Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 16 May 2019[1]

Case C-281/18 P

Repower AG
v

European Union Intellectual Property Office (EUIPO)

(Appeal — EU trade mark — Invalidity proceedings — Revocation of the Board of Appeal's original decision partially refusing the application for a declaration of invalidity of the EU word mark REPOWER)

1. This appeal essentially concerns the legal basis that enables the Boards of Appeal of the European Union Intellectual Property Office (EUIPO) to revoke their own decisions.

2. The dispute arose when the association repowermap.org ('repowermap') sought to have a European Union trade mark ('REPOWER'), of which another undertaking (Repower AG) was the proprietor, declared invalid in respect of all the goods and services covered by the application for registration.

3. At the end of the administrative proceedings, the Fifth Board of Appeal of EUIPO, by decision of 8 February 2016, partially upheld the application for a declaration of invalidity of the mark.[2] After repowermap contested that decision before the General Court,[3] the Board of Appeal revoked it (on 3 August 2016) on the grounds that it contained an inadequate statement of reasons.

4. Repower AG then brought an action contesting the decision of 3 August 2016 before the General Court, which dismissed that action by judgment of 21 February 2018, which is now the subject of this appeal.

I. Legislative framework. Regulation (EC) No 207/2009[4]

5. The proceedings are governed *ratione temporis* by Regulation (EC) No 207/2009 in its original version; that regulation was amended in 2015[5] and later replaced by Regulation (EU) 2017/1001.[6]

1 Original language: Spanish.

2 Decision of 8 February 2016, case R 2311/2014-5.

3 Case T-188/16, *repowermap* v *EUIPO — Repower (REPOWER)*, stayed before the General Court.

4 Council Regulation of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

5 Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Regulation No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OJ 2015 L 341, p. 21).

6 Regulation of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

6. Article 80 of Regulation No 207/2009 provides:

'1. Where the Office has made an entry in the Register or taken a decision which contains an obvious procedural error attributable to the Office, it shall ensure that the entry is cancelled or the decision is revoked. Where there is only one party to the proceedings and the entry or the act affects its rights, cancellation or revocation shall be determined even if the error was not evident to the party.

2. Cancellation or revocation as referred to in paragraph 1 shall be determined, *ex officio* or at the request of one of the parties to the proceedings, by the department which made the entry or took the decision. Cancellation or revocation shall be determined within six months from the date on which the entry was made in the Register or the decision was taken, after consultation with the parties to the proceedings and any proprietor of rights to the Community trade mark in question that are entered in the Register.

3. This Article shall be without prejudice to the right of the parties to submit an appeal under Articles 58 and 65, or to the possibility, under the procedures and conditions laid down by the Implementing Regulation, of correcting any linguistic errors or errors of transcription and obvious errors in the Office's decisions or errors attributable to the Office in registering the trade mark or in publishing its registration.'

7. Article 83 of Regulation No 207/2009 reads:

'In the absence of procedural provisions in this Regulation, the Implementing Regulation, the fees regulations or the rules of procedure of the Boards of Appeal, the Office shall take into account the principles of procedural law generally recognised in the Member States.'

II. Background to the dispute

A. Procedure before EUIPO

8. Repower AG is the proprietor of the EU word mark 'REPOWER', registered for goods and services in classes 4, 9, 37, 39, 40 and 42 of the Nice Agreement.[7] Those categories of goods and services include or relate to, *inter alia*, electrical energy, its production, and other technical aspects.

9. On 3 June 2013, repowermap applied for a declaration of invalidity of the mark REPOWER, arguing that it was a descriptive sign and was devoid of distinctive character in respect of all the goods and services for which it had been registered.[8]

10. By decision of 9 July 2014, the Cancellation Division of EUIPO:

– Partially upheld the application for a declaration of invalidity in relation to some of the goods and services in Classes 37[9] and 42.[10]

7 Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as amended on 28 September 1979.

8 It relied in that connection on Article 52(1)(a), in conjunction with Article 7(1)(b) and (c), of Regulation No 207/2009.

9 The Cancellation Division indicated the following: 'Building construction; repair; installation services; construction, repair as well as maintenance of transmission systems and distribution plants, intermediate and low voltage plants, public lighting systems together with electrical plant; construction, repair and maintenance of distribution systems for current; installation and maintenance of stations for transformers and distribution installations for electrical energy; installation and maintenance of public street lighting; building construction, installation and maintenance of large factories of large heat pumps; advice concerning the aforesaid services'.

10 Specifically: 'Scientific services and research and development relating thereto; technical expertise concerning electrical installations; services of an engineer concerning activities of granting, metering and information and for control of installations in connection with energy supply'.

– Dismissed the application for a declaration of invalidity in relation to all the other goods and services.

– In relation to the distinctive character of the sign, pointed out that repowermap had failed to show that the word REPOWER had been commonly used in the trade to designate the remaining goods and services, from which it followed that it should be regarded as a trade mark.

11. Repowermap appealed against the decision of the Cancellation Division to the Board of Appeal, which dismissed the appeal by decision of 8 February 2016. According to the Cancellation Division, the sign was not descriptive and repowermap had failed to adduce evidence that the sign was usual in relation to the goods and services at issue.

12. On 26 April 2016, repowermap brought an action before the General Court for annulment of the Board of Appeal's decision of 8 February 2016 (Case T-188/16).

