

JUDGMENT OF THE COURT (Fifth Chamber)

5 March 2020 (*)

(Appeal — EU trade mark — Regulation (EC) No 207/2009 — Opposition — Article 8(1)(b) — Likelihood of confusion — Criteria for assessment — Applicability in the case of an earlier collective mark — Interdependence between the similarity of the trade marks at issue and that of the goods or services covered by those marks)

In Case C-766/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 5 December 2018,

Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi, established in Nicosia (Cyprus), represented by S. Malynicz QC, S. Baran, Barrister, V. Marsland, Solicitor, and K.K. Kleanthous,

appellant,

the other parties to the proceedings being:

European Union Intellectual Property Office (EUIPO), represented by D. Gája, acting as Agent,

defendant at first instance,

M. J. Dairies EOOD, established in Sofia (Bulgaria), represented by D. Dimitrova and I. Pakidanska, advokati,

intervener at first instance,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, R. Silva de Lapuerta, Vice-President of the Court, acting as a Judge of the Fifth Chamber, I. Jarukaitis, E. Juhász and M. Ilešič (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 12 September 2019,

after hearing the Opinion of the Advocate General at the sitting on 17 October 2019,

gives the following

Judgment

- 1 By its appeal, the Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi seeks to have set aside the judgment of the General Court of the European Union of 25 September 2018, *Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v EUIPO — M. J.*

Dairies (BBQLOUMI) (T-328/17, not published, EU:T:2018:594) ('the judgment under appeal'), by which the General Court dismissed its action for annulment of the decision of the Fourth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 16 March 2017 (Case R 497/2016-4), relating to opposition proceedings ('the decision at issue').

Legal context

2 Council Regulation (EC) No 207/2009 of 26 February 2009 on the [European Union] trade mark (OJ 2009 L 78, p. 1), which had repealed and replaced Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), was amended by Regulation (EU) 2015/2424 of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. It was subsequently repealed and replaced, with effect from 1 October 2017, by 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). However, having regard to the date of the facts giving rise to the dispute in the main proceedings, the present appeal must be considered in the light of Regulation No 207/2009, in its initial version.

3 Article 7 of Regulation No 207/2009, entitled 'Absolute grounds for refusal', provided:

'1. The following shall not be registered:

...

(b) trade marks which are devoid of any distinctive character;

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or services;

(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade;

...

3. Paragraph l(b), (c) and (d) shall not apply if the trade mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it.'

4 Article 8 of that regulation, headed 'Relative grounds for refusal', was worded as follows:

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

...

(b) if because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark.

...

5. Furthermore, upon opposition by the proprietor of an earlier trade mark ..., the trade mark applied for shall not be registered where it is identical with, or similar to, the earlier trade mark and is to be registered for goods or services which are not similar to those for which the earlier trade mark is registered, where, in the case of an earlier [European Union] trade mark, the trade mark has a

reputation in the [European Union] and, in the case of an earlier national trade mark, the trade mark has a reputation in the Member State concerned and where the use without due cause of the trade mark applied for would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.’

5 Article 65 of that regulation provided:

‘1. Actions may be brought before the Court of Justice against decisions of the Boards of Appeal on appeals.

2. The action may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation or of any rule of law relating to their application or misuse of power.

3. The Court of Justice has jurisdiction to annul or to alter the contested decision.

...’

6 Article 66 of Regulation No 207/2009 which, like Articles 67 to 74 of that regulation, came under Title VIII thereof, headed ‘[European Union] collective marks’, stated:

‘1. A [European Union] collective mark shall be a [European Union] trade mark which is described as such when the mark is applied for and is capable of distinguishing the goods or services of the members of the association which is the proprietor of the mark from those of other undertakings. Associations of manufacturers, producers, suppliers of services, or traders which, under the terms of the law governing them, have the capacity in their own name to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued, as well as legal persons governed by public law, may apply for [European Union] collective marks.

2. In derogation from Article 7(1)(c), signs or indications which may serve, in trade, to designate the geographical origin of the goods or services may constitute [European Union] collective marks within the meaning of paragraph 1. A collective mark shall not entitle the proprietor to prohibit a third party from using in the course of trade such signs or indications, provided he uses them in accordance with honest practices in industrial or commercial matters; in particular, such a mark may not be invoked against a third party who is entitled to use a geographical name.

