



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

5 February 2026*

(Appeal – Application for the EU figurative mark APE TEES – Earlier non-registered figurative trade marks representing a monkey, protected in the United Kingdom of Great Britain and Northern Ireland – Regulation (EC) No 207/2009 – Article 8(4) – Relative ground for refusal – Opposition – Appeal before the Board of Appeal – Dismissal – Action before the General Court – Article 50(1) and (3) TEU – Withdrawal of the United Kingdom from the European Union – Articles 126 and 127 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – Transition period – Expiry – Circumstances prior to the adoption of the decision at issue – Relevant moment for assessing the existence of an earlier mark – Principle of territoriality – Territorial scope of the EU trade mark – Existence of a conflict)

In Case C-337/22 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 23 May 2022,

European Union Intellectual Property Office (EUIPO), represented by D. Gája, D. Hanf, E. Markakis and V. Ruzek, acting as Agents,

appellant,

supported by:

Federal Republic of Germany, represented by J. Möller, J. Heitz and M. Hellmann, acting as Agents,

International Trademark Association (INTA), established in New York (United States), represented by A. Lubberger, A. Wenninger-Lenz, Rechtsanwälte, N. Parrotta, avvocat, and M. Perraki, dikigoros,

interveners in the appeal,

the other party to the proceedings being:

Nowhere Co. Ltd, established in Tokyo (Japan), represented by R. Kunze, Rechtsanwalt,

applicant at first instance,

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of M.L. Arastey Sahún, President of the Chamber, J. Passer, E. Regan, D. Gratsias (Rapporteur) and B. Smulders, Judges,

Advocate General: T. Čapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2025,

gives the following

Judgment

- 1 By its appeal, the European Union Intellectual Property Office (EUIPO) seeks to have set aside the judgment of the General Court of the European Union of 16 March 2022, *Nowhere v EUIPO – Ye (APE TEES)* (T-281/21, ‘the judgment under appeal’, EU:T:2022:139), by which the General Court, first, annulled the decision of the Second Board of Appeal of EUIPO of 10 February 2021 (Case R 2474/2017-2) (‘the decision at issue’), relating to opposition proceedings between Nowhere Co. Ltd and Mr Junguo Ye, and, secondly, dismissed the action as to the remainder.

Legal context

The Withdrawal Agreement

- 2 The first and fourth paragraphs of the preamble to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7; ‘the Withdrawal Agreement’), which was approved on behalf of the European Union and the European Atomic Energy Community (EAEC) by Council Decision (EU) 2020/135 of 30 January 2020 (OJ 2020 L 29, p. 1), which entered into force on 1 February 2020, provide:

‘CONSIDERING that on 29 March 2017 the [United Kingdom], following the outcome of a referendum held in the United Kingdom and its sovereign decision to leave the European Union, notified its intention to withdraw from the [European Union] ... in accordance with Article 50 [TEU], ...

...

RECALLING that, pursuant to Article 50 TEU ... and subject to the arrangements laid down in this Agreement, the law of the Union ... in its entirety ceases to apply to the United Kingdom from the date of entry into force of this Agreement’.

- 3 The Withdrawal Agreement contains a Part Three entitled ‘Separation provisions’. Title IV of Part Three, entitled ‘Intellectual property’, includes, inter alia, Articles 54 and 59 of that agreement. Article 54, entitled ‘Continued protection in the United Kingdom of registered or granted rights’, provides:

‘1. The holder of any of the following intellectual property rights which have been registered or granted before the end of the transition period shall, without any re-examination, become the holder of a comparable registered and enforceable intellectual property right in the United Kingdom under the law of the United Kingdom:

- (a) the holder of a European Union trade mark registered in accordance with [Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1)] shall become the holder of a trade mark in the United Kingdom, consisting of the same sign, for the same goods or services;

...

3. Notwithstanding paragraph 1, if an intellectual property right referred to in that paragraph is declared invalid or revoked ... in the Union as the result of an administrative or judicial procedure which was ongoing on the last day of the transition period, the corresponding right in the United Kingdom shall also be declared invalid or revoked ... The date of effect of the declaration or revocation or cancellation in the United Kingdom shall be the same as in the Union.

By way of derogation from the first subparagraph, the United Kingdom shall not be obliged to declare invalid or to revoke the corresponding right in the United Kingdom where the grounds for the invalidity or revocation of the European Union trade mark ... do not apply in the United Kingdom.

...’

- 4 Article 59 of the Withdrawal Agreement, entitled ‘Right of priority with respect to pending applications for European Union trade marks, Community designs and Community plant variety rights’, provides, in paragraph 1 thereof:

‘Where a person has filed an application for a European Union trade mark ... in accordance with Union law before the end of the transition period and where that application was accorded a date of filing, that person shall have, for the same trade mark in respect of goods or services which are identical with or contained within those for which the application has been filed in the Union ..., the right to file an application in the United Kingdom within 9 months from the end of the transition period. An application made pursuant to this Article shall be deemed to have the same filing date and date of priority as the corresponding application filed in the Union and, where appropriate, the seniority of a trade mark of the United Kingdom claimed under Article 39 or 40 of Regulation [2017/1001].’

- 5 Part Four of that agreement, entitled ‘Transition’, includes, inter alia, Articles 126 and 127 thereof. Pursuant to Article 126:

‘There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020.’

- 6 Article 127 of that agreement, entitled ‘Scope of the transition’, states, in paragraphs 1, 3 and 6:
- ‘1. Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period.
- ...
3. During the transition period, the Union law applicable pursuant to paragraph 1 shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States, and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union.
- ...
6. Unless otherwise provided in this Agreement, during the transition period, any reference to Member States in the Union law applicable pursuant to paragraph 1, including as implemented and applied by Member States, shall be understood as including the United Kingdom.’
- 7 The fourth paragraph of Article 185 of the Withdrawal Agreement reads as follows:
- ‘Parts Two and Three ... shall apply as from the end of the transition period.’

Regulation No 40/94

- 8 Article 8 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended by Council Regulation (EC) No 422/2004 of 19 February 2004 (OJ 2004 L 70, p. 1) (‘Regulation No 40/94’), entitled ‘Relative grounds for refusal’, provides in paragraph 4 thereof:
- ‘Upon opposition by the proprietor of a non-registered trade mark or of another sign used in the course of trade of more than mere local significance, the trade mark applied for shall not be registered where and to the extent that, pursuant to the Community legislation or the law of the Member State governing that sign:
- (a) rights to that sign were acquired prior to the date of application for registration of the Community trade mark, or the date of the priority claimed for the application for registration of the Community trade mark;
- (b) that sign confers on its proprietor the right to prohibit the use of a subsequent trade mark.’

Regulation (EC) No 207/2009

- 9 Recitals 2 to 4, 7, 8 and 10 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1) stated:
- ‘(2) ... In order to create a[n internal] market ... and make it increasingly a single market, not only must barriers to free movement of goods and services be removed and arrangements be instituted which ensure that competition is not distorted, but, in addition, legal conditions must be created which enable undertakings to adapt their activities to the scale

of the Community, whether in manufacturing and distributing goods or in providing services. For those purposes, trade marks enabling the products and services of undertakings to be distinguished by identical means throughout the entire Community, regardless of frontiers, should feature amongst the legal instruments which undertakings have at their disposal.

(3) ... [I]t would appear necessary to provide for Community arrangements for trade marks whereby undertakings can by means of one procedural system obtain Community trade marks to which uniform protection is given and which produce their effects throughout the entire area of the Community. The principle of the unitary character of the Community trade mark thus stated should apply unless otherwise provided for in this Regulation.

(4) The barrier of territoriality of the rights conferred on proprietors of trade marks by the laws of the Member States cannot be removed by approximation of laws. In order to open up unrestricted economic activity in the whole of the internal market for the benefit of undertakings, trade marks should be created which are governed by a uniform Community law directly applicable in all Member States.

...

(7) The rights in a Community trade mark should not be obtained otherwise than by registration, and registration should be refused in particular if the trade mark ... conflicts with earlier rights.

(8) ... [T]he function [of the protection afforded by the Community trade mark] is in particular to guarantee the trade mark as an indication of origin ...

...

(10) There is no justification for protecting Community trade marks or, as against them, any trade mark which has been registered before them, except where the trade marks are actually used.'

10 Article 1 of that regulation, entitled 'Community trade mark', stated, in paragraph 2 thereof:

'A Community trade mark shall have a unitary character. It shall have equal effect throughout the Community ...'.

11 Article 6 of that regulation, entitled 'Means whereby a Community trade mark is obtained', stated:

'A Community trade mark shall be obtained by registration.'

12 Article 8 of that regulation, entitled 'Relative grounds for refusal', provided, in paragraphs 1, 2 and 4 thereof:

'1. Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered ...

...

2. For the purposes of paragraph 1, “earlier trade marks” means:

- (a) trade marks of the following kinds with a date of application for registration which is earlier than the date of application for registration of the Community trade mark, taking account, where appropriate, of the priorities claimed in respect of those trade marks:

...

...

4. Upon opposition by the proprietor of a non-registered trade mark or of another sign used in the course of trade of more than mere local significance, the trade mark applied for shall not be registered where and to the extent that, pursuant to the Community legislation or the law of the Member State governing that sign:

- (a) rights to that sign were acquired prior to the date of application for registration of the Community trade mark, or the date of the priority claimed for the application for registration of the Community trade mark;
- (b) that sign confers on its proprietor the right to prohibit the use of a subsequent trade mark.’

