Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

8 October 2014*

(Community trade mark — Opposition proceedings — Application for a Community figurative mark representing a star within a circle — Earlier Community and national figurative marks representing a star within a circle — Relative ground for refusal — Likelihood of confusion — Distinctive character of the earlier mark — Article 8(1)(b) of Regulation No 207/2009 — Revocation of the earlier Community mark — Continued interest in bringing proceedings — Failure to find that there was no need to adjudicate in part)

In Case T-342/12,

Max Fuchs, residing in Freyung (Germany), represented by C. Onken, lawyer,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by J. Crespo Carrillo, acting as Agent,

defendant,

the other party to the proceedings before the Board of Appeal of OHIM being

Les Complices SA, established in Montreuil-sous-Bois (France),

ACTION brought against the decision of the Fifth Board of Appeal of OHIM of 8 May 2012 (Case R-2040/2011-5), relating to opposition proceedings between Les Complices SA and Max Fuchs,

THE GENERAL COURT (Second Chamber),

composed of M.E. Martins Ribeiro, President, S. Gervasoni (Rapporteur) and L. Madise, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the application lodged at the Registry of the General Court on 1 August 2012,

having regard to the response lodged at the Court Registry on 15 November 2012,

having regard to the reply lodged at the Court Registry on 13 March 2013,

further to the hearing on 4 June 2014,

* Language of the case: English.

gives the following

Judgment

Background to the dispute

1 On 28 December 2006, the applicant, Mr Fuchs, filed an application for registration of a Community trade mark with the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (now replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1)).

2 The mark in respect of which registration was sought is the following figurative sign:



3 The goods in respect of which registration was sought are in Classes 18, 24, 25 and 26 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 to the following descriptions:

— Class 18: ‘Sporting and leisure articles, namely bags, shoulder bags, rucksacks’;

— Class 24: ‘Textiles and textile goods, namely labels of the aforesaid goods’;

— Class 25: ‘Clothing, in particular outdoor clothing, trousers, jackets, shirts, T-shirts, waistcoats, anoraks, pullovers, sweatshirts, coats, socks, underwear, scarves, collar protectors and gloves; headgear for wear, shoes, boots, belts’;

— Class 26: ‘buttons, zip fasteners, badges, bands, belt clasps’.

4 The Community trade mark application was published in the *Community Trade Marks Bulletin* No 36/2007 of 23 July 2007.

5 On 22 October 2007, Les Complices SA filed a notice of opposition under Article 42 of Regulation No 40/94 (now Article 41 of Regulation No 207/2009) to registration of the mark applied for in respect of all the goods referred to in paragraph 3 above.

6 The opposition was based, first, on the earlier Community figurative mark reproduced below, covering, inter alia, goods in Classes 18 and 24 corresponding to the following descriptions:

— Class 18: 'Leather and imitations of leather, handbags, evening bags, sports bags, travelling bags, briefcases, pouches, pocket wallets, credit card holders, cheque book holders, purses, school bags; trunks and travelling bags; umbrellas, parasols, leather leashes';

— Class 24: 'Fabrics for textile use; curtains and wall hangings; bath linen, bath towels, washing mitts and face towels; bed linen, blankets, sheets, pillowcases, eiderdowns, travelling rugs, duvets; table linen, table cloths, sets of table mats and table napkins'.



7 Second, the opposition was based on the earlier French figurative mark reproduced below, covering, inter alia, goods in Class 25 corresponding to the following description: 'clothing, shoes, helmets'.



8 The grounds relied on in support of the opposition were those referred to in Article 8(1)(b) of Regulation No 40/94 (now Article 8(1)(b) of Regulation No 207/2009) and Article 8(5) of Regulation No 40/94 (now Article 8(5) of Regulation No 207/2009).

9 On 17 February 2011 the applicant limited his application for registration to the following goods:

— Class 18: 'Leisure articles, namely bags, shoulder bags, rucksacks, except sports bags';

— Class 24: 'Textiles and textile goods, namely labels of the aforesaid goods';

— Class 25: 'Military clothing and outdoor clothing, manufactured from technical fabrics and other technical components, including trousers, jackets, shirts, T-shirts, waistcoats, anoraks, pullovers, sweatshirts, coats, socks, underwear, scarves, collar protectors and gloves; headgear for wear; belts'.

