

JUDGMENT OF THE GENERAL COURT (Second Chamber)

20 January 2021 (*)

(EU trade mark – Opposition proceedings – Application for EU figurative mark BBQLOUMI – Earlier EU collective word mark HALLOUMI – Relative ground for refusal – No likelihood of confusion – Article 8(1)(b) of Regulation (EC) No 207/2009 (now Article 8(1)(b) of Regulation (EU) 2017/1001))

In Case T-328/17 RENV,

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

applicant,

v

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

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO, intervener before the General Court, being

M. J. Dairies EOOD, established in Sofia (Bulgaria), represented by D. Dimitrova, avocate,

ACTION brought against the decision of the Fourth Board of Appeal of EUIPO of 16 March 2017 (Case R 497/2016-4), relating to opposition proceedings between the Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi and M. J. Dairies,

THE GENERAL COURT (Second Chamber),

composed of V. Tomljenović, President, F. Schalin (Rapporteur) and P. Škvařilová-Pelzl, Judges,

Registrar: A. Juhász-Tóth, Administrator,

having regard to the written part of the procedure and further to the hearing on 29 September 2020,

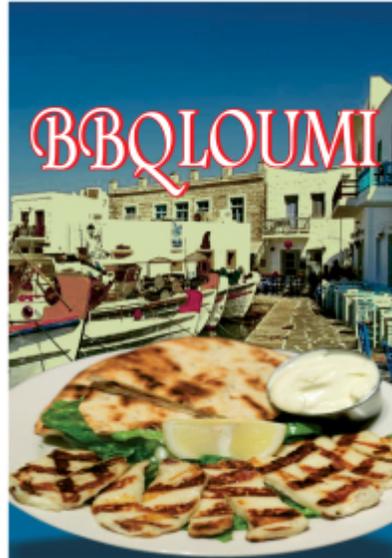
gives the following

Judgment

Background to the dispute

- 1 On 9 July 2014, the intervener, M. J. Dairies EOOD, filed an application for registration of an EU trade mark with the European Union Intellectual Property Office (EUIPO) pursuant to Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended (replaced 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)).

- 2 The trade mark in respect of which registration was sought is the figurative sign in colour represented as follows:



- 3 The goods and services in respect of which registration was sought are in 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, and correspond, for each of those classes, to the following description:
- Class 29: ‘Dairy products and dairy substitutes; cheese; processed cheese; cheese products; cheese dips; meat extracts; prepared dishes consisting wholly or substantially wholly of meat or dairy products’;
 - Class 30: ‘Sandwiches; crackers flavoured with cheese; condiments; sauces; cheese sauce; foodstuffs made from cereals’;
 - Class 43: ‘Restaurant services; fast food restaurant services; cafeterias; catering.’
- 4 The trade mark application was published in *Community Trade Marks Bulletin* No 149/2014 of 12 August 2014.
- 5 On 12 November 2014, the applicant, Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi, filed a notice of opposition pursuant to Article 41 of Regulation No 207/2009 (now Article 46 of Regulation 2017/1001) to registration of the mark applied for in respect of all of the goods and services referred to in paragraph 3 above.
- 6 The opposition was in particular based on the earlier EU collective word mark HALLOUMI, registered on 14 July 2000 under number 1082965 designating goods in Class 29 and corresponding to the following description: ‘cheese’.
- 7 The grounds relied on in support of the opposition were those set out in Article 8(1)(b) and (5) of Regulation No 207/2009 (now Article 8(1)(b) and (5) of Regulation 2017/1001).
- 8 On 15 January 2016, the Opposition Division rejected the opposition and ordered the applicant to pay the costs.
- 9 On 15 March 2016, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009 (now Articles 66 to 71 of Regulation 2017/1001), against the decision of the

Opposition Division.