13. While Case T-188/16 was pending before the General Court, the Board of Appeal decided, on 3 August 2016,[11] to revoke the decision of 8 February 2016. It justified the revocation of the decision on the basis of the 'inadequate statement of reasons [in the decision of 8 February 2016]' in relation to the goods and services, which constituted 'an obvious procedural error for the purposes of Article 80 of Regulation No 207/2009'. The Board of Appeal further stated that it would give a fresh decision in due course,[12] which it did on 26 September 2016.[13]

B. Judgment under appeal

14. Repower AG brought an action before the General Court on 10 October 2016 against the Board of Appeal's decision of 3 August 2016, relying on four pleas for annulment of the decision: (i) the decision lacks a legal basis; (ii) the Board of Appeal has no power to revoke its own decisions; (iii) infringement of Article 80 of Regulation No 207/2009, of EUIPO's Guidelines for Examination and of the principles of sound administration, of legal certainty and the force of *res judicata*; and (iv) the decision contains an inadequate statement of reasons.

15. For our purposes here, I should point out that Repower AG put forward the following arguments in its action before the General Court:

– The Board of Appeal infringed Article 80(1) of Regulation No 207/2009, for an inadequate statement of reasons is not a procedural error but an error of material law.[14]

– Under Part A, Section 6, paragraph 1.3.1 of EUIPO's Guidelines for Examination, a decision cannot be revoked if an appeal against it is pending before the Board of Appeal. That principle should apply by analogy to decisions of the Boards of Appeal against which actions are pending before the General Court.

– It would be incompatible with the principles of sound administration, of legal certainty and of *res judicata* that any department of EUIPO would be able to freely modify the subject matter of ongoing proceedings.

11 Case R 2311/2014-5 (REV).

12 Paragraphs 16 to 18 of the decision of 3 August 2016.

13 The decision of 26 September 2016 is not relevant to this appeal. Both Repower AG and repowermap brought actions against that decision before the General Court, which stayed the proceedings pending judgment in this appeal.

14 In reply to a question from the General Court, Repower AG added that the general principle of law which permits revocation of an unlawful administrative act could not serve as a legal basis for the contested decision.

16. By judgment of 21 February 2018,[15] the General Court dismissed the four pleas for annulment and, accordingly, the action brought by Repower AG.

17. The General Court accepted the claim that an inadequate statement of reasons could not be classified as a procedural error. It deduced from an earlier judgment[16] that 'the statement of reasons in a decision affects the actual substance of that decision and that an inadequate statement of reasons cannot be regarded as a procedural error within the meaning of Article 80(1) of Regulation No 207/2009'. Therefore, the Board of Appeal 'was not entitled to base the contested decision on Article 80(1) of Regulation No 207/2009'.[17]

18. Having set down that proposition, the General Court stated that 'the Boards of Appeal may, in principle, rely upon the general principle of law that permits the withdrawal of an unlawful administrative act in order to withdraw their decisions'.[18] The General Court took the view that the existence of a specific provision (Article 80(1) of Regulation No 207/2009) did not preclude the application of that principle, irrespective of that provision.

19. In support of that assertion, the General Court again relied on two of its own earlier judgments,[19] from which it inferred that, 'even where the legislature has regulated the procedure for withdrawing the acts of an institution, that institution may withdraw an act on the basis of the general principle of law permitting the withdrawal of unlawful administrative acts subject to compliance with certain conditions [respect for a reasonable time limit and the legitimate expectations of the beneficiary]'.[20]

20. The General Court held that the concept of an 'obvious procedural error' is not defined in any of the regulations referred to in Article 80(1) of Regulation No 207/2009 and that that provision 'is not without ambiguity and is therefore not sufficiently clear to exclude the application of Article 83 of Regulation No 207/2009'.[21]

21. After that, the General Court focused its analysis on the conditions for application of the general principle of law referred to above and went on to find[22] that:

– The contested decision (on revocation) had been given within a reasonable time, just under six months after the decision of 8 February 2016;

– Repower AG was not entitled to rely on a legitimate expectation, since repowermap had brought an action against the decision of 8 February 2016.[23]

15 Judgment in *Repower* v *EUIPO — repowermap.org (REPOWER)* (T-727/16, 'the judgment under appeal', EU:T:2018:88).

16 Judgment of 22 November 2011, *mPAY24* v *OHIM — Ultra (MPAY24)* (T-275/10, not published, EU:T:2011:683).

17 Judgment under appeal, paragraphs 57 and 59.

18 Ibid., paragraph 61.

19 Judgments of 12 September 2007, *González and Díez* v *Commission* (T-25/04, EU:T:2007:257, paragraph 97), and of 18 September 2015, *Deutsche Post* v *Commission* (T-421/07 RENV, EU:T:2015:654, paragraph 47); see paragraphs 63 to 65 of the judgment under appeal.

20 Judgment under appeal, paragraph 65.

21 Ibid., paragraph 66.

22 Ibid., paragraphs 67 to 82.

23 The General Court added that the insufficient reasoning in the decision of 8 February 2016 with regard to a link between the contested mark and the remaining goods and services should have led Repower AG, as a careful business undertaking, to doubt its lawfulness. The General Court cited in that connection the judgments of 12 February 2008, *CELF and ministre de la Culture et de la Communication* (C-199/06, EU:C:2008:79, paragraph 68), and of 20 June 1991, *Cargill* v *Commission* (C-248/89, EU:C:1991:264, paragraph 22).

