



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

9 November 2016*

(EU trade mark — International registration designating the European Union — Figurative mark representing a pattern of wavy, crisscrossing lines — Absolute ground for refusal — Distinctive character — Article 7(1)(b) of Regulation (EC) No 207/2009 — Surface pattern — Application of a pattern on the packaging of a product)

In Case T-579/14,

Birkenstock Sales GmbH, established in Vettelschoß (Germany), represented by C. Menebröcker and V. Töbelmann, lawyers,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented initially by G. Schneider and D. Walicka, and subsequently by D. Walicka, acting as Agents,

defendant,

ACTION brought against the decision of the First Board of Appeal of EUIPO of 15 May 2014 (Case R 1952/2013-1), concerning the international registration designating the European Union of the figurative mark representing a pattern of wavy, crisscrossing lines,

THE GENERAL COURT (Fifth Chamber),

composed of A. Dittrich (Rapporteur), President, J. Schwarcz and V. Tomljenović, Judges,

Registrar: A. Lamote, Administrator,

having regard to the application lodged at the Registry of the General Court on 1 August 2014,

having regard to the response lodged at the Court Registry on 22 October 2014,

having regard to the reply lodged at the Court Registry on 6 January 2015,

further to the hearing on 16 December 2015,

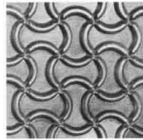
gives the following

* Language of the case: German.

Judgment

Background to the dispute

- 1 The applicant, Birkenstock Sales GmbH, is the successor to Birkenstock Orthopädie GmbH & Co. KG, which on 27 June 2012 obtained international registration from the World Intellectual Property Organization (WIPO) on the basis of a German trade mark designating inter alia the European Union for the following figurative mark:



- 2 On 25 October 2012, the European Union Intellectual Property Office (EUIPO) received notification of the international registration of the sign at issue.
- 3 The goods in respect of which the Community trade mark was registered are in Classes 10, 18 and 25 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond, for each of those classes, to the following description:
 - Class 10: ‘Surgical, medical, dental and veterinary apparatus and instruments; artificial limbs, eyes and teeth; orthopaedic articles; suture materials; suture materials for operations; orthopaedic footwear, including orthopaedic footwear for rehabilitation, foot physiotherapy, therapy and other medical purposes, and parts therefor, including orthopaedic shoes, including orthopaedic shoes with footbeds or with orthopaedic foot supports and foot and shoe inserts, including orthopaedic foot supports and shoe inserts and parts therefor, including in the form of rigid thermoplastic inserts; shoe components and shoe fittings for orthopaedic shoe adaptation, in particular fittings, wedges, pads, inner soles, foam padding, foam pads and moulded shoe soles, including in the form of fully plastic inserts with orthopaedic footbeds of natural cork, thermal cork, plastic, latex or foamed plastic materials, including being elastic compounds of cork latex mixtures or plastic cork mixtures; orthopaedic foot and shoe inserts; orthopaedic foot and shoe supports; orthopaedic footwear, in particular orthopaedic sandals and slippers; orthopaedic insoles, inserts, including inserts of plastic, latex or foamed plastic materials, including being elastic compounds of cork latex mixtures or plastic cork mixtures’;
 - Class 18: ‘Leather and imitations of leather, and goods made of these materials and included in this class; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery; change purses; bags; handbags; document cases; waist pouches; garment bags for travel; key cases (leatherwear); beauty cases; toilet bags, vanity cases; travelling bags; rucksacks’;
 - Class 25: ‘Clothing, headgear, footwear, including comfort footwear and footwear for work, leisure, health and sports, including sandals, gymnastic sandals, flip-flops, slippers, clogs, including with footbeds, in particular with anatomically moulded deep footbeds, foot supports and foot and shoe inserts, protective inserts; parts and fittings for the aforesaid footwear, namely footwear uppers, heel pieces, outsoles, inner soles, shoe bottom parts, including footbeds, foot supports; foot and shoe inserts, in particular with anatomically moulded deep footbeds, in particular of natural cork, thermal cork, plastic, latex or foamed plastic materials, including of elastic compounds of cork latex mixtures or plastic cork mixtures; inner soles; footwear, namely shoes and sandals, boots, and parts and fittings for all the aforesaid goods, included in this class; belts; shawls; neckerchiefs.’

- 4 On 21 November 2012, the examiner issued the applicant with an *ex officio* provisional total refusal of protection of the international mark in the European Union. The ground relied on in support of that refusal was the lack of distinctive character of the sign at issue within the meaning of Article 7(1)(b) of Council Regulation No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1) in respect of all the goods concerned.
- 5 By decision of 29 August 2013, after the applicant had responded to the objections set out in the notification of provisional refusal, the Examination Division upheld, on the same ground as that previously given, the total refusal of protection of the international mark in the European Union.
- 6 On 4 October 2013, the applicant filed a notice of appeal with EUIPO against that decision pursuant to Articles 58 to 60 of Regulation No 207/2009.
- 7 By decision of 15 May 2014 ('the contested decision'), the First Board of Appeal of EUIPO dismissed the appeal on the ground that the trade mark applied for was descriptive and devoid of any distinctive character in respect of the products at issue.
- 8 The Board of Appeal found *inter alia* that the sign at issue presented wavy lines crisscrossing at right angles in a repetitive sequence that could extend in all four directions of the square and therefore be used on any two- or three-dimensional surface. The sign at issue would thus be perceived immediately as representing a surface pattern.
- 9 The Board of Appeal also observed that it was well known that the surfaces of goods or their packaging are decorated with patterns for a variety of reasons, including enhancing their aesthetic appearance and/or for technical reasons.
- 10 It observed that, according to the case-law, as the average consumers do not usually presume the commercial origin of goods on the basis of the signs that are indissociable from the goods themselves, those signs will have distinctive character within the meaning of Article 7(1)(b) of Regulation No 207/2009 only if they depart significantly from the sectoral standards or usual practices. It considered that case-law to be applicable in the present case, as the sign at issue was indissociable from the appearance of the goods in question.
- 11 The Board of Appeal considered that the overall impression produced by the sign at issue was banal and that that surface pattern could be found on all of the goods in question, for which it could fulfil an aesthetic and/or technical function. It took the view that the overall impression produced by the sign at issue did not depart significantly — or even at all — from the usual practices of the sectors concerned.
- 12 The Board of Appeal concluded that the relevant public would in all likelihood perceive the sign as a simple surface pattern, not as an indication of any particular commercial origin.

Forms of order sought

- 13 The applicant claims that the Court should:

- annul the contested decision;
- order EUIPO to pay the costs.

