

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

29 September 2011 (*)

(Community trade mark – Opposition proceedings – Application for a Community figurative mark representing a shoe with two stripes on the side – Earlier national trade mark representing a shoe with three stripes on the side – Relative ground for refusal – Failure to substantiate the earlier right – Failure to translate elements essential to substantiating the registration of the earlier trade mark – Rule 16(3), Rule 17(2) and Rule 20(2) of Regulation (EC) No 2868/95)

In Case T-479/08,

adidas AG, established in Herzogenaurach (Germany), represented by V. von Bomhard, A. Renck, and I. Fowler, lawyers,

applicant,

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by D. Botis, acting as Agent,

defendant,

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

Patrick Holding ApS, established in Fredensborg (Denmark), represented by J. Løje and T. Meedom, lawyers,

ACTION brought against the decision of the Second Board of Appeal of OHIM of 27 August 2008 (Case R 849/2007-2) relating to opposition proceedings between adidas AG and Patrick Holding ApS,

THE GENERAL COURT (Sixth Chamber),

composed of E. Moavero Milanesi (Rapporteur), President, N. Wahl and S. Soldevila Fragoso, Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 10 November 2008,

having regard to the response of OHIM lodged at the Court Registry on 23 June 2009,

having regard to the response of the intervener lodged at the Court Registry on 9 February 2009,

having regard to the fact that no application for a hearing was submitted by the parties within the period of one month from notification of closure of the written procedure, and having therefore decided, acting upon a report of the Judge-Rapporteur, to give a ruling without an oral procedure pursuant to Article 135a of the Rules of Procedure of the Court,

gives the following

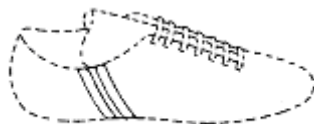
Judgment

Background to the dispute

1 On 12 August 2002, the intervener, Patrick Holding ApS, filed an application for registration of a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) pursuant to

Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p.1)).

2 The mark for which registration was sought is the following figurative sign:



3 The goods for which registration was sought are in Classes 18, 25 and 28 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, in respect of each of those classes, to the following description:

- Class 18: 'Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery';
- Class 25: 'Clothing, footwear, headgear';
- Class 28: 'Games and playthings; gymnastic and sporting articles not included in other classes; decorations for Christmas trees'.

4 The Community trade mark application was published in *Community Trade Marks Bulletin* No 18/2004 of 3 May 2004.

5 On 30 July 2004, the applicant, adidas AG, filed, pursuant to Article 42 of Regulation No 40/94 (now Article 41 of Regulation No 207/2009), a notice of opposition to registration of the trade mark applied for in respect of the goods referred to in paragraph 3 above, based on a number of earlier German and international rights. In annex to its notice of opposition, the applicant submitted extracts from the online register of the Deutsches Patent- und Markenamt (German Patent and Trade Mark Office) and from the online register of the World Intellectual Property Organisation.

6 The opposition was based, inter alia, on the following earlier right, for which the applicant submitted an extract from the online register of the Deutsches Patent- und Markenamt:

- German trade mark registration No 39 950 559 of 14 December 1999, for goods in Class 25, of the following mark:



7 The grounds relied on in support of the opposition were those referred to in Article 8(1)(b) and (5) of Regulation No 40/94 (now Article 8(1)(b) and (5) of Regulation No 207/2009).

8 On 28 September 2004, OHIM sent the applicant a deficiency notice, pursuant to Rules 15 and 18(2) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1), inviting it to provide a graphic representation of the earlier German trade marks and translations into the language of the proceedings – English – of the list of goods for the earlier German trade marks and for one of the earlier international registrations.

9 On 29 November 2004, the applicant filed a graphic representation of the earlier German trade marks and a translation into the language of the proceedings of the lists of goods of all the earlier marks on which the opposition was based.

10 By letter dated 5 January 2005, OHIM set a time-limit of 6 May 2005 for the applicant to substantiate the

opposition, pursuant to Rules 16(3), 17(2), 19(1) and 20(2) of Regulation No 2868/95, drawing the applicant's attention to the requirements for substantiating an opposition, including the translation requirements.

