

WORKING DOCUMENT

JUDGMENT OF THE COURT (Third Chamber)

November 29, 2023 (*)

"European Union trade mark - Invalidity proceedings - Three-dimensional European Union trade mark - Shape of a scooter - Absolute ground for invalidity - Lack of distinctive character - Article 7(1)(b) of Regulation (EC) No 207/2009 (now Article 7(1)(b) of Regulation (EU) 2017/1001) - Distinctive character acquired through use - Article 7(3) of Regulation No 207/2009 (now Article 7(3) of Regulation 2017/1001)"

In Case T-19/22,

Piaggio & C. SpA, established in Pontedera (Italy), represented by F. Jacobacci and B. La Tella, lawyers,

applicant,

against

European Union Intellectual Property Office (EUIPO), represented by M. Capostagno, D. Gája and J. Crespo Carrillo, acting as Agents,

defendant,

the other party to the proceedings before the Board of Appeal of the EUIPO, intervening before the Court of First Instance, being

Zhejiang Zhongneng Industry Group Co. Ltd, established in Taizhou (China), represented by M. Spolidoro, M. Gurrado, L. Mendola and M. Balestriero, lawyers,

THE COURT OF FIRST INSTANCE (Third Chamber),

composed of F. Schalin, President, P. Škvařilová-Pelzl (Rapporteur) and I. Nõmm, Judges,

Registrar: Mr G. Mitrev, Administrator,

having regard to the written phase of the proceedings,

following the hearing of May 24, 2023,

hereby gives this

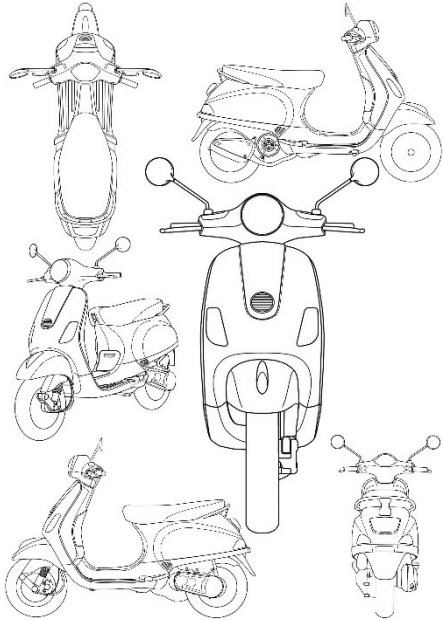
Judgment

1 By its action under Article 263 TFEU, the applicant, Piaggio & C. SpA, seeks annulment of the decision of the Fifth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of October 25, 2021 (Case R 359/2021-5) (hereinafter the "contested decision").

I. Background to the dispute

2 On March 25, 2013, the applicant submitted an application for registration of a European Union trademark to the EUIPO, pursuant to Council Regulation (EC) No 207/2009 of February 26, 2009, on the European Union trademark (OJ 2009 L 78, p. 1), as amended (replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of June 14, 2017, on the European Union trademark (OJ 2017 L 154, p. 1)).

3 The mark applied for is the three-dimensional sign reproduced below, corresponding to the shape of a "Vespa" scooter, the representation of which is provided in five orthogonal views and one perspective view :



4 The goods for which registration has been applied for fall within Classes 12 and 28 within the meaning of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of June 15, 1957, as revised and amended, and correspond, for Class 12, to "scooters" and, for Class 28, to "model scooters".

5 On April 4, 2013, the examiner issued a notification of provisional refusal to register the mark applied for on the ground that it was devoid of distinctive character, within the meaning of Article 7(1)(b) of Regulation No. 207/2009 [now Article 7(1)(b) of Regulation 2017/1001].

6 On August 2, 2013, the applicant filed observations in response to the examiner's provisional refusal to register the mark applied for, invoking the distinctive character acquired through use of that mark, within the meaning of Article 7(3) of Regulation No 207/2009 (now Article 7(3) of Regulation 2017/1001).

7 On October 9, 2013, the trademark application was published by the EUIPO and, on January 16, 2014, the trademark at issue was registered, with the express mention that it had "[c]aracter distinctif acquis [par l'usage]".

8 On April 29, 2014, the intervener, Zhejiang Zhongneng Industry Group Co. Ltd, applied for a declaration of invalidity of the mark at issue for the goods referred to in point 4 above. This application was based, firstly, on the grounds for relative invalidity referred to in Article 53(2)(d) of Regulation No. 207/2009 (now Article 60(2)(d) of Regulation 2017/1001) on the basis of the earlier Community design No. 17,836 55-0,002 registered on November 19, 2010 for "motorcycles [and] mopeds" falling within Class 12. 11 within the meaning of the Locarno Classification and, secondly, on the grounds for absolute invalidity referred to in Article 52(1)(a) of Regulation No. 207/2009 [now Article 59(1)(a) of Regulation 2017/1001], read in conjunction with Article 7(1), (b) and (e)(ii) and (iii)

of Regulation No 207/2009 (now Article 7(1)(b) and (e)(ii) and (iii) of Regulation 2017/1001), and Article 52(1)(b) of Regulation No 207/2009 (now Article 59(1)(b) of Regulation 2017/1001).

9 By decision of December 21, 2020, the Cancellation Division dismissed the intervener's application for a declaration of invalidity in its entirety.

10 On February 17, 2021, the intervener appealed against the decision of the Cancellation Division, taken in its entirety, under Articles 66 to 68 of Regulation 2017/1001.

11 By the contested decision, the EUIPO's Fifth Board of Appeal upheld that appeal, annulled the Cancellation Division's decision and declared the contested mark invalid, for all the goods referred to in point 4 above, on the basis of the ground for invalidity referred to in Article 52(1)(a) of Regulation 207/2009, read in conjunction with Article 7(1)(b) of the same Regulation, without examining the existence of the other grounds for invalidity, absolute and relative, invoked by the intervener. Having observed that, in the present case, the relevant territory was the European Union as a whole, and that the relevant public was, in substance, the general public, whose level of attention would be high for the purchase of "scooters" falling within class 12, while it would be average for the purchase of "model scooters" falling within class 28, it first overturned the Cancellation Division's assessment that the contested mark had inherent distinctive character within the meaning of Article 7(1)(b) of Regulation 207/2009, and found that the applicant's evidence and arguments failed to demonstrate that the mark had acquired distinctive character throughout the Union as a result of use within the meaning of Article 7(3) of the Regulation.

II. Form of order sought

12 The applicant claims that the Court should:

- annul the contested decision

- in the alternative, annul the said decision and refer the case back to the Board of Appeal so that it may state in which countries the contested mark has or has not acquired distinctive character;

- in any event, order the EUIPO to pay the costs of the proceedings before the Board of Appeal;

- order the EUIPO and the intervener to pay the costs.

13 The EUIPO claims that the Court should:

- dismiss the action ;

- order the applicant to pay the costs.

14 The intervener claims that the Court should:

- dismiss the action

- uphold the invalidity of the contested mark; and

- order the applicant to pay the costs.

III. In law

A. Applicable law *ratione temporis*

15 Given the date of submission of the application for registration at issue, namely March 25, 2013, which is decisive for the purposes of identifying the applicable substantive law, the facts of the present case are governed by the substantive provisions of Regulation No 207/2009 (see, to that effect, Order of 5 October 2004 in *Alcon v OHIM*, C-192/03 P, EU: C:2004:587, paragraphs 39 and 40, and judgment of April 23, 2020, *Gugler France/Gugler and EUIPO*, C-736/18 P, unreported, EU:C:2020:308, paragraph 3 and case law cited).