- 10 By decision of 16 March 2017 ('the contested decision'), the Fourth Board of Appeal of EUIPO dismissed the appeal and ordered the applicant to pay the costs incurred for the purposes of the opposition and appeal proceedings.
- 11 First of all, the Board of Appeal examined the nature of the earlier mark and stated that, notwithstanding its status as a collective mark, given that the proceedings related to relative grounds for refusal of registration, on the one hand, that mark had to be inherently distinctive, and, on the other, any enhanced distinctiveness had to have been acquired through use as a trade mark.
- 12 However, according to the Board of Appeal, the inherent distinctiveness of the earlier mark was weak in that the term 'halloumi' designated a particular type of cheese produced in a certain way in Cyprus and having particular characteristics associated with its composition and taste, so there was longstanding use of that term as a generic name.
- 13 The Board of Appeal then found that, for the purposes of Article 8(1)(b) of Regulation No 207/2009, there was no likelihood of confusion between the earlier mark and the mark applied for. In that regard, it held that it was necessary to carry out a comparison of the marks at issue on the basis of the perception of the general public in the European Union.
- 14 As regards the comparison of the goods and services, the Board of Appeal considered that the opposition was relevant only in respect of the goods covered by the mark applied for in Class 29, since the goods covered by the marks at issue could be identical or similar, with the exception of 'meat extracts', and in respect of the goods covered by the mark applied for in Class 30, since the goods in question could be similar to some degree. However, the services in Class 43 covered by the mark applied for were different from cheese.
- 15 As regards the comparison of the signs, the Board of Appeal found that the visual similarity was low because (i) the signs coincided only in the group of the letters 'l', 'o', 'u', 'm' and 'i', (ii) they were phonetically dissimilar and (iii) they were also conceptually dissimilar inasmuch as the sign applied for did not clearly convey the meaning associated with the term 'halloumi' or even the concept of cheese.
- 16 As regards the global assessment of the likelihood of confusion, the evidence submitted by the applicant demonstrates, at the very most, that the term 'halloumi' is used throughout the European Union as a generic name for a speciality cheese from Cyprus, and it is insufficient to establish intensive use as a trade mark designating cheese.
- 17 That finding applies with respect to use in both Cyprus and Greece, as the applicant did not submit any evidence of the actual perception of the mark HALLOUMI, other than as a type of cheese. The assessment of the likelihood of confusion must therefore rest on the finding of the inherently weak distinctiveness of the earlier mark.
- 18 The Board of Appeal therefore concluded that there was no likelihood of confusion given the weak distinctiveness of the earlier mark, the low degree of visual similarity between the signs in question, the lack of phonetic and conceptual similarity of those signs and the varying degrees of similarity for some of the goods covered by the marks at issue.
- 19 Finally, the Board of Appeal considered that the applicant was no longer relying on the ground of opposition relating to infringement of Article 8(5) of Regulation No 207/2009. It found, in any event, that the applicant had not shown how the use of the mark applied for took unfair advantage of the distinctiveness or the repute of the earlier mark, or was detrimental to them.