11 On 6 May 2005, the applicant submitted further facts, arguments and evidence in support of the opposition. Further translations of the documents previously submitted as evidence of registration of the earlier rights were not provided.

12 On 5 September 2005, the intervener submitted its observations in reply to the opposition.

13 By fax of 27 February 2006, OHIM requested the applicant to submit proof of use for all the earlier trade marks on which the opposition was based, except for the earlier German mark No 39 950 559, which was not subject to the proof of use requirement.

14 By letter of 10 May 2006, the applicant informed OHIM that the evidence submitted on 6 May 2005 proved the reputation of its earlier marks and also served as proof of their use in Germany. In that letter, the applicant enclosed further proof of use.

15 On 30 March 2007, the Opposition Division upheld the opposition and refused the trade mark application, on the basis of the earlier German trade mark No 39 950 559, which was not subject to the proof of use requirement.

16 On 30 May 2007, the intervener filed a notice of appeal at OHIM against the Opposition Division's decision, pursuant to Articles 57 to 62 of Regulation No 40/94 (now Articles 58 to 64 of Regulation No 207/2009). On 30 July 2007, the intervener filed a written pleading setting out the grounds of its appeal before the Board of Appeal, to which it annexed an extract of the international registration of the earlier German mark No 39 950 559.

17 By decision of 27 August 2008 ('the contested decision'), the Second Board of Appeal of OHIM allowed the appeal, annulled the decision of the Opposition Division and remitted the case to it for further prosecution.

18 First, the Board of Appeal found that the Opposition Division had failed to examine whether the earlier rights on which the opposition was based had been properly substantiated, in breach of Rules 16(3), 17(2) and 20(2) of Regulation No 2868/95. In addition, the Board of Appeal found that the Opposition Division had breached the obligation to state reasons and the obligation to safeguard the right to a fair procedure, laid down in Article 73 of Regulation No 40/94 (now Article 75 of Regulation No 207/2009), by failing to rule on the intervener's objections regarding the lack of translations into the language of the proceedings of the evidence submitted by the applicant in order to substantiate the earlier rights relied on in support of the opposition. The Board of Appeal concluded that those irregularities amounted to substantial procedural defects which justified the annulment of the Opposition Division's decision.

19 Second, the Board of Appeal examined whether it could, on the basis of the evidence in the file regarding the substantiation of the earlier German mark No 39 950 559, adopt a new decision with the same operative part as the Opposition Division's decision. In that connection, the Board of Appeal found that, since certain elements in the extract from the online register of the Deutsches Patent- und Markenamt, relied on in support of the earlier mark No 39 950 559, had not been translated into the language of the proceedings – English – that extract did not enable the existence, validity and scope of the earlier mark at issue to be ascertained. Consequently, in relation to that earlier right – and contrary to what the Opposition Division had decided – the Board of Appeal rejected the opposition as unfounded.

20 Third, the Board of Appeal remitted the case to the Opposition Division for it to determine whether the other earlier rights on which the opposition was based had been legally substantiated, and for a decision to be taken on the basis of those earlier rights.

21 Fourth, the Board of Appeal found that the Opposition Division had unduly discarded a number of documents validly filed by the intervener in the opposition proceedings.

Forms of order sought

22 The applicant claims that the Court should:

- annul the contested decision;
- order OHIM and the intervener to pay the costs.

23 OHIM contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

24 The intervener contends that the Court should:

- dismiss the action and uphold the contested decision;
- order the applicant to pay the costs or, in the alternative, order OHIM to pay the costs or, in the further alternative, order the applicant and OHIM to pay the costs.

Law

25 The applicant relies essentially on a single plea in law in support of its action, alleging infringement of Rule 16(3), Rule 17(2) and Rule 20(2) of Regulation No 2868/95. It submits that the Board of Appeal infringed those rules in concluding that the evidence submitted in support of German registration No 39 950 559 of its earlier mark did not substantiate properly the existence, validity and scope of that mark. In particular, the applicant submits that the evidence, included in the extract from the online register of the Deutsches Patent- und Markenamt submitted in support of the earlier mark No 39 950 559, and for which no translation into the language of the proceedings – English – had been provided, is not relevant to the opposition. Therefore, the lack of translation has no bearing on the outcome of the case.