13 Article 9 of Regulation No 207/2009, entitled ‘Rights conferred by a Community trade mark’, provided:

‘1. A Community trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

- (a) any sign which is identical with the Community trade mark in relation to goods or services which are identical with those for which the Community trade mark is registered;
- (b) any sign where, because of its identity with, or similarity to, the Community trade mark and the identity or similarity of the goods or services covered by the Community trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;
- (c) any sign which is identical with, or similar to, the Community trade mark in relation to goods or services which are not similar to those for which the Community trade mark is registered, where the latter has a reputation in the Community and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the Community trade mark.

...

3. The rights conferred by a Community trade mark shall prevail against third parties from the date of publication of registration of the trade mark. Reasonable compensation may, however, be claimed in respect of acts occurring after the date of publication of a Community trade mark application, which acts would, after publication of the registration of the trade mark, be prohibited by virtue of that publication. The court seised of the case may not decide upon the merits of the case until the registration has been published.’

14 Article 41 of that regulation, entitled ‘Opposition’, stated, in paragraphs 1 and 3 thereof:

‘1. Within a period of three months following the publication of a Community trade mark application, notice of opposition to registration of the trade mark may be given on the grounds that it may not be registered under Article 8:

...

(c) by the proprietors of earlier marks or signs referred to in Article 8(4) and by persons authorised under the relevant national law to exercise these rights.

...

3. Opposition must be expressed in writing and must specify the grounds on which it is made. It shall not be treated as duly entered until the opposition fee has been paid. Within a period fixed by the [Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)], the opponent may submit in support of his case facts, evidence and arguments.’

15 Article 42 of that regulation, entitled ‘Examination of opposition’, provided, in paragraphs 2 and 3 thereof:

‘2. If the applicant so requests, the proprietor of an earlier Community trade mark who has given notice of opposition shall furnish proof that, during the period of five years preceding the date of publication of the Community trade mark application, the earlier Community trade mark has been put to genuine use in the Community in connection with the goods or services in respect of which it is registered and which he cites as justification for his opposition, or that there are proper reasons for non-use, provided the earlier Community trade mark has at that date been registered for not less than five years. In the absence of proof to this effect, the opposition shall be rejected. If the earlier Community trade mark has been used in relation to part only of the goods or services for which it is registered it shall, for the purposes of the examination of the opposition, be deemed to be registered in respect only of that part of the goods or services.

3. Paragraph 2 shall apply to earlier national trade marks referred to in Article 8(2)(a), by substituting use in the Member State in which the earlier national trade mark is protected for use in the Community.’

16 Article 46 of that regulation, entitled ‘Duration of registration’, provided:

‘Community trade marks shall be registered for a period of 10 years from the date of filing of the application. ...’

17 Regulation No 207/2009 was amended by Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 (OJ 2015 L 341, p. 21), which entered into force on 23 March 2016. Subsequently, Regulation No 207/2009 was repealed and replaced, with effect from 1 October 2017, by Regulation 2017/1001.

Regulation 2017/1001

18 Recital 12 of Regulation 2017/1001 states:

‘In order to ensure legal certainty and full consistency with the principle of priority, under which a registered earlier trade mark takes precedence over later registered trade marks, it is necessary to provide that the enforcement of rights conferred by an EU trade mark should be without prejudice to the rights of proprietors acquired prior to the filing or priority date of the EU trade mark. ...’

19 Article 1(2), Article 8(1) and (4), Article 9(1) and Article 46(1) and (4) of that regulation are worded in terms similar to those of Article 1(2), Article 8(1) and (4), the first sentence of Article 9(1), Article 41(1) and the last sentence of Article 41(3) of Regulation No 207/2009 respectively. Article 9(2) of Regulation 2017/1001, which corresponds, in essence, to the second sentence of Article 9(1) of Regulation No 207/2009 states that it is ‘without prejudice to the rights of proprietors acquired before the filing date or the priority date of the EU trade mark’ that the proprietor of that EU trade mark is entitled to prevent all third parties not having his or her consent from using in the course of trade the signs listed in Article 9(2).

20 Article 47 of Regulation 2017/1001, entitled ‘Examination of opposition’, which is worded in similar terms to Article 42 of Regulation No 207/2009, provides, in paragraphs 1 and 5 thereof:

‘1. In the examination of the opposition [EUIPO] shall invite the parties, as often as necessary, to file observations, within a period set by [EUIPO], on communications from the other parties or issued by itself.

...

5. If examination of the opposition reveals that the trade mark may not be registered in respect of some or all of the goods or services for which the EU trade mark application has been made, the application shall be refused in respect of those goods or services. Otherwise the opposition shall be rejected.’

21 Article 51 of Regulation 2017/1001, entitled ‘Registration’, states, in paragraph 1 thereof:

‘... [W]here any opposition entered has been finally disposed of by withdrawal, rejection or other disposition, the trade mark and the particulars referred to in Article 111(2) shall be recorded in the Register. The registration shall be published.’

22 Article 70 of that regulation, entitled ‘Examination of appeals’, states in paragraph 2 thereof:

‘In the examination of the appeal, the Board of Appeal shall invite the parties, as often as necessary, to file observations, within a period to be fixed by the Board of Appeal, on communications from the other parties or issued by itself.’

23 Article 71 of that regulation, entitled ‘Decisions in respect of appeals’, provides, in paragraph 1 thereof:

‘Following the examination as to the allowability of the appeal, the Board of Appeal shall decide on the appeal. The Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.’

- 24 Article 139 of that regulation, entitled ‘Request for the application of national procedure’, states, in paragraphs 1 to 3 thereof:

‘1. The applicant for or proprietor of an EU trade mark may request the conversion of his EU trade mark application or EU trade mark into a national trade mark application:

- (a) to the extent that the EU trade mark application is refused, withdrawn, or deemed to be withdrawn;

...

2. Conversion shall not take place:

...

- (b) for the purpose of protection in a Member State in which, in accordance with the decision of [EUIPO] or of the national court, grounds for refusal of registration or grounds for revocation or invalidity apply to the EU trade mark application or EU trade mark.

3. The national trade mark application resulting from the conversion of an EU trade mark application or an EU trade mark shall enjoy in respect of the Member State concerned the date of filing or the date of priority of that application or trade mark ...’

Regulation No 2868/95

- 25 Rule 19 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1), as amended by Commission Regulation (EC) No 1041/2005 of 29 June 2005 (OJ 2005 L 172, p. 4) (‘Regulation No 2868/95’), entitled ‘Substantiation of the Opposition’, stated, in paragraphs 1 and 2 thereof:

‘(1) [OHIM] shall give the opposing party the opportunity to present the facts, evidence and arguments in support of his opposition or to complete any facts, evidence or arguments that have already been submitted pursuant to Rule 15(3), within a time limit specified by it and which shall be at least 2 months starting on the date on which the opposition proceedings shall be deemed to commence in accordance with Rule 18(1).

(2) Within the period referred to in paragraph 1, the opposing party shall also file proof of the existence, validity and scope of protection of his earlier mark or earlier right, as well as evidence proving his entitlement to file the opposition. In particular, the opposing party shall provide the following evidence:

...

- (d) if the opposition is based on an earlier right within the meaning of Article 8(4) of the Regulation, evidence of its acquisition, continued existence and scope of protection of that right;

...’

- 26 Rule 20 of Regulation No 2868/95, entitled ‘Examination of the opposition’, provided, in paragraph 1 thereof:

‘If until expiry of the period referred to in Rule 19(1) the opposing party has not prove[d] the existence, validity and scope of protection of his earlier mark or earlier right, as well [as] his entitlement to file the opposition, the opposition shall be rejected as unfounded.’

Delegated Regulation (EU) 2018/625

- 27 Article 80 of Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Delegated Regulation (EU) 2017/1430 (OJ 2018 L 104, p. 1), entitled ‘Transitional measures’, is worded as follows:

‘The provisions of [Regulation] (EC) No 2868/95 ... shall continue to apply to ongoing proceedings where this Regulation does not apply in accordance with its Article 82, until such proceedings are concluded.’

- 28 Article 82 of that delegated regulation, entitled ‘Entry into force and application’, provides, in paragraph 2 thereof:

‘[This regulation] shall be applicable from the date of entry into force referred to in paragraph 1, subject to the following exceptions:

...

- (b) Articles 7 and 8 shall not apply to opposition proceedings, the adversarial part of which has started before 1 October 2017;

...

- (j) Title V shall not apply to appeals entered before 1 October 2017;

...’

Background to the dispute

- 29 The facts of the dispute, as set out in paragraphs 1 to 15 and 22 of the judgment under appeal, may be summarised as follows.
- 30 On 30 June 2015, Mr Ye filed an application for registration of an EU trade mark with EUIPO.
- 31 Registration as a mark was sought for the following figurative sign:



- 32 Registration was sought in respect of goods and services in Classes 3, 9, 14, 18, 25 and 35 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.
- 33 The trade mark application was published in *Community Trade Marks Bulletin* No 234/2015 of 9 December 2015.
- 34 On 8 March 2016, Nowhere, the applicant at first instance, filed a notice of opposition pursuant to Article 41 of Regulation No 207/2009 to registration of the mark applied for in respect of all the goods and services referred to in paragraph 32 above.
- 35 The opposition was based on, inter alia, the following three earlier non-registered figurative trade marks, used in the course of trade in the United Kingdom:





- 36 The ground relied on in support of the opposition as regards those earlier trade marks was that set out in Article 8(4) of Regulation No 207/2009.
- 37 By a decision of 20 September 2017, the Opposition Division rejected the opposition.
- 38 On 17 November 2017, Nowhere filed a notice of appeal against that decision.
- 39 By a first decision of 8 October 2018, the Second Board of Appeal of EUIPO dismissed that appeal.
- 40 By document lodged at the Registry of the General Court on 7 January 2019, Nowhere brought an action seeking the annulment of that first decision.
- 41 By decision of 17 July 2019 (Case R 2474/2017-2 (REV)), the Second Board of Appeal of EUIPO revoked that first decision on account of an obvious error attributable to EUIPO.
- 42 By order of 18 December 2019, *Nowhere v EUIPO – Ye (APE TEES)* (T-12/19, EU:T:2019:907), the General Court held that there was no need to adjudicate on the action referred to in paragraph 40 above.
- 43 By a second decision, namely the decision at issue, the Second Board of Appeal of EUIPO dismissed the appeal referred to in paragraph 38 above. In particular, as regards the earlier marks referred to in paragraph 35 above, it found, in essence, that, after the United Kingdom's withdrawal from the European Union and after the expiry of the transition period on 31 December 2020, rights that might exist in the United Kingdom no longer constituted a basis

for the purpose of opposition proceedings based on, inter alia, Article 8(4) of Regulation No 207/2009. It therefore held that Nowhere could no longer rely, in support of its opposition, on the rules governing actions for passing off under the law of the United Kingdom for the purposes of Article 8(4) of Regulation No 207/2009. Thus, as regards those earlier marks, the Second Board of Appeal of EUIPO confirmed the rejection of the opposition on that ground alone.