Procedure before the General Court and the Court of Justice

- 20 By application lodged at the General Court Registry on 26 May 2017, the applicant brought an action for the annulment of the contested decision. The applicant put forward a single plea in law, alleging infringement of Article 8(1)(b) of Regulation No 207/2009; that plea is divided into four parts.
- 21 First, the applicant criticised the Board of Appeal for having erroneously characterised the meaning and effect of EU collective marks by following the reasoning of the General Court in the judgments of 13 June 2012, *Organismos Kypriakis Galaktokomikis Viomichanias v OHIM – Garmo (HELLIM)* (T-534/10, EU:T:2012:292), and of 7 October 2015, *Cyprus v OHIM (XΑΛΛΟΥΜΙ and HALLOUMI)*, T-292/14 and T-293/14, EU:T:2015:752). Second, it submitted that the Board of Appeal had misconstrued Articles 66 to 68 of Regulation No 207/2009 (now Articles 74 to 76 of Regulation 2017/1001) in so far as collective marks did not, by their nature, serve to distinguish a single commercial origin, but could, in any event, indicate geographical origin. Third, the Board of Appeal had wrongly considered that the earlier mark was generic, thus depriving it of any distinctiveness. Fourth, as a result of the finding of a lack of distinctiveness, it had wrongly considered that the differences between the marks at issue were sufficient to avoid a likelihood of confusion.
- 22 By judgment 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, ‘the original judgment’, EU:T:2018:594), the General Court dismissed the action and ordered the applicant to pay the costs.
- 23 In essence, the General Court considered that the Board of Appeal had not erred either in its assessment of the characteristics and nature of EU collective marks or in its assessment of the distinctiveness of the earlier mark.
- 24 First of all, the General Court held that the evidence produced by the applicant as regards the perception of the earlier mark by the relevant public, consisting of the general public of the European Union whose level of attention was, in essence, average, related to the word ‘halloumi’ which denoted a particular type of cheese produced according to certain features and had done so for a long time, but not to its belonging to anyone who marketed the product in question to a special association of producers or traders, so that those elements were not relevant to the demonstration of the inherent distinctiveness of that mark.
- 25 Next, the General Court held that the Board of Appeal also had not erred in its assessment of the degree of distinctiveness which the earlier mark must be acknowledged to have as a validly registered collective mark.
- 26 Finally, the General Court noted that, although the Board of Appeal had made two errors when comparing the signs in question by holding that there was no phonetic and conceptual similarity, when a low degree of similarity should have been found, there was no likelihood of confusion on the part of the relevant public, since the existence of a low degree of similarity from a visual, phonetic and conceptual point of view was not, in the case of an earlier mark having a descriptive meaning and therefore having a weak distinctive character, sufficient to establish the existence of a likelihood of confusion.
- 27 By application lodged at the Registry of the Court of Justice on 5 December 2018, the applicant brought an appeal against the original judgment and asked the Court to set aside that judgment. In support of the appeal, it raised four grounds, alleging, first and second, infringement of the EU collective marks regime as provided for in Article 66 of Regulation No 207/2009 (now Article 74 of Regulation 2017/1001); third, misinterpretation of the case-law of the Court of Justice on the application of Article 8(1)(b) of that regulation; and, fourth, infringement of Article 8(1)(b) and Article 65(2) of that regulation, in that the General Court had not referred the case back to EUIPO, notwithstanding the finding that the Board of Appeal had made errors.
- 28 By order of 17 September 2019, *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:2019:662), the General Court rectified paragraph 71 of the original judgment, in the version in the language of the case.

- 29 By judgment of 5 March 2020, *Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v EUIPO* (C-766/18 P, ‘the judgment on appeal’, EU:C:2020:170), the Court of Justice set aside the original judgment, referred the case back to the General Court and reserved the costs.
- 30 As a preliminary point, the Court of Justice noted that, in the absence of a provision to the contrary in Articles 67 to 74 of Regulation No 207/2009 (now Articles 75 to 82 of Regulation 2017/1001), Article 8(1) (b) of that regulation was applicable to EU collective marks pursuant to Article 66(3) of that regulation (now Article 74(3) of Regulation 2017/1001). It also stated that, where the earlier mark was a collective mark, the likelihood of confusion had to be understood as being 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 all originated from members of the association which is the proprietor of the earlier mark or, where appropriate, from undertakings economically linked to those members or to that association. Furthermore, it noted that the case-law establishing the criteria with regard to which the existence of a likelihood of confusion had to be assessed was applicable to EU collective marks and that, in that context, there was no need to assess specifically the distinctiveness, whether inherent or acquired through use, of those marks. In that regard, it observed that, where an association applied for registration, as an EU collective mark, of a sign which may designate a geographical origin, it was incumbent on it to ensure that that sign had elements which enabled the consumer to distinguish the goods or services of its members from those of other undertakings; accordingly, the degree of distinctiveness of that mark was a relevant factor for the purposes of assessing whether there was a likelihood of confusion.
- 31 As regards the facts in the present case, the Court of Justice held that, while the General Court had been correct in finding that the degree of distinctiveness of the earlier mark was weak, it had then made an error in holding, in the abstract, that there could be no likelihood of confusion in the mind of the relevant public, since the existence of a low degree of visual, phonetic and conceptual similarity between the marks at issue was not, in the case of an earlier mark with weak distinctiveness, sufficient to permit the conclusion that there was a likelihood of confusion. It stated that the General Court had relied on the premiss that, in the case of an earlier mark of weak distinctiveness, the existence of a likelihood of confusion had to be ruled out as soon as it was established that the similarity of the marks at issue, in itself, did not permit such a likelihood to be established. In its view, it was for the General Court to examine specifically, in the light of the criterion of the interdependence of the relevant factors, whether the low degree of similarity of the marks at issue was offset by the higher degree of similarity, or even identity, of the goods covered by those marks. It therefore held that the General Court had 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.