22. The General Court disagreed that the principle of revocation was incompatible with the principles of sound administration, of legal certainty and of *res judicata*. First, it is lawful and in the interest of sound administrative management to correct the errors and omissions in a decision. Second, since that must occur within a reasonable time, the right of the person concerned to rely on the lawfulness of the measure is respected. Finally, decisions of the Boards of Appeal, which are not judicial but administrative in nature, do not have the force of *res judicata*.[24]

III. Procedure before the Court of Justice and forms of order sought by the parties

23. Repower AG lodged its appeal with the Registry of the Court of Justice on 24 April 2018. EUIPO and repowermap lodged their defences on 25 July 2018 and 17 August 2018, respectively.

24. Repower AG claims that the Court should set aside the judgment under appeal and order EUIPO to pay the costs. EUIPO and repowermap claim that the Court should dismiss the appeal and order the appellant to pay the costs.

25. A hearing was held on 14 March 2019, at which oral argument was presented by Repower AG, EUIPO and repowermap.

IV. Examination of the appeal

26. Although Repower AG has relied on five grounds of appeal, the Court has asked the Advocate General to focus his analysis on the second and third grounds,[25] in which that company alleges:

– Incorrect application of the general principle that administrative acts may be revoked, in breach of Articles 80 and 83 of Regulation No 207/2009 (second ground); and

– Infringement of Article 83 of Regulation No 207/2009, by reversing the burden of proof against the appellant (third ground).

27. Although this changes the traditional methodology for examining appeals, I believe that, here, it may result in greater clarity if, before considering each of the two grounds, I set out, by way of introduction, a number of observations on the subject of debate.

A. Preliminary considerations

1. The general principle of law that permits the revocation of unlawful acts in EU law

28. The term 'revocation' in its broadest sense denotes two legally distinct concepts which may affect administrative acts the tenor of which is favourable to the person concerned:

– First, a decision pursuant to which an institution sets aside its own earlier, not necessarily unlawful, act, based on considerations of appropriateness;[26] and

24 Paragraphs 84 to 86 of the judgment under appeal.

25 The first ground of appeal alleges infringement of Article 188 of the Rules of Procedure of the General Court; the fourth, the infringement of Repower AG's legitimate expectations; and the fifth, a failure to state proper reasons.

26 A typical example of *revocation* in that sense is that provided for in Article 50 of the EU Treaty.

– second, an '*ex officio* review' on grounds of legality, which is carried out (subject to compliance with certain conditions) where an earlier act is vitiated by defects which render it unlawful.[27]

29. The revocation at issue in this case comes within the second of the two categories mentioned: it is, in fact, an *ex officio review* which an EU body (a Board of Appeal) performs unilaterally in relation to an act which it adopted and which it later considers to be vitiated by an error which renders the act unlawful.

30. The early case-law[28] of the Court described the principle now at issue as a general principle common to the administrative law of the six Member States of the then European Economic Community. The formulation of that principle may be summarised by these words from the judgment in *Compte* v *Parliament*: 'any Community institution which finds that a measure which it has just adopted is tainted by illegality has the right to withdraw it within a reasonable period …', although 'retroactive withdrawal of a favourable administrative act is generally subject to very strict conditions'.[29]

31. Subsequently, the principle has been applied in areas as diverse as the Staff Regulations of officials and staff employed by the EU institutions,[30] contributions from the EAGGF,[31] the fixing of production quotas for steel products within the framework of the ECSC Treaty,[32] and the fixing of Community subsidies in the oil seed sector,[33] among others.

32. I shall not discuss here the question of whether or not that principle has the *constitutional status* acquired by other principles, such as those of equal treatment[34] and of legal certainty,[35] with which the revocation of final acts is innately at odds. Suffice it to note that the former must be applied with the intention of reconciling legal certainty (as reflected by the legitimate expectation of the beneficiary of the act in its appearance of validity) with the principle of legality, that is, the Union's interest in the proper functioning of its institutions and agencies.[36]

33. In exercising its power of revocation on grounds of illegality, the public authority sacrifices part of the individual's legal certainty in the general interest, which requires an administrative act that is legally devoid of defects. This means that the required precautions must be taken where it is necessary to adversely affect the legal position of a person who was previously the beneficiary of a favourable act of the administrative authorities, which granted that person an individual right.[37]

27 That occurs specifically in the case of Article 80 of Regulation No 207/2009. The language versions that I have consulted (German, Spanish, French, English, Italian, Dutch and Portuguese) use the word 'revocation' or another similar word in their own language to refer to the act of setting aside an earlier act in the light of its unlawfulness. To remain faithful to the EU legislation, I shall use the word 'revocation' (and not '*ex officio* review') and its verb form.

28 Judgment of 12 July 1957, *Algera and Others* v *Common Assembly* (7/56 and 3/57 to 7/57, EU:C:1957:7, p. 56).

29 Judgment of 17 April 1997 (C-90/95 P, EU:C:1997:198, paragraph 35).

30 In addition to the judgment of 12 July 1957, *Algera and Others* v *Common Assembly* (7/56 and 3/57 to 7/57, EU:C:1957:7), see also judgment of 9 March 1978, *Herpels* v *Commission* (54/77, EU:C:1978:45, paragraph 38).