The action before the General Court and the judgment under appeal

- 44 By application lodged at the Registry of the General Court on 21 May 2021, Nowhere brought an action seeking the annulment and alteration of the decision at issue only in so far as, by that decision, the Second Board of Appeal of EUIPO dismissed the appeal referred to in paragraph 38 above on the ground referred to in paragraph 43 above.
- 45 In support of its action before the General Court, Nowhere relied on a single plea in law, alleging an infringement of Article 8(4) of Regulation No 207/2009. In that plea, Nowhere argued, in essence, that the only relevant date for the purpose of establishing the existence of an earlier right on which an opposition to the registration of an EU trade mark was based was the date on which the application for registration of that trade mark was filed.
- 46 EUIPO argued that such an earlier right should exist not only on that date, but also on the date on which EUIPO took its final decision on the opposition, that is to say, in the present case, on the date on which the decision at issue was adopted.
- 47 In the first place, in paragraph 24 of the judgment under appeal, the General Court found that, although, in accordance with Article 50(3) TEU, EU law had ceased to apply to the United Kingdom as from the entry into force of the Withdrawal Agreement, which was concluded pursuant to Article 50(2) TEU, namely 1 February 2020, it was clear from Article 126 of the Withdrawal Agreement, read in conjunction with the first sentence of Article 127(1) of that agreement, that, unless otherwise provided, EU law continued to apply to and in that State during a transition period that started on the date of entry into force of that agreement and ended on 31 December 2020 ('the transition period'). Furthermore, in paragraph 25 of that judgment, it noted that the provisions of Articles 54 to 61 of the Withdrawal Agreement, which are contained in Title IV of Part Three of that agreement, regarding intellectual property, remained 'silent' as regards the treatment of an opposition brought before the entry into force of the Withdrawal Agreement, on the basis of an earlier right that was protected in the United Kingdom.
- 48 In the second place, in paragraphs 26 and 27 of that judgment, the General Court observed that, in the present case, the only document in the administrative file relevant to the case before it that post-dated the end of the transition period was the decision at issue, since all the other documents relating to the proceedings before EUIPO since the filing of the application for registration of the mark applied for had taken place before the entry into force of the Withdrawal Agreement and thus, in any event, before the end of the transition period.
- 49 In the third place, first of all, in paragraph 28 of that same judgment, it held that, in line with the case-law of the Court of Justice, arising from the judgments of 8 May 2014, *Bimbo v OHIM* (C-591/12 P, EU:C:2014:305, paragraph 12), and of 18 June 2020, *Primart v EUIPO* (C-702/18 P, EU:C:2020:489, paragraph 2 and the case-law cited), cited in paragraph 18 of the judgment under appeal, according to which, in essence, it is the filing date of the application for registration of an

EU trade mark against which an opposition has been brought that is decisive for the purpose of identifying the applicable substantive law, it was clear from ‘now settled’ case-law of the General Court, set out inter alia in the judgment of 30 January 2020, *Grupo Textil Brownie v EUIPO – The Guide Association (BROWNIE)* (T-598/18, ‘the *BROWNIE* case-law’, EU:T:2020:22, paragraph 19), that the existence of a relative ground for refusal must be assessed as at the time of filing of the application for registration of an EU trade mark against which an opposition was brought.

- 50 In paragraph 29 of the judgment under appeal, the General Court recalled that, according to the *BROWNIE* case-law, the fact that the earlier trade mark could lose the status of a trade mark registered in a Member State at a time after that of the filing of the application for registration of the EU trade mark, in particular following the possible withdrawal of the Member State concerned from the European Union, is in principle irrelevant to the outcome of the opposition.
- 51 Next, still on the basis of that case-law, in paragraph 30 of that judgment, the General Court inferred from those considerations that the fact that an opposition under Article 8(4) of Regulation No 207/2009 was based on non-registered trade marks used in the course of trade in the United Kingdom and on the law of passing off laid down in the law of the United Kingdom was irrelevant as regards an opposition brought against an application for registration of an EU trade mark that was filed before the date of entry into force of the Withdrawal Agreement and the date of expiry of the transition period.
- 52 Lastly, in paragraph 31 of that judgment, it concluded that, since, in the present case, the application for registration of the mark applied for was filed before those dates, those earlier non-registered trade marks were, in so far as they had been used in the course of trade in the United Kingdom, in principle, capable of forming the basis of the opposition in the present case, which the Second Board of Appeal of EUIPO should have taken into account in its assessment.
- 53 In the fourth place, it found that the arguments put forward by EUIPO before it could not call that finding into question.
- 54 First, in paragraph 34 of the judgment under appeal, the General Court rejected EUIPO’s argument based on the use of the present tense in Article 8(4) of Regulation No 207/2009, observing, on the one hand, that the mere use of the present tense in a provision did not make it possible to derive any conclusion as regards its interpretation and, on the other hand, that, in the light of the words ‘[u]pon opposition by the proprietor of a non-registered trade mark’, with which Article 8(4) begins, it cannot be ruled out that that use refers to the date on which the opposition is brought rather than to the date on which the decision at issue is adopted.
- 55 Secondly, as regards the provisions of Rule 19(2)(d) and Rule 20(1) of Regulation No 2868/95, relied on by EUIPO, the General Court noted, in paragraph 36 of that judgment, that it was apparent from the wording of the latter rule that proof of the existence, validity and scope of protection of the earlier right had to be produced before the expiry of the period referred to in the former rule. However, it found that, in the present case, that period had expired on a date before the entry into force of the Withdrawal Agreement and the expiry of the transition period. In paragraph 37 of that judgment, the General Court concluded that, ‘at least in the present case’, those provisions precluded EUIPO’s argument that the relevant date for determining the existence of the earlier rights concerned was that on which the decision at issue was adopted.

- 56 Thirdly, in response to EUIPO's argument based on Article 42(2) and (3) of Regulation No 207/2009, the General Court stated, in paragraphs 38 and 39 of that judgment, that the examination of an opposition did not as a matter of course entail an examination of whether the earlier mark had been put to genuine use, since the latter examination could take place only if the applicant so requests, and that, in any event, Article 42(2) of that regulation referred to the five years preceding the date of publication of the EU trade mark application, and not to the period that ends on the date on which EUIPO gives its final decision on the opposition.
- 57 Fourthly, in paragraph 40 of the judgment under appeal, the General Court rejected EUIPO's references to provisions and case-law relating to applications for a declaration of invalidity, noting that those provisions and that case-law were not necessarily relevant in the context of a case concerning opposition proceedings.
- 58 Fifthly, in response to EUIPO's argument that, in essence, as from the end of the transition period, no conflict could arise between the mark applied for and the earlier non-registered trade marks, used in the course of trade in the United Kingdom, the General Court noted, in paragraph 41 of the judgment under appeal, that, under Article 51 of Regulation 2017/1001, the mark applied for was to be registered where any opposition entered had finally been disposed of by, *inter alia*, rejection, and that it was clear from Article 52 of that regulation that a registration was valid as from the date of filing of the application, and not only as from the date on which any opposition is finally rejected.
- 59 In paragraph 42 of that judgment, the General Court held that, even if it were to be accepted that, after the end of the transition period, a conflict between the marks at issue could no longer arise, the fact remained that, if the mark applied for was registered, such a conflict could nevertheless have existed during the period between the date on which the EU trade mark application was filed and the date of expiry of the transition period. The General Court observed that it was difficult to comprehend why Nowhere's earlier non-registered trade marks used in the course of trade in the United Kingdom would have to be denied protection during that period, and that it must therefore be acknowledged that the applicant had a legitimate interest in the success of its opposition as regards that period.
- 60 Sixthly, in paragraphs 44 and 45 of that judgment, it held that it was also necessary to reject EUIPO's argument alleging that, pursuant to Article 139 of Regulation 2017/1001, the applicant for the EU trade mark at issue would be able to convert its EU trade mark application into national trade mark applications in all EU Member States, and thus obtain protection of the same mark in the same territory by means of a burdensome and costly route, although the obstacle to registration would no longer exist in the European Union. The General Court noted that such considerations applied, in principle, to any opposition proceedings and, furthermore, that, under Article 139(3) of Regulation 2017/1001, the national trade mark application resulting from the conversion of an EU trade mark application enjoyed, in respect of the Member State concerned, the date of filing of that latter application; a conflict could thus have existed during the period between the date on which the EU trade mark application was filed and the date of expiry of the transition period.
- 61 In the light of the foregoing, in paragraph 46 of the judgment under appeal, the General Court held that none of the arguments put forward by EUIPO was capable of supporting its position that the date on which the decision at issue was adopted, 'the only event in the present case which took place after the expiry of the transition period', was the relevant date with regard to

the outcome of the present case and held that Nowhere's single plea in law had to be upheld and the decision at issue annulled. By contrast, for the reasons set out in paragraphs 47 and 48 of that judgment, it dismissed the action as to the remainder.