3. The provisions of this regulation shall apply to [European Union] collective marks, unless Articles 67 to 74 provide otherwise.’

7 The wording of Article 7(1)(b) to (d), Article 7(3), Article 8(1) and (5), and Articles 65 and 66 of Regulation No 207/2009 corresponded to the wording of Article 7(1)(b) to (d), Article 7(3), Article 8(1) and (5), and Articles 63 and 64 of Regulation No 40/94, respectively, and was reproduced without substantial amendment in Article 7(1)(b) to (d), Article 7(3), Article 8(1) and (5), and Articles 72 and 74 of Regulation 2017/1001, respectively.

Background to the dispute and the decision at issue

8 On 9 July 2014, M. J. Dairies EOOD, a company established in Bulgaria, applied to EUIPO requesting the registration of the following word and figurative sign as an EU trade mark (‘the mark applied for BBQLOUMI’):



- 9 The goods and services for which registration was sought are covered by Classes 29, 30 and 43 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 ('the Nice Agreement'), and correspond to the following description:
- Class 29: 'Dairy products and dairy substitutes; cheese; ... prepared dishes consisting wholly or substantially wholly of meat or dairy products';
 - Class 30: 'Sandwiches; crackers flavoured with cheese; ...', and
 - Class 43: 'Restaurant services; ...'
- 10 The trade mark application was published in *European Union Trade Marks Bulletin* on 12 August 2014.
- 11 On 12 November 2014, the appellant filed a notice of opposition against registration of the mark applied for BBQLOUMI in respect of all the goods and services referred to in paragraph 9 of this judgment.
- 12 The appellant based its opposition on its EU collective mark HALLOUMI, registered on 14 July 2000 for goods in Class 29 corresponding to the following description: 'Cheese'.
- 13 The grounds relied on in support of the opposition were those set out in Article 8(1)(b) and Article 8(5) of Regulation No 207/2009.
- 14 By decision of 15 January 2016, EUIPO's Opposition Division rejected the opposition.
- 15 The action brought by the appellant against that decision was dismissed by the decision at issue of the Fourth Board of Appeal of EUIPO ('the Board of Appeal').
- 16 In the reasoning for dismissing the action, the Board of Appeal first of all stated that earlier collective marks must, in opposition proceedings, be treated in the same way as earlier individual marks. The distinctiveness of the earlier mark at issue is weak since the term 'halloumi' simply designates a type of cheese. That term is used only as a generic name for a product type. Even as regards Cyprus and Greece, the appellant has not produced any evidence capable of showing that the general public perceives the mark HALLOUMI otherwise than as a description of a type of cheese.
- 17 Next, the Board of Appeal found that there was no likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009, between the earlier mark and the mark applied for

BBQLOUMI.

18 The Board of Appeal found that, while it is true that as regards Class 29 of the Nice Agreement the goods covered by the marks at issue are for the most part identical or similar, the visual similarity between those marks, by contrast, is merely low. Moreover, there is no phonetic or conceptual similarity.

19 Finally, the Board of Appeal found that the appellant had decided no longer to rely on its ground of opposition based on Article 8(5) of Regulation No 207/2009.

The procedure before the General Court and the judgment under appeal

20 By application lodged at the Registry of the General Court on 26 May 2017, the appellant sought the annulment of the decision at issue.

21 In support of that action, the appellant relied on a single plea in law, alleging infringement of Article 8(1) (b) of Regulation No 207/2009, divided into four parts.

22 First, the appellant complained that the Board of Appeal wrongly characterised the scope and effects of EU collective marks by adopting the reasoning, which was also wrong, in the judgment of 13 June 2012, *Organismos Kypriakis Galaktokomikis Viomichanias v OHIM — Garmo (HELLIM)* (T-534/10, EU:T:2012:292).

23 Second, it claimed that the Board of Appeal had misinterpreted Article 66 et seq. of Regulation No 207/2009 by failing to take into account the fact that collective marks cannot serve to indicate a single commercial origin and can indicate a geographical origin.

