an error that was found in the English version of the judgment under appeal. Therefore, there is no need to respond to that argument.

78 Having regard to the foregoing considerations, the first branch of the second ground of appeal must be rejected as in part inadmissible and in part unfounded.

79 As regards the second branch of the second ground of appeal, concerning a similarity between the signs at issue, it must be observed at the outset that, given that it is not apparent either from the wording of Article 8(1)(b) or Article 8(5) of Regulation No 207/2009, or from the case-law of the Court of Justice, that the concept of similarity has a different meaning in each of those paragraphs, it follows that, if, in examining the conditions for the application of Article 8(1)(b) of that regulation, the

General Court concludes that there is no similarity between the signs at issue, such a finding is equally valid for the application of both Article 8(1)(b) and Article 8(5) of that regulation (see, to that effect, judgment of 10 December 2015, *El Corte Inglés v OHIM*, C-603/14 P, EU:C:2015:807, paragraph 39).

80 In that regard, the General Court found, in paragraph 81 of the judgment under appeal, that, since it had concluded that the signs at issue were similar, within the meaning of Article 8(1)(b) of Regulation No 207/2009, it was necessary to hold that the condition laid down in Article 8(5) of that regulation, regarding the similarity of the signs at issue, was also satisfied.

81 Therefore, to the extent that Groupe Léa Nature refers to the same arguments advanced in the context of the second branch of the first ground of appeal, relating to the similarity between the signs at issue, those arguments must be rejected for the same reasons as relied on in paragraphs 35 to 60 of this judgment.

82 Consequently, the second branch of the second ground of appeal must be rejected as unfounded.

83 As regards the third branch of the second ground of appeal, relating to the existence of a link between the marks at issue, it is settled case-law that the existence of such a link must be assessed globally, taking into account all factors relevant to the circumstances of the case, including, the degree of similarity between the marks at issue; the nature of the goods or services for which the marks at issue were registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public; the strength of the earlier mark's reputation; and, the existence of the likelihood of confusion on the part of the public (see, to that effect, judgment of 27 November 2008, *Intel Corporation*, C-252/07, EU:C:2008:655, paragraphs 41 and 42).

84 However, in the present case, Groupe Léa Nature's argument alleging the failure to assess the existence of a link between the marks at issue is not well founded, since it is based on a selective and incorrect reading of the judgment under appeal. After recalling, in paragraph 78 of the judgment under appeal, the established case-law that sets out the factors that may be relevant for the purposes of the global assessment of whether there is a link between the marks at issue, the General Court analysed those factors in paragraphs 82 to 91 of the judgment under appeal. It was therefore after having examined the degree of closeness or dissimilarity between those goods or services for which the marks at issue were registered, and the strength of the earlier mark's reputation, that the General Court carried out the overall assessment of the link between the marks at issue, summarised in paragraph 91 of that judgment, by deciding that the fact that the mark applied for was used for cleaning products strengthened the likelihood that the relevant public would made a negative connection with the earlier mark, which had a reputation for cosmetics. Therefore, it cannot successfully be claimed that General Court did not acknowledge the link between the marks at issue.

85 Consequently, the third branch of the second ground of appeal must be rejected as unfounded.

86 As regards the fourth branch of the second ground of appeal, relating to the existence a risk of a detrimental effect on the earlier marks, it must be held that, to the extent that the General Court's obligation to state reasons does not mean, as has been recalled in paragraphs 54 and 55 of this judgment, that the General Court is required to respond in detail to every argument relied on, the reasoning of the General Court may be implicit on condition that it enables the parties to know the grounds for the latter's decision and provides the Court of Justice with sufficient material for it to exercise its power of review.

87 In the present case, it should be noted, first, that, in paragraphs 75 to 78 of the judgment under appeal the General Court recalled the case-law relevant to the determination of whether the use of the mark applied for takes unfair advantage of the reputation of the earlier marks. In paragraphs 80, 89 and 90 of the judgment under appeal, the General Court examined the nature and degree of closeness of the goods concerned. Next, it established that the conflicting nature of the goods covered by the marks at issue made it possible to hold that there was a 'risk of tarnishment' of the image associated with the earlier mark which was registered in respect of cosmetic products. Finally, in paragraph 91 of the judgment under appeal, the General Court upheld the Board of Appeal's assessment that there was a risk that the relevant public would make a negative connection with the earlier mark which had a reputation for cosmetics, and the risks to health associated with some bleaching and cleaning products.

- 88 In those circumstances, the General Court carried out a global assessment of all the relevant factors in order to assess whether the mark applied for would be unduly detrimental to the positive image conveyed by the earlier marks and, consequently, it cannot be claimed that the General Court did not duly state reasons for that assessment.
- 89 Therefore, the fourth branch of the second ground of appeal must be rejected as unfounded.
- 90 In those circumstances, the second ground of appeal must be dismissed.
- 91 Since none of the grounds of appeal raised by Groupe Léa Nature has been upheld, the appeal must be dismissed in its entirety.

Costs

- 92 Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Debonair and EUIPO have applied for costs against Groupe Léa Nature and the latter has been unsuccessful, it must be ordered to pay, in addition to its own costs, those incurred by Debonair and by EUIPO.

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

- 1. Dismisses the appeal;**
- 2. Orders Groupe Léa Nature SA to pay, in addition to its own costs, those incurred by Debonair Trading Internacional Lda and by The Office of the European Union for Intellectual Property (EUIPO).**

Jürimäe

Šváby

Rodin

Delivered in open court in Luxembourg on 28 February 2019.

A. Calot Escobar

K. Jürimäe

Registrar

President of the Ninth Chamber

* Language of the case: English.