Procedure before the Court of Justice and forms of order sought by the parties to the appeal

- 62 By document lodged on 23 May 2022, EUIPO requested, pursuant to Article 170a(1) of the Rules of Procedure of the Court of Justice, that its appeal be allowed to proceed, in accordance with the third paragraph of Article 58a of the Statute of the Court of Justice of the European Union.
- 63 By order of 16 November 2022, *EUIPO v Nowhere* (C-337/22 P, EU:C:2022:908), the appeal was allowed to proceed.
- 64 By decision of the President of the Court of 21 March 2023, the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by EUIPO.
- 65 By order of the President of the Court of 27 April 2023, *EUIPO v Nowhere* (C-337/22 P, EU:C:2023:409), the International Trademark Association (INTA) was granted leave to intervene in support of the form of order sought by EUIPO.
- 66 By decision of the President of the Court of 3 October 2023, the proceedings in the present case were stayed pending delivery of the judgment of 20 June 2024, *EUIPO v Indo European Foods* (C-801/21 P, EU:C:2024:528). Following the delivery of that judgment, by order of the President of the Court of 20 June 2024, the present proceedings were resumed.
- 67 By its appeal, EUIPO claims that the Court of Justice should:
- set aside the judgment under appeal in its entirety;
 - dismiss, in its entirety, the action brought by Nowhere against the decision at issue; and
 - order Nowhere to pay the costs of the present proceedings and of the proceedings before the General Court.
- 68 Nowhere contends that the Court should:
- dismiss the appeal; and
 - order EUIPO to pay the costs of the appeal.
- 69 The Federal Republic of Germany supports the forms of order sought by EUIPO.
- 70 INTA contends that the Court should:
- set aside the judgment under appeal; and
 - order it to bear its own costs.

The appeal

- 71 In support of its appeal, EUIPO puts forward a single ground of appeal. By that ground of appeal, it submits, in essence, that the General Court's finding that the Second Board of Appeal of EUIPO was required to take into consideration, in its assessment of the opposition at issue, the earlier non-registered trade marks, in so far as they had been used in the course of trade in the United Kingdom, is vitiated by an inadequate statement of reasons and errors of law. That ground of appeal is divided into three parts: the first part alleges infringement by the General Court of its obligation to state reasons by failing to explain, to the requisite legal standard, the reasons why, by that conclusion, it departed from its settled case-law; the second part alleges an error of law in the interpretation of Article 8(4) of Regulation No 207/2009; and the third part alleges failure to have regard to the legal consequences of Article 50(3) TEU and of Articles 126 and 127 of the Withdrawal Agreement and failure to observe the principle of territoriality referred to in Article 1(2) of Regulation No 207/2009.
- 72 In support of the form of order sought in that appeal, the Federal Republic of Germany also submits that Nowhere's action before the General Court should have been dismissed for lack of interest in bringing proceedings, on account of the disappearance of those earlier marks during the appeal proceedings before EUIPO.

Admissibility

- 73 Nowhere disputes the admissibility of the appeal, arguing, in essence, that it does not raise an issue that is significant with respect to the unity, consistency or development of EU law within the meaning of Article 58a of the Statute of the Court of Justice of the European Union, since the decision at issue was vitiated by a failure to observe the principle of good administration, laid down in Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter'), and that, in those circumstances, it had, in any event, to be set aside, and the operative part of the judgment under appeal must be based on that ground.
- 74 In that regard, first, it should be noted that the Court allowed the appeal to proceed in its entirety, holding that EUIPO's request that the appeal be allowed to proceed, in accordance with Article 170a(1) of the Rules of Procedure, demonstrated to the requisite legal standard that the appeal raised an issue that was significant with respect to the unity, consistency and development of EU law (order of 16 November 2022, *EUIPO v Nowhere*, C-337/22 P, EU:C:2022:908, paragraphs 41 and 42).
- 75 Secondly, the question whether the operative part of the judgment under appeal may be based on legal grounds other than those of that judgment has no bearing on the admissibility of the appeal.
- 76 Nowhere's line of argument must therefore be rejected.

The Federal Republic of Germany's argument that Nowhere had no interest in bringing proceedings before the General Court

- 77 It should be recalled that a party who, pursuant to Article 40 of the Statute of the Court of Justice of the European Union, is granted leave to intervene in a case submitted to the Court may not alter the subject matter of the dispute as defined by the forms of order sought and the pleas in law raised by the main parties. It follows that arguments submitted by an intervener are not

admissible unless they fall within the framework provided by those forms of order and pleas in law (judgment of 10 November 2016, *DTS Distribuidora de Televisión Digital v Commission*, C-449/14 P, EU:C:2016:848, paragraph 114 and the case-law cited).

- 78 However, by relying on a plea involving a matter of public policy, which may, or even must, be raised by the EU judicature of its own motion, an intervener does not go beyond the scope of the dispute before that court (see, to that effect, judgment of 2 December 2009, *Commission v Ireland and Others*, C-89/08 P, EU:C:2009:742, paragraphs 34 and 35 and the case-law cited). In the context of an appeal, any fact that relates to the admissibility of an action for annulment brought before the General Court and, in particular, to the interest of the party bringing that action in having the annulment of the contested act constitutes such a plea involving a matter of public policy (see, to that effect, judgment of 15 June 2023, *Silver and Others v Council*, C-499/21 P, EU:C:2023:479, paragraphs 38 and 40 and the case-law cited).
- 79 In the present case, in its statement in intervention in support of the form of order sought in the appeal, the Federal Republic of Germany submits inter alia that Nowhere's action before the General Court should have been dismissed for lack of interest in bringing proceedings, given that, as a result of the 'disappearance' of the earlier mark relied on in support of the opposition during the appeal proceedings before the Board of Appeal, that action could no longer procure any advantage for Nowhere.
- 80 In the light of what has been stated in paragraph 78 above, although, in its appeal, EUIPO did not rely on Nowhere's lack of interest in bringing proceedings against the decision at issue, the arguments of the Federal Republic of Germany in that regard are admissible.
- 81 As to the substance, it should be borne in mind that the existence of an interest in bringing an action for annulment requires that, through its outcome, the action must be capable of procuring an advantage to the person which brought it. The question of whether such an advantage exists must be assessed in the light of the specific circumstances, in view of all the consequences that may follow from a possible finding of unlawfulness vitiating the decision that is the subject of that action and in view of the nature of the damage allegedly suffered (see, to that effect, judgment of 20 June 2024, *EUIPO v Indo European Foods*, C-801/21 P, EU:C:2024:528, paragraphs 80 and 81 and the case-law cited).
- 82 The decision at issue confirms the Opposition Division's decision to reject Nowhere's opposition on the ground that Nowhere could no longer, as from the date of expiry of the transition period, rely on the benefit of its earlier non-registered UK trade marks in support of that opposition. Nowhere was therefore likely to benefit from the finding that that ground was unlawful and from the annulment of the decision at issue.
- 83 The Federal Republic of Germany's argument relating to Nowhere's lack of interest in bringing proceedings before the General Court must therefore be rejected as unfounded.

Substance

- 84 As a preliminary point, it should be noted that since the application for registration of the EU trade mark at issue was filed on 30 June 2015, the present dispute is governed, first, by the substantive provisions of Regulation No 207/2009, in force on that date, and, secondly, by the procedural provisions of Regulation 2017/1001 (see, by analogy, judgment of 20 June 2024, *EUIPO v Indo European Foods*, C-801/21 P, EU:C:2024:528, paragraph 50 and the case-law cited).

Second part of the single ground of appeal, alleging an error of law in the interpretation of Article 8(4) of Regulation No 207/2009

– Arguments of the parties

- 85 By the second part of its single ground of appeal, which it is appropriate to examine first, EUIPO, supported by the Federal Republic of Germany and INTA, submits that, both in opposition proceedings and in invalidity proceedings, the proprietor of an earlier right is required to prove the existence, validity and scope of that right not only on the filing or priority date of the application for registration of the EU trade mark concerned, in order to establish the priority of that right in relation to that application, but also on the date on which EUIPO gives its decision, in order to establish its continued existence. The disappearance with *ex nunc* effect of the same right in the course of the proceedings before EUIPO, in particular in the event of expiry, revocation or surrender, would necessarily lead to the rejection of the opposition or invalidity request concerned. Those general rules were recognised by the General Court in paragraphs 30 to 34 of the judgment of 13 September 2006, *MIP Metro v OHIM – Tesco Stores (METRO)* (T-191/04, ‘the judgment in *METRO*’, EU:T:2006:254), and confirmed by its subsequent case-law.
- 86 According to EUIPO, those rules can be inferred from the wording of Article 8(4) of Regulation No 207/2009, in particular from the use of the present tense in and the grammatical structure of that provision, its context, in particular the wording of Rule 19(2)(d) and Rule 20(1) of Regulation No 2868/95 and Article 42(2) and (3) of Regulation No 207/2009, as well as the general purpose of opposition proceedings, which is to protect the interests of proprietors of earlier rights by preserving the essential function of those rights against conflicts with EU trade marks resulting from the simultaneous existence of two valid and enforceable rights.
- 87 First, EUIPO criticises the General Court for having ‘created’, in paragraphs 28 to 31 of the judgment under appeal, a new general rule, according to which events concerning an earlier mark which occur after the date of filing of the application for registration of an EU trade mark are not relevant to the outcome of the opposition to that registration. In that regard, the General Court relied on irrelevant considerations – relating to the substantive law applicable *ratione temporis* and to the assessment of the existence of a relative ground for refusal as at the time of filing of the application for registration of the EU trade mark applied for – and on irrelevant case-law of the General Court. It incorrectly concluded that EUIPO was obliged to take into account earlier rights protected in the United Kingdom relied on against an application for registration of an EU trade mark filed before the end of the transition period.
- 88 Secondly, EUIPO claims that the General Court, in paragraphs 34 to 42 of that judgment, interpreted Article 8(4) of Regulation No 207/2009 in disregard of the wording, context and objectives of that provision, by rejecting the arguments relating thereto that EUIPO had submitted to it for the purpose of establishing the existence of the rules referred to in paragraph 85 above.
- 89 As regards, in the first place, the wording of Article 8(4) of Regulation No 207/2009, the General Court, in paragraph 34 of the judgment under appeal, misinterpreted Nowhere’s argument and misunderstood the grammatical structure of that provision.
- 90 In the second place, as regards the context of that provision, in paragraphs 36 and 37 of that judgment, the General Court downplayed the role of that context in finding that Rule 19(1) and Rule 20(1) of Regulation No 2868/95 did not refer to the date on which the decision on the