24 Third, the appellant submitted that the Board of Appeal wrongly considered the earlier mark to be generic and thus failed to recognise the distinctive character of that mark.

25 Fourth, the Board of Appeal wrongly considered that the differences between the marks at issue serve to avoid any likelihood of confusion.

26 Since no part of the single plea in law was upheld, the action was dismissed.

27 By order of 17 September 2019, the General Court rectified paragraph 71 of the judgment under appeal, in the version in the language of the case. According to the version thus rectified, the General Court held that, despite the fact that the goods covered by the marks at issue are in part identical and in part similar to some degree, there can be no likelihood of confusion in the mind of the relevant public since the existence of a low degree of similarity from a visual, phonetic and conceptual point of view is not, in the case of an earlier mark having a descriptive meaning and therefore having weak distinctive character, sufficient to establish the existence of a likelihood of confusion.

28 In paragraph 71 of the judgment under appeal, in the version in the language of the case originally communicated to the parties and made public, the General Court had held that, despite the fact that the goods covered by the marks at issue are in part identical and in part similar to some degree, there cannot be any likelihood of confusion on the part of the relevant public since the existence of a visual, phonetic and conceptual similarity is not, in the case of an earlier descriptive mark with low distinctive character, sufficient to give rise to a presumption of a likelihood of confusion.

Forms of order sought by the parties to the appeal

29 The appellant claims that the Court should:

- set aside the judgment under appeal;

- uphold its action for annulment; and
- order EUIPO and M. J. Dairies to bear their own costs, and pay those of the appellant.

30 EUIPO contends that the Court should:

- dismiss the appeal; and
- order the appellant to pay the costs.

31 M. J. Dairies contends that the Court should:

- dismiss the appeal; and
- order the appellant to bear the costs incurred by M. J. Dairies.

The request to have the oral procedure reopened

32 Following the delivery of the Advocate General's Opinion, the appellant, by a document lodged at the Court Registry on 30 October 2019, applied for the oral part of the procedure to be reopened, pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

33 Under that provision, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated.

34 In support of its request, the appellant submits that the Advocate General's Opinion is based on an erroneous reading of the grounds of appeal and arguments put forward in support of the appeal. Such an erroneous reading constitutes a new fact and, furthermore, gives rise to a risk that the case is decided on the basis of an argument that has not been debated between the parties.

35 Nevertheless, it should be noted that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his or her involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (judgments of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others*, C-126/16, EU:C:2017:489, paragraph 31, and of 13 November 2019, *College Pension Plan of British Columbia*, C-641/17, EU:C:2019:960, paragraph 39).

36 It should also be recalled that the Statute of the Court of Justice of the European Union and the Rules of Procedure make no provision for the submission of observations in response to the Advocate General's Opinion. Disagreement with the Advocate General's Opinion cannot therefore in itself constitute grounds justifying the reopening of the oral procedure (judgments of 25 October 2017, *Polbud — Wykonawstwo*, C-106/16, EU:C:2017:804, paragraphs 23 and 24, and of 13 November 2019, *College Pension Plan of British Columbia*, C-641/17, EU:C:2019:960, paragraph 40).

37 In the present case, since the grounds of appeal and arguments put forward in support of the appeal were debated during the written and oral parts of the procedure, and since the Court is not bound by the description of those grounds of appeal and arguments as set out in the Advocate General's Opinion, there is no risk, contrary to the appellant's claim, that the case will be decided on the basis of an argument which has not been debated between the parties.

38 Furthermore, the findings in that opinion, including those relating to the scope of the grounds of appeal and arguments submitted in support of the appeal, do not in any way constitute a new fact submitted by a party after the close of the oral part of the procedure, within the meaning of Article 83 of the Rules of Procedure.

39 The Court considers, after hearing the Advocate General, that it has all the necessary information to rule on the appeal.