16 Furthermore, in so far as, according to settled case-law, procedural rules are generally deemed to apply on the date on which they enter into force (see judgment of 11 December 2012, *Commission v Spain*, C-610/10, EU:C:2012:781, paragraph 45 and case-law cited), the dispute is governed by the procedural provisions of Regulation 2017/1001.

B. Admissibility of evidence submitted to the General Court for the first time

17 The applicant specified in the application that annexes 25 to 29 thereto do not constitute new evidence, but purely confirmatory documents of data it had already submitted in the course of the administrative proceedings before the EUIPO, which it was necessary to supplement or corroborate due to concrete objections put forward by the Board of Appeal in the contested decision. However, it would appear from the judgment of March 28, 2012, *Rehbein v OHIM - Dias Martinho (OUTBURST)*

(T-214/08, EU:T:2012:161), that evidence intended to reinforce or clarify the content of the initial evidence, such as that in the present case, is admissible. Similarly, according to the judgment of April 11, 2019, *Adapta Color/EUIPO - Coatings Foreign IP (ADAPTA POWDER COATINGS)* (T-223/17, unreported, EU:T:2019:245), documents relating to factual circumstances to which the decision whose legality is challenged refers would be admissible for the purposes of rebutting arguments raised for the first time by the Board of Appeal.

18 EUIPO argues that annexes 12 to 14 and 24 to 29 of the application are inadmissible, insofar as they were produced for the first time before the Court of First Instance. However, at the hearing, the EUIPO indicated that it no longer contested the admissibility of annex 24 to the application, a fact noted in the minutes of the hearing.

19 The intervener contests only the admissibility of annexes 25 to 29 of the application on the same grounds as those put forward by the EUIPO.

20 Firstly, it should be noted that annexes 12 to 14 of the application correspond to a judgment of the Tribunale di Torino (Turin Court, Italy) of April 6, 2017, to which a technical expert report of January 7, 2016 is annexed (annex 12), to a judgment of the Corte d'appello di Torino (Turin Court of Appeal, Italy) of April 16, 2019 (annex 13) and to a judgment of the Tribunal de Grande Instance de Paris of February 7, 2013 (annex 14). As is apparent in particular from points 13, 19, 39 and 48 of the application, the said annexes were relied on by the applicant by way of illustration in order to contest the Board of Appeal's finding that the contested mark is devoid of distinctive character, within the meaning of Article 7(1)(b) of Regulation No. 207/2009.

21 In this regard, it should be noted that, on the one hand, the judgment of the Tribunal de Grande Instance de Paris of February 7, 2013 (Annex 14 to the application) is in the EUIPO's administrative file and was therefore not produced for the first time before the Court, so that it is admissible.

22 On the other hand, while the judgment of the Tribunale di Torino (Turin District Court, Italy) of April 6, 2017, to which a technical expert report of January 7, 2016 is annexed (Annex 12 to the application), and the judgment of the Corte d'appello di Torino (Turin Court of Appeal, Italy) of April 16, 2019 (Annex 13 to the application), were admittedly produced for the first time before the Court of First Instance, they do not, however, constitute evidence as such, but concern national case law, to which a party is entitled to refer (see, to that effect, judgment of 22 September 2021, *Moviescreens Rental/EUIPO - the aircscreen company (AIRSCREEN)*, T-250/20, unreported, EU: T:2021:602, paragraph 20 and case law cited). Indeed, neither the parties nor the Court of First Instance itself can be prevented from drawing inspiration, in interpreting Union law, from elements drawn from national case-law [judgment of 13 June 2019, *MPM-Quality/EUIPO - Elton Hodinářská (MANUFACTURE PRIM 1949)*, T-75/18, unreported, EU:T:2019:413, paragraph 20]. Such a possibility of referring to national judgments is not covered by the case law according to which the purpose of an action before the Court of First Instance is to review the legality of the decisions of the Boards of Appeal in the light of the evidence submitted by the parties before them, since it is not a question of reproaching those Boards for not having taken account of factual elements in a specific judgment, but of relying on

judgments in support of a plea alleging infringement by those Boards of a provision of Regulation No 207/2009, as is the case here (see, to that effect, judgment of March 17, 2021, *Bende v EUIPO - Julius-K9 (K-9)*, T-878/19, not published, EU: T:2021:146, paragraph 56 and the case law cited therein]. It follows that Annexes 12 and 13 to the application must also be declared admissible.

23 Secondly, it should be noted that the documents contained in annexes 25 to 29 to the application, namely a summary table of official sources of sales data and related links dated December 2021 (annex 25), statements confirming sales data provided by official bodies in Spain, Portugal, France and Germany dated December 2021 (annex 26), a statement from the Association of European Motorcycle Manufacturers (ACEM) dated December 20, 2021 confirming sales data for Bulgaria, Estonia, Ireland, Latvia, Lithuania, Poland, Romania, Slovakia and Luxembourg (appendix 27), invoices for sales of "Vespa" in Cyprus dated from 2009 to 2013 (appendix 28) and invoices for sales of "Vespa" in Malta dated from 2010 to 2013 (appendix 29), were all produced for the first time before the Tribunal.

24 It should be borne in mind that the purpose of an action before the General Court is to review the legality of decisions of the EUIPO Boards of Appeal within the meaning of Article 65 of Regulation No. 207/2009. It follows from this provision that facts which have not been invoked by the parties before the EUIPO bodies can no longer be invoked at the appeal stage before the Court, and that the Court cannot re-examine the factual circumstances in the light of evidence presented for the first time before it. Indeed, the legality of a decision of a Board of Appeal of the EUIPO must be assessed on the basis of the information available to it at the time it adopted the decision [see judgment of 19 June 2018 in Case T-89/17 *Erwin Müller v EUIPO - Novus Tablet Technology Finland (NOVUS)*, not published, EU:T:2018:353, paragraph 15 and the case-law cited].

25 The documents contained in annexes 25 to 29 to the application should therefore be disregarded, without it being necessary to examine their probative value (see, to that effect, judgment of 24 November 2005 in Case T-346/04 *Sadas v OHIM - LTJ Diffusion (ARTHUR ET FELICIE)*, EU:T:2005:420, paragraph 19 and the case-law cited therein).

26 The arguments put forward by the applicant are not such as to call this conclusion into question.

27 First, with regard to the applicant's argument that the documents at issue merely supplement and corroborate the evidence presented before the Board of Appeal, it should be recalled that this is irrelevant to the fact that the said Board was not in possession of the information contained in those documents (see, to that effect, judgments of 26 July 2017, *Staatliche Porzellan-Manufaktur Meissen v EUIPO*, C-471/16 P, unreported, EU: C:2017:602, paragraph 27, and of March 9, 2018, *Recordati Orphan Drugs/EUIPO - Laboratorios Normon (NORMOSANG)*, T-103/17, unreported, EU:T:2018:126, paragraph 30].

28 Secondly, with regard to the applicant's argument that it is apparent from the judgment of 28 March 2012, *OUTBURST* (T-214/08, EU:T:2012: 161, paragraph 51), that evidence intended to

reinforce or clarify the content of the original evidence is admissible, it should be noted, as the EUIPO did, that this judgment dealt with the question of admissibility, in the light of the provisions of rule 22, paragraph 2, of Regulation No. 2868/95, of evidence submitted for the first time before the Board of Appeal, and therefore had no bearing on the admissibility of evidence submitted for the first time before the Court of First Instance, so that the said judgment is irrelevant to the present case.