31 Judgment of 26 February 1987 (*Consorzio Cooperative d'Abruzzo*, 15/85, EU:C:1987:111, paragraph 12 et seq.).

32 Judgment of 3 March 1982, *Alpha Steel* v *Commission* (14/81, EU:C:1982:76, paragraphs 10 and 11).

33 Judgment of 20 June 1991, *Cargill* v *Commission* (C-248/89, EU:C:1991:264, paragraph 20).

34 Judgment of 15 October 2009, *Audiolux and Others* (C-101/08, EU:C:2009:626, paragraphs 53 and 54).

35 See, inter alia, judgment of 13 January 2014, *Kühne & Heitz* (C-453/00, EU:C:2004:17, paragraph 24).

36 That is clearly explained by the judgment of 22 March 1961, *Snupat* (42/59 and 49/59, EU:C:1961:5, p. 86).

37 Evidence of this is provided by the wording of Article III-36(3), third sentence, of the ReNEUAL Model Rules on EU Administrative Procedure — Book III — Single Case Decision-Making (ReNEUAL SC 2014, p. 94), which explains that that article 'empowers public authorities only under very restrictive conditions to withdraw such a decision' (p. 141, point 138). Although they are non-binding, those rules demonstrate the general sensitivity in the administrative law of a good number of Member States.

34. It is clear from the foregoing that the EU legislature is entitled to modify the application of the principle of revocation of unlawful administrative acts the tenor of which is favourable to the persons concerned. It can, therefore, set limits by which the EU institutions must be bound in this area, especially where this is to safeguard legal certainty. That limitation is particularly important in *inter partes* proceedings because, given the conflicting views of the persons concerned, decisions on revocation adopted by the administrative authorities will be detrimental to some individuals while at the same time benefiting others, thereby affecting the legal position of those who already had a decision favourable to their interests.

35. I believe, therefore, that it is open to the EU legislature to specify which type of (procedural and substantive) defects must occur, and to what extent, in order for revocation to be permitted. At the hearing, EUIPO and repowermap denied the existence of that power, arguing that the general principle enabling the revocation of unlawful administrative acts is unlimited whatever the circumstances.

36. I am not persuaded by that argument, which actually disregards the fact that, even as it is currently worded, the reference in Article 80(1) of Regulation No 207/2009 to *obvious* errors reduces the scope of that principle. If it were an absolute principle, the EU legislature would simply not be able to restrict its application in a provision of secondary law, for the unlawfulness of an act is not conditional on whether or not the defect by which it is tainted is obvious.

2. Application of the principle to EU trade mark law

37. In EU trade mark law, the tension between revocation and legal certainty is reflected in Article 80(1) and Article 83 of Regulation No 207/2009.

38. In the case of Article 80, the legislature considered it appropriate to limit the situations in which the departments of EUIPO are entitled to revoke their own decisions: this is possible only if a decision 'contains an obvious procedural error'.

39. In the case of Article 83, the legislature accepted that, 'in the absence of procedural provisions in this Regulation [or in other regulations adopted pursuant to the regulation], the Office [may] take into account the principles of procedural law generally recognised in the Member States'.

40. Although I shall return later to the interpretation of both articles in the judgment under appeal, I wish to state now that I find no ambiguity in Article 80(1) of Regulation No° 207/2009. The expression 'obvious procedural error'[38] must, like all legal expressions, be interpreted in order to establish whether an obvious (and serious) error has occurred within a procedure. However, aside from that interpretative task, which is common to the application of all legal rules, I can see no ambiguity in the provision.

41. Nor do I believe that that article contains a legal 'gap', and not just because it is governed by the maxim *inclusio unius, exclusio alterius*. To my mind, what Article 80(1) of Regulation No 207/2009 contains is an explicit limitation of the power of revocation, which it confines to procedural, and not substantive, errors. If the legislature had wished to widen the power of revocation to include substantive errors, it would undoubtedly have made that clear. The EU judicature would be supplanting the role of the legislature if it were to declare, in the light of a provision worded in that way, that the power of revocation may be extended to fill that alleged gap.

38 In this context, 'obvious' is synonymous with 'manifest', an adjective more in keeping with that used in other language versions, like the French ('manifeste') or the German ('offensichtlich'). The English version uses 'obvious'.

3. Revocation of decisions of the Boards of Appeal

42. From a theoretical perspective, it is debatable whether the Boards of Appeal are vested with the power to revoke their own decisions where an action is pending against such a decision before the General Court. Despite their administrative nature, there is a certain consensus regarding the quasi-judicial role [39] of boards of appeal in general and the Boards of Appeal of EUIPO in particular. [40] It would be possible to apply to them, by analogy, the same criterion which applies to courts in the strict sense: courts cannot revoke their judgments of their own motion, even if they subsequently identify procedural or substantive errors in those judgments.

43. From that point of view (which, I stress, is rather theoretical), decisions of the Boards of Appeal can only be set aside using the ordinary procedure which the EU legislature created for reviewing acts of EU institutions and agencies: that is, by means of an action for annulment before the General Court, as referred to in Article 65 of Regulation No 207/2009. [41]

44. However, that matter is also entrusted to the legislative discretion of the EU legislature. In the context of that discretion, the legislature could have prohibited Boards of Appeal from revoking their own decisions where these are *sub judice* or, equally, it could have permitted them to do so.

45. Against that background, it must be acknowledged that, where Article 80(1) of Regulation No 207/2009 refers to decisions containing an obvious procedural error, it does not differentiate between decisions given by the different departments of EUIPO, which include the Boards of Appeal. Neither the procedural rules of the Boards of Appeal [42] nor the implementing rules in force at the material time contain a derogation in that regard. [43]

B. The second ground of appeal

1. The parties' submissions

46. Repower AG claims that the General Court relied on the general principle that unlawful administrative acts may be revoked in order to uphold the contested decision. In Repower AG's submission, Article 83 of Regulation No 207/2009 is a *lex specialis* which authorises EUIPO to use the general principles recognised in that regard in the Member States if there is a legal gap in the regulation. It further submits that that article permits reliance only on principles common to the Member States, not on general principles of EU law.