opposition was adopted. Moreover, in paragraphs 38 and 39 of that judgment, it incorrectly rejected EUIPO's argument relating to the requirements for genuine use of the earlier mark, even though those conditions illustrate the existence of a mechanism that prevents the application for registration of an EU trade mark from being rejected where, at the time the decision on the opposition is taken, there is no conflict. Lastly, the General Court erred, in paragraph 40 of that judgment, in refusing to regard as relevant the application of the provisions of EU law and the case-law relating to invalidity proceedings.

- 91 In the third place, as regards the objectives of the opposition proceedings, EUIPO submits that the General Court's conclusion, in paragraph 42 of the judgment under appeal, that Nowhere had a legitimate interest in the success of its opposition, is based on erroneous considerations. First, the General Court's finding relating to the existence of a potential conflict, in the event of registration, is based on a conflation of the filing or priority date of an application for registration of an EU trade mark, the essential role of which is to determine the temporal precedence of rights, in accordance with the principle of priority, and the date of publication of the registration of that mark, from which EU trade marks may be relied on as against third parties. Secondly, it follows, *inter alia*, from the case-law of the Court of Justice that infringement proceedings and administrative proceedings differ in their purpose and their effects. Consequently, contrary to the General Court's assertions, EUIPO's position does not amount to refusing Nowhere protection of its earlier non-registered UK trade marks during the period between the date on which the application for the mark at issue was filed and the date of expiry of the transition period.
- 92 Nowhere contends that EUIPO's arguments are unfounded.
- 93 In that regard, it submits that the withdrawal of the United Kingdom from the European Union has no bearing on the protection enjoyed by its earlier rights, on the ground that the only relevant date for the purpose of examining the opposition that it filed is the date on which the application for registration of the mark applied for was filed, a date on which the United Kingdom was still a Member State of the European Union.
- 94 In addition, it claims that, on the date on which its opposition was filed, the earlier mark concerned enjoyed territorial protection under trade mark law within the European Union.
- 95 Furthermore, it submits that EUIPO relies on a presumption that has no basis in the relevant provisions of Regulation No 207/2009, according to which any cessation of validity of an earlier right that occurs in the course of the opposition proceedings, before EUIPO takes its final decision on the opposition, must result in the rejection of the opposition.
- 96 First, it submits that the General Court was correct to hold that the mere use of the present tense in Article 8(4) of Regulation No 207/2009 did not support that presumption.
- 97 Secondly, it does not follow from the relevant provisions of Regulation No 207/2009, in particular Article 41 thereof, that, on the date of the decision at issue, the earlier rights concerned must still be capable of being classified as such. What matters is only whether, on the filing or priority date of the application for registration of the EU trade mark at issue, the earlier marks concerned were 'earlier rights'.

- 98 Thirdly, EUIPO's reference to the judgment in *METRO* refers to a scenario that is different from that in the present case, as the General Court pointed out in paragraph 35 of the judgment under appeal, since the renewal of a trade mark cannot be equated with a political event that is beyond the parties' control.
- 99 Fourthly, EUIPO's reasoning, relating to the requirements arising from Article 42(2) and (3) of Regulation No 207/2009, disregards the numerous cases in which, since the earlier mark had not been registered for five years, genuine use of that mark is not taken into account.

– *Findings of the Court*

- 100 In order to conclude, in paragraph 31 of the judgment under appeal, that the earlier non-registered UK trade marks, relied on by Nowhere on the basis of Article 8(4) of Regulation No 207/2009, were, in principle, capable of forming the basis of its opposition, the General Court relied on the *BROWNIE* case-law, referred to in paragraphs 28 to 30 of that judgment.
- 101 That case-law is based on the premiss that, since the existence of a relative ground for refusal relied on in support of an opposition to the registration of an EU trade mark must be assessed at the date of filing of the application relating to that registration, the fact that the earlier mark relied on in support of that opposition loses, after that date, the status of a trade mark registered or protected in a Member State does not, in principle, affect the outcome of that opposition.
- 102 As EUIPO submits, in essence, in the second part of its single ground of appeal, such a premiss has no basis either in the wording and context of Article 8(4) of Regulation No 207/2009 or, more generally, in the objectives of opposition proceedings.
- 103 In that regard, in the first place, under Article 8(4) of Regulation No 207/2009, 'the trade mark applied for shall not be registered', 'upon opposition by the proprietor of a non-registered trade mark or of another sign used in the course of trade of more than mere local significance', 'where and to the extent that' that sign satisfies, in accordance with EU legislation or the law of the applicable Member State, two conditions, namely, first, according to Article 8(4)(a), that 'rights to that sign were acquired prior to the date of application for registration of the [EU] trade mark, or the date of the priority claimed for [that application]' and, secondly, according to Article 8(4)(b), that, 'that sign confers on its proprietor the right to prohibit the use of a subsequent trade mark'.
- 104 As regards the condition laid down in Article 8(4)(a) of that regulation, as emphasised by the use of the past tense and the preposition 'prior to', it expressly refers to a temporal criterion of anteriority of the acquisition of rights to the sign relied on in the opposition with respect to the date of filing of the application for the EU trade mark concerned or, as the case may be, the date of the priority claimed in support of that application.
- 105 By contrast, although the condition laid down in Article 8(4)(b) of that regulation also applies that criterion of anteriority by requiring that the sign relied on in support of the opposition confer on its proprietor, under the legislation applicable to it, the 'right to prohibit the use of a subsequent trade mark', it should be noted that that condition is drafted in the present tense and does not refer to any date on which it should be satisfied.

- 106 Similarly, it must be pointed out that, in Article 8(4), the words ‘the trade mark applied for shall not be registered’, which refer to EUIPO’s decision upholding the opposition and rejecting the application for registration of an EU trade mark, are also drafted in the present tense.
- 107 It follows from the wording of that provision that, admittedly, the acquisition of the earlier right relied on in support of an opposition based on that provision must be assessed in the light of the date of filing of the application for the EU trade mark concerned or, as the case may be, the priority date. However, it also follows that it is necessary, in order for that opposition to be upheld, that that earlier right confer on its proprietor the ‘right to prohibit the use of a subsequent trade mark’ under the legislation of a Member State or that of the European Union, not only on that date, but also at the later date on which that opposition was filed and until the date on which a decision is taken as to whether ‘the trade mark applied for shall not be registered’.
- 108 In the second place, that interpretation is supported by the context of which Article 8(4) of Regulation No 207/2009 forms part.
- 109 First, it should be noted that, like the wording of that provision, the wording of Article 8(1) and (2) of that regulation, the structure of which is similar, suggests, as regards oppositions based on earlier registered marks to which the latter provision is applicable, that, although the date of filing of the application for registration of the EU trade mark is relevant for the purpose of assessing the priority of those earlier registered marks, the existence of those marks until the date on which a ruling is given on the opposition is required in order for that opposition to succeed. Thus, while Article 8(2) defines ‘earlier trade marks’, for the purposes of Article 8(1), as referring, inter alia, to ‘trade marks ... with a date of application for registration which is earlier than the date of application for registration of the [EU] trade mark, taking account, where appropriate, of the priorities claimed in respect of those trade marks’, Article 8(1) provides that, ‘upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered’ where the conditions referred to in the latter provision are satisfied.
- 110 Secondly, it is clear from the case-law of the Court that it is for the Boards of Appeal to verify that the earlier right relied on under Article 8(4) of Regulation No 40/94 has not been declared invalid by a final judicial decision against which there was no appeal at the date on which the Board of Appeal concerned rules on the appeal against the decision of the Opposition Division, in order to ensure that that right continues to produce the effects required by that provision (see, to that effect, judgment of 29 March 2011, *Anheuser-Busch v Budějovický Budvar*, C-96/09 P, EU:C:2011:189, paragraphs 95 to 97 and 205).
- 111 Furthermore, it is clear from that case-law that, in the absence of such a final judicial decision, and since the earlier right at issue continues to exist on the date on which EUIPO gives a final decision on the opposition, it is for EUIPO to examine whether the opponent has established that the sign at issue falls within the scope of the law of the Member State relied on and whether it allows use of a subsequent trade mark to be prohibited (see, to that effect, judgment of 29 March 2011, *Anheuser-Busch v Budějovický Budvar*, C-96/09 P, EU:C:2011:189, paragraphs 95 to 97 and 205 to 207).
- 112 It therefore follows from the foregoing considerations that the question whether there is still a validly protected earlier right must be assessed on the date on which EUIPO gives a final decision on the opposition in order to decide whether ‘the trade mark applied for shall not to be registered’, including at the stage of the appeal before the Board of Appeal. That is a preliminary issue that EUIPO must resolve before ascertaining whether the opposing party has proved that that earlier

right also satisfied the substantive conditions laid down in Article 8(4) of Regulation No 207/2009, and in particular that it conferred on its proprietor the right to prohibit the use of a subsequent trade mark.