- 14 EUIPO contends that the Court should:

- dismiss the action;

— order the applicant to pay the costs.

Law

- 15 In support of its action, the applicant raises a single plea in law, alleging infringement of Article 7(1)(b) of Regulation No 207/2009.
- 16 The applicant argues *inter alia* that the Board of Appeal applied criteria not included in Article 7(1)(b) of Regulation No 207/2009. The Board of Appeal did not base itself on the international mark in its registered form, being an image with a clearly delimited surface that is not indissociable from the shape of the goods, but unjustifiedly expanded the mark by affirming that it could be reproduced and continued.
- 17 The international registration claims protection for a square-shaped figurative mark with an abstract pattern, whose appearance is in itself complete, singular and unusual.
- 18 EUIPO considers that the Board of Appeal found, correctly, that the sign at issue represented a surface pattern and that it was devoid of distinctive character for the goods in question.

General points

- 19 Under Article 154(1) of Regulation No 207/2009, any international registration designating the EU is subject to examination as to absolute grounds for refusal in the same way as applications for EU trade marks.
- 20 Under Article 7(1)(b) of Regulation No 207/2009, trade marks which are devoid of any distinctive character are not to be registered.
- 21 For a trade mark to possess distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94 it must serve to identify the goods in respect of which registration is sought as originating from a particular undertaking, and thus to distinguish those goods from those of other undertakings (see judgment of 20 October 2011, *Freixenet v OHIM*, C-344/10 P and C-345/10 P, EU:C:2011:680, paragraph 42 and the case-law cited).
- 22 Furthermore, it is apparent from settled case-law that the distinctive character of a trade mark must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them on the part of the relevant public, which is made up of the average consumers of those goods or services (judgments of 29 April 2004, *Procter & Gamble v OHIM*, C-473/01 P and C-474/01 P, EU:C:2004:260, paragraph 33, and 22 June 2006, *Storck v OHIM*, C-25/05 P, EU:C:2006:422, paragraph 25). The level of attention of the average consumer, who is reasonably well informed and reasonably observant and circumspect, is likely to vary according to the category of goods or services in question (judgments of 22 June 1999, *Lloyd Schuhfabrik Meyer*, C-342/97, EU:C:1999:323, paragraph 26, and 10 October 2007, *Bang & Olufsen v OHIM (Shape of a loudspeaker)*, T-460/05, EU:T:2007:304, paragraph 32).
- 23 According to equally consistent case-law, the criteria for assessing the distinctive character of three-dimensional marks consisting of the appearance of the product itself are no different from those applicable to other categories of trade mark. Nonetheless, for the purpose of applying those criteria, the average consumer's perception is not necessarily the same in the case of a three-dimensional mark consisting of the appearance of the product itself as it is in the case of a word or figurative mark consisting of a sign which is independent of the appearance of the products it denotes. Average consumers are not in the habit of making assumptions about the origin of products on the basis of

their shape or the shape of their packaging in the absence of any graphic or word element, and it could therefore prove more difficult to establish distinctiveness in relation to such a three-dimensional mark than in relation to a word or figurative mark (judgments of 7 October 2004, *Mag Instrument v OHIM*, C-136/02 P, EU:C:2004:592, paragraph 30, and 22 June 2006, *Storck v OHIM*, C-25/05 P, EU:C:2006:422, paragraphs 26 and 27).

- 24 It is apparent from those considerations that only a three-dimensional mark, consisting in the appearance of the product itself, only a mark which departs significantly from the standards or usual practices of the sector and thereby fulfils its essential function of indicating origin is not devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation No 207/2009 (judgments of 12 January 2006, *Deutsche SiSi-Werke v OHIM*, C-173/04 P, EU:C:2006:20, paragraph 31, and 22 June 2006, *Storck v OHIM*, C-25/05 P, EU:C:2006:422, paragraph 28).
- 25 The case-law referred to in paragraphs 23 and 24 above, which evolved in relation to three-dimensional trade marks consisting of the appearance of the product designated, also applies where the trade mark in question is a figurative mark consisting of the shape of that product. In such a case, the mark does not consist of a sign that bears no relation to the appearance of the products it identifies (judgment of 22 June 2006, *Storck v OHIM*, C-25/05 P, EU:C:2006:422, paragraph 29).
- 26 That case-law is also applicable in the case of a sign composed of a design applied to the surface of goods (see, to that effect, judgment of 9 October 2002, *Glaverbel v OHIM (Surface of a glass sheet)*, T-36/01, EU:T:2002:245, paragraph 23).
- 27 That is also the case for a figurative mark consisting of a part of the shape of the product that it represents, inasmuch as the relevant public will immediately and without further thought perceive it as a representation of a particularly interesting or attractive detail of the product in question, rather than as an indication of its commercial origin (judgment of 19 September 2012, *Fraas v OHIM (Tartan pattern in dark grey, light grey, black, beige, dark red and light red)*, T-50/11, not published, EU:T:2012:442, paragraph 43).
- 28 As observed by the Board of Appeal in paragraph 27 of the contested decision, the decisive element for the applicability of that case-law is not the categorisation of the sign in question as a figurative sign, be it three-dimensional or otherwise, but rather the fact that it is indissociable from the appearance of the product designated.

The relevant public

- 29 The Board of Appeal observed that the goods in Class 10 concerned essentially orthopaedic shoes and parts therefor. It also found that those products could be purchased by consumers in general as part of the general public or by health professionals and that they are chosen with care.
- 30 The Board of Appeal also observed that the goods ‘surgical, medical, dental and veterinary apparatus and instruments; artificial limbs, eyes and teeth; orthopaedic articles; suture materials; suture materials for operations’ were intended essentially for health professionals displaying an average level of attention when choosing them.
- 31 Lastly, it found that the goods in Classes 18 and 25 were intended for the general public displaying an average level of attention at the time of purchase.
- 32 Those considerations — which are not disputed by the applicant — must be endorsed, except as regards the goods ‘leather and imitations of leather’ and ‘animal skins, hides’, in Class 18. Those goods are intended principally for a professional public that uses those goods to make other goods.