10 On 30 June 2011 the Opposition Division rejected the opposition in respect of the goods in Class 24 and allowed the opposition in respect of all of the other goods.

11 On 9 August 2011, the applicant filed a notice of appeal with OHIM, pursuant to Articles 57 to 62 of Regulation No 40/94 (now Articles 58 to 64 of Regulation No 207/2009), against the decision of the Opposition Division inasmuch as it was unfavourable to him.

12 By decision of 8 May 2012 ('the contested decision'), the Fifth Board of Appeal of OHIM dismissed the appeal. In particular, after finding that the relevant public consisted of the average consumer in all of the Member States of the European Union, in respect of the goods included in Class 18, and of the average French consumer, in respect of the goods included in Class 25, the Board of Appeal took the view that there was a likelihood of confusion between the signs at issue in respect of the goods in Classes 18 and 25, on the ground that the goods were identical or similar, and the signs were visually similar and conceptually identical and that, even if a comparison were impossible from a phonetic perspective, in principle, consumers could refer to the signs at issue by the term 'star'. With regard to the distinctiveness of the earlier marks, the Board of Appeal found that a star with five points was indeed the sign most commonly used to represent a star. However, it found that the minor visual differences between the signs and their conceptual identity continued to be a source of a likelihood of confusion for a public whose level of attention was average.

Forms of order sought

13 The applicant claims that the Court should:

— annul the contested decision;

— reject the opposition in its entirety;

— order OHIM and the other party to the proceedings before the Board of Appeal to pay the costs.

14 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

15 By letter lodged at the Court Registry on 18 November 2013, the applicant, first, notified the Court of the decision of 24 October 2013 by which the Cancellation Division of OHIM had revoked the earlier Community mark as from 24 June 2013 and, secondly, indicated that the opposition should be considered devoid of purpose to the extent to which it was based on the earlier Community mark. The General Court requested OHIM to submit its observations on that application that there was no need to adjudicate.

16 By document lodged at the Court Registry on 26 November 2013, OHIM indicated that the decision of the Cancellation Division of 24 October 2013 could still be the subject of an appeal to the Board of Appeal and had not become final. OHIM pointed out that it was, in any event, for the General Court to rule on the contested decision in so far as the opposition was based on the earlier French mark.

17 In response to a question put by the Court, OHIM also indicated, by document lodged at the Court Registry on 13 January 2014, that the decision of the Cancellation Division of OHIM of 24 October 2013 had become final, the other party to the proceedings before OHIM not having filed an appeal against that decision within the period prescribed by Article 60 of Regulation No 207/2009. OHIM did not specify which procedural consequences the General Court should draw from the definitive nature of that decision.

18 By order of 9 January 2014, the Court joined the objection to the substantive action.

Law

Subject-matter of the dispute

19 By decision of 24 October 2013 the Cancellation Division of OHIM revoked the earlier Community mark as from 24 June 2013, on the basis of Article 51(1)(a) of Regulation No 207/2009. That decision has become final since Les Complices, the other party to the proceedings before the Board of Appeal, did not bring any appeal against that decision within the time allowed by Article 60 of Regulation No 207/2009. It must also be noted that that earlier Community mark constituted the only basis of the opposition brought by the other party to the proceedings before the Board of Appeal for the goods in Class 18.

20 By letter lodged at the Court Registry on 18 November 2013, the applicant specified that the opposition must be considered to be devoid of purpose to the extent to which it was based on the earlier Community mark. At the hearing, the applicant stated that he still maintained all of his forms of order sought relating to the annulment of the contested decision, including those that were based on the earlier Community mark.

21 At the hearing, OHIM also indicated that the revocation of the earlier Community mark had occurred after the adoption of the contested decision and that, accordingly, it was still necessary for the Court to rule on the action in its entirety.