47. Repower AG contends that Article 80 of Regulation No 207/2009 does not contain any legal gaps: it lays down a derogation from the rule that decisions are irrevocable, such that it empowers EUIPO to revoke a decision only where it contains an obvious procedural error. If that power were extended to other kinds of defect, Article 80 would be rendered meaningless because the legislature did not intend such defects to be covered by the derogation.

39 See Opinion of Advocate General Bot in *OHIM* v *National Lottery Commission* (C-530/12 P, EU:C:2013:782, point 93); also in relation to Boards of Appeal, albeit those of the Community Plant Variety Office (CPVO), see judgment of 21 May 2015, *Schräder* v *CPVO* (C-546/12 P, EU:C:2015:332, paragraph 73).

40 Their powers are not reduced when they review acts of a public authority and instead they prepare the ground for bringing proceedings before the EU judicature by clarifying the factual and legal issues to be debated before the General Court. See judgment of 13 March 2007, *OHIM* v *Kaul* (C-29/05, EU:C:2007:162, paragraphs 53 and 54).

41 This has been retained unaltered in Article 72 of Regulation 2017/1001.

42 Commission Regulation (EC) No 216/96 of 5 February 1996 laying down the rules of procedure of the Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OJ 1996 L 28, p. 11), as amended by Commission Regulation (EC) No 2082/2004 of 6 December 2004 (OJ 2004 L 360, p. 8), and repealed by Commission Delegated Regulation (EU) 2017/1430 of 18 May 2017 supplementing Regulation No 207/2009 and repealing Commission Regulations (EC) No 2868/95 and (EC) No 216/96 (OJ 2017 L 205, p. 1).

43 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).

48. Repower AG also complains that the General Court cites judgments on the revocation of decisions of the Commission relating to State aid [44] and collusion between undertakings, [45] which refer to provisions not included in Regulation No 207/2009.

49. Lastly, Repower AG submits that, from a systematic point of view, only Article 61 of Regulation No 207/2009 provides for the revocation of an act by a department of EUIPO whose decision is the subject of an appeal before the Boards of Appeal in *ex parte* proceedings. It concludes from this that, in the absence of a similar provision governing the review of *inter partes* cases, the legislature intended that an action for annulment brought before the General Court would preclude the possibility that decisions of the Boards of Appeal could be revoked *ex officio*.

50. EUIPO and repowermap claim primarily that this ground of appeal is inadmissible because it merely repeats the arguments put forward at first instance to the effect that there is no legal gap in Regulation No 207/2009, without clearly identifying the error of law committed by the General Court.

51. In the alternative, as regards the substance, EUIPO takes issue with Repower AG regarding the relevance of the judgments concerning the Commission's power to revoke its own decisions. That case-law is merely an expression of the general principle that unlawful administrative acts which create individual rights may be revoked. The conditions to which revocation must be made subject (compliance with a reasonable time limit and the legitimate expectations of the beneficiary) were fulfilled in the case before the Court.

52. Repowermap contends that there has been no explanation in the appeal of the extent to which the difference between the subject areas (State aid/trade mark law) has a bearing on the conditions for application of the principle that administrative decisions may be revoked.

2. Analysis of the ground of appeal

(a) Admissibility

53. Pursuant to Article 169(2) of the Rules of Procedure of the Court of Justice, 'the pleas in law and legal arguments relied on shall identify precisely those points in the grounds of the decision of the General Court which are contested'.

54. Although there is no need to be excessively formalistic when applying that rule, nor can it be ignored. In relation to EU trade marks, the Court of Justice has explained that where the appellant is contesting the General Court's interpretation or application of EU law, the legal arguments examined at first instance may be discussed again on appeal. [46]

55. Since Repower AG pleaded the infringement of Article 80 of Regulation No 207/2009 before the General Court and its plea for annulment in that connection was dismissed in the judgment, there is nothing unusual about the fact that the arguments submitted at first instance have also been put forward on appeal, this time to dispute the associated line of reasoning of the General Court.

44 Repower AG refers to the judgments of 12 September 2007, *González and Díez* v *Commission* (T-25/04, EU:T:2007:257), and of 18 September 2015, *Deutsche Post* v *Commission* (T-421/07 RENV, EU:T:2015:654).

45 Repower AG refers to the judgment of 15 July 2015, *Socitrel and Companhia Previdente* v *Commission* (T-413/10 and T-414/10, EU:T:2015:500, paragraph 187).

46 'Indeed, if an appellant could not base his appeal on pleas in law and arguments already relied on before the General Court in that way, an appeal would be deprived of part of its purpose'. Judgments of 10 May 2012, *Rubinstein and L'Oréal* v *OHIM* (C-100/11 P, EU:C:2012:285, paragraph 110), and of 17 March 2016, *Naazneen Investments* v *OHIM* (C-252/15 P, EU:C:2016:178, paragraph 24 and the case-law cited).

56. It is impossible to overlook the fact that Repower AG, which is required to *identify precisely the contested elements* of the judgment under appeal, has not explained at points 31 to 41 of its appeal, relating to the second ground of appeal, the specific paragraphs or sections of the judgment with which it takes issue. Repower AG has therefore failed to fulfil the requirement in Article 169(2) of the Rules of Procedure of the Court of Justice, and the case-law interpreting it, to the effect that an appeal must indicate specifically the contested elements of the judgment which the appellant seeks to have set aside. [47]

57. It is true that, at the hearing, in response to a question from the [Court], Repower AG clarified that the second ground of appeal related to paragraphs 65 and 66 of the judgment under appeal. If it overlooks the fact that that clarification is out of time, the Court could rule the ground admissible by interpreting its own case-law less strictly. Nevertheless, the other parties and the Court have been able to identify, particularly in the oral stage of the proceedings, the contested points on which the second plea in law is based.