The applicability in the present case of the case-law relating to marks that are indissociable from the appearance of the goods

- 33 It is appropriate to turn now to the question of whether the Board of Appeal was correct in applying in the present case the case-law relating to signs that are indissociable from the appearance of the products.
- 34 To that end, it is appropriate to begin by examining the characteristics of the sign at issue.
- 35 The sign at issue is made up of a square graphic representation with crisscrossing wavy lines so that the pattern is the same vertically and horizontally. The representation has no contours.
- 36 As observed by the Board of Appeal, the repetitive sequence can extend infinitely in all four directions of the square and therefore be applied to any two- or three-dimensional surface.
- 37 It is therefore a sign composed of a series of components that repeat themselves regularly and lends itself particularly well to being used as a surface pattern.
- 38 As the applicant stated, EUIPO must, in its examination of the distinctive character of a sign, refer to the reproduction of the mark sought attached to the registration application and the description included in that application, where there is one (judgment of 30 November 2005, *Almdudler-Limonade v OHIM (Shape of a lemonade bottle)*, T-12/04, not published, EU:T:2005:434, paragraph 42).
- 39 It should be noted, however, that, in finding that the repetitive sequence could extend infinitely in all four directions of the square and therefore be applied to any two- or three-dimensional surface, EUIPO based itself on the intrinsic characteristics of the sign at issue, as apparent from the reproduction of the international mark. It cannot therefore be criticised for having based its assessment on aspects which are not apparent from the reproduction of the sign at issue.
- 40 The applicant submits that if the reasoning in the contested decision were to be taken literally, no figurative mark could be registered, because any figurative mark could, in principle, be extended infinitely and be used as a pattern on a surface of goods.
- 41 It is true that a figurative sign representing a ‘classic’ logo may be reproduced infinitely and be used as a surface pattern. If the Board of Appeal were to base itself on a possible infinite duplication of such a sign in order to find that it was indissociable from the appearance of the goods, then that approach would be purely speculative.
- 42 However, where a sign in itself is made up of a repetitive sequence of elements, EUIPO may take into account the intrinsic characteristics of that sign in order to examine its nature, including the question whether it is a sign that is indissociable from the appearance of the goods covered. In the present case, the Board of Appeal based its reasoning on an analysis of the intrinsic characteristics of the sign at issue. That approach cannot be criticised.
- 43 It is also apparent from the case-law that the fact that a sign has been designated as a figurative mark does not prevent the Board of Appeal from finding, on the basis of the practical experience generally acquired from the marketing of the goods covered by the registration application, that there is a surface pattern (see, to that effect, judgment of 19 September 2012, *Tartan pattern in dark grey, light grey, black, beige, dark red and light red*, T-50/11, not published, EU:T:2012:442, paragraph 51).

- 44 In the judgment of 19 September 2012, *Tartan pattern in dark grey, light grey, black, beige, dark red and light red* (T-50/11, not published, EU:T:2012:442, paragraphs 46 and 47), the Court rejected the argument to the effect that EUIPO had distorted the purpose of the registration application in finding that a mark for which registration as a figurative mark had been sought was a pattern on fabric.
- 45 The Court observed that the abstract pattern presented in the image that made up the mark sought could constitute the pattern on a fabric (judgment of 19 September 2012, *Tartan pattern in dark grey, light grey, black, beige, dark red and light red*, T-50/11, not published, EU:T:2012:442, paragraph 51). The Court noted that the products at issue in that case were fabrics or goods made up of fabrics which 'could' have surfaces of fabric (judgment of 19 September 2012, *Tartan pattern in dark grey, light grey, black, beige, dark red and light red*, T-50/11, not published, EU:T:2012:442, paragraph 47).
- 46 It should be noted that, in that case, in accordance with the case-law to the effect that the distinctive character of a sign must be examined by reference to the goods in respect of which registration has been applied for (see paragraph 22 above), the Court did not therefore restrict itself to finding that the image making up the mark sought could be a pattern on fabric, but also examined, in the light of the goods covered by the trade mark application, whether they could have fabric surfaces.
- 47 It should be noted that the goods at issue in that case were fabrics or fashion items in the broad sense of the term, which obviously often have surface patterns.
- 48 It should be noted that, in the present case, some of the goods covered by the international mark are goods that often have surface patterns, such as fashion items in the broad sense of the term, whilst others will not obviously lend themselves often to having surface patterns.
- 49 The question then arises as to which criterion is the relevant one for determining whether a figurative sign that is made up of a series of regularly repetitive elements and therefore lends itself particularly well to being used as a surface pattern, may in fact be regarded as being a surface pattern for a given good.

The relevant criterion for regarding a figurative mark, made up of a series of regularly repetitive elements, as being a surface pattern for a given good

- 50 In the contested decision, the Board of Appeal observed, in essence, that all of the products at issue, or their packaging, could have a surface pattern, either for decorative purposes or for technical reasons, in order to enhance their grip. It implicitly considered that the possibility of applying a surface pattern on the products at issue or their packaging was sufficient for the case-law relating to signs that are indissociable from the appearance of the products to be applicable.
- 51 When questioned on this point at the hearing, EUIPO confirmed that, in its submission, in order for the case-law relating to marks that are indissociable from the appearance of the goods to be applicable in the present case, it was sufficient that the use of the sign at issue as a surface pattern on the products at issue or on their packaging was possible and that it was not necessary that it be the most likely use of the sign.
- 52 The applicant stated at the hearing that the assessment criterion should be much stricter and that the mere possibility that the sign at issue might be used as a surface pattern on the products at issue or on their packaging was not sufficient.
- 53 It is necessary, first of all, to identify the relevant criterion for determining whether the case-law relating to signs that are indissociable from the appearance of the products is applicable in the case of possible use of a sign, made up of a series of regularly repetitive elements and designated as a figurative mark, as a surface pattern on the products at issue themselves (see paragraphs 54 to 57 below). Next,

an assessment will have to be made of the specific case of possible use of such a sign as a surface pattern not on the products at issue themselves, but on the packaging (see paragraphs 58 to 68 below).