Procedure and forms of order sought by the parties after the referral back to the General Court

- 32 By documents lodged at the General Court Registry on 30 March, 29 April and 15 May 2020, the intervener, EUIPO and the applicant submitted their observations on the next step to be taken in the proceedings, in accordance with Article 217(1) of the Rules of Procedure of the General Court.
- 33 In its observations on the next step to be taken in the proceedings, the applicant claims that the General Court should:
- amend the contested decision and uphold the opposition;
 - in the alternative, annul that decision and refer the case back to the Fourth Board of Appeal, providing it with the information necessary for the resolution of the dispute;
 - order EUIPO and the intervener to pay the costs.
- 34 In their observations on the next step to be taken in the proceedings, EUIPO and the intervener contend that the General Court should:

- dismiss the action;
- order the applicant to pay the costs.

Law

- 35 In support of the action, the applicant put forward a single plea in law, alleging infringement of Article 8(1)(b) of Regulation No 207/2009, in that the contested decision included the erroneous finding that there was no likelihood of confusion between the marks at issue; that plea is divided into four parts (see paragraph 21 above).
- 36 In the judgment on appeal, the Court of Justice did not call in question the original judgment in so far as it had declared unfounded the first two parts of the single plea in law, based in essence on a failure to take full account of the characteristics and scope of EU collective marks, and the third part of that plea, based on an incorrect analysis of the earlier mark which the Board of Appeal had found to be devoid of any distinctiveness, considering it to be merely generic.
- 37 By contrast, the Court considered, in paragraph 85 of the judgment on appeal, that the General Court had made an error in the assessment of the fourth part, by relying on the premiss that, in the case of an earlier mark of weak distinctiveness, the existence of a likelihood of confusion had to be ruled out as soon as it was established that the similarity of the marks at issue, in itself, did not permit such a likelihood to be established.
- 38 As a result of the referral of the case back to the General Court and the request by the Court of Justice to that effect in paragraph 92 of the judgment on appeal, it is therefore for the General Court to conduct a further examination of the fourth part of the single plea in law, by carrying out a global and specific assessment of the likelihood of confusion in accordance with the criteria laid down by the case-law relating to Article 8(1)(b) of Regulation No 207/2009, taking account of the interdependence of all the relevant factors.
- 39 In the context of the present action, the applicant submits that the Board of Appeal's failure to acknowledge that the earlier mark is distinctive – considering it to be no more than the generic name of a type of cheese – on any view rendered nugatory the assessment of the likelihood of confusion based on the similarities and differences between the marks at issue. However, it also noted that the discrete errors made by the Board of Appeal in the comparison of the signs, *inter alia*, by denying the existence of a conceptual similarity between the signs in question and by failing to take into consideration the figurative elements of the mark applied for, which clearly depict cheese grilled on the barbecue, led to the erroneous finding that there was no likelihood of confusion.
- 40 Moreover, in its observations on the next step to be taken in the proceedings, the applicant claims that the global assessment of the likelihood of confusion must be based on the fact that the earlier mark enjoys a certain degree of distinctiveness which, even if it is not high, is capable of resulting in a finding of a likelihood of confusion. In its opinion, where the marks at issue are similar in certain of their aspects that have some distinctiveness, there is a likelihood of confusion if the goods and services covered by the marks at issue are identical or similar.
- 41 However, the applicant claims that, irrespective of the graphic element of the mark applied for, the word element 'bbq' of that mark lacks any distinctiveness, whereas the word element 'loumi', which is common to the marks at issue, has a certain distinctiveness on account of its meaning and position. Those marks are therefore not just similar, but similar in respect of the only distinctive element of which they are composed. Taken together with the fact that the goods and services covered by those marks are either identical or highly similar, that finding should lead to the acknowledgement of a likelihood of confusion, both in respect of the identical goods and of the other goods covered by those marks, or even in respect of the services in Class 43 covered by the mark applied for, in that the high similarity of the signs in question