58. In short, from the point of view of procedural *orthodoxy*, and following the case-law to the letter, the second ground of appeal should be ruled inadmissible. However, in case the Court of Justice does not take that view, I shall give my opinion on the errors of law which that ground of appeal alleges (without due rigour) vitiate the judgment under appeal.

(b) The substance

59. Repower AG submits [48] that the legislature did not provide for Boards of Appeal to have the power to review their own acts *ex officio*, a submission it repeats in the third ground of appeal. [49] For the reasons I set out above, I do not believe that its argument on this point can be upheld.

60. On the other hand, the second ground of appeal could succeed if it is shown that the General Court should have confined itself to applying Article 80 of Regulation No 207/2009.

(1) The self-sufficiency of Article 80

61. As I pointed out in the preliminary considerations, I agree with Repower AG that, in Article 80(1) of Regulation No 207/2009, the EU legislature decided to limit the grounds for revocation on which EUIPO may rely to cases of 'obvious procedural error'.

62. That decision, clearly expressed in the provision, is a demonstration of the legislature's power to modify, including to limit, reliance on the principle of revocation by EU institutions and agencies. [50] EUIPO and the judicial bodies which review its actions are therefore bound by it.

63. Article 80(1) of Regulation No 207/2009 is, I believe, a *self-sufficient* provision, in the sense that it sets the boundaries of the power of revocation. It is therefore necessary to remain within those boundaries when establishing that the grounds for revocation excluded therefrom (for example, substantive errors) may be *reinstated*, either under the general principle or under Article 83 of that regulation. The latter provision applies only in the *absence* of other provisions of the regulation (or of other regulations adopted pursuant thereto), and no such absence is clear in this case.

47 See, for example, judgment of 28 February 2018, *mobile.de* v *EUIPO* (C-418/16 P, EU:C:2018:128, paragraph 35 and the case-law cited).

48 Point 36 of the appeal.

49 Point 48 of the appeal.

50 See point 34 of this Opinion.

64. That being so, I disagree with the General Court's reliance on a number of its own judgments [51] to support the similarity between that situation and the situation referred to in Article 9 of Regulation (EC) No 659/1999. [52] In those judgments, the General Court found that the Commission was entitled to revoke its unlawful acts in all circumstances (subject to certain conditions relating to the time limit and the legitimate expectations of the addressees of the acts), notwithstanding Article 9 of Regulation No 659/1999.

65. While there is no need for me to state my position now on the interpretation of Article 9 of Regulation No 659/1999, suffice it to observe that Article 80(1) of Regulation No 207/2009 has a very different legal structure from that article. To my mind, Article 9 of Regulation No 659/1999 refers to a specific situation (the provision of incorrect information by the parties) which does not exclude other grounds for revocation. On the other hand, Article 80(1) *exhausts*, so to speak, the matter in that it authorises revocation only in the event of an obvious procedural error.

66. The difference in legislative structure between the two provisions suggests that, in theory, the principle of revocation of unlawful acts is generally applicable beyond the scope of Article 9 of Regulation No 659/1999, but not in relation to Article 80(1) of Regulation No 207/2009.

67. The second ground of appeal should therefore be upheld in this respect. However, that does not automatically lead to the annulment of the judgment under appeal if, nevertheless, the General Court correctly categorised the error affecting the Board of Appeal's first decision. I shall now state, therefore, that, to my mind, the General Court also erred in that categorisation.

(2) Nature of the error in the revoked decision

68. In the judgment under appeal, the General Court, again citing another of its own judgments, [53] observed that 'the statement of reasons in a decision affects the actual substance of that decision and that an inadequate statement of reasons cannot be regarded as a procedural error within the meaning of Article 80(1) of Regulation No 207/2009'. [54] On that basis, the General Court annulled the assessment of the Board of Appeal, which had categorised the insufficient reasoning in its first decision as a procedural error. [55]

69. I believe that that proposition is legally incorrect and that the Board of Appeal was right to classify the inadequate statement of reasons as a procedural error.

70. According to the settled case-law of the Court of Justice, 'the obligation to state reasons provided for in Article 296 TFEU constitutes an essential procedural requirement which must be distinguished from the question whether the reasoning is well founded, which goes to the substantive legality of the measure at issue'. [56]

51 Cited in footnote 44 above.

52 'The Commission may revoke a decision [on State aid] taken pursuant to Article 4(2) or (3), or Article 7(2), (3), (4), after having given the Member State concerned the opportunity to submit its comments, where the decision was based on incorrect information provided during the procedure which was a determining factor for the decision.' Council Regulation of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

53 Referring to the judgment of 22 November 2011, *MPAY24* (T-275/10, EU:T:2011:683).

54 Judgment under appeal, paragraph 57.

55 Ibid., paragraph 59.

56 Inter alia, judgments of 2 April 1998, *Commission* v *Systraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraphs 63 and 67 and the case-law cited); of 14 September 2016, *Trafilerie Meridionali* v *Commission* (C-519/15, EU:C:2016:682, paragraph 40); and of 25 July 2018, *Spain* v *Commission* (C-588/17 P, not published, EU:C:2018:607, paragraph 74).