26 OHIM and the intervener dispute the applicant's arguments.

27 First of all, since the Opposition Division and then the Board of Appeal exercised their discretion regarding the substantiation of the earlier rights only in relation to the earlier mark No 39 950 559 – the mark on the basis of which, moreover, the applicant has primarily developed its arguments – it must be held that it is only in relation to that mark that the Court is to examine the substantiation of earlier rights.

28 Under Rule 16(3) of Regulation No 2868/95, the particulars of the facts, evidence and arguments and other supporting documents as referred to in Rule 16(1), and the evidence referred to in Rule 16(2) may, if they are not submitted together with the notice of opposition or subsequent thereto, be submitted within such period after commencement of the opposition proceedings as OHIM may specify pursuant to Rule 20(2).

29 Under Rule 17(2) of Regulation No 2868/95, where the evidence in support of the opposition as provided for in Rule 16(1) and (2) is not filed in the language of the opposition proceedings, the opposing party is to file a translation of that evidence into that language within a period of one month from the expiry of the opposition period or, where applicable, within the period specified by OHIM pursuant to Rule 16(3).

30 Under Rule 20(2) of Regulation No 2868/95, where the notice of opposition does not contain particulars of the facts, evidence and arguments as referred to in Rule 16(1) and (2), OHIM is to call upon the opposing party to submit such particulars within a period specified by OHIM. Any submission by the opposing party is to be communicated to the applicant who is to be given an opportunity to reply within a period specified by OHIM.

31 In accordance with settled case-law, it follows, in particular, from Article 74(1) of Regulation No 40/94 in fine (now Article 76(1) of Regulation No 207/2009) that in proceedings relating to relative grounds for refusal of registration, the onus is upon the party opposing the registration of a Community trade mark in reliance on an earlier national trade mark to prove its existence and, as the case may be, the extent of protection (Case T-318/03 *Atomic Austria v OHIM – Fabricas Agrupadas de Muñecas de Onil (ATOMIC BLITZ)* [2005] ECR II-1319, paragraph 33).

32 As regards the need, pursuant to Rule 17(2) of Regulation No 2868/95, to translate in full the certificates of

registration of the earlier marks relied on in opposition, the question whether certain parts of the documents concerned may be considered irrelevant for the opposition at issue and therefore not be translated is a matter for the discretion of the opposing party. However, only the parts actually translated into the language of the proceedings are to be taken into consideration by the Opposition Division (Case T-107/02 *GE Betz v OHIM – Atofina Chemicals (BIOMATE)* [2004] ECR II-1845, paragraph 74).

33 It follows that it is not the failure as such to translate certain information from a national registration certificate which might, ultimately, be a basis for rejecting an opposition on the ground that the registration of an earlier mark has not been properly substantiated, but rather the fact that it is impossible for OHIM to take account of that untranslated information. Such a conclusion applies where it becomes apparent that the untranslated information is essential in order to prove the existence, validity and scope of protection of the earlier mark.

34 It is therefore for the General Court to examine the information submitted to OHIM and to decide, in the light of that information, whether the Board of Appeal was entitled to conclude that the registration of the earlier mark was not properly substantiated.

35 In the present case, to substantiate the German registration No 39 950 559 of its earlier mark, the applicant first of all submitted an extract from the online register of the Deutsches Patent- und Markenamt, in annex to its notice of opposition. Subsequently, on 29 November 2004, the applicant submitted to OHIM a graphic representation of the earlier mark and a translation into the language of the proceedings of the list of goods designated by that mark.

36 The extract from the online register of the Deutsches Patent- und Markenamt included a series of terms translated into the language of the proceedings, English. These relate to the registration number ('Registration number/File number: 39950559.8'), the name of the proprietor of the mark ('Owner: adidas-Salomon AG'), the class of goods designated by the mark ('Classes: 25'), the date of filing ('Filing date: 20.08.1999'), the date of registration of the mark ('Date of registration: 14.12.1999') and the date of publication of the registration ('Date of publication of the registration: 13.01.2000').