40 Having regard to the foregoing considerations, there is no need to reopen the oral part of the procedure.

The appeal

Arguments of the parties

41 The appellant puts forward four grounds in support of its appeal.

42 In support of its first ground of appeal, alleging infringement of Article 66 of Regulation No 207/2009 (now Article 74 of Regulation 2017/1001), the appellant claims that it follows from that provision that collective marks cannot, as regards their distinctiveness, be assessed in the same way as individual marks. In that regard, the appellant points out that it follows from paragraph 1 of that provision that the essential function of the indication of origin of collective marks is to distinguish the goods or services of one or more members of an association from those of other undertakings, and that it follows from paragraph 2 of that provision that it is possible, by way of derogation from Article 7(1)(c) of the regulation, for such marks to designate the geographical origin of the goods or services concerned.

43 According to the appellant, by confirming the Board of Appeal's approach consisting in deprecating the distinctiveness of the mark HALLOUMI on the basis that the term 'halloumi' designates a type of cheese produced according to a special recipe based on milk from Cyprus, the General Court misconstrued the characteristics of the collective mark set out in Article 66(1) and (2) of Regulation No 207/2009.

44 Furthermore, by requiring, in opposition proceedings, the proprietor of a collective mark to demonstrate the degree of distinctiveness of that mark, the General Court introduced an inappropriate burden of proof. Essentially, it relied on a premiss of weak distinctive character and required the appellant to refute that premiss.

45 By its second ground of appeal, alleging infringement of Article 8(1)(b) of Regulation No 207/2009, read in conjunction with Article 66 thereof, the appellant reiterates, in essence, the same arguments as those put forward in the first ground of appeal and concludes that the General Court failed to take into account, in the assessment of the criterion of 'likelihood of confusion on the part of the public', referred to in Article 8(1)(b), the characteristics of the collective mark set out in Article 66.

46 By its third ground of appeal, the appellant claims that the General Court, in its application of Article 8(1)(b) of Regulation No 207/2009, misinterpreted the case-law of the Court of Justice relating to that provision.

47 In the first place, the appellant notes that the judgment of 13 June 2012, *Organismos Kypriakis Galaktokomikis Viomichanias v OHIM — Garmo (HELLIM)* (T-534/10, EU:T:2012:292), to which the General Court referred, was not upheld by the Court of Justice. While the appellant recognises that the appeal against that judgment was dismissed by the order of 21 March 2013, *Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v OHIM* (C-393/12 P, not published, EU:C:2013:207), it points out however that, in that order, the Court of Justice merely found that the appellant had misinterpreted that judgment, without deciding whether the General Court had correctly applied the relevant principles.

- 48 As regards the judgment of 20 September 2017, *The Tea Board v EUIPO* (C-673/15 P to C-676/15 P, EU:C:2017:702), also referred to by the General Court in the judgment under appeal, the appellant points out that the Court of Justice merely stated therein that the likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009, must be assessed having regard to the fact that the essential function of a collective mark is, like that of individual marks, to indicate the commercial origin of the goods or services concerned.
- 49 As regards the judgment of 24 May 2012, *Formula One Licensing v OHIM* (C-196/11 P, EU:C:2012:314), to which the General Court also referred, the appellant submits that, in paragraph 41 of the judgment under appeal, the General Court erred by inferring from that judgment that it is only possible to acknowledge that an EU collective mark has a certain degree of distinctiveness where the proprietor of that mark provides evidence in that regard.
- 50 The appellant submits that the General Court furthermore misinterpreted the fundamental rules, laid down by the case-law of the Court of Justice, concerning Article 8(1)(b) of Regulation No 207/2009, as regards the global assessment of the likelihood of confusion. The appellant refers, in that regard, to the judgment of 8 November 2016, *BSH v EUIPO* (C-43/15 P, EU:C:2016:837), in particular paragraphs 61 to 64 thereof, in which the Court reiterated those rules, emphasising in particular that, even in a case involving an earlier mark with weak distinctiveness, there may be a likelihood of confusion because of a similarity of the marks at issue and the goods or services concerned.
- 51 The appellant claims that paragraph 71 of the judgment under appeal is manifestly incompatible with that case-law since, in that paragraph, the General Court excluded a likelihood of confusion without duly carrying out a global assessment of that likelihood, taking into account all the relevant factors and the interdependence between them.
- 52 By its fourth ground of appeal, alleging infringement of Article 8(1)(b) and Article 65(2) of Regulation No 207/2009, the appellant complains that the General Court failed to refer the case back to EUIPO, notwithstanding the fact that it found that the Board of Appeal had made errors.
- 53 According to EUIPO and M. J. Dairies, the Board of Appeal and the General Court found, without erring in law, that, in the context of the examination of the likelihood of confusion referred to in Article 8(1)(b) of Regulation No 207/2009, the distinctiveness of the mark HALLOUMI should be classified as weak.
- 54 They note that, in the same way as the essential function of an individual mark, the essential function of a collective mark is to indicate the commercial origin of the goods and services that it designates. The distinctiveness of such a collective mark should therefore not be assessed according to criteria different from those that apply where the earlier mark is an individual mark.
- 55 They submit that the first and second grounds of appeal must therefore be dismissed.
- 56 EUIPO and M. J. Dairies submit that the third ground is also unfounded. In that regard, they point out that the General Court found that there was no likelihood of confusion on the basis not only of the weak distinctive character of the earlier mark, but also on other relevant factors, in particular the low degree of similarity between the marks at issue. The judgment under appeal, including paragraph 71 thereof, is therefore compatible with the Court of Justice's case-law on Article 8(1)(b) of Regulation No 207/2009.
- 57 As regards the fourth plea, EUIPO and M. J. Dairies consider that the General Court was fully entitled to find that there was no likelihood of confusion despite the errors committed by the Board of Appeal in the phonetic and conceptual comparison of the signs at issue.