may bridge the effects of the differences between the goods and services concerned and, conversely, as regards the goods in question which are identical, that identity offsets any dissimilarity between the marks in question.

42 At the hearing, the applicant insisted that the term ‘bbqloumi’ should be analysed in the same way as the marks which it referred to as ‘portmanteau marks’, namely marks consisting of two very easily recognisable word elements. In that regard, in a part of the European Union, the word element ‘bbq’ is a synonym of ‘barbecue’, whereas the word element ‘loumi’ has no meaning other than that of an abbreviation of the term ‘halloumi’. In the light of the fact that, in the United Kingdom in particular, consumers associate halloumi cheese with cooking on the barbecue, that finding, supported by the Mediterranean context to which the graphic representation composing the mark applied for refers, should lead to a finding of similarity between the signs in question and, therefore, of a likelihood of confusion between the marks at issue, having regard to the identity or similarity of the goods and services which they designate.

43 EUIPO and the intervener, for their part, contend that the terms of the original judgment should be upheld in so far as it found that there was no likelihood of confusion.

44 It must be recalled that, under Article 8(1)(b) of Regulation No 207/2009, upon opposition by the proprietor of an earlier trade mark, the 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 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.

45 According to settled case-law, the risk that the public may believe that the goods or services in question come from the same undertaking or from economically linked undertakings constitutes a likelihood of confusion. According to the same case-law, the likelihood of confusion must be assessed globally, according to the relevant public’s perception of the signs and goods or services in question and taking into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs and that of the goods or services covered (see judgment of 22 September 2016, *Sun Cali v EUIPO – Abercrombie & Fitch Europe (SUN CALI)*, T-512/15, EU:T:2016:527, paragraph 44 and the case-law cited).

46 Where the earlier mark is an EU collective mark, the Court observed in paragraph 64 of the judgment on appeal that the likelihood of confusion had to be understood as being 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 all originate from members of the association which is the proprietor of the earlier mark or, where appropriate, from undertakings economically linked to those members or to that association (see paragraph 30 above).

47 For the purposes of applying Article 8(1)(b) of Regulation No 207/2009, a likelihood of confusion presupposes both that the marks at issue are identical or similar and that the goods or services which they cover are identical or similar. Those conditions are cumulative (see judgment of 22 January 2009, *Commercy v OHIM – easyGroup IP Licensing (easyHotel)*, T-316/07, EU:T:2009:14, paragraph 42 and the case-law cited; judgment of 22 September 2016, *SUN CALI*, T-512/15, EU:T:2016:527, paragraph 45).

48 It is in the light of those considerations that the Court must assess whether the Board of Appeal was correct in finding that there was no likelihood of confusion on the part of the relevant public, within the meaning of Article 8(1)(b) of Regulation No 207/2009.

49 In the present case, notwithstanding the applicant’s argument in its observations on the next step to be taken in the proceedings, in particular as far as concerns the comparison of the goods and services, it must be noted that the global assessment of the likelihood of confusion must be carried out taking account of the relevant factors as laid down in the original judgment and in the terms set out below, since the judgment on appeal did not call in question the General Court’s findings in this respect.

The relevant territory and the relevant public and its level of attention

- 50 In paragraph 27 of the original judgment, the General Court found no error in the Board of Appeal's findings in paragraph 20 of the contested decision. Since the trade marks in question were EU trade marks covering or designating everyday consumer goods, it noted, in essence, that the relevant territory was that of the European Union and the relevant public was the general public, whose level of attention is average when purchasing the goods in question.