37 Some of the information included in the extract in the form of headings was also translated into the language of the proceedings. That information relates to the type of mark ('Type of mark'), the legal and procedural status of the mark ('Legal/procedural status') and any opposition proceedings against the registration of that mark ('Opposition procedure').

38 However, the entries relating to each one of those headings were not themselves translated into the language of the proceedings. Those entries correspond, specifically, to the terms 'sonstige Markenform', 'Wid.frist ohne Widersp. abgel. (veröffentl.)' and 'Es wurde kein Widerspruch erhoben'. In accordance with the case-law referred to in paragraph 32 above, OHIM was not to take such untranslated information into account.

39 As regards the graphic representation of the earlier mark and the translation into the language of the proceedings of the list of goods designated by that mark, the Board of Appeal was, however, properly entitled to take these into consideration, although they were not included in the extract from the online register of the Deutsches Patent- und Markenamt. Indeed, in the absence of a full translation of the registration certificate for the earlier mark, the Board of Appeal may, nevertheless, give a ruling on the opposition on the basis of other evidence which it may have before it, in accordance with Rule 20(3) of Regulation No 2868/95 (see, to that effect, *BIOMATE*, cited in paragraph 32 above, paragraph 72).

40 In that connection, the intervener's argument that the list of goods submitted on 29 November 2004 ought not to have been taken into consideration, since the applicant did not state that it was a translation of the corresponding entry from the extract from the online register of the Deutsches Patent- und Markenamt, is not convincing because it does not take account of the factual and procedural context in which that list was submitted. It must be pointed out, as stated in the first paragraph of the letter of 29 November 2004 enclosing the translated list of the goods designated by the earlier mark, that that list was sent to OHIM in reply to its notification of 28 September 2004 inviting the applicant to provide a translation of the list. In addition, the use of the word 'translation' in the letter of 29 November 2004 in order to

designate the list of goods referred to in it leaves no doubt that that list was in fact the translation into the language of the proceedings of the list in the extract from the online register of the Deutsches Patent- und Markenamt submitted to OHIM.

41 In the light of the foregoing, it must be found that although the Board of Appeal had available the list of goods and a graphic representation of the earlier mark, it did not, however, have evidence which could make up for the fact that the entries corresponding to the type of the earlier mark and its legal and procedural status had not been translated into the language of the proceedings.

42 Against that background, it is appropriate to examine the essential nature of the untranslated entries relating to the type of the earlier mark and its legal and procedural status – in the extract from the online register of the Deutsches Patent- und Markenamt – which the Board of Appeal was not able to consider in the course of its analysis.

43 First, as regards the entry ‘Type of mark’, it must be noted, first of all, that the applicant has failed to adduce evidence which substantiates its claim that the indication of the type of mark has no legal force under German law because the nature and the scope of the protection of a mark depend on that mark’s graphic representation.

44 Similarly, although the applicant seeks to rely on a new extract from the register of the Deutsches Patent- und Markenamt dated 29 October 2008 and on a copy of the registration certificate for the earlier national mark together with an English-language translation thereof, in order to prove that the indication of the type of mark has no legal force under German law, it is sufficient to note that those documents, produced for the first time before the Court, cannot be taken into consideration. The purpose of actions before the General Court is to review the legality of decisions of the Boards of Appeal of OHIM for the purposes of Article 63 of Regulation No 40/94 (now Article 65 of Regulation No 207/2009), so it is not the Court’s function to review the facts in the light of documents produced for the first time before it. Accordingly, the abovementioned documents must be excluded, without it being necessary to assess their probative value (Case T-346/04 *Sadas v OHIM – LTJ Diffusion (ARTHUR ET FELICIE)* [2005] ECR II-4891, paragraph 19).

45 In addition, contrary to what the applicant claims, the indication of the type of the earlier mark is essential in order to assess the scope of the protection of the earlier mark on which opposition proceedings under Article 8(1)(b) of Regulation No 40/94 are based.

46 Although that regulation does not differentiate between the various types of marks when their distinctiveness is being assessed (see, to that effect, Joined Cases C-53/01 to C-55/01 *Linde and Others* [2003] ECR I-3161, paragraph

48), the fact remains that the type of mark is a factor in such an assessment, since distinctiveness may prove more difficult to establish depending on whether a three-dimensional or a figurative mark is involved.