29 Thirdly, the appellant relies on the judgment of 11 April 2019 in ADAPTA POWDER COATINGS (T-223/17, unreported, EU:T:2019:245, paragraphs 16 and 17) to argue that the documents at issue are admissible, as they are intended to rebut an argument raised for the first time by the Board of Appeal. Following a question from the Court of First Instance at the hearing, the appellant clarified that it was intended to rebut the facts resulting from the generally acquired practical experience of marketing the goods in question on which the Board of Appeal relied, in paragraph 61 of the contested decision, when examining the intrinsic distinctiveness of the contested mark. However, it must be noted that the said documents clearly do not concern the intrinsic distinctiveness of the said mark and are in no way intended to refute the well-known fact invoked by the said Board in paragraph 61 of the contested decision. The applicant's argument must therefore be rejected.

C. The merits of the pleas in law

30 In support of its first main claim, the applicant puts forward two pleas in law, the first alleging infringement of Article 7(1)(b) of Regulation No 207/2009 and the second alleging infringement of Article 7(3) of that regulation.

1. The first plea, alleging infringement of Article 7(1)(b) of Regulation 207/2009

31 In essence, the applicant submits that the Board of Appeal wrongly concluded that the contested mark did not diverge significantly from the norm or custom of the sector and was therefore devoid of intrinsic distinctiveness.

32 In particular, the applicant complains that the Board of Appeal failed to take due account of the arguments and evidence submitted by the applicant. In addition, it argues that, even assuming that the representative elements of the contested mark, namely, the arrow-shaped apron, the "inverted Ω " shape between the saddle and the footrest as well as the "X" shape between the rear fairing and the underside of the saddle, taken individually, were not "sufficiently distinctive to give [this mark] a minimum degree of distinctiveness", the way in which these various elements are combined indicates that the said mark, considered as a whole, represents more than the sum of the elements of which it is composed, so that it has distinctive character. This would be confirmed by the renown and recognizability of the historical shape of the "Vespa", by a judgment of the Tribunale di Torino (Turin Court, Italy) of April 6, 2017 and a judgment of the Corte d'appello di Torino (Turin Court of Appeal, Italy) of April 16, 2019, as well as by opinion polls conducted in twelve EU Member States.

33 The EUIPO and the intervener contest the applicant's arguments.

34 Under Article 7(1)(b) of Regulation 207/2009, trademarks that are devoid of distinctive character shall be refused registration.

35 The distinctive character of a mark within the meaning of Article 7(1)(b) of Regulation No 207/2009 means that the mark makes it possible to identify the product for which registration is sought as originating from a particular undertaking and thus to distinguish that product from those of other undertakings (see judgment of 21 January 2010, Audi v OHIM, C-398/08 P, EU:C:2010:29, paragraph 33 and case law cited).

36 The distinctive character of a mark must be assessed, firstly, in relation to the goods or services for which registration is sought and, secondly, in relation to the perception of the relevant public (see judgment of 29 April 2004 in Henkel v OHIM, C-456/01 P and C-457/01 P, EU:C:2004:258, paragraph 35 and the case law cited).

37 The criteria for assessing the distinctiveness of three-dimensional marks consisting of the shape of the product itself are no different from those applicable to other categories of marks. However, when applying these criteria, the perception of the average consumer is not necessarily the same in the case of a three-dimensional mark, consisting of the appearance of the product itself, as in the case of a word or figurative mark, which consists of a sign independent of the appearance of the products it designates. Average consumers are not in the habit of presuming the origin of goods on the basis of their shape or that of their packaging, in the absence of any graphic or textual elements, and it could therefore prove more difficult to establish distinctiveness in the case of a three-dimensional mark than in the case of a word or figurative mark (judgments of October 7, 2004, Mag Instrument/OHMI, C-136/02 P, EU: C:2004:592, paragraph 30, and of October 20, 2011, Freixenet/OHMI, C-344/10 P and C-345/10 P, EU:C:2011:680, paragraphs 45 and 46).

38 The closer the shape applied for as a trademark is to the most likely shape that the product in question will take, the more likely it is that said shape is devoid of distinctive character, within the meaning of Article 7(1)(b) of Regulation 2017/1001. In those circumstances, only a mark which significantly diverges from the norm or custom of the sector and is therefore capable of fulfilling its original essential function is not devoid of distinctive character within the meaning of that provision (judgments of 7 October 2004, Mag Instrument v OHIM, C-136/02 P, EU: C:2004:592, paragraph 31, and of 5 February 2020, Hickies/EUIPO (Shape of a shoelace), T-573/18, EU:T:2020:32, paragraph 29 (unreported)).

39 It follows that, where a three-dimensional mark consists of the shape of the product for which registration is sought, the mere fact that that shape is a "variant" of one of the usual shapes of that type of product is not sufficient to establish that the mark is not devoid of distinctive character, within the meaning of Article 7(1)(b) of Regulation 2017/1001. It must always be ascertained whether such a mark enables the average consumer of that product, who is reasonably well informed and reasonably

observant and circumspect, to distinguish, without carrying out an analysis and without paying particular attention, the product concerned from those of other undertakings [see judgment of 7 May 2015, *Voss of Norway v OHIM*, C-445/13 P, EU: C:2015:303, paragraph 92 and case law cited; judgment of 29 June 2018, *hoechstmass Balzer/EUIPO (Shape of a tape measure housing)*, T-691/17, unreported, EU:T:2018:394, paragraph 29].

40 Finally, it should be remembered that novelty or originality are not relevant criteria for assessing the distinctive character of a trademark, so that for a trademark to be registrable, it is not enough for it to be original, but it must be substantially different from the basic shapes of the product in question, commonly used in the trade, and not appear as a mere variant of those shapes (see judgment of 26 November 2015, *Établissement Amra v OHIM (KJ Kangoo Jumps XR)*, T-390/14, unreported, EU: T:2015:897, paragraph 25 and case law cited].

41 It is in the light of those principles that the present plea must be examined.

42 In the first place, the Board of Appeal rightly considered, in essence, in paragraphs 43 to 45 of the contested decision, that the relevant territory was that of the Union as a whole and that the products at issue, namely "scooters" and "model scooters", were intended for the general public, whose level of attention would be high for the purchase of "scooters" falling within Class 12, while it would be average for the purchase of "model scooters" falling within Class 28. These considerations are not challenged by the applicant.

43 Furthermore, as the Board of Appeal pointed out, the high level of attention of the relevant public for the purchase of "scooters" in class 12 cannot have a decisive influence on the legal criteria used to assess the distinctiveness of a sign. Indeed, the threshold of distinctiveness necessary for the registration of a trademark cannot depend on the level of attention of the relevant public (see, to that effect, judgment of 14 February 2019, *Bayer Intellectual Property v EUIPO (Representation of a heart)*, T-123/18, EU:T:2019:95, paragraph 17 and case law cited).

44 Secondly, in paragraphs 53 to 63 of the contested decision, the Board of Appeal held essentially that the contested mark was devoid of intrinsic distinctive character within the meaning of Article 7(1)(b) of Regulation No 207/2009. In particular, it considered, on the basis of facts resulting from the practical experience generally gained from the marketing of the goods in question, that none of the characteristics of the shape represented by the said mark diverged significantly from the usual shapes of a scooter and that, consequently, the mark would only be perceived as a variant of the characteristic shape of a scooter. Furthermore, referring to the examples of scooters cited by the examiner and recalled by the intervener, she considered that the arrow-shaped apron, the "inverted Ω " shape between the saddle and the footrest, and the "X" shape between the rear fairing and the underside of the saddle, put forward by the applicant, were not sufficiently characteristic to confer on the contested mark a minimum degree of distinctiveness and that they would only be perceived as an original form of ornamentation.