Comparison of the goods and services

- 51 As regards the comparison of the goods and services, the General Court observed in paragraph 14 of the original judgment that, according to the Board of Appeal, the opposition was relevant only in respect of the goods covered by the mark applied for in Class 29, with the exception of 'meat extracts', and in respect of the goods in Class 30. In paragraph 71 of that judgment, it considered that those findings were not wrong, holding that, with the exception of the services in Class 43 covered by the mark applied for that were different to the 'cheese' designated by the earlier mark, the goods in question covered by the marks at issue were in part identical and in part similar to some degree.

The analysis and comparison of the signs

The distinctive and dominant elements in the mark applied for

- 52 In paragraph 62 of the original judgment, the General Court noted that, in accordance with the case-law, in a case involving a trade mark composed of word and figurative elements, such as the mark applied for, the word element of the mark was, in principle, more distinctive than the figurative element, since the average consumer would more easily refer to the goods in question by citing the name rather than describing the figurative element (see judgment of 9 September 2008, *Honda Motor Europe v OHIM – Seat (MAGIC SEAT)*, T-363/06, EU:T:2008:319, paragraph 30 and the case-law cited). However, in the light of the graphic form of the mark applied for, the relevant public's attention would be drawn to both the word element 'bbqloumi' and the figurative element representing a dish containing grilled food due to the latter's position in the foreground. In that regard, it held that the Board of Appeal had been correct in finding that those two elements dominated the overall impression produced by the mark applied for and that, as regards the word element of that mark, more weight had to be given to its initial part, 'bbq', than to its final part, 'loumi'.
- 53 Further, in paragraph 70 of the original judgment, the General Court held that the Board of Appeal had not erred in finding that the inherent distinctiveness of the earlier mark was low and that the evidence submitted by the applicant was insufficient to establish intensive use of that mark as a trade mark designating cheese. Thus, it was held that enhanced distinctiveness acquired through use had not been proved.

The visual, phonetic and conceptual comparison

- 54 The General Court upheld, in paragraphs 60 to 62 of the original judgment, the Board of Appeal's assessment that the visual similarity of the signs in question was weak. Since the element 'loumi', in which those signs coincided, did not occupy a separate position within them, inter alia because, within the mark applied for, that element was included in the term 'bbqloumi', the visual similarity of those signs had to be considered weak.
- 55 By contrast, in paragraphs 63 to 69 of the original judgment, the General Court noted that the Board of Appeal had made two errors by finding, first, that the signs in question were not phonetically similar and, second, that they were conceptually different, whereas it should have been held that those signs were both phonetically and conceptually similar to a low degree.

The global assessment of the likelihood of confusion in the light of the relevant factors