22 Nevertheless, the Court must address of its own motion the question whether the applicant continues to have an interest in bringing the action to the extent that the contested decision ruled on the opposition based on the earlier Community mark, for the goods contained within Class 18. Since the conditions of admissibility of an action, in particular whether there is a legal interest in bringing proceedings, concern an absolute bar to proceedings (orders of 7 October 1987 in *d. M.* v *Council and ESC*, 108/86, ECR, EU:C:1987:426, paragraph 10, and of 10 March 2005 in *Gruppo ormeggiatori del porto di Venezia and Others* v *Commission*, T-228/00, T-229/00, T-242/00, T-243/00, T-245/00 to T-248/00, T-250/00, T-252/00, T-256/00 to T-259/00, T-265/00, T-267/00, T-268/00, T-271/00, T-274/00 to T-276/00, T-281/00, T-287/00 and T-296/00, ECR, EU:T:2005:90, paragraph 22), it is for the Court to consider of its own motion whether the applicant retains an interest in obtaining the annulment of the contested decision.

23 It is necessary, therefore, to determine whether, following the revocation of the earlier Community mark, the annulment of the contested decision, to the extent that it is based on that mark, is still capable of procuring an advantage for the applicant. According to settled case-law, the applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which it will be inadmissible. That purpose must continue, like the interest in bringing proceedings, until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage to the party bringing it (order of 9 February 2007 in *Wilfer* v *OHIM*, C-301/05 P, ECR, EU:C:2007:91, paragraph 19, and judgment of 7 June 2007 in *Wunenburger* v *Commission*, C-362/05 P, ECR, EU:C:2007:322, paragraph 42). If the applicant's interest in bringing proceedings disappears in the course of proceedings, a decision of the Court on the merits cannot bring him any benefit (judgment in *Wunenburger* v *Commission*, EU:C:2007:322, paragraph 43). However, the lapsing of the contested decision, which occurred after the lodging of the action, does not in itself place the Court under an obligation to declare that there is no need to adjudicate for lack of purpose or for lack of interest in bringing proceedings at the date of the delivery of the judgment (judgment in *Wunenburger* v *Commission*, EU:C:2007:322, paragraph 47).

24 First, it must be noted that the revocation of the mark upon which an opposition is based, when it occurs only after a decision of the Board of Appeal allowing an opposition based on that mark, does not constitute either a withdrawal or a repeal of that decision. As OHIM submitted at the hearing, in the case of revocation under the provisions of Article 55(1) of Regulation No 207/2009, the Community mark is deemed not to have had, as from the date of the application for revocation, the effects provided for under that regulation. By contrast, until that date, the Community mark benefitted in full from all the effects arising from that protection, laid down in Section 2 of the regulation. Consequently, at the date on which the contested decision was adopted, the earlier Community mark benefited in full from all the effects specified in those provisions. Therefore, for the Court to find that the litigation becomes devoid of purpose when, in the course of the proceedings, a revocation decision is reached would amount to taking into account matters arising after the adoption of the contested decision, which neither affect the well-foundedness of that decision nor have any relevance for the opposition proceedings of which the present case is the culmination.

25 The Court has already held that it could not, in the context of an action against a decision of the Board of Appeal relating to opposition proceedings, take account of a later revocation decision concerning the mark on which the opposition was based, since the revocation decision could not have had an effect for the earlier period (judgment of 4 November 2008 in *Group Lottuss* v *OHIM — Ugly (COYOTE UGLY)*, T-161/07, ECR, EU:T:2008:473, paragraphs 47 to 50). In another judgment, in which the registration of the earlier mark had expired after the decision of the Board of Appeal (judgment of 15 March 2012, in *Cadila Healthcare* v *OHIM — Novartis (ZYDUS)*, T-288/08, ECR, EU:T:2012:124, paragraphs 21 to 23), which was confirmed by the Court of Justice (order of 8 May 2013 in *Cadila Healthcare* v *OHIM*, C-268/12 P, ECR, EU:C:2013:296, paragraph 33), the General Court also held that the application for a declaration that there was no need to adjudicate must be rejected.