- 54 In order to determine the relevant criterion, it must be remembered that a sign that is made up of a series of regularly repetitive elements lends itself particularly well to being used as a surface pattern. There is therefore, in principle, a probability, inherent in that sign, that it will be used as a surface pattern, irrespective of its designation by the trade mark applicant as a figurative mark, a three-dimensional mark, a surface pattern or other type of mark.
- 55 In those circumstances, it is only when the use of a surface pattern is unlikely in the light of the nature of the products at issue that such a sign cannot be considered a surface pattern in respect of the products at issue. Otherwise, the sign at issue, bearing the typical characteristics of a surface pattern owing to the repetitive sequence of its elements, may in fact be held to constitute a surface pattern.
- 56 As regards the judgment of 13 April 2011, *Deichmann v OHIM (Representation of a curved band with dotted lines)* (T-202/09, not published, EU:T:2011:168), relied on by EUIPO, the Court found, in paragraph 47 of that judgment, that the Board of Appeal was free to base its examination of the mark at issue on the ‘the most likely’ use of it.
- 57 That judgment did not concern the registration of a sign made up of a repetitive sequence of element. Given that factor, the Court held that the decorative or strengthening use of the sign on the products at issue was ‘the most likely’. When a sign is made up of a repetitive sequence of elements and, owing to its intrinsic characteristics, lends itself particularly well to being used as a surface pattern, there is, in principle, a probability, inherent in that sign, that it will be used as a surface pattern. For that reason, there are valid grounds for holding that it is only when the use of a surface pattern is unlikely in the light of the nature of the products at issue that such a sign cannot be considered a surface pattern in respect of the products at issue (see paragraphs 54 and 55 above). That is an objective criterion that is not contingent on the commercial intentions of the undertaking concerned.
- 58 Next, the question arises as to whether the fact that the use of a surface pattern on the packaging of the products at issue is possible, and not unlikely, is sufficient in order for the case-law relating to signs that are indissociable from the appearance of the products to be applicable.
- 59 EUIPO, in essence, affirmed at the hearing that the possibility of using the sign on the packaging of the products at issue was sufficient in order for the case-law relating to signs that are indissociable from the appearance of the products to be applicable.
- 60 The applicant, in essence, affirmed at the hearing that, according to the case-law, the shape of the packaging of a good could be equated with the shape of the good only in the case of goods requiring packaging for reasons linked to the very nature of those goods because they do not have an intrinsic shape, such as liquids.
- 61 It should be borne in mind that, according to the case-law referred to in paragraph 23 above, average consumers do not usually presume the origin of goods on the basis of the shape of the goods’ packaging.
- 62 It must be considered whether that case-law is also applicable to a sign designated as a figurative mark made up of a repetitive sequence of elements that therefore lends itself particularly well to being used as a surface pattern on the packaging of a given product.
- 63 It should be noted that the case-law relating to marks that are indissociable from the appearance of the goods applies to three-dimensional trade marks consisting of the packaging of goods, such as liquids, which are packaged in trade for reasons linked to the very nature of the product (see, to that effect,

judgment of 12 January 2006, *Deutsche SiSi-Werke v OHIM*, C-173/04 P, EU:C:2006:20, paragraphs 29 to 31). That case-law also applies where the trade mark for which registration is sought is a mark consisting of the specific appearance of the surface of the packaging of a liquid product (judgment of 20 October 2011, *Freixenet v OHIM*, C-344/10 P and C-345/10 P, EU:C:2011:680, paragraph 48).

- 64 It follows that that case-law also applies to a surface pattern used on the packaging of products that are packaged in trade for reasons linked to the very nature of those products.
- 65 There are, however, no grounds for limiting the application of that case-law to the packaging of products that must necessarily be packaged for reasons linked to the very nature of those products. Thus, the case-law relating to signs that are indissociable from the appearance of the goods has been held to be applicable to the shape of a sweet wrapper with twisted ends (judgment of 22 June 2006, *Storck v OHIM*, C-25/05 P, EU:C:2006:422, paragraphs 26 to 29), even though a sweet does not necessarily need to be in individual packaging. That case-law has also been held to be applicable to the shape of a packet of cigarettes (judgment of 12 September 2007, *Philip Morris Products v OHIM (Shape of a packet of cigarettes)*, T-140/06, not published, EU:T:2007:272, paragraph 64), even though cigarettes need not necessarily be packaged for reasons linked to the very nature of those products. A packet of cigarettes is not necessary to give the packaged product its shape because cigarettes have their own shape and are not in liquid or granulated form.
- 66 By analogy, the case-law relating to signs that are indissociable from the appearance of the products also applies to surface patterns used on the packaging of products such as sweets or cigarettes. They are products that are usually sold in packaging, and are only brought out of their packaging just prior to being consumed.
- 67 However, there are no grounds to apply that case-law in the case of a surface pattern used on what is merely transport packaging. A surface pattern used on mere transport packaging cannot be equated with the appearance of the product.
- 68 Therefore, in principle, the criterion as defined in paragraph 55 above also applies in the case of use of a surface pattern on the packaging of the products at issue, except for what is merely transport packaging.
- 69 In the light of those considerations, it must be determined whether the Board of Appeal was correct in the present case in applying the case-law relating to signs that are indissociable from the appearance of the products.

The applicability of the case-law relating to signs that are indissociable from the appearance of the goods in respect of the products at issue

- 70 It is not unusual for the products 'footwear, including comfort footwear and footwear for work, leisure, health and sports, including sandals, gymnastic sandals, flip-flops, slippers, clogs, including with footbeds, in particular with anatomically moulded deep footbeds, foot supports and foot and shoe inserts, protective inserts' in Class 25 to have a surface pattern. Footwear are fashion items and may therefore have a surface pattern for aesthetic purposes. A surface pattern may also be applied to their outsoles for technical reasons. Outsoles are often profiled as serving to improve the footwear-to-surface grip, as observed by the Board of Appeal in paragraph 33 of the contested decision.
- 71 The applicant submits in that regard that the sign at issue is not suitable for fulfilling a technical function, since a figurative mark, by its very nature, has two dimensions.