- 56 A global assessment of the likelihood of confusion implies some interdependence between the factors taken into account and, 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 marks, and vice versa (judgments of 29 September 1998, *Canon*, C-39/97, EU:C:1998:442, paragraph 17, and of 14 December 2006, *Mast-Jägermeister v OHIM – Licorera Zacapaneca (VENADO with frame and others)*, T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 74).
- 57 In the present case, it should be observed that, in paragraph 45 of the contested decision, the Board of Appeal concluded that, taking into account the low distinctive character of the earlier mark, the low visual similarity of the signs at issue, the absence of phonetic or conceptual similarity of those signs and in the light of the varying degrees of similarity of part of the goods covered by the marks at issue (the services designated by the mark applied for being considered dissimilar to those designated by the earlier mark), there was no likelihood of confusion (see paragraph 18 above).
- 58 In that regard, since the existence of a likelihood of confusion presupposes both that the marks at issue are identical or similar and that the goods or services which they cover are identical or similar, it must be held that the finding of the absence of a likelihood of confusion must, in any event, be upheld in respect of ‘meat extracts’ in Class 29 and ‘restaurant services’, ‘fast-food restaurant services’, ‘cafeteria’ services and ‘catering’ services in Class 43, covered by the mark applied for, since, as is apparent from the original judgment, those goods and services are neither identical nor similar to the goods covered by the earlier mark.
- 59 By contrast, as regards the other goods in Classes 29 and 30 covered by the mark applied for and similar to varying degrees to the goods covered by the earlier mark, the existence of a likelihood of confusion cannot be ruled out from the outset and, accordingly, the global assessment of that likelihood must be carried out in the light of all the relevant factors.
- 60 First, as regards the factor relating to the similarity of the signs in question, this is based, first, on the presence in each of those signs of the element ‘loumi’, which gives rise to a low degree of visual, phonetic and conceptual similarity and, second, on the fact that the figurative element representing a dish, included in the mark applied for, supports, to some extent, the concept conveyed by the word element ‘bbqloumi’ of the mark applied for, namely that of foods grilled on the barbecue which will in particular be perceived, by a large part of the relevant public, as possibly being halloumi cheese.
- 61 Those considerations must however be examined in the light of the fact that, where the public is confronted with the word element making up the mark applied for, its attention will be drawn more to the initial part of that element, in this case ‘bbq’, rather than to the final part ‘loumi’ (see paragraph 52 above). Furthermore, although it is true that the figurative element composing the sign supports to some extent the concept conveyed by the word element, namely that of halloumi cheese cooked or grilled on the barbecue, that figurative element relates more to the concept of barbecue, in view of the representation of a dish of food, some of which shows signs of having been grilled, than that of cheese produced in a Mediterranean environment since, as is apparent from the original judgment, it is not possible to state categorically that the foods represented are pieces of halloumi cheese.
- 62 Moreover, the figurative element of the mark applied for also plays a differentiating role since the sign constituting the earlier mark – a word mark – does not have such an element.
- 63 Thus, the element ‘loumi’ – the main element from which the similarity of the signs in question stems – contributes very little to the distinctiveness of the mark applied for because the element ‘bbq’ of the mark applied for has been considered to be the part of the word element of that mark which most caught the relevant public’s attention owing to its position in the foreground of that element, and because the earlier mark enjoys only a weak degree of inherent distinctiveness.