47 Thus, a mark with a highly distinctive character enjoys more extensive protection than a mark with a less distinctive character (order of 27 April 2006 in Case C-235/05 P *L’Oréal v OHIM*, not published in the ECR, paragraph

36). Where the earlier mark consists of the shape of the product itself, it will be less easy to establish distinctiveness in relation to that mark than where the earlier mark is a figurative trade mark, since in the latter case, signs or logos may contribute to a greater or lesser extent in establishing the distinctiveness necessary for the purposes of assessing whether there is a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 (see, to that effect, *Linde and Others*, cited in paragraph 46 above, paragraph 48).

48 In the present case, it is apparent from the graphic representation submitted by the applicant on 29 November 2004 that the earlier mark is represented by a shoe, which is, moreover, one of the goods in respect of which registration was sought, namely, goods in Class 25. Thus, where the earlier mark consists of the shape of the product itself, it will be necessary to take into consideration the shape of the product as a whole in order to assess the mark’s distinctiveness. On the other hand, where the earlier mark is a figurative mark, even if the overall impression has to be taken into account, any graphic elements present are likely to assume a greater or lesser importance in the assessment of the distinctiveness of that mark. It follows from this that, if the earlier mark is a three-dimensional mark, it may be found to be less

distinctive and, therefore, enjoy a more limited protection than that likely to be afforded to a figurative mark.

49 Accordingly, in the circumstances of the present case, in which it is not possible *a priori* to deduce the type of the earlier mark at issue from the graphic representation, the indication of the type of mark was of vital importance in the context of the opposition proceedings, and it was for the applicant to communicate that indication to OHIM so that the latter could ascertain the scope of the mark's protection. In that connection, the Court cannot draw any inference from the fact that, in its letter of 29 November 2004, the applicant used the expression 'the earlier ... national figurative marks' in a general fashion, without further explanation, to allude to the earlier national marks as a whole.

50 Second, as regards the entry 'Legal/procedural status' for the earlier mark, it should be noted that, in paragraph 43 of the contested decision, the Board of Appeal found – without being challenged on that point by the parties – that that expression related to the legal validity of that mark and to whether there are procedures pending which might affect that validity. In addition, it is clear from the OHIM guidance annexed to OHIM's letter to the applicant of 5 January 2005 that the indication of the legal status of the earlier mark concerned covers circumstances such as the renewal of the earlier mark or the existence of actions pending.

51 As is clear from the case-law referred to in paragraph 31 above, it is for the opposing party to prove, *inter alia*, the validity of the earlier mark on which the opposition is based. This is justified by the fact that the assessment of a relative ground for refusal for the purpose of Article 8(1)(b) or Article 8(5) of Regulation No 40/94 presupposes the coexistence of marks for a certain period and that OHIM must, therefore, be in a position to ascertain with sufficient certainty the validity of the earlier mark. Since the validity of the earlier mark may be affected by certain circumstances such as, *inter alia*, the existence before the national authorities of opposition proceedings against that mark, as such proceedings may result in a retroactive declaration of invalidity of the earlier mark, it is for the opposing party which seeks to base its opposition on such a mark to inform OHIM of any circumstances which may affect the mark's validity.

52 Thus, contrary to the applicant's contention, the indicators of the legal status and, in particular, of the existence of opposition proceedings brought against the earlier mark are essential components in opposition proceedings before OHIM.

53 The Court must also reject the applicant's argument that OHIM was entitled, on the basis of the judgment in *ATOMIC BLITZ*, cited in paragraph 31 above, to infer from the date of registration and date of publication of the earlier mark that that mark was valid. In *ATOMIC BLITZ*, the General Court held that OHIM was able to determine, on the basis of the registration dates in the extracts from the Austrian Patent Office and from the fact that the box marked 'expired on' was empty, the date on which the protection of the earlier marks at issue ended and that certain of those marks were valid. In the present case, for the reasons set out in paragraphs 51 and 52 above, the registration dates of the earlier mark in question, on the original certificate, did not enable the validity of that mark to be determined with sufficient certainty. It should also be noted that that certificate contains German-language terms for which no translation into the language of the proceedings was submitted, so that the dates on the registration certificate are not sufficient by themselves to prove that the mark in question is valid.

