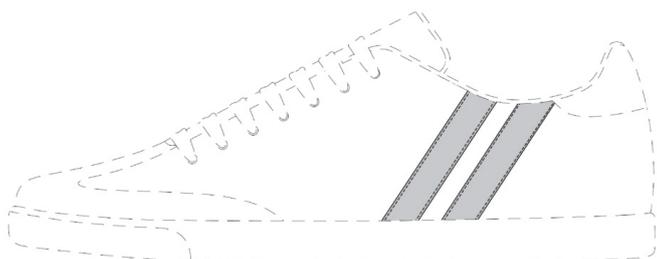
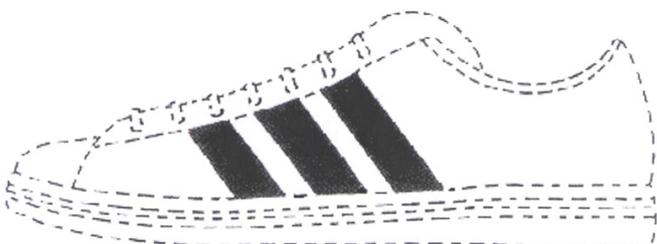


In *Shoe Branding Europe BVBA v adidas AG, Case C-396/15 P*, 17 February 2016, the Court of Justice of the European Union (CJEU) dismissed an appeal against a decision by the General Court upholding an opposition by the international sports company Adidas to an application to register the following Community trade mark consisting of two parallel lines positioned on footwear:



Adidas opposed on the basis of a number of its trade marks that protect the three-stripe mark, including the following Community trade mark



By decision of 22 May 2012, the Opposition Division had rejected the opposition. This was confirmed by OHIM's Second Board of Appeal on 28 November 2013. The Board took the view that the differences in the number of stripes and their respective positions on the shoe were sufficient to find that the signs at issue were, overall, dissimilar. It concluded that, even taking into account the reputation of the earlier marks, those differences were sufficient to preclude any likelihood of confusion under Article 8(1)(b) CTMR. The Board also rejected the opposition filed pursuant to Article 8(5) CTMR, on the ground that the relevant section of the public was unlikely to establish a link between the marks at issue, considering that the differences in the number of stripes and their positioning were determinant, whatever the reputation of the earlier marks may have been.

Adidas appealed OHIM's decision to the General Court. Not only did the General Court consider that there was such a likelihood sufficient for the opposition to succeed under Article 8(1)(b) CTMR, but it also held that the reputation of the cited marks was strong enough to support a refusal under Article 8(5) CTMR as well, regardless of any prospect of confusion. The court therefore annulled the OHIM Board of Appeal's decision (Case T-145/14).

This decision was further appealed by Shoe Branding Europe BVBA to the Court of Justice. The Court of Justice dismissed all the grounds brought forward by Shoe Branding Europe BVBA against the General Court's decision by reasoned order. It upheld the General Court's reasoning both as regards the nature of "minor differences" of elements such as the length of the stripes, their different inclination, and their number. The Court of Justice found that Shoe Branding Europe BVBA's contention that the General Court had made an incorrect assessment of the average consumer criterion, including by finding that the average consumer did not demonstrate a high level of attention and could not distinguish between brands of sports items, was manifestly inadmissible or unfounded. The Court of Justice concluded that the General Court correctly conducted an overall assessment of the conflicting signs by holding that

"the difference between two and three stripes placed on a shoe [is] not sufficient to affect the similarities arising from the configuration of the signs at issue and from their position on the side of the shoe [so that] that difference [does] not influence the overall impression produced".

The decision by the Court of Justice will make it more difficult for Adidas' competitors to use stripe variations on shoes. The addition or omission of a single stripe alone is unlikely to be found sufficient to avoid a likelihood of confusion with Adidas' position marks. This decision mirrors several decisions by Community trade mark courts in several member states that upheld Adidas' infringement actions against competitors using stripe variations. It is also noteworthy that OHIM upheld an opposition on appeal by Adidas in parallel proceedings against another CTM application by Shoe Branding (Case R-3106/2014-2).

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