71. If the obligation to provide a statement of reasons for an act is breached (because the reasoning is non-existent or inadequate, where such inadequacy is significant), that act will be vitiated by a *formal* or procedural error but not by a substantive error. A statement of reasons is an 'essential procedural requirement';[57] in other words, it is a vital part of the procedure leading to the adoption of the final decision and its external configuration. On the other hand, the determination of whether the reasons set out in the decision are legally correct takes place during the debate concerning the substance, that is to say, during the review of the *substantive* legality of that act.

72. The question whether the duty to state reasons has been satisfied must be assessed with reference not only to the wording of the measure but also to its context and the whole body of legal rules governing the matter in question.[58] The examination of the statement of reasons is carried out on a strictly case-by-case basis, such that, by reference to the context and scope of the decision, an exercise of a similar intensity can be classified as an adequate, inadequate or non-existent statement of reasons, depending on the circumstances.

73. It is apparent from the letter of 22 June 2016 sent to the parties by the Board of Appeal that, 'further to the action brought before the General Court of the European Union' (this refers to the action brought by repowermap which gave rise to Case T-188/16, now stayed), the Board had found that its statement of reasons was inadequate for the purposes of Article 75 of Regulation No 207/2009.

74. At points 94 and 95 of its application to the General Court, repowermap complained that the decision of the Board of Appeal (which was later revoked) did not contain a single paragraph, or even a sentence, examining the reasons why the contested sign was not descriptive of the goods and services concerned. Following those assertions, I repeat, the Board of Appeal revoked its decision of 8 February 2016.

75. Accordingly, the error identified by the Board of Appeal concerned the inadequate statement of reasons in its decision of 8 February 2016. This, as the Board later rightly found, could be classified as a procedural error. In fact, neither party disputes the inadequacy of the statement of reasons or the *obvious* nature of that defect, for the purposes of Article 80(1) of Regulation No 207/2009.

76. In those circumstances, I believe that the General Court infringed Article 80(1) of Regulation No 207/2009 by declaring, in paragraph 59 of the judgment under appeal, that the Board of Appeal was not entitled to base the contested decision on that provision.

(3) The procedural consequences of upholding the second ground of appeal

77. It is settled case-law that, 'if the grounds of a decision of the General Court contain an infringement of EU law but its operative part is shown to be well founded on other legal grounds, such an infringement is not one that should cause that decision to be set aside, and a substitution of grounds must be made'.[59] That infringement does, however, result in a lack of legal basis, and, therefore, the subsequent arguments on which the judgment is based are ineffective.[60]

57 Judgment of 14 October 2010, *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603, paragraph 130).

58 Judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 70 and the case-law cited), and of 7 February 2018, *American Express* (C-643/16, EU:C:2018:67, paragraph 73).

59 See judgment of 9 June 2011, *Diputación Foral de Vizcaya and Others* v *Commission* (C-465/09 P to C-470/09 P, not published, EU:C:2011:372, paragraph 171 and the case-law cited), and, more recently, order of 22 November 2018, *King* v *Commission* (C-412/18 P, not published, EU:C:2018:947, paragraph 18).

60 In paragraphs 60 to 91, at least, of the judgment under appeal.

78. In this case, the General Court ultimately, albeit based on arguments which, to my mind, are incorrect, upheld the decision on revocation given by the Board of Appeal on 3 August 2016. Since it is my belief that revocation of the decision complied with Article 80(1) of Regulation No 207/2009, the associated arguments on which the judgment is based should be replaced by others which support the finding of an obvious procedural error, on which the Board of Appeal relied to revoke its decision of 8 February 2016.

C. The third ground of appeal

1. The parties' submissions

79. Repower AG complains that the General Court reversed, and therefore infringed, the rules governing the burden of proof when applying Article 83 of Regulation No 207/2009. Repower AG submits that, since EUIPO relied on the general principle that unlawful administrative acts may be revoked, it was for that body to prove the existence of such a principle in all the Member States. Contrary to the General Court's assertion, Repower AG could not be required to provide details about any Member State which did not recognise that principle.

80. Repower AG contends that Article 83 of Regulation No 207/2009 refers only to the procedural rules of Member States in relation to trade marks. There is no principle common to the Member States which provides that it is possible for national trade mark offices to revoke their own decisions.

81. EUIPO and repowermap contend that the third ground of appeal is the result of an incorrect interpretation of the judgment under appeal and that the General Court did not reverse the burden of proof. It merely pointed out that the principle that unlawful administrative acts may be revoked was common to the Member States, as acknowledged by the Court of Justice since its first judgments and constantly restated in decisions of the EU Courts. In that connection, the judgment under appeal criticised Repower AG for failing to adduce any evidence that that principle does not exist in the legal systems of some Member States.

82. Repowermap further contends that the function of a general legal principle is to act as a criterion for interpretation and to correct the undesirable effects of provisions, and therefore the fact that it is enshrined in case-law makes it unnecessary to adduce evidence of such a principle.

2. Analysis of the ground of appeal

83. At the hearing, it was discussed whether the General Court had *directly* applied the general principle that unlawful administrative acts may be revoked or whether it had done so *through* Article 83 of Regulation No 207/2009.

84. The uncertainty arises as a result of the wording of the last sentence of paragraph 66 of the judgment under appeal, one of the few in which the General Court refers to Article 83. That sentence states, in particular, that, 'given that the concept of an obvious procedural error is not defined in the aforementioned regulations, Article 80(1) of Regulation No 207/2009 … is not without ambiguity and is therefore not sufficiently clear to exclude the application of Article 83 of Regulation No 207/2009'.