- 72 However, the wavy lines making up the sign at issue produce a shade effect, giving a three-dimensional aspect to the sign. In fact, the edge of those lines is darker than the part in the middle of those lines. Although it is true, as the applicant states, that the international mark was applied for as a two-dimensional figurative mark, and the application does not contain any description showing that it has raised or recessed elements, the Board of Appeal was correct to base itself on the characteristics of the sign at issue, including the shade effect produced by the wavy lines, to find that the sign could also be applied in raised format.
- 73 Moreover, it should be noted that, according to the case-law, there is nothing precluding the Board of Appeal from taking into account, as part of a registration application for a sign designated as a figurative mark, a possible use of that sign as a three-dimensional shape (see, to that effect, judgment of 10 September 2015, *EE v OHIM (Representation of white dots on an ivory background)*, T-144/14, not published, EU:T:2015:615, paragraph 40).
- 74 Regarding the applicant's argument to the effect that the contested decision is self-contradictory because a mark cannot simultaneously be both a two-dimensional surface pattern and a three-dimensional overlay, the following remarks are apposite.
- 75 There is nothing precluding two-dimensional or three-dimensional use of a sign from being taken into consideration. For example, in the judgment of 10 September 2015, *Representation of white dots on an ivory background* (T-144/14, not published, EU:T:2015:615, paragraphs 40 and 43), the Court took into account a possible use of a figurative sign representing white dots on an ivory background on printed matter and internet sites (two-dimensional use) and use in the form of small protuberant points serving serve to make the surface of a product less slippery. Therefore, contrary to the applicant's assertions, the contested decision is not self-contradictory on this point.
- 76 Moreover, the applicant stated, in the course of the administrative procedure and in its pleadings before the Court, that it had been using the sign at issue for over 40 years. When questioned about that use at the hearing, the applicant acknowledged that that use consisted in an application of the sign at issue on outsoles of footwear and that the pattern covered the entire sole. Use such as that corresponds to a use of the sign as a raised surface pattern.
- 77 As the applicant observed, it is true that, when the distinctive intrinsic character of a sign is being examined, the assessment must be based on the characteristics of the sign at issue, independently of any use that might have been made of the sign.
- 78 It must nevertheless be observed that the applicant's line of argument is inconsistent in that it states, on the one hand, that the international mark is a 'common' two-dimensional figurative mark and not a surface pattern, whilst on the other affirms that use on the outsoles of footwear as a raised surface pattern also constitutes a use of the mark.
- 79 Moreover, the only example of use of the sign at issue provided by the applicant in the course of the administrative procedure consists of one photograph of a signboard displaying the pattern at issue and serving as a background for shoe racks, reproduced in paragraph 6 of the contested decision. Such use corresponds to a use of the sign at issue in two-dimensional form. It should be noted that, in being used as a background for shoe racks, the sign at issue has not been used in square form but has been extended on all sides in order to cover the entire background of the shoe rack, and thus has been used as a two-dimensional surface pattern.
- 80 In affirming both the use as a background for shoe racks and a use on the outsoles of footwear constitutes a use of the international mark, the applicant implicitly concedes that the sign at issue may also be used in both two-dimensional and three-dimensional form.

- 81 As regards the applicant's argument, put forward at the hearing, to the effect that it plans to use the international mark in the future in the shape of a square to be applied on parts of its products where, in its view, the relevant public expects to find marks, the following remarks are apposite. As the applicant itself observed, EUIPO must assess the distinctive character of a sign by reference to the reproduction of the mark sought attached to the registration application and to the description included in that application, where there is one (see paragraph 38 above). The business intentions of the trade mark applicant, which may vary in time and according to its wishes, are not relevant.
- 82 Moreover, when the applicant of a mark representing a pattern made up of a repetitive sequence of elements plans to use that sign in a particular manner and considers that the sign at issue has distinctive intrinsic character when used in that specific manner (for example, applied in square form to a specific place on the products at issue), it may, for example, apply for registration of a position mark, in order to ensure that EUIPO takes into account, in the assessment of distinctive character, the use of the pattern in the particular form envisaged. As observed by EUIPO at the hearing, however, it cannot base its decision on the registration of a mark, or on the protection of an international trade mark in the EU, on mere promises made by an applicant to use the mark in a certain manner.
- 83 It follows from the foregoing that it is unlikely that footwear will have a surface pattern, either for aesthetic purposes or for technical purposes. The Board of Appeal was therefore correct in applying the case-law relating to signs that are indissociable from the appearance of the goods to 'footwear, including comfort footwear and footwear for work, leisure, health and sports, including sandals, gymnastic sandals, flip-flops, slippers, clogs, including with footbeds, in particular with anatomically moulded deep footbeds, foot supports and foot and shoe inserts, protective inserts' in Class 25.
- 84 Next, as regards 'parts and fittings for the aforesaid footwear, namely footwear uppers, heel pieces, outsoles, inner soles, shoe bottom parts, including footbeds, foot supports', in Class 25, the following should be borne in mind.
- 85 It is not unlikely that the parts and fittings for footwear will have a surface pattern. For 'outsoles', a raised surface pattern, may serve to improve the grip between the footwear and the surface. The same considerations apply for 'heel pieces', whilst a surface pattern may be applied for decorative purposes to 'footwear uppers'.
- 86 A surface pattern on the upper part for decorative purposes may be found on 'inner soles, shoe bottom parts, including footbeds, foot supports'. Although inner soles are not visible when footwear is worn, they are parts that are visible for the footwear user when he puts them on or takes them off. The applicant in fact acknowledged in its reply that the inner soles of footwear may show patterns such as flowers or animal prints. Therefore, the mere fact that the inner sole of the footwear is not visible when the footwear is worn does not prevent the decorative patterns from being applied to them; such use is not unlikely.
- 87 Inner soles may also include a raised surface pattern on their lower part for technical purposes, in order to prevent the sole from sliding inside the footwear; nor is this type of use unlikely.
- 88 The considerations set out in paragraphs 86 to 87 above also hold true for 'foot and shoe inserts, in particular with anatomically moulded deep footbeds, in particular of natural cork, thermal cork, plastic, latex or foamed plastic materials, including of elastic compounds of cork latex mixtures or plastic cork mixtures' and 'inner soles', in Class 25.
- 89 Moreover, the considerations set out in paragraphs 70, 83 and 85 to 87 above also apply to 'footwear, namely shoes and sandals, boots, and parts and fittings for all the aforesaid goods, included in this class', in Class 25.