45 In the present case, firstly, it should be noted that the contested mark, which is a three-dimensional mark representing the shape of a scooter, corresponds to the shape of the goods in question. Thus, in the light of the case law set out in paragraphs 37 to 39 above, the Board of Appeal was right to consider whether the mark in question diverges significantly from the norm or customary practice in the scooter and scooter model sector.

46 Secondly, it should be borne in mind that, when the Board of Appeal concludes that the contested mark lacks intrinsic distinctiveness, it may base its analysis on well-known facts, i.e. facts resulting from generally acquired practical experience of the marketing of goods for general consumption, which facts are likely to be known to any person and are known in particular to consumers of such goods. In such a case, the said Board is not obliged to present examples of such practical experience [see judgment of 29 June 2015, *Grupo Bimbo v OHIM (Shape of a Mexican tortilla)*, T-618/14, unreported, EU:T:2015:440, paragraph 30 and case law cited].

47 The Board of Appeal was thus able, in the present case, to base its reasoning in particular on the practical experience generally acquired in the marketing of general consumer goods, since the goods covered by the contested mark belong to that category. Indeed, the products in question, which are aimed at the general public (see point 42 above), are likely to be purchased by anyone. What's more, while the "scooters" included in class 12 are certainly relatively expensive durable goods, it has been held that higher-priced products, which are not purchased at regular and frequent intervals, but rather on rare and special occasions, could be regarded as products for general consumption (see, to this effect and by analogy, judgments of September 19, 2012, *Fraas v OHIM (Dark grey, light grey, light blue, dark blue, ochre and beige check pattern)*, T-231/11, unreported, EU: T:2012:445, paragraph 28, and of 14 December 2011, *Vuitton Malletier/OHMI - Friis Group International (Representation of a locking device)*, T-237/10, unreported, EU:T:2011:741, paragraph 49].

48 Thirdly, insofar as the applicant relies on the distinctive character of the contested mark despite the Board of Appeal's analysis based in particular on the practical experience generally acquired in marketing the goods in question, it is for the applicant to provide concrete and substantiated evidence that the mark is distinctive, since it is in a much better position to do so, given its in-depth knowledge of the market (see judgment of 16 January 2014, *Steiff v OHIM (Label with metal button in the middle of a plush ear)*, T-434/12, not published, EU: T:2014:6, paragraph 22 and case law cited].

49 In that regard, the applicant essentially submits that the representative features of the contested mark, namely the arrow-shaped apron, the "inverted Ω " shape between the saddle and the footrest and the "X" shape between the rear fairing and the underside of the saddle, as well as the way in which those various features are combined, enable that mark to be distinguished from other forms of scooter present on the market.

50 However, it has to be said that the contested trademark does not deviate significantly from the basic shapes of the products concerned. In fact, as the examiner pointed out in her communication of April 4, 2013, the said mark reproduces the typical characteristics of the shape of a scooter, such as

the classic small-diameter wheels and the engine recessed under the saddle and hidden by side covers.

51 Furthermore, the features to which the applicant refers in order to consider the contested mark as having the intrinsic ability to distinguish the goods in question from those of its competitors, appear in a very similar way, in particular, in the two examples of scooters present on the market on which the Board of Appeal relied in paragraph 54 of the contested decision, so that these features cannot be considered unusual on the market. This is also corroborated by the various scooter models mentioned by the intervener in its application for a declaration of invalidity and its statement of grounds for appeal, which have similar characteristics. Moreover, the applicant has not put forward any argument to refute the relevance of the examples of scooters on which the said Board relied in particular in order to corroborate its conclusion that the said mark did not diverge significantly from the usual shapes of a scooter.

52 Moreover, even if those features were to be identified by the relevant public, the fact remains that they constitute simple and purely ornamental shapes, so that they are not sufficiently characteristic or striking to confer on the contested mark a minimum degree of distinctive character, as the Board of Appeal rightly found (see, to that effect, Case T-252/21 Hrebenyuk v EIPO (Shape of a stand-up collar), unreported, EU: T:2022:157, paragraph 27 and case law cited]. They will thus be perceived as mere habitual variations on the standard shape of scooters, but not as an indication of the commercial origin of the goods.

53 Finally, the way in which the elements of the contested mark are combined is not likely to give it distinctive character either, since they have no particular impact on the overall appearance of the product in question. Moreover, the applicant does not concretely demonstrate that this is the case.

54 It follows that the Board of Appeal was entitled to consider that the shape represented by the contested mark did not diverge significantly from the usual practice in the sector and that it was no more than a variant of the characteristic shape of a scooter.

55 The other arguments put forward by the applicant are not such as to call this conclusion into question.

56 Firstly, the applicant claims that the Board of Appeal failed to take due account of its arguments and the evidence it had produced. However, it is clear from paragraphs 56 and 62 of the contested decision that the Board did take these arguments and evidence into account, but that it essentially considered that, on the one hand, they related mainly to the question of the acquisition of distinctiveness through use and, on the other hand, that the allegedly distinctive features of the contested mark were not sufficiently distinctive to confer on the mark a minimum degree of distinctiveness. The applicant's argument should therefore be dismissed as unfounded.

57 Secondly, with regard to the alleged repute of the "Vespa" relied on by the applicant, it should be recalled that this criterion is irrelevant for the purposes of determining whether the contested mark had inherent distinctiveness in that it diverged significantly from the norm or custom of the sector (see, to that effect, judgment of September 8, 2021, *Eos Products v. EUIPO (Shape of a spherical container)*, T-489/20, unreported, EU: T:2021:547, paragraph 69], so that the applicant's argument cannot succeed.

58 Thirdly, with regard to the national decisions that would have recognized the intrinsic distinctive character of an Italian trademark representing a shape identical to that of the contested trademark, it should be recalled that the European Union's trademark regime is an autonomous system, made up of a set of rules and pursuing objectives that are specific to it, its application being independent of any national system and the legality of the decisions of the EUIPO's Boards of Appeal having to be assessed solely on the basis of Regulation 207/2009, as interpreted by the EU judiciary. Consequently, the EUIPO and, where applicable, the European Court of Justice are not bound by a decision taken by a Member State, or even a third country, accepting the registrability of the same sign as a national trademark. Admittedly, even if the decisions of national authorities are not binding for the purposes of applying European Union trademark law, they may be taken into consideration (see judgment of September 8, 2021, *Shape of a spherical container*, T-489/20, not published, EU:T:2021:547, paragraph 91 and case law cited).

59 However, in the present case, since the Board of Appeal rightly concluded that the contested mark fell foul of the ground for refusal set out in Article 7(1)(b) of Regulation 207/2009, the national decisions referred to by the applicant are not such as to call into question the legality of the contested decision.

60 Fourthly, with regard to the opinion polls carried out in twelve Member States which establish that the persons questioned immediately recognize the commercial origin of the shape represented by the contested mark in relation to other shapes of scooters, it is sufficient to point out that such a perception of the said mark could, be taken into account only for the purposes of assessing the distinctive character acquired through use of that mark, and not for assessing its intrinsic distinctive character (see, to that effect, judgment of 17 December 2010 in *Case T-346/08 Chocoladefabriken Lindt & Sprüngli v OHIM (Shape of a bell with a red ribbon)*, not published, EU: T:2010:548, paragraph 39 and case law cited].

61 In the light of all the foregoing considerations, the first plea, alleging infringement of Article 7(1)(b) of Regulation No 207/2009, must be dismissed as unfounded.