85. In my view, it may be inferred from paragraphs 62 to 65 of the judgment under appeal that the General Court wished to apply directly the general principle that unlawful acts may be revoked after finding that there was a gap in Article 80 of Regulation No 207/2009. I believe that that is the true rationale of the judgment and that paragraph 66 thereof includes only a hypothetical reference to Article 83. In truth, the only paragraph (number 93) of the judgment which deals specifically with that provision is a response to an additional submission by the applicant, not the central argument for dismissal of its action.

86. In that connection, the reference by the General Court to Article 83 of Regulation No 207/2009 is made *for the sake of completeness*, not as the *ratio decidendi* of the judgment. It follows that the third ground of appeal should be classified as ineffective in accordance with settled case-law, since, if it were upheld, it could not lead to the setting aside of the judgment under appeal. [61]

87. However, in case the Court does not agree with that assessment, I shall state my position on the substance of the ground of appeal in the alternative.

88. According to the General Court, Repower AG submitted that 'EUIPO was required to disclose the general principles of national law based on the principles applicable in all Member States without exception'. [62]

89. The General Court dismissed that argument on the grounds that the principle that unlawful acts may be revoked was common to all the Member States, as indicated in the first judgments of the Court of Justice [63] and subsequently confirmed by the Court of Justice and the General Court. [64]

90. If the proposition regarding the application of Article 83 was accepted, which was appropriate in these proceedings once the application of Article 80 of Regulation No 207/2009 had been ruled out, it was not [necessary] to establish the definition of the principle that unlawful acts may be revoked in general or its treatment in case-law but rather to interpret Article 83 of Regulation No 207/2009, in accordance with which, in the absence of procedural provisions in that regulation, 'the Office shall take into account the principles *of procedural law* generally recognised in the Member States'. [65]

91. In other words, having accepted that there is a gap (*quod non*) in Article 80 of Regulation No 207/2009, it was necessary to determine whether the principle referred to applied to the revocation of decisions of national trade mark offices (including Boards of Appeal) under national laws, and under what conditions. That was a matter for EUIPO to determine.

92. The General Court criticised Repower AG for 'not provid[ing] a single example of a Member State in which that principle is not recognised'. [66] However, in reality, it was EUIPO from which the General Court should have required evidence in that specific regard (rather than in general), in order to establish the terms under which the laws of the Member States permitted their national trade mark offices to revoke their own decisions.

61 See, for example, order of 11 June 2015, *Faci* v *Commission* (C-291/14, not published, EU:C:2015:398, paragraph 50 and the case-law cited).

62 Paragraph 93 of the judgment under appeal.

63 The General Court cited the judgments of 12 July 1957, *Algera and Others* v *Common Assembly* (7/56 and 3/57 to 7/57, EU:C:1957:7, pp. 55 and 56); of 22 March 1961, *Snupat* v *High Authority* (42/59 and 49/59, EU:C:1961:5, p. 87); and of 13 July 1965, *Lemmerz-Werke* v *High Authority* (111/63, EU:C:1965:76, p. 690).

64 The General Court cited the judgments of 3 March 1982, *Alpha Steel* v *Commission* (14/81, EU:C:1982:76, paragraph 10); of 5 December 2000, *Gooch* v *Commission* (T-197/99, EU:T:2000:282, paragraph 53); of 12 September 2007, *González and Díez* v *Commission* (T-25/04, EU:T:2007:257, paragraph 97); and of 11 July 2013, *BVGD* v *Commission* (T-104/07 and T-339/08, not published, EU:T:2013:366, paragraph 63).

65 Italics added.

66 Paragraph 93 of the judgment under appeal.

93. In summary, if my assessment that it is ineffective is not accepted, then this ground of appeal must be upheld.

94. The only possible consequence of that finding would be the referral of the case back to the General Court, given that, in support of its argument in favour of the revocation of the decision by the Board of Appeal, EUIPO did not rely at any point [67] on Article 83 of Regulation No 207/2009.

95. In those circumstances, the General Court should grant EUIPO a time limit within which to adduce evidence of how the principle that decisions adopted by trade mark offices may be revoked is applied in the legal systems of the Member States. [68]

V. Costs

96. Given that this Opinion is concerned with only two of the five grounds of appeal, I am unable to state my position on costs, which would be appropriate (under Article 184(2) of the Rules of Procedure of the Court of Justice) if the appeal brought by Repower AG were unfounded in its entirety.

VI. Conclusion

97. In the light of the foregoing considerations, I propose that the Court should:

(1) Rule inadmissible, or, in the alternative, dismiss, the second ground of the appeal brought by Repower AG against the judgment of the General Court of 21 February 2018 in Case T-727/16, *Repower* v *EUIPO — repowermap.org (REPOWER)*.

(2) Dismiss the third ground of that appeal as ineffective, or, in the alternative, uphold that ground of appeal and refer the case back to the General Court.

67 An incidental reference to that provision was made in connection with the argument in support of the power of Boards of Appeal to revoke an act on the grounds of an inadequate statement of reasons, relying on Article 80(1) of Regulation No 207/2009.

68 See, on the exchange of information between the Office and the authorities of the Member States, Article 20 of Commission Implementing Regulation (EU) 2018/626 of 5 March 2018 laying down detailed rules for implementing certain provisions of Regulation 2017/1001, and repealing Implementing Regulation (EU) 2017/1431 (OJ 2018 L 104, p. 37).