Findings of the Court

- 58 Although the opposition brought by the appellant against the mark applied for BBQLOUMI was based both on Article 8(1)(b) and on Article 8(5) of Regulation No 207/2009, it is common ground that that

opposition could, in the light of the pleas in law and arguments subsequently submitted, be examined by the Board of Appeal and by the General Court solely from the point of view of Article 8(1)(b).

- 59 Under that provision, which is, in the absence of any provision to the contrary in Articles 67 to 74 of Regulation No 207/2009, applicable to EU collective marks pursuant to Article 66(3) of that regulation (judgment of 20 September 2017, *The Tea Board v EUIPO*, C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 46), the trade mark applied for is not to be registered if, because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the mark applied for and the earlier mark, there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected.
- 60 In the present case, the earlier mark is the EU collective mark HALLOUMI which the appellant has registered for cheese. The assessment made by the Board of Appeal and confirmed by the General Court according to which the relevant public is, by reason of the fact that the goods covered are everyday consumer goods, the general public in the European Union is not disputed.
- 61 The appellant submits, however, by the first to third grounds of its appeal, that the General Court failed correctly to apply the criteria in the light of which the existence of a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 207/2009 is to be assessed. Those grounds thus relate to the legal principles applicable to the assessment of the likelihood of confusion between the marks at issue, a matter which constitutes a point of law that may be placed before the Court of Justice on appeal (judgment of 8 November 2016, *BSH v EUIPO*, C-43/15 P, EU:C:2016:837, paragraph 52 and the case-law cited).
- 62 Those three grounds of appeal must be dealt with together, in order to examine, first of all, which criteria apply and, next, whether the General Court complied with those criteria.
- 63 When considering cases concerning opposition proceedings based on earlier individual marks, the Court has repeatedly held that the likelihood of confusion must be understood as the risk that the public might believe that the goods or services covered by the earlier mark and those covered by the mark applied for come from the same undertaking or, as the case may be, from economically linked undertakings (judgments of 12 June 2007, *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 33; of 8 May 2014, *Bimbo v OHIM*, C-591/12 P, EU:C:2014:305, paragraph 19; and of 12 June 2019, *Hansson*, C-705/17, EU:C:2019:481, paragraph 40).
- 64 However, where, as in the present case, the earlier mark is a collective mark, the essential function of which is, pursuant to Article 66(1) of Regulation No 207/2009, to distinguish the goods or services of the members of the association which is the proprietor from those of other undertakings (judgments of 20 September 2017, *The Tea Board v EUIPO*, C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 63, and of 12 December 2019, *Der Grüne Punkt v EUIPO*, C-143/19 P, EU:C:2019:1076, paragraph 52), the likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009, must be understood as being the risk that the public might believe that the goods or services covered by the earlier trade mark and those covered by the trade mark applied for all originate from members of the association which is the proprietor of the earlier trade mark or, where appropriate, from undertakings economically linked to those members or to that association.
- 65 Although, as a result, in the event of opposition by the proprietor of a collective mark, the essential function of that type of mark, as set out in Article 66(1) of Regulation No 207/2009, must be taken into account in order to understand what is meant by likelihood of confusion, within the meaning of Article 8(1)(b) of that regulation, the fact remains that the case-law establishing the criteria with regard to which the existence of such a likelihood must be assessed in practice is applicable to cases concerning an earlier collective mark.
- 66 None of the characteristics of EU collective marks justifies derogation, in the event of opposition based on such a mark, from the assessment criteria of the likelihood of confusion which emerge from that case-law.