2. The second plea, alleging infringement of Article 7(3) of Regulation No 207/2009

62 In the context of this plea, the applicant essentially raises two complaints alleging that the Board of Appeal, on the one hand, reversed the apportionment of the burden of proof to its detriment and,

on the other, wrongly considered that the evidence was insufficient to demonstrate the acquisition of distinctive character through use of the contested mark throughout the territory of the Union.

a) The first complaint, alleging a reversal of the burden of proof

63 The applicant argues that, as the contested mark has been registered, it enjoys a presumption of validity, so that it was incumbent on the intervener to adduce evidence capable of calling into question the validity of that registration, which it failed to do. In fact, the intervener merely presented "generic grievances" as to the reliability of the evidence of distinctiveness acquired through use of the said trademark that had been provided, instead of presenting concrete evidence. The applicant deduces that, by considering that it had not submitted sufficient evidence to demonstrate the said acquisition, the Board of Appeal reversed the burden of proof, placing it on the applicant.

64 The EUIPO and the intervener contest the applicant's arguments.

65 In this respect, it should be pointed out that, in invalidity proceedings, the Board of Appeal cannot be obliged to carry out a fresh *ex officio* examination of the relevant facts carried out at the time of registration by the competent EUIPO bodies. It follows from the provisions of Articles 52 and 55 of Regulation 207/2009 that a European Union trademark is considered valid until it is declared invalid following invalidity proceedings. It therefore benefits from a presumption of validity, which is the logical consequence of the control carried out by the EUIPO in the context of the examination of an application for registration [see judgment of June 10, 2020, *Louis Vuitton Malletier v. EUIPO - Wisniewski* (Representation of a checkerboard pattern), T-105/19, unreported, EU:T:2020:258, paragraph 22 and case law cited].

66 This presumption of validity limits the EUIPO's obligation, set out in Article 76(1) of Regulation 207/2009, to examine of its own motion the relevant facts that might lead it to apply the absolute grounds for refusal to the examination of the application for a European Union trade mark carried out by the EUIPO bodies during the registration procedure for that trade mark. However, in invalidity proceedings, as the registered European Union trademark is presumed to be valid, it is up to the person who filed the invalidity application to raise before the EUIPO the concrete elements that would call into question its validity (see, to that effect, judgment of March 29, 2019, *All Star v. EUIPO - Carrefour Hypermarchés* (Shape of a shoe sole), T-611/17, unreported, EU:T:2019:210, paragraph 45 and case law cited).

67 However, while this presumption of validity of the registration limits the EUIPO's obligation to examine the relevant facts, it cannot, for all that, prevent it, in particular in the light of the elements relied on by the party contesting the validity of the contested mark, from relying on those arguments as well as on any evidence attached by that party to the application for a declaration of invalidity (see judgment of 18 November 2015, *Research Engineering & Manufacturing/OHMI - Nedschroef Holding* (TRILOBULAR), T-558/14, unreported, EU: T:2015:858, paragraph 41 and case law cited).

68 In the present case, it should be noted that, contrary to the applicant's contention, the intervener had contested the validity of the mark at issue and, in particular, the sufficiency of the evidence of the acquisition of distinctive character through use submitted by the applicant, putting forward concrete evidence in support of the application for a declaration of invalidity. Indeed, as indicated in paragraph 67 of the contested decision, the intervener had essentially pointed out that the documents submitted by the applicant referred generically to the mythical and legendary "Vespa", but not specifically to the scooter whose shape is represented by the contested mark, and did not "even contain a sales invoice, the most typical and effective document for demonstrating the use referred to in Article 7(3) of [Regulation No. 207/2009]".

69 It follows that it was incumbent on the Board of Appeal, as it did, to examine the arguments put forward by the intervener and thus to determine whether, as the latter claimed, the evidence submitted by the applicant was not sufficient to demonstrate that the contested mark had acquired distinctive character through use.

70 Consequently, in so doing, the Board of Appeal in no way reversed the burden of proof. Moreover, contrary to the applicant's contention, it is not apparent from the contested decision that the Board imposed any "additional obligation" on the applicant. Finally, insofar as the applicant maintains that it was up to the intervener to demonstrate the absence of distinctive character acquired through use, this argument can no longer succeed, since it is clear from the scheme of Article 52(2) of Regulation 207/2009 (now Article 59(2), of Regulation 2017/1001) that it is for the proprietor of the mark whose invalidity is sought to produce appropriate and sufficient evidence to show that it has acquired distinctive character (see, to that effect, judgment of 29 March 2019, *Shape of a shoe sole*, T-611/17, not published, EU: T:2019:210, paragraphs 156 and 157 and the case law cited).

71 This complaint should therefore be dismissed as unfounded.

b) The second complaint, alleging that the Board of Appeal wrongly concluded that there was insufficient evidence of distinctive character acquired through use of the contested mark

72 The applicant maintains that, contrary to the Board of Appeal's finding, there was sufficient evidence to show that the contested mark had acquired distinctive character through use throughout the Union.

73 Firstly, the applicant points out that the opinion polls proved recognition of the "Vespa" shape in twelve Member States representing 83.43% of the European population, which is a more than significant sample of the relevant public. Moreover, an overall analysis of the evidence would demonstrate the acquisition of distinctive character through use of the contested trademark throughout the territory of the Union. Secondly, the applicant considers that the evidence it has provided relates directly to the contested mark, given that it represents the shape of the "Vespa", whose essential features have never been altered and are repeated in all models of "Vespa" scooters.

Thirdly, it maintains that, contrary to the Board of Appeal's finding, the data it has presented is objective and has been supplied by specifically identified independent third-party entities.

74 The EUIPO disputes the applicant's arguments and points out that the distinctive character acquired through use must be established throughout the territory of the Union and not only in a substantial part or the majority of that territory. However, the evidence, even if assessed globally, would not provide sufficient data for the whole of the said territory. In fact, the opinion polls covered only twelve Member States, and the applicant did not provide adequate documentation for the remaining part of the territory of the Union. In particular, the data relating to sales volume, turnover and market share contained in the tables drawn up by the applicant itself were not accompanied by documents from third parties which could corroborate and confirm their veracity and reliability. Moreover, contrary to the applicant's claims, the information contained in the evidence and the explanations provided do not clearly and unambiguously identify the source of the information.

75 The intervener also contests the applicant's arguments and points out that the opinion polls concern only eleven Member States, whereas case law would require proof to be provided for each Member State taken individually. In addition, the market studies are devoid of probative value, given that they were carried out on behalf of the applicant, postdate the filing of the contested trademark and do not objectively demonstrate the alleged distinctive character acquired through use of the said trademark. Furthermore, the data relating to sales and advertising investment were tables drawn up by the applicant itself and contained no indication as to the sources of the data, so that they were devoid of any probative value. In any case, these data are irrelevant, since they do not relate to the sale of the "Vespa LX" scooter, the shape of which is represented by the contested trademark, but concern "Vespa" scooters in general. The same would apply to evidence relating to the presence of "Vespa clubs", which would not concern this trademark, but "historic Vespa" scooters.