- 90 The Board of Appeal was therefore correct in applying the case-law relating to signs that are indissociable from the appearance of the goods to the following products, in Class 25: ‘parts and fittings for the aforesaid footwear, namely footwear uppers, heel pieces, outsoles, inner soles, shoe bottom parts, including footbeds, foot supports’; ‘foot and shoe inserts, in particular with anatomically moulded deep footbeds, in particular of natural cork, thermal cork, plastic, latex or foamed plastic materials, including of elastic compounds of cork latex mixtures or plastic cork mixtures’; ‘inner soles’ and ‘footwear, namely shoes and sandals, boots, and parts and fittings for all the aforesaid goods, included in this class’.
- 91 The considerations relating to footwear and their parts and fittings, set out in paragraphs 70, 83 and 85 to 87 above, also apply to footwear in Class 10. Orthopaedic shoes in Class 10 may, like footwear in Class 25, show a surface pattern for decorative purposes on footwear uppers or for technical purposes on the outsole. The considerations set out in paragraphs 84 to 87 above apply to parts and fittings for orthopaedic shoes.
- 92 The Board of Appeal was therefore correct in applying the case-law relating to signs that are indissociable from the appearance of the goods for the following goods in Class 10: ‘orthopaedic footwear, including orthopaedic footwear for rehabilitation, foot physiotherapy, therapy and other medical purposes, and parts therefor, including orthopaedic shoes, including orthopaedic shoes with footbeds or with orthopaedic foot supports and foot and shoe inserts, including orthopaedic foot supports and shoe inserts and parts therefor, including in the form of rigid thermoplastic inserts’; ‘shoe components and shoe fittings for orthopaedic shoe adaptation, in particular fittings, wedges, pads, inner soles, foam padding, foam pads and moulded shoe soles, including in the form of fully plastic inserts with orthopaedic footbeds of natural cork, thermal cork, plastic, latex or foamed plastic materials, including being elastic compounds of cork latex mixtures or plastic cork mixtures’; ‘orthopaedic foot and shoe inserts’; ‘orthopaedic foot and shoe supports’; ‘orthopaedic footwear, in particular orthopaedic sandals and slippers’; and ‘orthopaedic insoles, inserts, including inserts of plastic, latex or foamed plastic materials, including being elastic compounds of cork latex mixtures or plastic cork mixtures’.
- 93 Next, it is appropriate to consider whether the Board of Appeal was correct in applying the case-law relating to signs that are indissociable from the appearance of the goods for the other products in Class 10 covered by the international mark.
- 94 As regards ‘surgical, medical, dental and veterinary apparatus and instruments’, the Board of Appeal observed, correctly, that they may have a raised surface pattern applied to a handle, and thus part of their surface, for technical reasons, namely to enable a more sure and precise grip; such use is not unlikely.
- 95 The ‘orthopaedic articles’ listed in Class 10 comprise a vast category of products, some of which are likely to have a raised surface pattern for technical purposes, namely to improve their grip.
- 96 The Board of Appeal was therefore correct in applying the case-law relating to signs that are indissociable from the appearance of the products to ‘surgical, medical, dental and veterinary apparatus and instruments’ and ‘orthopaedic articles’, in Class 10.
- 97 By contrast, ‘artificial limbs, eyes and teeth’, in Class 10 are not likely to have a surface pattern, as they are generally designed to look as natural as possible and the application of a surface pattern would be counterproductive.
- 98 In the contested decision, the Board of Appeal based itself on the facts that those products are advantageously sold in packaging displaying a raised surface pattern to enable a more sure and precise grip.

- 99 The question then arises as to whether the possible use of a surface pattern on the packaging of ‘artificial limbs, eyes and teeth’ is sufficient to apply the case-law relating to signs that are indissociable from the appearance of the products. It should be noted, first of all, that those are custom-made products and must therefore be ordered. They are generally ordered by health professionals. The Board of Appeal, moreover, noted in paragraph 19 of the contested decision that those products were aimed at health professionals.
- 100 It should also be noted that although it is likely that those products will be delivered in packaging in order to avoid their being damaged in transport and in order to protect them until they are fitted in place, they are products that are fitted as soon as possible after delivery. Since they are custom made, they are not intended to be stored.
- 101 Regarding the Board of Appeal’s statement in paragraph 34 of the contested decision, to the effect that ‘artificial limbs, eyes and teeth’ are advantageously ‘sold’ in packaging displaying a raised surface pattern, it should be noted that those products, which are necessarily custom made, are more ‘delivered’ in packaging rather than ‘sold’ in packaging.
- 102 The potential use of a surface pattern on the packaging of those products is not sufficient to establish that that surface pattern is indissociable from the appearance of those products, since the packaging must be regarded as being merely transport packaging.
- 103 At the hearing, EUIPO submitted that the user must put those products away when they are not being used, and that this could be done in their original packaging. In so doing, it in essence affirmed that it is not merely transport packaging, but packaging that the health professional who fitted the artificial limbs, eyes and teeth gives to the user, who keeps it.
- 104 As regards artificial eyes, however, they are used permanently once fitted.
- 105 Artificial teeth are not fixed but may be removed. They are usually kept in a glass or water or specific container intended to be filled with water. It is not practical to keep them in their original packaging, as it usually cannot be filled with water.
- 106 EUIPO has not put forward any argument relating to artificial limbs establishing that the user receives the original packaging from the health professional who fitted them and keeps them in their original packaging when they are not being used.
- 107 The argument put forward on this point by EUIPO at the hearing cannot, therefore, be upheld.
- 108 For ‘artificial limbs, eyes and teeth’, the Board of Appeal was therefore incorrect in applying the case-law relating to signs that are indissociable from the appearance of the products. For those products, the appearance of the packaging cannot be regarded as being indissociable from the appearance of the goods, with the result that the possibility that a surface pattern might be used on the packaging cannot be sufficient for that case-law to apply.
- 109 Next, as regards the goods ‘suture materials; suture materials for operations’, it is unlikely that those products will themselves have a surface pattern, and that the Board of Appeal did not base its reasoning on a possible use of a surface pattern on those products themselves.
- 110 The Board of Appeal held, in paragraph 34 of the contested decision, that those goods were medical products that had to be handled with particular care and that accordingly they would be advantageously sold in a packaging having a surface pattern in order to enable a more sure and precise grip.

- 111 Those considerations cannot be upheld, however. Suture materials are not fragile, with the result that there is an advantage in selling them in packaging having a raised surface pattern in order to enable a more sure grip. Moreover, given the nature of those medical products, it seems unlikely that their packaging will have a surface pattern for decorative purposes; nor did the Board of Appeal base its reasoning on a potential use of a surface pattern for decorative purposes on the packaging of suture materials.
- 112 It is therefore unlikely that the products ‘suture materials; suture materials for operations’ will have a surface pattern either on the products themselves or on their packaging. For that reason, the Board of Appeal was incorrect in applying the case-law relating to signs that are indissociable from the appearance of the products to the products ‘suture materials; suture materials for operations’.
- 113 Next, ‘clothing, headgear’ and ‘belts’, ‘shawls’ and ‘neckerchiefs’, in Class 25 are fashion items. They often have surface patterns for decorative purposes. The applicant’s statement that belts, as a rule, do not have any pattern, except on the buckle, cannot be upheld. It is well known that belts often have surface patterns for decorative purposes. In any event, it is not unlikely that they will have a surface pattern.
- 114 The Board of Appeal was therefore correct in applying the case-law relating to signs that are indissociable from the appearance of the products at issue to the following goods in Class 25: ‘clothing, headgear’, ‘belts’, ‘shawls’ and ‘neckerchiefs’.
- 115 Next, the following should be borne in mind with respect to the goods covered by the international mark in Class 18.
- 116 The goods ‘trunks and travelling bags’ and ‘change purses; bags; handbags; document cases; waist pouches; garment bags for travel; key cases (leatherwear); beauty cases; toilet bags, vanity cases; travelling bags; rucksacks’ are items which may fulfil, in addition to their primary function, a common aesthetic function by contributing to the outward image of the consumer concerned (see, to that effect, judgment of 6 November 2014, *Vans v OHIM (Representation of a wavy line)*, T-53/13, EU:T:2014:932, paragraph 54 (not published)).
- 117 As the Court has already held, the various leatherware and luggage goods in Class 18 may be regarded as part of the fashion sector in the broad sense of the term (see judgment of 6 November 2014, *Representation of a wavy line*, T-53/13, EU:T:2014:932, paragraph 55 (not published) and the case-law cited).
- 118 Items like ‘umbrellas, parasols and walking sticks’ may be regarded as part of the fashion sector in the broad sense of the term, inasmuch as they may be used by consumers to convey a certain outward image (see, to that effect, judgment of 6 November 2014, *Representation of a wavy line*, T-53/13, EU:T:2014:932, paragraph 61 (not published) and the case-law cited).
- 119 The international mark also covers ‘leather and imitations of leather, and goods made of these materials and included in this class’, in Class 18. The latter goods, namely leather and imitations of leather in Class 18, are also generally fashion items.
- 120 Furthermore, fashion items in the broad sense of the term as well as ‘whips, harness and saddlery’ are goods which may be decorated with different forms of decorations (see, to that effect, judgment of 6 November 2014, *Representation of a wavy line*, T-53/13, EU:T:2014:932, paragraph 62 (not published)).
- 121 It is therefore not unlikely that those goods will have surface patterns for decorative purposes.