- 67 According to that case-law, the likelihood of confusion must be assessed globally, taking into account all factors relevant to the circumstances of the case (judgments of 12 June 2007, *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 34; of 2 September 2010, *Calvin Klein Trademark Trust v OHIM*, C-254/09 P, EU:C:2010:488, paragraph 44; and of 8 May 2014, *Bimbo v OHIM*, C-591/12 P, EU:C:2014:305, paragraph 20).
- 68 As regards the visual, phonetic or conceptual similarity of the marks at issue, that assessment must be based on the overall impression which they convey to the relevant public (judgments of 12 June 2007, *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 35; of 2 September 2010, *Calvin Klein Trademark Trust v OHIM*, C-254/09 P, EU:C:2010:488, paragraph 45; and of 8 May 2014, *Bimbo v OHIM*, C-591/12 P, EU:C:2014:305, paragraph 21).
- 69 Furthermore, that global assessment implies some interdependence between the relevant factors, in particular between the similarity of the trade marks and that of the goods or services covered. Accordingly, a low degree of similarity between those goods or services may be offset by a high degree of similarity between the trade marks, and vice versa (judgments of 18 December 2008, *Éditions Albert René v OHIM*, C-16/06 P, EU:C:2008:739, paragraph 46, and of 12 June 2019, *Hansson*, C-705/17, EU:C:2019:481, paragraph 43).
- 70 It is also settled case-law that the degree of distinctiveness of the earlier mark, which determines the extent of the protection conferred by it, is one of the relevant factors in the case in point. Where the distinctiveness of the earlier mark is significant, such a circumstance is likely to increase the likelihood of confusion. That being so, the existence of a likelihood of confusion is not precluded where the distinctiveness of the earlier mark is weak (see, to that effect, judgments of 8 November 2016, *BSH v EUIPO*, C-43/15 P, EU:C:2016:837, paragraphs 61 and 62, and of 12 June 2019, *Hansson*, C-705/17, EU:C:2019:481, paragraphs 42 and 44).
- 71 The appellant's argument that the distinctiveness of the earlier mark should, having regard, in particular, to Article 66(2) of Regulation No 207/2009, be assessed differently where the earlier mark is an EU collective mark cannot be accepted.
- 72 In that regard, it must be noted that in the absence of any provision to the contrary in Articles 67 to 74 of Regulation No 207/2009, Article 7(1)(b) and Article 7(3) of that regulation apply to EU collective marks. Consequently, those marks must in any event, whether intrinsically or through use, be distinctive.
- 73 Article 66(2) of Regulation No 207/2009 is not an exception to that requirement of distinctiveness. While that provision permits, by way of derogation from Article 7(1)(c) of that regulation, registration as EU collective marks of signs which may serve to designate the geographical origin of goods or services, it does not, on the other hand, allow the signs thus registered to be devoid of distinctiveness. Where an association applies for registration, as an EU collective mark, of a sign which may designate a geographical origin, it is therefore incumbent on it to ensure that that sign has elements which enable the consumer to distinguish the goods or services of its members from those of other undertakings.
- 74 Therefore, even supposing that the EU collective mark HALLOUMI implicitly refers, as the appellant claims, to the Cypriot geographical origin of the goods covered, that mark must nevertheless still fulfil its essential function, namely to distinguish the goods or services of the members of the association which is the proprietor of that mark from those of other undertakings, and the degree of distinctiveness of that mark is, in accordance with the case-law referred to in paragraph 70 above, a relevant factor for the purposes of assessing whether there is a likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009, between that mark and the mark applied for BBQLOUMI.
- 75 It follows that the General Court did not err in law in assessing the degree of distinctiveness of the earlier mark HALLOUMI and in including that factor in its assessment of the existence of a likelihood of confusion.