26 Second, if the Court were to annul the contested decision, its *ex tunc* revocation could procure an advantage for the applicant that he would not obtain in the event of a declaration that there was no need to adjudicate. If the Court were required to declare that there is no need to adjudicate, in part, for the goods in Class 18, the applicant could simply present, before OHIM, a fresh application for registration of his mark, without it being possible for opposition to that application thereafter to be mounted on the basis of the earlier Community mark that had been revoked. By contrast, if the Court were required to give a ruling on the substance and allow the action to the extent that it related to those goods, in holding that there was no likelihood of confusion between the marks at issue, nothing would then preclude the registration of the mark applied for.

27 Third, it is necessary to distinguish a case in which opposition is withdrawn, which arises on the initiative of the opponent, and which allows for the removal of all obstacles to registration of the mark applied for, from one where the mark is revoked, on the application of a third party, and in which the effects are restricted by Article 55(1) of Regulation No 2007/2009. Thus, the outcome decided on by the Court where opposition was withdrawn in the course of proceedings before it, consisting of declaring devoid of purpose the application for annulment of a decision of a Board of Appeal which had ruled on the opposition (order of 3 July 2003, in *Lichtwer Pharma* v *OHIM — Biofarma (Sedonium)*, T-10/01, ECR, EU:T:2003:182, paragraphs 14 to 17), cannot be transposed to the present case.

28 Finally, the mere fact that appeals against the decisions of the Opposition Division and of the Board of Appeal have a suspensory effect under the second sentence of Article 58(1) and of Article 64(3) of Regulation No 207/2009, cannot suffice to call into question the applicant's interest in pursuing the action. It must be recalled that, according to Article 45 of Regulation No 207/2009, it is only once an opposition has been rejected by a definitive decision that the mark is to be registered as a Community trade mark. Accordingly, when the Opposition Division or the Board of Appeal allows an opposition, such a decision will result in the mark not being registered, for so long as there has been no ruling on an appeal brought against that decision.

29 Consequently, notwithstanding the intervention of a definitive decision revoking the earlier Community mark on which the opposition was based, the applicant retains an interest in challenging the contested decision, including to the extent that that decision rules on the opposition based on that mark for the goods in Class 18.

Merits

30 In support of his action, the applicant puts forward a single plea, alleging infringement of Article 8(1)(b) of Regulation No 40/94 (now Article 8(1)(b) of Regulation No 207/2009).

31 The applicant considers that, notwithstanding the identical nature of the goods concerned, the signs at issue do not present any likelihood of confusion. He submits, first, that since the distinctive character of the earlier marks is extremely weak, even a minimal difference between the earlier marks and the mark applied for suffices to exclude any likelihood of confusion. Visually, the applicant argues that the signs at issue contain differences that are all the more important because they do not relate to the element of the earlier marks that lacks distinctive character. He considers that no phonetic comparison is possible, as the marks are purely figurative. Finally, conceptually the marks at issue are not identical since their only common elements are devoid of any distinctive character.

32 OHIM disputes the applicant's arguments.

33 Under Article 8(1)(b) of Regulation No 40/94 (now 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, an earlier trade mark and the identity or similarity of the goods or services covered by the trade marks at issue 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.

34 According to settled case-law, the risk that the public might 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 concerned, 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 designated (see the judgment of 9 July 2003 in *Laboratorios RTB* v *OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)*, T-162/01, ECR, EU:T:2003:199, paragraphs 30 to 33 and the case-law cited).

35 It is in the light of those principles that the assessment by the Board of Appeal of the likelihood of confusion between the signs at issue must be examined.

The relevant public

36 According to the case-law, in the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of products concerned, who is reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see judgment of 13 February 2007 in *Mundipharma* v *OHIM — Altana Pharma (RESPICUR)*, T-256/04, ECR, EU:T:2007:46, paragraph 42 and the case-law cited).

37 In the present case, the Board of Appeal held, correctly, at paragraph 14 of the contested decision, and without that paragraph being challenged by the applicant, that since the goods covered by the signs at issue were everyday fashion goods, the relevant public was composed of the average consumer, deemed to be reasonably well informed, reasonably observant and circumspect. Furthermore, as the Board of Appeal correctly held in that paragraph, as regards the goods in Class 18, since the earlier mark was a Community mark, the likelihood of confusion must be assessed in relation to the public of the whole of the Member States. As regards the goods in Class 25, the Board of Appeal was also correct to hold that since the earlier mark was a French national mark, the likelihood of confusion must be assessed in relation to the public in France.