- 122 The Board of Appeal further observed, correctly, that the goods referred to in paragraphs 116 and 118 to 120 above were usually designed to be carried by the consumer using a handle or other parts. Thus, it is not unlikely that those goods will have a raised surface pattern on those parts in order to improve their grip.
- 123 The goods ‘leather and imitations of leather’ may also have surface patterns for decorative purposes. As observed by EUIPO at the hearing, without being contradicted on the point by the applicant, ‘leather and imitations of leather’ include crafted products. It is thus not unlikely that they will have surface patterns for decorative purposes.
- 124 By contrast, the term ‘animal skins, hides’ (in the French version, ‘cuirs d’animaux, pelleteries’ and, in the German version, ‘Häute und Felle’) refer to goods in their unprocessed state without a surface pattern, as correctly pointed out by the applicant. Regarding ‘hides’, it should also be noted that they are animals skins covered with fur. It is difficult to see how a surface pattern might be applied to an animal skins covered with fur.
- 125 Furthermore, where ‘animal skins, hides’ are delivered in packaging, that is often merely transport packaging. The possible use of a surface pattern on such packaging does not mean that the sign at issue is indissociable from the appearance of the goods ‘animal skins, hides’.
- 126 The Board of Appeal was therefore incorrect in applying the case-law relating to signs that are indissociable from the appearance of the products to ‘animal skins, hides’.
- 127 By contrast, as regards the other goods in Class 18, the Board of Appeal was correct in applying that case-law.
- 128 It follows from the foregoing that the contested decision must be annulled in so far as concerns the following goods: ‘artificial limbs, eyes and teeth’, ‘suture materials; suture materials for operations’ and ‘animal skins, hides’. For those goods, the Board of Appeal was incorrect in applying the case-law relating to signs that are indissociable from the appearance of the products, with the result that it based itself on incorrect assessment criteria.

The alleged significant departure of the sign at issue from the standards and usual practices of the sectors concerned

- 129 It must now be examined whether the Board of Appeal was correct in finding that the sign at issue departed significantly from the standards or usual practices of the sectors concerned with respect to the other goods covered by the international mark.
- 130 As observed by the Board of Appeal, the sign at issue is made up of crisscrossing horizontal and vertical wavy lines having the same shape.
- 131 It is a simple pattern, made up of a simple combination of wavy lines, crisscrossing repeatedly. As observed by the Board of Appeal, the overall impression produced by the sign remains banal and merely represents the sum of the components making up the sign.
- 132 The applicant’s assertion that the shapes making up the sign are already unusual taken in isolation, and that, in the overall impression produced by it, the pattern is original and unusual, cannot be upheld. The applicant merely makes a general statement, without providing evidence liable to establish what could be considered ‘original’ and ‘unusual’ in the simple combination of wavy lines.

- 133 Moreover, as observed by the Board of Appeal, general experience shows that patterns applied to surfaces are characterised by infinite different designs. It also observed, correctly, that the elements of patterns applied to surfaces were often simple geometrical shapes such as spots, circles, rectangles or lines, which could be straight or go up and down in a zigzag or wavy pattern.
- 134 The Board of Appeal considered that the overall impression produced by the sign examined did not depart significantly — or even at all — from the usual practices of the sectors concerned and that the relevant public would therefore perceive the sign at issue as a simple surface pattern and not as an indication of any particular commercial origin.
- 135 The applicant submits in that regard that the Board of Appeal provides no evidence in support of its statement that the sign at issue does not depart significantly from other surface patterns used in trade for the goods in question. In its submission, the sign at issue or similar signs are not used for the goods in question, stating that, contrary to the Board of Appeal's findings, it cannot be presumed that the sign at issue or a similar sign is usually employed for decorative or technical purposes on the products at issue.
- 136 It must be remembered in that regard that, if an applicant claims that a trade mark applied for is distinctive, despite EUIPO's analysis, it is for that applicant to provide specific and substantiated information to show that the trade mark applied for has either an intrinsic distinctive character or a distinctive character acquired by usage (judgment of 25 October 2007, *Develey v OHIM*, C-238/06 P, EU:C:2007:635, paragraph 50), since it is much better placed to do so, given its thorough knowledge of the market (judgment of 29 June 2015, *Grupo Bimbo v OHIM (Shape of a Mexican tortilla)*, T-618/14, not published, EU:T:2015:440, paragraph 32).
- 137 The following remarks are apposite with respect to the applicant's argument to the effect that the Board of Appeal ought not to have confined itself to general statements about the goods or services as a whole, but rather should have referred specifically to the different products at issue.
- 138 In the present case, in paragraphs 33 to 36 of the contested decision, the Board of Appeal examined the distinctive character of the sign at issue for the various products at issue. Moreover, the Board of Appeal found, correctly, that the patterns applied to surfaces were characterised by an infinite number of different designs and that that finding was not limited to a specific sector.
- 139 It is true, as pointed out by the applicant, that the Board of Appeal did not give specific examples of other surface patterns used in trade for the goods in question that are similar to the sign at issue. However, the Board of Appeal is not required to give such examples. Where the Board of Appeal bases its finding on facts shown by practical experience generally acquired in the marketing of the products at issue and likely to be known by anyone, the Board is not required to provide concrete examples (see, to that effect, judgment of 22 June 2006, *Storck v OHIM*, C-25/05 P, EU:C:2006:422, paragraph 54). On the other hand, although the fact that a mark is capable of being commonly used in trade for the presentation of the goods or services in question is a relevant criterion in relation to Article 7(1)(c) of Regulation No 207/2009, that criterion is not the yardstick by which Article 7(1)(b) of that regulation must be applied (see judgment of 28 September 2010, *Rosenruist v OHIM (Representation of two curves on a pocket)*, T-388/09, not published, EU:T:2010:410, paragraph 37 and the case-law cited).
- 140 The applicant's argument to the effect that it is the only undertaking that uses the sign at issue does not suffice to prove that there is a significant departure by the sign at issue and from the standards and usual practices of the sectors concerned.