76 In the present case, the applicant submitted a number of items of evidence during the administrative proceedings before the EUIPO. These included the following documents:

- an extract from the New York Museum of Modern Art (MoMA) website dated July 18, 2013 showing the "Vespa GS 150" scooter model;

- excerpts from Italian online newspapers dated 2013 reporting that the "Vespa" is one of the twelve objects that have left their mark on world design;

- brochures on the "Vespa GTS + GTS Super", "Vespa LX + S", "Vespa PX", "Gamma Vespa", "Gamma 2012" scooters from 2012 and 2013;

- an Excel table with data on sales volume and market share of the "Vespa" from 2007 to 2012 in the EU, Italy, Germany, France, Spain, the UK, the Netherlands, Belgium, Greece, Austria, Croatia,

Portugal, Denmark, Finland, Sweden, the Czech Republic, Slovenia, Hungary, Poland, Romania, Estonia, Lithuania, Latvia, Slovakia, Ireland, Bulgaria and Luxembourg;

- a table showing the sources of the data in the table on sales volume and market share for the "Vespa";

- an Excel table showing sales volume and turnover for the "Vespa" from 2003 to 2012 in all member states;

- a presentation entitled "Distribuzione Vespa EMEA & AMERICAS Piaggio Group, Milano, Maggio 2013" (Distribution Vespa EMEA & AMERICAS Piaggio Group, Milan, May 2013);

- an Excel table summarizing advertising investment from 2003 to 2012;

- a publication entitled "Il mito di Vespa" (the Vespa myth), 2001;

- the statutes of the "Vespa World Club", extracts from the "www.vespaworldclub.com" website, a list of "Vespa clubs" in several member states and events organized in 2012 as part of "Vespa clubs";

- a publication entitled "Il libro della Comunicazione" (the book of communication) from 1995 and illustrations taken from it;

- a catalog entitled "Eurovespa 2000";

- photographs of the "Vespa" at the cinema;

- a table detailing daily visits to the Piaggio Museum in 2013, and extracts from the Museum's visitors' book of October 2012;

- a publication entitled "Vespa. Un'avventura italiana nel mondo" (Vespa. An Italian adventure in the world) from 2005;

- tables containing data on the population of the EU and individual member states;

- opinion polls entitled "Riconoscibilità forma scooter" (scooter shape recognition) carried out by a statistical research and public opinion analysis institute between June and September 2014 in Italy, Austria, Belgium, the Czech Republic, France, Germany, the Netherlands, Poland, Portugal, Spain, Sweden and the UK;

- an opinion poll entitled "Riconoscibilità di quattro forme di scooter" (recognition of four forms of scooter) carried out by the same institute for statistical research and analysis of public opinion in September 2014;

- a letter from the national association of cycles, mopeds and their accessories (ANCMA) dated January 29, 2015, containing data on scooter sales in Italy for the years 2007 to 2013;

- an informative note issued by the Institute for Statistical Research and Public Opinion Analysis in question on June 19, 2015, in which the details of the surveys referred to in appendices 10 to 22 of the memorandum of November 10, 2014 are described;

- an audit report on the verification of revenues from the sale of "Vespa" scooters and advertising investments made in connection with the Vespa brand from January 1, 2005 to December 31, 2013.

77 In this respect, it should first be recalled that, according to Article 52(2) of Regulation 207/2009, where a European Union trademark has been registered contrary to, in particular, Article 7(1)(b) of that regulation, which provides that trademarks which are devoid of any intrinsic distinctive character shall not be registered, the trademark may not be declared invalid if, through the use made of it after registration, it has acquired a distinctive character in relation to the goods or services for which it is registered. According to Article 7(3) of the said Regulation, paragraph 1(b) of the same Article is not applicable if the mark has acquired, in respect of the goods or services for which registration is sought, a distinctive character through the use which has been made of it.

78 Thus, Article 52(2) of Regulation No 207/2009 applies to trade marks whose registration was contrary, in particular, to Article 7(1)(b) of that Regulation and which, in the absence of such a provision, would have had to be cancelled, pursuant to Article 52(1) of that Regulation. The very purpose of Article 52(2) of Regulation 207/2009 is to maintain the registration of trademarks which, as a result of the use made of them, have, in the meantime, i.e. after their registration, acquired distinctive character in relation to the goods or services for which they were registered, despite the fact that that registration, at the time it took place, was contrary to Article 7 of the same regulation (see, to that effect, judgment of 21 April 2015, *Louis Vuitton Malletier v OHIM - Nanu-Nana* (Representation of a grey checkerboard pattern), T-360/12, not published, EU: T:2015:214, paragraph 82 and case law cited).

79 According to the case law, in order to determine whether a mark has acquired distinctive character following the use made of it, the competent authority must carry out a concrete examination and

make an overall assessment of the elements which may demonstrate that the mark has become capable of identifying the product or service concerned as originating from a specific undertaking (see judgment of 19 June 2014, *Oberbank and Others*, C-217/13 and C-218/13, EU:C:2014:2012, paragraph 40 and case law cited).

80 In this respect, account must be taken, in particular, of the market share held by the mark, the intensity, geographical extent and duration of use of that mark, the scale of the investment made by the undertaking to promote it, the proportion of interested circles which identify the product as originating from a particular undertaking thanks to the mark, statements by chambers of commerce and industry or other trade associations and opinion polls (see judgment of 10 June 2020, *Representation of a checkerboard pattern*, T-105/19, unreported, EU: T:2020:258, paragraph 63 and case law cited).

81 If, on the basis of such evidence, the circles concerned, or at least a significant proportion thereof, use the mark to identify the product as originating from a particular undertaking, it must be concluded that the condition laid down in Article 7(3) of Regulation 207/2009 has been met (see, by analogy, Case C-108/97 and C-109/97 *Windsurfing Chiemsee*, EU:C:1999:230, paragraph 52).

82 Finally, as regards the geographical scope of proof of distinctive character acquired through use, it should be recalled that, under Article 1(2) of Regulation 207/2009, the European Union trademark has a unitary character and produces the same effects throughout the Union. It follows from the unitary nature of the European Union trade mark that, in order to be eligible for registration, a sign must possess distinctive character, intrinsic or acquired through use, throughout the Union (see, to that effect, judgment of 25 July 2018, *Société des produits Nestlé and Others v Mondelez UK Holdings & Services*, C-84/17 P, C-85/17 P and C-95/17 P, EU:C:2018:596, paragraph 68).

83 Thus, a sign can only be registered as a European Union trade mark, pursuant to Article 7(3) of Regulation No 207/2009, if there is proof that it has acquired, through the use made of it, a distinctive character in the part of the Union in which it did not ab initio have such a character, within the meaning of paragraph 1(b) of that article. It follows that, in the case of a mark devoid of distinctive character ab initio in all the Member States, such a mark may be registered under that provision only if it is shown that it has acquired distinctive character through use throughout the territory of the Union (see, to that effect, judgment of 25 July 2018, *Société des produits Nestlé e. a./Mondelez UK Holdings & Services*, C-84/17 P, C-85/17 P and C-95/17 P, EU:C:2018:596, paragraphs 75 and 76 and the case law cited).

84 In that regard, the Court has made clear that it would be excessive to require proof of such an acquisition to be provided for each Member State taken individually (see, to that effect, judgment of 24 May 2012, *Chocoladefabriken Lindt & Sprüngli v OHIM*, C-98/11 P, EU:C:2012:307, paragraph 62).

85 Indeed, there is no provision in Regulation 207/2009 that requires separate proof of the acquisition of distinctive character through use in each individual Member State. It cannot, therefore,

be ruled out that evidence of the acquisition, by a particular sign, of distinctive character through use is relevant in relation to several Member States, or even the Union as a whole (judgment of 25 July 2018, *Société des produits Nestlé and Others v Mondelez UK Holdings & Services*, C-84/17 P, C-85/17 P and C-95/17 P, EU:C:2018:596, paragraph 80).

86 In particular, it is possible that, for certain products or services, economic operators have grouped together several Member States within the same distribution network and treated those Member States, in particular from the point of view of their marketing strategies, as if they constituted a single national market. In such a case, evidence of the use of a sign on such a cross-border market is likely to be relevant for all the Member States concerned (judgment of 25 July 2018, *Société des produits Nestlé and Others v Mondelez UK Holdings & Services*, C-84/17 P, C-85/17 P and C-95/17 P, EU:C:2018:596, paragraph 81).