The comparison of the goods

38 At paragraph 15 of the contested decision, the Board of Appeal also held, correctly and without being challenged by the applicant, that the disputed goods in Classes 18 and 25 were identical or similar.

The comparison of the signs

39 First, it must be noted that the global assessment of the likelihood of confusion, in relation to the visual, aural or conceptual similarity of the signs in question, must be based on the overall impression given by them, bearing in mind, in particular, their distinctive and dominant components. The perception of marks by the average consumer of the goods or services in question plays a decisive role in the global appreciation of that likelihood of confusion. In that regard, the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (see judgment of 12 June 2007 in *OHIM* v *Shaker*, C-334/05 P, ECR, EU:C:2007:333, paragraph 35 and the case-law cited).

40 At paragraphs 17 to 19 of the contested decision, the Board of Appeal held that the signs at issue were visually similar and conceptually identical and that, phonetically, even if a comparison was not, in principle, possible, consumers could refer to the signs at issue by using the term 'star'.

– Visual similarity

41 At paragraph 17 of the contested decision, the Board of Appeal observed that the signs at issue consisted of the figurative representation of a five-pointed star, shaped identically, placed within a circle, the proportions between the size of the star and the size of the circle being identical. The only differences between the two signs are the colour of the star, which is white in the earlier marks and black in the mark applied for, the fact that the background to the circle is shaded black in the earlier marks, and that the circle of the mark applied for is outlined in an intermittent black line, and not a continuous line, as the earlier marks were. Those similarities outweighed the differences between the signs, which the Board of Appeal considered to be similar overall.

42 The applicant submits that the signs at issue are not visually similar. He invokes, in particular, a decision of the Opposition Division of OHIM of 18 December 2002, concerning proceedings between the other party before the Board of Appeal and a third party, in which the Opposition Division had held that there were no visual similarities between the signs at issue in the case giving rise to that decision.

43 Without it being necessary to consider the differences between the signs at issue and those that were the subject of the case giving rise to the decision of the Opposition Division relied on by the applicant, it must be recalled that decisions concerning registration of a sign as a Community trade mark which the Boards of Appeal of OHIM are called on to take under Regulation No 207/2009 are adopted in the exercise of circumscribed powers and are not a matter of discretion. The legality of decisions of those Boards of Appeal must be assessed solely by reference to that regulation and not to the practice of the Board in earlier cases (judgments of 26 April 2007 in *Alcon* v *OHIM*, C-412/05 P, ECR, EU:C:2007:252, paragraph 65, and of 24 November 2005, *Sadas* v *OHIM — LTJ Diffusion (ARTHUR ET FELICIE)*, T-346/04, ECR, EU:T:2005:420, paragraph 71).

44 As regards the visual comparison of the signs at issue, it is correct that the signs are visually similar overall because they represent a five-pointed star placed within a circle and because the proportion of each of those two elements is similar. The fact that the circle in the mark applied for is represented by a dashed line cannot suffice to find that it is not a circle. In addition, the fact that the mark applied for represents a black star on a white background while the earlier marks are made up of a white star on a black background amounts to a minor difference only that cannot lead to a finding that the two figurative elements are not similar.

45 It follows from the foregoing that the Board of Appeal was correct to conclude that the signs at issue are visually similar overall.

– Phonetic similarity

46 The applicant complains that the Board of Appeal carried out a phonetic comparison of the signs at issue, which is, however, impossible given that they are figurative marks.

47 According to the case-law, a phonetic comparison is not, in principle, relevant in the examination of the similarity of a figurative mark without word elements with another mark (judgments of 25 March 2010 in *Nestlé* v *OHIM — Master Beverage Industries (Golden Eagle)*, T-5/08 to T-7/08, ECR, EU:T:2010:123, paragraph 67, and of 7 February 2012 in *Dosenbach-Ochsner* v *OHIM — Sisma (Representation of elephants in a rectangle)*, T-424/10, ECR, EU:T:2012:58, paragraphs 45 and 46).