- 113 In the third place, that interpretation is borne out by the objectives of the opposition proceedings.
- 114 In that regard, it should be noted that the anteriority criteria set out in Article 8(2)(a) of Regulation No 207/2009, as regards earlier registered trade marks, and in Article 8(4) thereof, as regards non-registered trade marks, implement the principle of priority, referred to in recital 12 of Regulation 2017/1001.
- 115 In accordance with that principle, the exclusive right conferred by those regulations on the proprietor of the EU trade mark belongs to the person who first registered or acquired the trade mark concerned. In that regard, as is apparent from Article 46 of Regulation No 207/2009, it is the date of filing of the application for registration relating to that mark or, as the case may be, the date of the priority claimed for that application that is decisive. In the event of a conflict between two marks, the mark acquired or registered first is presumed to have satisfied the conditions required for protection before the EU trade mark registered second (see, to that effect, judgment of 21 February 2013, *Fédération Cynologique Internationale*, C-561/11, EU:C:2013:91, paragraphs 39 and 40 and the case-law cited).
- 116 From that point of view, opposition proceedings, which are among the mechanisms for prior review available in the context of the procedure for registration of EU trade marks, serve the purpose of preventing the registration of EU trade marks liable to conflict with other marks or other signs used in the course of trade by enabling the proprietor of an earlier mark to prevent a sign that is liable to infringe that mark from being registered, without prejudice to the right of that proprietor, under Regulation No 207/2009, to bring infringement proceedings on account of the use of a subsequent mark or an application for a declaration of invalidity in respect of that mark, once it has been registered (see, to that effect, judgment of 21 February 2013, *Fédération Cynologique Internationale*, C-561/11, EU:C:2013:91, paragraphs 42, 43, 45 and 48).
- 117 Furthermore, the general objective of Regulation No 207/2009 is to strike a balance between, first, the interests of the proprietor of a trade mark in preserving the essential function of that mark, which is to guarantee the identity of the origin of the goods or services for which it is registered for the consumer or end user by enabling him or her, without any possibility of confusion, to distinguish those goods or services from others which have another origin, and, secondly, the interests of other economic operators in having signs capable of designating their goods and services (see, to that effect, judgments of 30 May 2018, *Tsujimoto v EUIPO*, C-85/16 P and C-86/16 P, EU:C:2018:349, paragraph 90 and the case-law cited, and of 16 July 2020, *ACTC v EUIPO*, C-714/18 P, EU:C:2020:573, paragraph 35 and the case-law cited).
- 118 Thus, in order that a trade mark may achieve its essential function, Regulation No 207/2009 confers on the proprietor of that mark a set of rights, while limiting them to what is strictly necessary for the performance of that function, in particular through the application of rules relating to ‘genuine use’, within the meaning of the first sentence of Article 42(2) of that regulation (see, to that effect, judgment of 16 July 2020, *ACTC v EUIPO*, C-714/18 P, EU:C:2020:573, paragraph 36 and the case-law cited).

- 119 In that regard, Article 42(2) and (3) of Regulation No 207/2009, in the version applicable to the present dispute, provides that an applicant for an EU trade mark may require the proprietor of an earlier registered trade mark to furnish proof that that mark has been put to ‘genuine use’ in the European Union during the period of five years preceding the date of publication of the trade mark application against which an opposition has been filed. Furthermore, if the earlier mark has been used only in relation to part of the goods or services for which it is registered, it is, for the purposes of the examination of the opposition, to be deemed to be registered only in respect of that part of the goods or services. Thus, those provisions reflect, in the specific context of opposition proceedings, the general objective of those regulations of striking a balance between the maintenance and preservation of the exclusive rights conferred on the proprietor of the earlier mark and the limitation of those rights in order to take account of the interests of third parties (see, to that effect, judgment of 16 July 2020, *ACTC v EUIPO*, C-714/18 P, EU:C:2020:573, paragraphs 33, 38 and 39).
- 120 That said, as has been pointed out in paragraph 101 above, it is apparent from paragraphs 28 to 30 of the judgment under appeal that, according to the *BROWNIE* case-law, where an earlier mark ceases to be protected in the relevant territory on a date subsequent to that of the filing of the application for registration of the EU trade mark, and therefore also before EUIPO rules on the opposition to registration of the latter mark, at the stage of the opposition or appeal proceedings, EUIPO does not have to take that circumstance into account in order to determine whether that opposition must be upheld. That interpretation necessarily means that EUIPO may have to refuse registration of an EU trade mark on account of a potential conflict with an earlier trade mark, even though, on the date of that refusal, the latter mark is no longer protected in that territory by the legislation or treaty provisions applicable to it.
- 121 However, in a situation in which the earlier mark no longer enjoys such protection, the essential function of that mark can no longer be compromised by the registration of the EU trade mark, since such an earlier mark is no longer capable of fulfilling that essential function. Consequently, the interpretation of Regulation No 207/2009 on which the conclusion in paragraph 31 of the judgment under appeal is based is contrary to the general objective of that regulation of balancing the interests of the proprietor of an earlier mark and those of third parties in having signs capable of designating their goods and services.
- 122 It follows from all of the foregoing that the General Court erred in law in relying, in paragraphs 28 to 30 of the judgment under appeal, on the premiss that the existence of a relative ground for refusal relied on in support of an opposition to the registration of an EU trade mark must be assessed only as at the date of filing of the application for that registration.
- 123 As regards paragraph 42 of the judgment under appeal, in which the General Court, in response to EUIPO’s argument that there was no conflict between Nowhere’s earlier marks and the mark applied for after the end of the transition period, held that a conflict could exist, at the very least, during the period between the date on which the EU trade mark application was filed and the expiry of the transition period, with the result that that company had a legitimate interest in the success of its opposition, it should, first, be noted that invalidity and opposition proceedings differ, in terms of their subject matter and effects, from infringement proceedings.
- 124 Thus, it is clear from the case-law that the possibility for the proprietor of an earlier mark to bring infringement proceedings against the proprietor of a subsequent EU trade mark cannot render either the bringing of an application for a declaration of invalidity before EUIPO or the

mechanisms for prior control available under the procedure for registering EU trade marks, including opposition proceedings, devoid of all purpose (see, to that effect, judgment of 21 February 2013, *Fédération Cynologique Internationale*, C-561/11, EU:C:2013:91, paragraph 48).

- 125 Similarly, the filing of an opposition, which may be rejected by EUIPO without being examined on its merits, does not deprive an infringement action of its purpose of prohibiting the use in the course of trade of signs identical or similar to the earlier trade mark, including in relation to a subsequent EU trade mark (see, by analogy, judgment of 21 February 2013, *Fédération Cynologique Internationale*, C-561/11, EU:C:2013:91, paragraphs 45, 46 and 52), and therefore, a fortiori, in relation to a sign that, like the sign at issue in the present case, is the subject of an application for registration of an EU trade mark that is still pending.
- 126 That reasoning is applicable, *mutatis mutandis*, to an earlier non-registered trade mark such as that referred to in Article 8(4) of Regulation No 207/2009, which, according to the wording of that provision, ‘confers on its proprietor the right to prohibit the use of a subsequent trade mark’.
- 127 Consequently, contrary to the premiss on which the General Court’s reasoning in paragraph 42 of the judgment under appeal is based, the rejection of Nowhere’s opposition on the ground that no conflict between the marks at issue could arise after the date of expiry of the transition period does not mean that Nowhere’s earlier non-registered trade marks used in the course of trade in the United Kingdom before that date should be refused protection, in particular as regards a possible conflict linked to the use of an EU trade mark.
- 128 In so far as Nowhere actually had, under United Kingdom legislation, the right to prohibit the use of a subsequent trade mark, within the meaning of Article 8(4) of Regulation No 207/2009, that company was, during that period, entitled to bring an action before the United Kingdom courts for infringement of its rights against the use of the EU trade mark that was the subject of the application for registration at issue, without the subsequent registration of that latter mark being able, in any event, to preclude that action.
- 129 Secondly, it should be noted that, unlike infringement proceedings, opposition proceedings do not concern a conflict linked to the actual use of the marks in the course of trade, but a potential conflict, conditional on the registration applied for and linked to the coexistence of two competing intellectual property rights, which are equally valid and enforceable.
- 130 In that context, as the General Court recalled in paragraph 41 of the judgment under appeal, in accordance with Article 46 of Regulation No 207/2009, EU trade marks are to be registered for a period of 10 years from the date of filing of the application.
- 131 However, contrary to what the General Court appears to infer from that in paragraph 42 of that judgment, it does not follow that there is a likelihood of conflict between that mark and an earlier mark from that date. Under the first sentence of Article 9(3) of Regulation No 207/2009, an EU trade mark is to prevail against third parties only from the date of publication of registration of the latter trade mark. In particular, it follows that the exclusive right that the EU trade mark confers on its proprietor, enabling him or her, in particular, in infringement proceedings pursuant to Article 9(1) and (2) of that regulation, to prevent third parties from using a mark, can relate only to acts of third parties occurring after the date of publication of the registration of that EU trade mark (see, to that effect, judgment of 22 June 2016, *Nikolajeva*, C-280/15, EU:C:2016:467, paragraph 37).