87 The same applies where, because of the geographical, cultural or linguistic proximity between two Member States, the relevant public in the former has sufficient knowledge of the products or services present on the national market of the latter (judgment of 25 July 2018 in *Société des produits Nestlé e.a./Mondelez UK Holdings & Services*, C-84/17 P, C-85/17 P and C-95/17 P, EU:C:2018:596, paragraph 82).

88 While it is therefore not necessary, for the purposes of registration, on the basis of Article 7(3) of Regulation No 207/2009, of a mark devoid ab initio of distinctive character in all the Member States of the Union, for proof to be adduced, for each Member State taken individually, of the acquisition by that mark of distinctive character through use, the evidence adduced must nevertheless make it possible to demonstrate such an acquisition in all the Member States of the Union. Indeed, in the case of a trademark which does not possess intrinsic distinctive character throughout the Union, the distinctive character acquired through use of that trademark must be demonstrated in the whole of that territory, and not just in a substantial part or the majority of that territory, so that, although such proof may be adduced globally for all the Member States concerned or separately for different Member States or groups of Member States, it is not sufficient for the party bearing the burden of proof merely to adduce evidence of such acquisition which does not cover part of the Union, even if it consists of a single Member State (see, to that effect, judgment of 25 July 2018, *Société des produits Nestlé e. a. a./Mondelez UK Holdings & Services*, C-84/17 P, C-85/17 P and C-95/17 P, EU:C:2018:596, paragraphs 83 and 87).

89 It is in the light of these considerations that the arguments put forward by the applicant should be examined.

90 As a preliminary point, it should be recalled that, for the purposes of applying Article 7(3) of Regulation 207/2009, it must be shown that the distinctive character of the mark has been acquired through use prior to the date of filing of the application for registration (judgment of 15 December 2005, *BIC v OHIM (Shape of a flint lighter)*, T-262/04, EU:T:2005:463, paragraph 66). This interpretation does not rule out the possibility for the competent authority to take into consideration factors which, although subsequent to the date of filing of the application for registration, enable

conclusions to be drawn about the situation as it was prior to that same date (see, to this effect, judgment of July 17, 2008, L & D/OHMI, C-488/06 P, EU:C:2008:420, paragraph 71, and of June 19, 2014, Oberbank e.a., C-217/13 and C-218/13, EU:C:2014:2012, paragraphs 54 to 61).

91 Furthermore, Article 52(2) of Regulation No 207/2009 provides, *inter alia*, that, where the European Union trade mark has been registered contrary to Article 7(1)(b) of that Regulation, it may not, however, be declared invalid if, through the use which has been made of it, it has acquired after registration a distinctive character in relation to the goods for which it is registered.

92 It follows that, as the Board of Appeal pointed out in essence in paragraph 66 of the contested decision, the applicant had to prove either that the contested mark had, prior to the date of filing of the application for registration on March 25, 2013, acquired distinctive character by reason of the use made of it, or that it had acquired such character by reason of the use made of it, between the date of its registration, January 16, 2014, and that of the application for a declaration of invalidity, April 29, 2014, and in the Union as composed at the time of filing the application for registration [see judgment of December 15, 2016, Mondelez UK Holdings & Services v EUIPO - Société des produits Nestlé (Shape of a chocolate bar), T-112/13, unreported, EU: T:2016:735, paragraph 117 and case law cited].

93 Furthermore, it should be recalled that the contested mark is devoid of intrinsic distinctive character throughout the Union, as was found in the examination of the first plea. Consequently, the applicant had to show that the mark had acquired distinctive character through use in all the Member States, as the Board of Appeal stated in substance in paragraph 81 of the contested decision.

94 First, in paragraphs 67 to 88 of the contested decision, the Board of Appeal essentially held that the evidence submitted by the applicant did not demonstrate that the contested mark had acquired distinctive character throughout the territory of the Union as a result of the use made of it.

95 Firstly, the Board of Appeal noted that much of the evidence did not refer to the shape represented by the contested mark, but in general to the various models of scooters sold by the applicant under the Vespa trademark, most of which showed significant differences from the said shape, irrespective of the possible coincidence of certain features.

96 In this respect, it should be borne in mind that, while the acquisition of distinctive character may result both from the use, as part of a registered mark, of an element of that mark and from the use of a separate mark in combination with a registered mark, the essential condition is always that, as a result of such use, the sign in respect of which registration as a mark is sought must be capable of designating, in the minds of the circles concerned, the goods to which it relates as coming from a particular undertaking. It follows that, in order to obtain registration of a trade mark which has acquired distinctive character through use within the meaning of Article 7(3) of Regulation No 207/2009, whether as part of another registered trade mark or in combination with it, the applicant for registration must demonstrate that the trade mark has acquired distinctive character through use,

the applicant for registration must prove that the interested parties perceive the product or service designated by that mark alone, as opposed to any other mark which may also be present, as originating from a specific undertaking (see, by analogy, Nestlé, C-353/03, EU: C:2005:432, paragraph 30; of 18 April 2013, Colloseum Holding, C-12/12, EU:C:2013:253, paragraphs 27 and 28, and of 16 September 2015, Société des Produits Nestlé, C-215/14, EU:C:2015:604, paragraphs 64 to 67).

97 It is therefore necessary to assess, in the present case, whether the evidence adduced by the applicant was sufficient to establish that the interested circles actually perceived the "scooters" and "model scooters" designated by the contested mark alone as originating from a specific undertaking, in this case itself.

98 Furthermore, it has been held that evidence which does not specifically concern a mark is not such as to show that it has acquired distinctive character through use (see, to that effect, judgment of 24 February 2016 in Coca-Cola v OHIM (Shape of a bottle with contours without grooves), T-411/14, EU:T:2016:94, paragraphs 86 and 88).

99 In the present case, it is clear from the evidence in the file that the shape represented by the contested mark corresponds to the three-dimensional representation of the "Vespa LX" scooter marketed by the applicant.

100 While much of the evidence produced by the applicant admittedly does not relate directly to this representation, but rather to the "Vespa" in general or to other "Vespa" models, the fact remains that the applicant has produced certain evidence that relates specifically to the contested mark, such as brochures and opinion polls.

101 Furthermore, it should be noted that the overall appearance of the scooters featured in the evidence produced by the applicant, including the "Vespa LX" scooter, remains essentially the same.

102 As pointed out by the applicant, this is supported in particular by the fact that the three features of the shape represented by the contested mark that were mentioned by the applicant, namely the arrow-shaped apron, the "inverted Ω " shape between the saddle and the footrest and the "X" shape between the rear fairing and the underside of the saddle, appear in all the other "Vespa" scooters in the applicant's evidence, as well as in all the "Vespa" scooters marketed between 1945 and 2008 that were presented by the applicant in its reply to the examiner's communication of April 3, 2014.

103 This finding is also corroborated by the judgment of April 6, 2017 of the Turin District Court (Annex 12 to the application), in which it was acknowledged that the three aforementioned features as well as the teardrop shape of the hull were recurrent in all "Vespa" models from 1945 to the present day and, in any event, certainly in the "Vespa LX" scooter whose shape is represented by the contested trademark.

104 Finally, there are few variations between the various models of "Vespa" scooters.

105 It follows that, given the existence of evidence that relates specifically to the contested mark, evidence referring to the "Vespa" in general or to other "Vespa" models relates, in some way, to the shape represented by the contested mark and cannot be disregarded when examining the distinctive character acquired through use of the contested mark. Indeed, it cannot be ruled out that this evidence, taken as a whole, is such as to demonstrate that the relevant public perceives all "Vespa" scooters, including the "Vespa LX" scooter whose shape is represented by the mark applied for, as coming from the same specific company, given their overall appearance, which has remained essentially the same since 1945. The Board of Appeal therefore committed an error of assessment in essentially finding, in paragraphs 72 and 73 of the contested decision, that this evidence was irrelevant.