- 141 In the present case, the applicant has not provided evidence liable to cast doubt on the Board of Appeal's finding that, in essence, given the banality of the sign at issue and the infinite number of different designs used as surface patterns, there is no significant departure by the overall impression produced by the sign at issue from the standards or usual practices of the sectors concerned.
- 142 The applicant submits that, in the administrative procedure, it submitted several hundred images representing products on which no pattern that is identical or similar to the sign at issue could be distinguished.
- 143 On that point, it is apparent from the file submitted by EUIPO that, in the administrative procedure, the applicant submitted results of searches (images) done on the *Google* search engine for the following key words: 'shoes' and 'shoes logos'. The applicant did not provide examples in the administrative procedure for products other than shoes.
- 144 From among the images of shoes submitted by the applicant, there are almost no images showing outsoles of footwear. Those images therefore do not provide indications about the surface patterns used in trade on the outsoles of shoes. Given that a surface pattern may be inter alia applied in raised format on the outsole of a shoe in order to improve the grip (see paragraph 70 above), the images provided by the applicant do not suffice to establish that there is a significant departure by the sign at issue from the standards and usual practices of the footwear sector.
- 145 In the application, the applicant also put forward some images of inner soles of shoes. Without its being necessary to rule on the admissibility of that evidence, which was adduced for the first time before the Court, it should be noted that, in any event, those images do not suffice to establish that there is a significant departure by the sign at issue from the standards and usual practices of the sector concerned. All of the images show the upper part of the inner soles. However, the Board of Appeal observed, correctly, that inner soles could have a surface pattern in order to improve the grip, inter alia, between the inner sole and the footwear. Therefore, images that do not show the lower part of the inner soles do not suffice to establish that there is a significant departure by the sign at issue from the standards and usual practices of the sector.
- 146 For the other goods at issue, the applicant has not provided images to establish the standards and usual practices of the sectors concerned. It merely gave general statements to the effect that surface patterns are not customary for those goods or that the surface patterns present on the market do not resemble the sign at issue.
- 147 Those statements do not suffice to establish that there is a significant departure by the sign at issue and from the standards and usual practices of the sectors concerned.
- 148 Regarding the applicant's argument to the effect that, in the area covered by Class 25, logos and geometric patterns regularly serve as an indication of origin, it should be noted, first of all, that none of the examples provided by the applicant in paragraphs 14 and 15 of the reply concerns a repetitive sequence of elements displaying the characteristics of a surface pattern.
- 149 It is, moreover, clear from the case-law that, although the appearance of the goods in a given sector, or a component of those goods, serves to indicate the manufacturer, that is only because the appearance of a sufficient number of those goods departs significantly from the standards or usual practices of the sector. That does not in any way mean that the appearance of a good or a component of a good of the same sector that, in regards to it, does not depart significantly from that standard is liable to indicate the origin of that good in the mind of the relevant public (order of 13 September 2011, *Wilfer v OHIM*, C-546/10 P, not published, EU:C:2011:574, paragraph 56).

- 150 Moreover, the fact that certain signs are recognised as trade marks by consumers does not necessarily mean that they are devoid of intrinsic distinctive character. It is in fact possible for a mark to acquire distinctive character through use over time (see judgment of 28 September 2010 in *Rosenruist v OHIM (Representation of two curves on a pocket)*, T-388/09, not published, EU:T:2010:410, paragraph 33).
- 151 The considerations set out in paragraphs 149 and 150 above also hold true for the applicant's argument to the effect that, for shoes, consumers are accustomed to manufacturers' always designing their goods with the same mark affixed to certain places.
- 152 Lastly, regarding the applicant's argument, put forward at the hearing, to the effect that it is entitled to register the mark when it has distinctive character, it should be noted that that fact does not mean that the examination conducted at the time of the application for trade mark registration or at the time of assessment of an application for extension of the protection of an international trade mark for the EU, must not be strict and complete in order to avoid marks being unduly registered or protected in the European Union. There is no presumption that a mark is suitable for registration (judgment of 11 June 2009, *Baldesberger v OHIM (Shape of tweezers)*, T-78/08, not published, EU:T:2009:199, paragraph 36).
- 153 In the present case, the conclusion is that, given the banality of the sign at issue and the infinite number of different designs used for surface patterns, the Board of Appeal was correct in finding that there was not a significant departure by the sign at issue and from the standards and usual practices of the sectors concerned usual practices of the sectors concerned. It was therefore correct in finding that the relevant public would perceive the sign as a simple surface pattern, applied for decorative or technical purposes, and not as an indication of any particular commercial origin.
- 154 It follows from all the foregoing that the contested decision must be annulled in respect of the following goods: 'artificial limbs, eyes and teeth', 'suture materials; suture materials for operations' (Class 10) and 'animal skins, hides' (Class 18) (see paragraph 128 above).
- 155 As regards the other goods covered by the international mark, however, the single plea in law put forward by the applicant must be dismissed, as must therefore the action in its entirety.

Costs

- 156 Under Article 134(3) of the Rules of Procedure of the General Court, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the General Court may order that one party, in addition to bearing his own costs, pay a proportion of the costs of the other party.
- 157 In the present case, as the contested decision has been annulled for a limited number of goods, there are grounds for ordering the applicant to bear its own costs and to pay half of those incurred by EUIPO. EUIPO shall accordingly bear half of its own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

- 1. Annuls the decision of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 15 May 2014 (Case R 1952/2013-1) in so far as it concerns the following goods: 'artificial limbs, eyes and teeth', 'suture materials; suture materials for operations' and 'animal skins, hides';**

2. **Dismisses the action as to the remainder;**
3. **Orders Birkenstock Sales GmbH to bear its own costs and to pay half of those incurred by EUIPO, and EUIPO to bear half of its own costs.**

Dittrich

Szwarcz

Tomljenović

Delivered in open court in Luxembourg on 9 November 2016.

[Signatures]