- 132 In the scenario invoked by EUIPO before the General Court and considered in paragraph 42 of the judgment under appeal, namely that in which the earlier marks protected in the United Kingdom would no longer be protected in the European Union as from the end of the transition period, it is true that there would be a potential likelihood of conflict between those earlier marks and the EU trade mark if the latter mark were registered before the date of expiry of that period.
- 133 However, given that, in the present case, Nowhere's opposition was pending on that date and that the Second Board of Appeal of EUIPO had not yet adopted the decision at issue, until that date, that opposition enabled Nowhere to protect the essential function of the earlier marks at issue by preventing that registration.
- 134 By contrast, assuming that the scenario referred to in paragraph 132 above were borne out, since, on the date of expiry of the transition period, the EU trade mark applied for had not yet been registered, it could be registered, in any event, only after those earlier marks had ceased to have effect.
- 135 Consequently, in the event of registration, that EU trade mark would become valid and enforceable only on a date on which there is no, even potential, conflict, with those earlier marks. Therefore, in the light of the objective of opposition proceedings as stated in paragraph 116 above, which is precisely to avoid the occurrence of such a potential conflict, it cannot be held, contrary to what is stated in paragraph 42 of the judgment under appeal, that Nowhere would have retained a 'legitimate interest' in the refusal to register the mark applied for in that scenario.
- 136 It follows that, in that paragraph of the judgment under appeal, the General Court rejected EUIPO's line of argument relating to the absence of a conflict between the earlier marks and the mark applied for after the end of the transition period on the basis of erroneous premisses.
- 137 As regards the errors of law allegedly committed by the General Court in paragraphs 34 to 40 of the judgment under appeal, in which the General Court rejected EUIPO's arguments relating, first, to the interpretation of the wording of Article 8(4) of Regulation No 207/2009, secondly, to the relevance of Rule 19(2)(d) and Rule 20(1) of Regulation No 2868/95, thirdly, to the importance to be attached to the conditions relating to genuine use of an earlier mark and, fourthly, to the case-law of the General Court relating to invalidity proceedings, suffice it to note that, in the light of the findings made in paragraphs 102 to 136 above, the existence or otherwise of those errors of law cannot have any bearing on the outcome of the second part of the single ground of appeal.
- 138 In the light of all the foregoing and without it being necessary to examine the other arguments put forward by EUIPO in support of the second part of its single plea, it must be concluded that that second part must be upheld.
- 139 The arguments put forward by Nowhere and based, in essence, on the same premiss as that on which the General Court based its arguments in paragraphs 28 to 31 of the judgment under appeal, which was rejected in paragraphs 102 to 122 above, are not such as to call that conclusion into question.
- 140 Furthermore, as regards the relevance of EUIPO's reference to the judgment in *METRO*, which is disputed by Nowhere, it must be stated, first, that, as was pointed out by EUIPO in the reply, in the judgment under appeal, the General Court applied to the facts of the present dispute general principles relating to the relevant date for the purpose of assessing the existence of earlier rights,

without taking into account the fact that the withdrawal of the United Kingdom constitutes, unlike, in particular, the non-renewal of an earlier mark, a circumstance independent of the will of the parties. Secondly, as is apparent, in particular, from paragraph 121 above, the question whether it is relevant, for the purpose of examining an opposition, that the earlier right has ceased to enjoy the protection conferred on it by EU law, by reason of a circumstance beyond the control of its proprietor, is not decisive, since, in any event, in such a case, the essential function of that earlier right can no longer be jeopardised by the registration of the mark applied for.

The third part of the single ground of appeal, alleging failure to have regard to the legal consequences of Article 50(3) TEU and Articles 126 and 127 of the Withdrawal Agreement and failure to observe the principle of territoriality, referred to in Article 1(2) of Regulation No 207/2009

– *Arguments of the parties*

- 141 By the third part of its single ground of appeal, which it is appropriate to examine in the second place, EUIPO submits, as a preliminary point, that the general rules referred to in paragraph 85 above are applicable where the earlier mark is no longer valid and enforceable in the European Union as a result of the effective withdrawal of the United Kingdom from the European Union at the end of the transition period.
- 142 In support of that assertion, first, it observes that the Withdrawal Agreement does not contain any express provision providing, by way of derogation from those general rules, for a treatment of the cessation of the effect of earlier rights and trade marks protected in the United Kingdom different from that applicable to any earlier right.
- 143 It follows that, in paragraph 25 of the judgment under appeal, it was futile for the General Court to note that the Withdrawal Agreement did not contain provisions governing the treatment of an opposition that was brought, on the basis of an earlier right that was protected in the United Kingdom, before the date of entry into force of the Withdrawal Agreement, since that fact could not justify the General Court departing from those general rules.
- 144 Furthermore, the fact that, as the General Court found in paragraphs 26 and 27 of that judgment, the decision at issue is the only relevant document that post-dates the date of expiry of the transition period is irrelevant.
- 145 Secondly, in EUIPO's view, no reasonable compensation could be claimed, under the second sentence of Article 9(3) of Regulation No 207/2009, on the basis of the EU trade mark applied for in respect of events that occurred in the United Kingdom, the latter not being a Member State on the date of publication of the registration of that mark. That factor also militates in favour of there being no potential conflict after the date of expiry of the transition period and confirms that paragraph 42 of the judgment under appeal is vitiated by an error of law in that regard.
- 146 Thirdly, EUIPO submits that, in the event of registration of the EU trade mark applied for, that mark will be valid and enforceable in the current 27 Member States of the European Union with the benefit of the priority date of the application for registration of that mark. In the event of a refusal to register and in the event of conversion of that application into 27 national trade mark applications, the applicant could obtain national trade marks in all those Member States, again with the benefit of that date. Furthermore, that applicant would subsequently have the option of filing a new EU trade mark application, claiming, on the basis of Article 139 of Regulation

2017/1001, the national trade marks thus obtained and, consequently, obtaining a unitary trade mark at EU level, similar to that of the EU trade mark applied for in the present case. Nowhere therefore has no interest in obtaining the rejection of the EU trade mark application concerned, which could be ‘legally circumvented’ by means of a conversion of the latter application producing the same effects.

- 147 As regards the territory of the United Kingdom, Nowhere still has, where appropriate, the possibility of challenging, on the basis of its earlier non-registered trade marks in that State, any registration of the trade mark application submitted by the trade mark applicant concerned in the United Kingdom, within nine months of the date of expiry of the transition period, on the basis of Article 59(1) of the Withdrawal Agreement. That possibility is, however, disconnected from the opposition proceedings before EUIPO.
- 148 Consequently, EUIPO claims that, contrary to what is stated in paragraph 45 of the judgment under appeal, the considerations that it set out before the General Court, relating to the conversion of the EU trade mark application at issue into national trade mark applications, do not apply to all opposition proceedings, since, in a ‘normal’ situation, in which the earlier right is protected by the law of a Member State of the European Union, the applicant for the EU trade mark does not, in the event of conversion, obtain protection equivalent to that afforded by registration of the mark applied for at issue in the present dispute.
- 149 Furthermore, EUIPO submits that, contrary to what the General Court states in that paragraph, on account of the principle of territoriality of intellectual property rights, referred to in recital 5 of Regulation 2017/1001, no conflict can exist between a national mark resulting from such a conversion and an earlier non-registered UK trade mark, during the period prior to the date of expiry of the transition period. Finally, EUIPO submits that the General Court misinterprets the intention of the EU legislature, as set out in the first recital of Regulation No 40/94, to create a unitary intellectual property right at EU level as an alternative to national trade marks.
- 150 Nowhere contends that EUIPO’s arguments are unfounded.
- 151 First, it submits that the chronology of events must be taken into account when examining the principle of proportionality in accordance with Article 17(2) and Article 52(1) of the Charter in proceedings initiated before the United Kingdom’s withdrawal from the European Union, or even before the referendum on that withdrawal was held, namely on a date on which there was nothing to indicate that withdrawal.
- 152 Secondly, while noting that the Withdrawal Agreement does not contain any express provision relating to the cessation of the effect, within the European Union, of the rights protected in the United Kingdom, it relies on Section 6(3)(a) of the European Union (Withdrawal) Act 2018, under which trade mark courts or tribunals in the United Kingdom are required to apply national law derived from EU law in accordance with EU law, as it stood at the end of the transition period.
- 153 Moreover, it is acknowledged, pursuant to the transition provisions of the Trademarks (Amendment etc.) (EU Exit) Regulations 2019, that the registration of an EU trade mark serving as a formal basis for opposition proceedings remains the relevant law in those proceedings. Thus, the Intellectual Property Rights Office for the United Kingdom is obliged to decide the opposition on the basis of the law as it stood at the date of the application. Nowhere concludes from this that,

in order to apply the principle of proportionality and to ensure reciprocity of the law, account should be taken of those provisions, which would have mitigated the consequences of the cessation of the effect, within the European Union, of the rights protected in the United Kingdom.