- 76 Furthermore, contrary to the appellant's claim, it does not appear that the General Court, in making that assessment, 'deprecated' the distinctiveness of the earlier mark HALLOUMI or that it relied on a premiss of weak distinctiveness which it was for the appellant to rebut. On the contrary, it is apparent from paragraphs 42 and 70 of the judgment under appeal that the General Court objectively found, as did the Board of Appeal after analysing the evidence adduced by the appellant, that the term 'halloumi', the sole element of which that earlier mark consists, designates a particular type of cheese produced according to a special recipe and that the distinctiveness of such a mark, which is restricted to designating a type of product, is weak. That assessment of the degree of distinctiveness of the earlier mark cannot, in the absence of a specific complaint based on a manifest distortion of the evidence, be challenged before the Court of Justice (see, to that effect, judgment of 20 September 2017, *The Tea Board v EUIPO*, C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 41).
- 77 Nor did the General Court misinterpret the scope of the judgment of 24 May 2012, *Formula One Licensing v OHIM* (C-196/11 P, EU:C:2012:314). In paragraphs 41 to 47 of that judgment, the Court stated that, when examining an opposition based on a national trade mark, it is necessary to acknowledge that that mark has 'a certain degree of distinctiveness'. Irrespective of whether that case-law can be applied to the present case, it is in any event apparent from the judgment under appeal that the General Court, having found the mark HALLOUMI to be of weak distinctive character, acknowledged that that mark had 'a certain degree of distinctiveness' and therefore did not misinterpret that judgment of the Court of Justice.
- 78 Whereas it follows from all the foregoing considerations that the first and second grounds of appeal are unfounded and that the arguments put forward in the third ground of appeal, alleging a failure correctly to apply the judgments of 24 May 2012, *Formula One Licensing v OHIM* (C-196/11 P, EU:C:2012:314), and of 20 September 2017, *The Tea Board v EUIPO* (C-673/15 P to C-676/15 P, EU:C:2017:702), must also be rejected, it is still necessary to consider the argument, also put forward in support of that third ground, that the General Court failed to carry out a global assessment of the likelihood of confusion which takes account, in accordance with the Court of Justice's case-law, of all the relevant factors and the interdependence between them.
- 79 In that regard, it should be noted that, in paragraphs 62 to 69 of the judgment under appeal, the General Court held that the Board of Appeal wrongly concluded that there was no phonetic or conceptual similarity between the marks at issue. On the contrary, the General Court found that those marks are, albeit to a low degree, similar visually as well as phonetically and conceptually.
- 80 The General Court also found, in paragraph 70 of that judgment, that the earlier mark HALLOUMI has a weak distinctive character and, in paragraph 71 of that judgment, that the goods covered by the marks at issue are in part identical and in part similar to some degree.
- 81 Having thus assessed those various factors, it was incumbent on the General Court, in accordance with Article 8(1)(b) of Regulation No 207/2009, as interpreted by the case-law referred to in paragraphs 67 to 70 above, to include them within a global assessment, in the light of the interdependence existing between those factors, in particular between the similarity of the trade marks and that of the goods or services covered, since a low degree of similarity between the goods or services covered may be offset by a high degree of similarity between the marks and vice versa.
- 82 It follows that it was for the General Court to examine, at the very least, whether the fact that the mark HALLOUMI and the mark applied for BBQLOUMI are merely, in its view, visually, phonetically and conceptually similar to a low degree is offset, inter alia, by the identity of the goods covered by each of those marks, namely cheese. In accordance with the principles set out in that case-law, which requires an assessment that takes into account the interdependence between the relevant factors, such an examination was necessary in order to determine whether there is a risk that the general public may wrongly believe that the goods or services offered under the BBQLOUMI mark originate from an undertaking affiliated with the association which is the proprietor of the HALLOUMI mark.