- 64 Whereas the acknowledgement of the weak distinctiveness of the earlier mark does not, per se, preclude a finding that there is a likelihood of confusion (see, to that effect, order of 27 April 2006, *L'Oréal v OHIM*, C-235/05 P, not published, EU:C:2006:271, paragraphs 42 to 45), owing inter alia to the similarity of the signs and goods or services covered (see, to that effect, judgment of 8 November 2016, *BSH v EUIPO*, C-43/15 P, EU:C:2016:837, paragraph 44), it does appear that, where the elements of similarity between two signs arise from the fact that, as in the present case, they share a component which has weak inherent distinctiveness, the impact of such elements of similarity on the global assessment of the likelihood of confusion is itself low (see, to that effect, judgments of 22 February 2018, *International Gaming Projects v EUIPO – Zitro IP (TRIPLE TURBO)*, T-210/17, not published, EU:T:2018:91, paragraph 73 and the case-law cited, and of 20 September 2018, *Kwizda Holding v EUIPO – Dermapharm (UROAKUT)*, T-266/17, EU:T:2018:569, paragraph 79).
- 65 In those circumstances, the low degree of similarity of the signs in question is unlikely to contribute to the existence of a likelihood of confusion, since those signs share the common element 'loumi' which is not dominant per se and which, moreover, has weak inherent distinctiveness for a large part of the relevant public who will understand it as a possible reference to halloumi cheese.
- 66 Second, as the Court observes in paragraph 70 of the judgment on appeal, according to case-law, the degree of distinctiveness of the earlier mark, which determines the extent of the protection conferred by it, is one of the relevant factors that must be taken into account in the present case (see, to that effect, judgment of 8 November 2016, *BSH v EUIPO*, C-43/15 P, EU:C:2016:837, paragraph 71 and the case-law cited).
- 67 As regards the distinctiveness of the earlier mark, as the Court stated in paragraphs 71 and 76 of the judgment on appeal, it cannot be assessed in a specific way on the ground that it is a collective mark and there is no need to call in question the General Court's assessment that the degree of inherent distinctiveness of that mark is weak.
- 68 According to the original judgment, the evidence submitted by the applicant does not allow a finding that consumers, confronted with the earlier mark, will associate it with something other than halloumi cheese, having regard to the fact that it refers to the generic name of that type of cheese, rather than to the commercial origin of the goods designated by it in so far as they originate from members of the association which is the proprietor of that mark or, as the case may be, from undertakings that are economically linked to those members or to that association.
- 69 Therefore, the level of protection conferred by the earlier mark, in the light of its weak degree of inherent distinctiveness, can itself only be weak.
- 70 Third, the factor relating to the fact that the goods in Classes 29 and 30 designated by the mark applied for are similar to varying degrees to the goods designated by the earlier mark must be taken into account. In this respect, it should be recalled that all the goods in question are everyday goods in relation to which the relevant public will show an average degree of attention when purchasing them (see paragraph 50 above).
- 71 A likelihood of confusion may only be found to exist if the relevant public were likely to be misled as to the commercial origin of the goods designated by the mark applied for.
- 72 In the present case, that risk does not appear to be established, even for the goods in Class 29 designated by the mark applied for, such as, inter alia, 'dairy products and dairy substitutes', 'cheese', 'processed cheese' and 'cheese dips', which are identical or highly similar to 'cheese' in that class and designated by the earlier mark.
- 73 When confronted with the mark applied for and assuming that they also focus their attention on the element 'loumi' – which is unlikely given the secondary position occupied by that element in that mark – or even assuming that they perceive that the figurative element representing a dish, which is present in that mark as a possible reference to halloumi cheese grilled on the barbecue, consumers will not establish a link

between that mark and the earlier mark since, first, they will at most establish a link between that mark and the goods that it designates, namely halloumi cheese, and, second, the marks at issue, considered as a whole, have only a low degree of similarity.

74 Moreover, it appears that the clarifications provided by the applicant at the hearing relating to the analysis of the mark applied for, concerning, in particular, the meaning of the combined elements 'bbq' and 'loumi' in the mark applied for, together with the message conveyed by the graphic representation making up that mark (see paragraph 42 above), do not differ significantly from the relevant factors relied on in the present case in the global assessment of the likelihood of confusion (see paragraphs 60 and 61 above). In any event, it must be recalled that those factors were laid down in the original judgment, without being called in question by the judgment on appeal. The clarification provided by the applicant does not therefore call in question the global assessment of the likelihood of confusion which was undertaken in the present case.

75 In the light of all of the foregoing considerations, it must be held that, in the present case, the Board of Appeal was correct in finding that there was no likelihood of confusion. The fourth part and, therefore, the single plea in law must therefore be rejected and the action as a whole must be dismissed, without there being any need to examine the admissibility of the heads of claim, particularly those seeking alteration, set out by the applicant in its observations on the next step to be taken in the proceedings.

Costs

76 Since, in the judgment on appeal, the Court of Justice set aside the original judgment and reserved the costs, it is for the General Court, in accordance with Article 219 of the Rules of Procedure, to decide, in the present judgment, on all the costs relating to the proceedings instituted before it, namely the proceedings in Cases T-328/17 and T-328/17 RENV, and the costs relating to the proceedings on the appeal in Case C-766/18 P.

77 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

78 Since the applicant has been unsuccessful, it must be ordered to pay the costs relating to the proceedings instituted before the General Court and to the proceedings on the appeal before the Court of Justice, in accordance with the form of order sought by EUIPO and the intervener.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi to pay the costs relating to the proceedings instituted before the General Court and to the proceedings on the appeal before the Court of Justice.**

Tomljenović

Schalin

Škvařilová-Pelzl

Delivered in open court in Luxembourg on 20 January 2021.

Registrar

President

* Language of the case: English.