54 It follows that, contrary to what the applicant asserts, the validity of an earlier mark may not simply be inferred from the reference to that mark's date of registration, but, on the contrary, requires that details of any opposition proceedings brought against it be set out.

55 In the light of the foregoing, and even if, as the applicant submits, the Board of Appeal erred in criticising the applicant's failure to submit the description of its earlier mark No 39 950 559, the fact remains that, in the absence of indications of the type and legal and procedural status of that mark – which are essential – the Board of Appeal was correct to find, in paragraph 46 of the contested decision, that it was impossible to ascertain the legal status, the nature and the actual scope of the protection of that mark's registration.

56 In addition, the applicant cannot maintain that the requirement to file a translation of the evidence submitted to OHIM is justified by the need to observe the principle of the right to be heard and to ensure equality of arms between the parties, while also arguing that, in the circumstances of the present case, those objectives were achieved since the intervener did not at any stage complain that it could not understand which type of mark was involved and itself

submitted additional evidence of the earlier mark's validity – such as an extract from that mark's international registration – to the Board of Appeal, thereby indicating that it had no doubts as to the mark's validity.

57 First, as OHIM correctly points out, in its pleading filed with the Board of Appeal on 30 July 2007, the intervener referred to the applicant's earlier mark as a figurative mark, whereas, according to the extract from the online register of the Deutsches Patent- und Markenamt, the mark is in fact an 'other type of mark' ('sonstige Markenform'). It follows from this that, contrary to the applicant's claim, the intervener had been misled as to the type of the earlier mark because that entry had not been translated into the language of the proceedings.

58 Next, the extract from the earlier mark's international registration, annexed to the pleading filed with the Board of Appeal on 30 July 2007 by the intervener, does not contain any information relating either to the mark's type or to its legal and procedural status. The submission of that extract does not therefore prove that the intervener had in fact acquainted itself with that information. In addition, even if, as the applicant maintains, the extract from the international registration may prove that the German mark at issue is registered and valid, the fact remains that, since the extract contains no information relating to the type of the mark or its legal and procedural status, its submission cannot dispel the doubts caused by the lack of translation of that information in the extract from the online register of the Deutsches Patent- und Markenamt.

59 Lastly, as OHIM correctly observes, nowhere did the intervener accept that it was unnecessary to translate all the information from the extract from the online register of the Deutsches Patent- und Markenamt. On the contrary, in its observations of 5 September 2005, it expressly stated that it could not ascertain the scope of protection of the earlier marks.

60 Therefore, the lack of translation into the language of the proceedings of the entries corresponding to the type of the earlier mark and its legal and procedural status, in the extract from the online register of the Deutsches Patent- und Markenamt, and the lack of other evidence in that regard cannot be offset, for the purposes of substantiating the earlier mark, by the intervener's alleged comprehension of the documents in question.

61 As regards the applicant's arguments relating to the earlier Board of Appeal decisions, these must be rejected since the legality of the decisions of Boards of Appeal is to be assessed solely on the basis of Regulation No 40/94, as interpreted by the Courts of the European Union, and not on the basis of a previous decision-making practice of those boards (Case T-106/00 *Streamserve v OHIM (STREAMSERVE)* [2002] ECR II-723, paragraph 66).

62 Consequently, the Board of Appeal was right to reject the opposition on the ground that the earlier trade mark registration No 39 950 559 had not been properly substantiated. The Board of Appeal did not therefore infringe Rule 16(3), Rule 17(2) or Rule 20(2) of Regulation No 2868/95.

63 It follows from the foregoing that the single plea raised must be rejected and, accordingly, that the action must be dismissed.

Costs

Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs incurred by OHIM and by the intervener, in accordance with the forms of order sought by those parties.

THE GENERAL COURT (Sixth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders adidas AG to pay the costs.**

Moavero Milanesi

Wahl

Soldevila Fragoso

Delivered in open court in Luxembourg on 29 September 2011.
[Signatures]