48 In the present case, it is clear from paragraph 18 of the contested decision that the Board of Appeal was correct to hold that no phonetic comparison was possible, given that the marks are figurative. While the Board of Appeal also held, in the same paragraph, that the signs at issue represented a star and that it was possible that consumers would refer to them aurally as such, that finding was not followed by any conclusion that might suggest that the Board of Appeal held that there was a phonetic similarity between the signs. Moreover, in its global assessment of the likelihood of confusion, the Board of Appeal did not make any reference whatsoever to a phonetic comparison of those signs.

49 The applicant's submission therefore has no factual basis.

– Conceptual similarity

50 The applicant submits that the signs at issue are not conceptually identical, since their only common elements are devoid of distinctive character. The applicant refers, in this respect, to a decision of the Board of Appeal of 15 April 2011, in which the applicant alleges that the Board held that it was impossible to determine whether there was a common commercial origin on the basis of geometric figures.

51 As regards the decision of the Board of Appeal upon which the applicant relies, it must be observed, without it being necessary to assess whether that decision is relevant in the present case, that the legality of the decisions of the Board of Appeal must be assessed solely on the basis of Regulation No 207/2009 and not on the basis of a previous decision-making practice (see paragraph 43 above).

52 Furthermore, even if the applicant's submission that a five-pointed star does not have distinctive character were upheld, that would not suffice, in any event, for it to be held that the signs at issue, which each represent a star within a circle, with slight graphic differences, convey different concepts. The Board of Appeal was therefore correct to hold, at paragraph 19 of the contested decision, that the two signs were conceptually identical.

53 In view of the foregoing considerations, the findings of the Board of Appeal that the marks at issue are visually similar and conceptually identical, and that a phonetic comparison is not relevant, must be upheld.

The global assessment of the likelihood of confusion

54 The global assessment of the likelihood of confusion implies some interdependence between the relevant factors and, in particular, between the similarity of the trade marks and that of the goods or services concerned. Accordingly, a lesser degree of similarity between those goods or services may be offset by a greater degree of similarity between the marks, and vice versa (judgments of 29 September

1998 in *Canon*, C-39/97, ECR, EU:C:1998:442, paragraph 17, and of 14 December 2006 in *Mast-Jägermeister* v *OHIM — Licorera Zacapaneca (VENADO with frame and others)*, T-81/03, T-82/03 and T-103/03, ECR, EU:T:2006:397, paragraph 74).

55 As regards the global assessment of the likelihood of confusion, the Board of Appeal held, at paragraph 22 of the contested decision, that a five-pointed star was indeed the most common way of representing a star, but that the minor visual differences between the signs at issue and the fact that they were conceptually identical still gave rise to a likelihood of confusion for a public whose level of attention was average.

56 The applicant submits that the earlier marks are devoid of any distinctive character, but he accepts that, since those marks have already been registered, it must be held, in the context of opposition proceedings, that they do possess a minimal distinctive character. For the purpose of challenging the submissions made at paragraphs 16 and 17 of the response, the applicant submits that OHIM had already found that such marks were devoid of distinctive character.

57 In that respect, it must first be observed that it is for the Court to assess the legality of the contested decision and not to rule on whether the response is well founded.

58 Next, and as the applicant himself accepts, it must be observed that the applicant cannot rely, in opposition proceedings, on an absolute ground for refusal precluding valid registration of a sign by a national registry or by OHIM. It is clear that the absolute grounds for refusal referred to in Article 7 of Regulation No 207/2009 do not fall to be examined as part of the opposition procedure and that that article is not one of the provisions in relation to which the legality of the contested decision must be appraised (judgments of 9 April 2003 in *Durferrit* v *OHIM — Kolene (NU-TRIDE)*, T-224/01, ECR, EU:T:2003:107, paragraphs 72 and 75, and of 30 June 2004 in *BMI Bertollo* v *OHIM — Diesel (DIESELIT)*, T-186/02, ECR, EU:T:2004:197, paragraph 71). If the applicant was of the view that the earlier Community trade mark had been registered in breach of the provisions of Regulation No 207/2009, he ought to have applied for cancellation under Article 51 of that regulation. Furthermore, as regards the earlier French trade mark, it must be noted that the validity of the registration of a sign as a national trade mark may not be called into question in proceedings for registration of a Community trade mark, (see, to that effect, judgment of 24 May 2012 in *Formula One Licensing* v *OHIM*, C-196/11 P, ECR, EU:C:2012:314, paragraphs 40 to 47) but only in cancellation proceedings brought in the Member State concerned (judgment in *DIESELIT*, EU:T:2004:197, paragraph 71).