- 83 Although it recalled those principles in paragraph 56 of the judgment under appeal and stated, in paragraph 69 of that judgment, that it would carry out a global assessment of the likelihood of confusion in the remaining part of that judgment, the General Court, in paragraphs 70 and 71 of that judgment, merely (i) set out its findings as regards the degree of distinctiveness of the earlier mark and the degree of similarity both of the marks at issue and of the goods covered by them, and (ii) held, in the abstract, that there could be no likelihood of confusion in the mind of the relevant public since the existence between marks at issue of a degree — in this case, a low degree — of visual, phonetic and conceptual similarity is not, in the case of an earlier mark with weak distinctive character, sufficient to permit the conclusion that there is a likelihood of confusion. On that basis alone, the General Court held, in paragraph 72 of the judgment under appeal, that the Board of Appeal, although it made the errors set out in paragraphs 62 to 69 of that judgment, was correct in finding that there was no likelihood of confusion.
- 84 Thus, it is not apparent from any of the grounds of the judgment under appeal that the General Court duly considered the interdependence of the relevant factors. Even if it were the case that the General Court examined whether the low degree of similarity of the marks at issue could be offset by the significantly higher degree of similarity of the goods covered by those marks, the fact remains that the General Court did not set out, in the judgment under appeal, the reasons why it took the view that that was not the case.
- 85 Rather, it is apparent from paragraph 71 of the judgment under appeal that the General Court relied on the premiss that, in the case of an earlier mark of weak distinctive character, the existence of a likelihood of confusion must be ruled out as soon as it is established that the similarity of the marks at issue, in itself, does not permit such a likelihood to be established.
- 86 As follows from the case-law referred to in paragraphs 69 and 70 above, such a premiss is incorrect since the fact that the distinctive character of an earlier mark is weak does not preclude the existence of a likelihood of confusion. For the purpose of determining whether or not there is such a risk, it was necessary, having regard to the criterion of interdependence set out in that case-law, to examine whether the low degree of similarity of the marks at issue is offset by the higher degree of similarity, or even identity, of the goods covered by those marks. However, the assessment carried out by the General Court does not include any specific examination in that regard.
- 87 That reading of the judgment under appeal prevails whether account is taken of the initial version of that judgment or of the version stemming from the rectification order of 17 September 2019. Since the rectification which the General Court made is therefore of no consequence for the assessment of the present appeal, there is no need to consider the question, debated between the parties at the hearing before the Court of Justice, whether that rectification, which the General Court announced to the parties shortly before that hearing before the Court, was compatible with the applicable procedural rules.
- 88 Since the assessment made by the General Court does not satisfy, for the reasons set out in paragraphs 82 to 87 of this judgment, the requirement to carry out a global assessment which takes account of the interdependence of the relevant factors, it must be concluded that the General Court failed correctly to apply the criteria with regard to which the existence of a likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009, must be assessed and, in so doing, erred in law.
- 89 It follows that the judgment under appeal must be set aside, without it being necessary to consider the fourth ground of appeal.

Referral of the case back to the General Court

- 90 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court may, where the decision of the General Court has been set aside, either 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.

91 In the present case, the General Court erred in law by failing to carry out a global assessment in accordance with the criteria established by the case-law relating to Article 8(1)(b) of Regulation No 207/2009.

92 In those circumstances, the case must be referred back to the General Court so that it may carry out such an assessment and, consequently, carry out a further examination of the existence of a likelihood of confusion.

Costs

93 Since the case is being referred back to the General Court, it is appropriate to reserve the costs.

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

1. **Sets aside the judgment of the General Court of the European Union of 25 September 2018, *Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v EUIPO — M. J. Dairies (BBQLOUMI)* (T-328/17, not published, EU:T:2018:594);**
2. **Refers the case back to the General Court of the European Union;**
3. **Reserves the costs.**

Regan

Silva de Lapuerta

Jarukaitis

Juhász

Ilešič

Delivered in open court in Luxembourg on 5 March 2020.

A. Calot Escobar

E. Regan

Registrar

President of the Fifth
Chamber

* Language of the case: English.