– *Findings of the Court*

- 154 In the first place, it should be noted that, under Article 50(3) TEU, the Treaties ceased to apply to the United Kingdom on the date on which the Withdrawal Agreement entered into force on 1 February 2020, so that that State is no longer, as from that date, a Member State (judgment of 9 June 2022, *Préfet du Gers and Institut national de la statistique et des études économiques*, C-673/20, EU:C:2022:449, paragraph 55 and the case-law cited). However, the fourth paragraph of the preamble to that agreement states that the law of the European Union in its entirety ceases to apply to that State from the date of entry into force of that agreement ‘subject to the arrangements laid down’ in that agreement.
- 155 That agreement provides, in Articles 126 and 127 thereof, for a transition period, starting on the date of entry into force of that agreement and ending on 31 December 2020, during which, unless otherwise provided for in that agreement, EU law is applicable to and in the United Kingdom and any reference to Member States in that law is to be understood as including that State.
- 156 By contrast, as the General Court found, in essence, in paragraph 25 of the judgment under appeal, Articles 54 to 61 of the Withdrawal Agreement, which appear in Title IV of Part Three thereof, entitled ‘Intellectual Property’, and which are applicable from the end of the transition period, in accordance with the fourth paragraph of Article 185 of that agreement, do not state what treatment is to be given to an opposition brought before the date of entry into force of that agreement, on the basis of an earlier right protected in the United Kingdom, and which is pending at the end of that period.
- 157 However, in finding that there was no such statement, the General Court considered that that finding supported the possibility of relying, including after the date of expiry of the transition period, on trade marks protected in the United Kingdom on the basis of which an opposition was brought before the date of entry into force of the withdrawal agreement, as is apparent from the inclusion of that finding in the reasoning set out in paragraphs 24 to 31 of the judgment under appeal. In so doing, the General Court erred in law.
- 158 First, as stated in paragraph 154 above, it is apparent from the fourth paragraph in the preamble to the Withdrawal Agreement that, subject to the arrangements laid down in that agreement, EU law ceases to apply to the United Kingdom from the date of entry into force of that agreement. Secondly, under Article 8(4) of Regulation No 207/2009, the earlier trade mark or right referred to in that provision must, in particular, ‘pursuant to ... the law of the Member State governing [that trade mark or that sign]’, confer on its proprietor ‘the right to prohibit the use of a subsequent trade mark’. From the end of the transition period, the law of the United Kingdom, relied on by Nowhere in support of its opposition, no longer constituted, in the absence of any provision to the contrary in the Withdrawal Agreement, the ‘law of a Member State’.
- 159 The General Court therefore erred in finding, in paragraph 25 of the judgment under appeal, that there were no express provisions in the Withdrawal Agreement as regards the treatment of an opposition that was brought before the date of entry into force of that agreement, without,

however, drawing appropriate legal inferences as regards the possibility of relying, after the end of the transition period, on the earlier marks protected in the United Kingdom on which that opposition is based.

- 160 In the second place, in accordance with the principle of territoriality, referred to in recitals 2 to 4 of Regulation No 207/2009 and applied to the EU trade mark in the second sentence of Article 1(2) of that regulation, the legal effects of a trade mark are limited to the territory in which it is protected (see, to that effect, judgments of 22 June 1994, *IHT Internationale Heiztechnik and Danzinger*, C-9/93, EU:C:1994:261, paragraph 22, and of 19 December 2012, *Leno Marken*, C-149/11, EU:C:2012:816, paragraphs 38, 40 and 41). Thus, in accordance with that principle, for the purpose of applying Article 8(4) of that regulation, it is only in the territory in which the sign concerned is protected that the applicable law confers on that sign exclusive rights that may enter into conflict with an EU trade mark (see, to that effect, judgment of 29 March 2011, *Anheuser-Busch v Budějovický Budvar*, C-96/09 P, EU:C:2011:189, paragraph 162).
- 161 It does not follow from Articles 54 to 61 of the Withdrawal Agreement that the parties to that agreement provided, by way of derogation from that principle of territoriality, for an EU trade mark registered after the date of expiry of the transition period to have effect in the territory of the United Kingdom, including for the period of validity of that trade mark prior to that date. In particular, those articles do not establish any link between the outcome of an EU trade mark application pending on that date and the outcome of a similar application filed with the United Kingdom authorities on the basis of Article 59(1) of that agreement.
- 162 It follows that, as EUIPO stated, in essence, in the third part of its single ground of appeal, there can be no conflict between earlier trade marks that are protected in the United Kingdom and an EU trade mark, in the event that the latter is registered after the date of expiry of the transition period, given that the latter mark will, in that case, have effect in a territory other than that in which those earlier trade marks are protected.
- 163 However, by referring, in paragraphs 42 and 45 of the judgment under appeal, to a potential conflict between, on the one hand, the earlier marks protected in the United Kingdom and, on the other, the EU trade mark applied for or, as the case may be, in the event of refusal to register the latter, the national trade mark application resulting from the conversion of an EU trade mark application, the General Court relied, implicitly but necessarily, on the premiss that, in so far as an application for registration of an EU trade mark was filed before the date of expiry of the transition period, that latter mark, registered after that date or, at the very least, a national trade mark resulting from the conversion of that latter application, could produce effects in the territory of the United Kingdom. Such a premiss implies the existence of express provisions in the Withdrawal Agreement allowing, by way of derogation from the principle of territoriality of trade marks, the extension of such effects beyond that date, which is not the case.
- 164 It follows that, by relying, in paragraphs 42 and 45 of the judgment under appeal, on the existence of such a potential conflict, the General Court erred in law in that it did not correctly take into account the legal consequences of the end of the transition period and the principle of territoriality of trade marks on the opposition at issue in the present dispute.
- 165 Accordingly, the third part of the single ground of appeal must be upheld, without it being necessary to examine the other arguments relied on by EUIPO in support of it.

- 166 That conclusion is not called into question by Nowhere's arguments relating to the principles of proportionality and reciprocity. Since the General Court did not rely on those principles in the judgment under appeal, they cannot support the reasoning on which that judgment is based.
- 167 Assuming that, by those arguments, Nowhere intends to ask the Court of Justice to replace the grounds on which that judgment is based with other grounds, first, suffice it to note that the fact that the opposition was filed on a date on which the withdrawal of the United Kingdom was not foreseeable is irrelevant, since, in any event, as is apparent from paragraphs 102 to 122 above, in order for an opposition to succeed, the earlier mark protected under EU law must continue to exist until the date of delivery of the final decision on that opposition.
- 168 Secondly, as regards Nowhere's reliance on the provisions of law of the United Kingdom concerning oppositions based on EU trade marks, adopted with a view to that State's withdrawal from the European Union, it must be borne in mind that the EU trade mark system is an autonomous system with its own set of objectives and rules peculiar to it; it applies independent of any national system (judgment of 6 June 2018, *Apcoa Parking Holdings v EUIPO*, C-32/17 P, EU:C:2018:396, paragraph 31 and the case-law cited). Moreover, as has been stated in paragraph 161 above, it does not follow from Articles 54 to 61 of the Withdrawal Agreement that the parties to that agreement provided, by way of derogation from the principle of territoriality, for an EU trade mark registered after the date of expiry of the transition period to have effect in the territory of the United Kingdom. In those circumstances, even if it were accepted that the principle of reciprocity is relevant in the present case, it cannot, in any event, lead EUIPO to accept that an earlier right protected in the United Kingdom may still be relied on in the context of an opposition to the registration of such a mark after that date.
- 169 In the light of all of the foregoing and without there being any need to examine the first part of the single ground of appeal, the appeal must be upheld and the judgment under appeal set aside.

The action before the General Court

- 170 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, where the Court of Justice sets aside a decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.
- 171 In the present case, the state of the proceedings permits final judgment to be given.
- 172 In that regard, as has been pointed out in paragraph 45 above, Nowhere relied, in support of its action, on a single plea in law, alleging infringement of Article 8(4) of Regulation No 207/2009, in which it submits, in essence, that the only relevant date for the purpose of determining the existence of an earlier right on which an opposition to the registration of an EU trade mark is based is the date on which the application for registration of that mark was filed.
- 173 For the reasons set out in paragraphs 102 to 137 above, that plea in law must be rejected, since that earlier right must continue to exist until the date on which EUIPO rules on the opposition based on that right, including at the stage of the appeal before the Board of Appeal, which was not the case with the mark relied on by Nowhere in support of its opposition.

174 In the context of the present appeal, Nowhere submits that it had also raised a plea alleging failure to observe the principle of good administration, laid down in Article 41 of the Charter.

175 However, as is apparent from the content of its application initiating proceedings, although Nowhere maintained that, as a result of the failure to take into account its earlier rights protected in the United Kingdom in the decision at issue, it suffered damage for which EUIPO alone was responsible, having regard, in particular, to the revocation of the first decision of 8 October 2018 of the Second Board of Appeal of EUIPO, referred to in paragraph 39 above, that line of argument is developed in support of its single plea in law, alleging infringement of Article 8(4) of Regulation No 207/2009, and not of a separate and independent plea, alleging failure to observe the principle of good administration.

176 It follows that Nowhere's action must be dismissed.

Costs

177 Under Article 184(2) of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

178 In accordance with Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

179 In the present case, since EUIPO has applied for costs and Nowhere has been unsuccessful, Nowhere must be ordered to bear its own costs and to pay those incurred by EUIPO in the present appeal and in the proceedings at first instance.

180 In accordance with Article 140(1) of the Rules of Procedure, which applies to the procedure on appeal by virtue of Article 184(1) thereof, the Federal Republic of Germany, which intervened in these proceedings, is to bear its own costs.

181 Article 140(3) of those rules, which is also applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that the Court of Justice may order an intervener other than a Member State or an institution to bear its own costs.

182 In the present case, INTA must be ordered to bear its own costs.

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

- 1. Sets aside the judgment of the General Court of the European Union of 16 March 2022, *Nowhere v EUIPO – Ye (APE TEES)* (T-281/21, EU:T:2022:139);**
- 2. Dismisses the action brought by Nowhere Co. Ltd;**
- 3. Orders Nowhere Co. Ltd to bear its own costs and pay those incurred by the European Union Intellectual Property Office (EUIPO) in the present appeal and in the proceedings at first instance;**

4. Orders the Federal Republic of Germany and the International Trademark Association (INTA) each to bear their own costs.

Arastey Sahún

Passer

Regan

Gratsias

Smulders

Delivered in open court in Luxembourg on 5 February 2026.

A. Calot Escobar
Registrar

M. L. Arastey Sahún
President of the Chamber