106 Secondly, the Board of Appeal noted that the data relating to sales volume, turnover, market share and advertising investment were unreliable and that there was no evidence to corroborate them.

107 In this respect, the table showing sales volume and market share data for "Vespa" in 26 member states shows that "Vespa" models have the highest sales volume and also one of the highest market shares in all member states between 2007 and 2012. Furthermore, with regard to the data for Cyprus and Malta, which are not included in the above table, it is clear from the table showing sales volume and turnover for the said models in all Member States, that sales volume and turnover for these two Member States are not particularly high, but have increased between 2009 and 2012.

108 While, as the Board of Appeal rightly pointed out, these data consist of simple Excel tables prepared by the applicant itself, so that their probative value is limited, the fact remains that the applicant has produced evidence that is such as to confirm certain data relating to sales volume and the market share held by "Vespa". In particular, the ANCMA letter of January 29, 2015 confirms, at the very least, the data relating to sales volume and market share for "Vespa" in Italy between 2007 and 2012. Similarly, the audit report indicates that the applicant obtained significant revenues between 2005 and 2013 in Italy, thanks to the sale of "Vespa".

109 The Board of Appeal therefore committed an error of assessment in essentially considering, in paragraphs 70 and 84 of the contested decision, that there was no evidence to corroborate the data relating to sales volume, turnover and market share of the "Vespa".

110 Furthermore, it is clear from the table showing the applicant's advertising investments that it spent very large sums on promoting the "Vespa", at least in Italy, Germany, Spain, France and Belgium between 2003 and 2012.

111 While these data also appear in an Excel table prepared by the applicant herself, so that their evidential value is limited, it should nevertheless be noted that there was evidence to corroborate the scale of the advertising investments made by the applicant.

112 Firstly, the audit report confirms that the applicant made significant advertising investments between 2005 and 2013 in Italy. Secondly, the applicant presented brochures in English and Italian on several "Vespa" models, a book dedicated to the "Vespa myth" and a publication entitled "Vespa. Un'avventura italiana nel mondo", all of which were likely to demonstrate that the "Vespa" had been advertised not only in Italy, but also on an international level. Finally, the "Eurovespa 2000" catalog and the presence of "Vespa clubs" in 20 Member States were also likely to demonstrate that the applicant had made certain efforts to promote the "Vespa" within the Union.

113 The Board of Appeal therefore committed an error of assessment in considering, in paragraph 71 of the contested decision, that there was no evidence capable of corroborating the data relating to the advertising investments made by the applicant in respect of the 'Vespa'.

114 Thirdly, the Board of Appeal considered that the evidence did not cover the entire territory of the Union. In particular, the opinion polls had only been carried out in twelve Member States and therefore covered only part of that territory. Furthermore, the data relating to sales volume, turnover and market share were not corroborated by any objective elements, so that the applicant had not produced any relevant evidence relating to the Member States not covered by the opinion polls. The said Chamber therefore considered that, even assuming that the opinion polls and other evidence produced by the applicant were relevant, the results of the said polls in twelve Member States could neither be extrapolated to all Member States, nor supplemented and corroborated, in the Member States not covered by the said polls, by the other evidence produced by the applicant.

115 While it is true that the opinion polls concern only twelve Member States, whereas the Union had 27 at the date of filing of the application for registration, it is nevertheless important to emphasize that, although it must be established that the contested mark has acquired distinctive character in all the Member States of the Union, there is no requirement for the same type of evidence to be adduced for each Member State (see judgment of 28 October 2009 in Case T-137/08 BCS v OHIM - Deere (Combination of the colors green and yellow), EU: T:2009:417, paragraph 39 and case law cited therein]. Indeed, the absence of an opinion poll does not rule out the possibility of demonstrating that a sign has acquired distinctive character through use, which may be demonstrated by other elements (see, to that effect, judgments of 28 October 2009, Combination of the colors green and yellow, T-137/08, EU:T:2009:417, paragraph 41, and of 10 June 2020, Representation of a checkerboard pattern, T-105/19, unreported, EU:T:2020:258, paragraph 63).

116 Furthermore, as pointed out in paragraph 88 above, the evidence of distinctiveness acquired through use may concern all or a group of Member States as a whole. Certain evidence may therefore be relevant in relation to several Member States or even the whole of the Union (see, to that effect, judgment of 25 July 2018, Société des produits Nestlé and Others v Mondelez UK Holdings & Services, C-84/17 P, C-85/17 P and C-95/17 P, EU:C:2018:596, paragraphs 80 and 87). As pointed out in

paragraph 85 above, there is no provision in Regulation 207/2009 requiring separate proof of the acquisition of distinctiveness through use in each individual Member State, and it would be excessive to require proof of such acquisition to be provided for each Member State separately.

117 However, it has to be said that certain evidence, other than data relating to sales volume, turnover and market share, was likely to be relevant for the purposes of assessing the distinctive character acquired through use of the contested mark in the Member States not covered by the opinion polls.

118 These include, in particular, the presence of the "Vespa" at the Museum of Modern Art in New York, the numerous extracts from online newspapers all highlighting the fact that the "Vespa" is one of the twelve objects that have left their mark on world design over the last hundred years, according to international design experts, the photographs in the publication entitled "Il mito di Vespa", which show the use of "Vespa" scooters in world-famous films such as "Roman Holiday", and the presence of "Vespa" clubs in many Member States, which were likely to demonstrate the iconic nature of the "Vespa" and therefore its global recognition, including throughout the Union.

119 The Board of Appeal therefore committed an error of assessment by failing to take account of the evidence at issue, which was nonetheless capable of demonstrating the distinctive character acquired through use of the contested mark throughout the Union.

120 In those circumstances, the applicant is entitled to claim that the Board of Appeal infringed Article 7(3) of Regulation 207/2009, so that the second complaint in the second plea in law must be upheld.

121 The contested decision should therefore be annulled.

IV. Costs

122 Under Article 134(1) of the Rules of Procedure of the Court of First Instance, any unsuccessful party is to be ordered to pay the costs of the proceedings, if an order to that effect is made.

123 In the present case, the applicant has claimed that the EUIPO and the intervener should be ordered to pay the costs incurred before the Court of First Instance.

124 As the EUIPO and the intervener have been unsuccessful, they should be ordered to bear their own costs and to pay those of the applicant in the present proceedings, in accordance with the latter's submissions.

125 The applicant also seeks an order that the EUIPO pay the costs incurred before the Board of Appeal.

126 In that regard, it will be for the Board of Appeal to rule, in the light of the present judgment, on the costs relating to those proceedings (see, to that effect, judgment of 5 December 2012, *Consorzio vino Chianti Classico v OHIM - FFR (F.F.R.)*, T-143/11, not published, EU:T:2012:645, paragraph 74 and the case-law cited).

For these reasons,

THE COURT OF FIRST INSTANCE (Third Chamber)

declares and orders:

1) The decision of the Fifth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of October 25, 2021 (Case R 359/2021-5) is annulled.

2) Orders the EUIPO and Zhejiang Zhongneng Industry Group Co. Ltd to bear their own costs and to pay those incurred by Piaggio & C. SpA.

Schalin

Škvařilová-Pelzl

Nömm

Delivered in open court in Luxembourg on November 29, 2023.

Signatures