59 The applicant considers in addition that, given that the distinctive character of the earlier marks is extremely weak, as OHIM has itself recognised in other cases, even a minimal difference between the earlier marks and the mark applied for would suffice to exclude any likelihood of confusion.

60 It must be noted in that respect that the recognition of a weak distinctive character of the earlier mark does not preclude, in itself, a finding that there is a likelihood of confusion (see, to that effect, order of 27 April 2008 in *L'Oréal* v *OHIM*, C-235/05 P, ECR, EU:C:2006:271, paragraphs 42 to 45). While the distinctive character of the earlier mark must be taken into account in order to assess the likelihood of confusion, it is no more than one element, among others, to be considered in that assessment. Thus, even in a case involving an earlier mark of weak distinctive character there may be a likelihood of confusion on account, in particular, of a similarity between the signs and between the goods or services covered (see judgments of 16 March 2005 in *L'Oréal* v *OHIM — Revlon (FLEXI AIR)*, T-112/03, ECR, EU:T:2005:102, paragraph 61 and the case-law cited, and of 13 December 2007 in *Xentral* v *OHIM — Pages jaunes (PAGESJAUNES.COM)*, T-134/06, ECR, EU:T:2007:387, paragraph 70 and the case-law cited.)

61 Finally, it is necessary to reject the applicant's submission that the Board of Appeal did not give sufficient weight to the fact that the earlier marks had only an extremely weak distinctive character. The approach taken by the applicant would have the effect of disregarding the factor of the similarity of the marks in favour of one based on the distinctive character of the earlier Community trade marks, which would be given undue importance. The result would be that when the earlier Community marks are only of weak distinctive character a likelihood of confusion would exist only when there was a complete reproduction of that mark by the mark applied for, and that result would arise whatever the degree of similarity between the signs at issue (order in *L'Oréal* v *OHIM*, EU:C:2006:271, paragraph 45). Such an result would not, however, be consistent with the very nature of the global assessment that the competent authorities are required to undertake by virtue of Article 8(1)(b) of Regulation No 207/2009 (judgment of 15 March 2007 in *T.I.M.E. ART* v *OHIM*, C-171/06 P, ECR, EU:C:2007:171, paragraph 41).

62 Therefore, it must be held that there is, in the present case, a likelihood of confusion, given the identical or similar nature of the goods in question and the similarity of the signs at issue. As the Board of Appeal correctly held, at paragraph 22 of the contested decision, the relevant public, whose level of attention is average, who do not have the opportunity to examine the marks side by side and whose recollection of the marks is, consequently, imperfect, will probably not remember the minor differences between the signs.

63 Having regard to all those considerations, the Board of Appeal did not fail correctly to apply Article 8(1)(b) of Regulation No 40/94 (now Article 8(1)(b) of Regulation No 207/2009) in finding that there was a likelihood of confusion between the signs at issue.

64 For all those reasons, the action must be dismissed in its entirety, without it being necessary to rule on the admissibility of the second part of the form of order sought by the applicant, requesting the Court to dismiss the opposition in its entirety (see, to that effect, judgments of 22 May 2008 in *NewSoft Technology* v *OHIM — Soft (Presto! Bizcard Reader)*, T-205/06, ECR, EU:T:2008:163, paragraph 70, and of 22 January 2009 in *Commercy* v *OHIM — easyGroup IP Licensing (easyHotel)*, T-316/07, EU:T:2009:14, paragraphs 35 and 67).

Costs

65 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, he must be ordered to pay the costs in accordance with the form of order sought by OHIM.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders Mr Max Fuchs to pay the costs.

Martins Ribeiro Gervasoni Madise

Delivered in open court in Luxembourg on 8 October 2014.

[Signatures]