Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

4 February 2016 *

(Community trade mark — Opposition proceedings — Application for the Community figurative mark STICK MiniMINI Beretta — Earlier Community word mark MINI WINI — Relative ground for refusal — No likelihood of confusion — Article 8(1)(b) of Regulation (EC) No 207/2009 — Article 8(3) of Regulation (EC) No 216/96)

In Case T-247/14,

Meica Ammerländische Fleischwarenfabrik Fritz Meinen GmbH & Co. KG, established in Edewecht (Germany), represented by S. Labesius, lawyer,

applicant,

v

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

defendant,

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

Salumificio Fratelli Beretta SpA, established in Barzanò (Italy) represented by G. Ghisletti, F. Braga and P. Pozzi, lawyers,

ACTION brought against the decision of the Fourth Board of Appeal of OHIM of 14 February 2014 (Case R 1159/2013-4) relating to opposition proceedings between Meica Ammerländische Fleischwarenfabrik Fritz Meinen GmbH & Co. KG and Salumificio Fratelli Beretta SpA,

THE GENERAL COURT (Sixth Chamber),

composed of S. Frimodt Nielsen (Rapporteur), President, F. Dehousse and A.M. Collins, Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 17 April 2014,

having regard to the response of OHIM lodged at the Court Registry on 26 August 2014,

having regard to the response of the intervener lodged at the Court Registry on 12 August 2014,

* Language of the case: English.

having regard to the reply of the applicant lodged at the Court Registry on 5 November 2014,

having regard to the rejoinder of the intervener lodged at the Court Registry on 28 January 2015,

having regard to the fact that no application for a hearing was submitted by the parties within the period of one month from notification of closure of the written procedure, and having therefore decided, acting upon a report of the Judge-Rapporteur, to rule on the action without an oral procedure pursuant to Article 135a of the Rules of Procedure of the General Court of 2 May 1991,

gives the following

Judgment

Background to the dispute

1 On 22 June 2011 the intervener, Salumificio Fratelli Beretta SpA, filed an application for registration of a Community trade mark with the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) pursuant to Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

2 Registration as a mark was sought for the following figurative sign:



3 The goods and services in respect of which registration was sought are in, inter alia, Classes 29 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 to the following description:

— Class 29: ‘Meat, poultry and game’;

— Class 43: ‘Services for providing food and drink’.

4 The Community trade mark application was published in *Community Trade Marks Bulletin* No 2011/139 of 26 July 2011.

5 On 24 October 2011, the applicant, Meica Ammerländische Fleischwarenfabrik Fritz Meinen GmbH & Co. KG, filed a notice of opposition pursuant to Article 41 of Regulation No 207/2009 to registration of the mark applied for in respect of the goods and services referred to in paragraph 3 above.

6 The opposition was based on the earlier Community word mark MINI WINI, filed on 31 July 2003 and registered on 2 March 2005 under reference number 3 297 835.

7 The goods covered by the earlier mark on which the opposition was based are in, inter alia, Class 29 and correspond to the following description: 'Meat products and charcuterie, meat and sausage preserves, fish, poultry and game, all in ready-to-eat, preserved, marinaded and frozen form; meat extracts; jellies, meat jellies; preserved prepared meals, mainly consisting of vegetables and/or meat and/or mushrooms and/or charcuterie and/or pulses and/or potatoes and/or sauerkraut and/or fruits; vegetable and mushroom preserves, ready-to-cook soups, ready-to-eat soups; vegetable paste; canned food, snacks, including suitable for the microwave; ready-to-cook and ready-to-eat prepared meals, including suitable for the microwave, mainly containing meat products and charcuterie, fish, poultry and game, mushrooms, vegetables, pulses, potatoes and/or sauerkraut; hot dogs; charcuterie in pastry cases; salads'.

8 The ground relied on in support of the opposition was that set out in Article 8(1)(b) of Regulation No 207/2009.

9 By decision of 30 April 2013, the Opposition Division partially upheld the opposition in respect of, inter alia, the goods 'Meat, fish, poultry and game' in Class 29. First, it considered that there was a likelihood of confusion between the marks at issue in respect of the product 'sausages', the only product for which the application had, in its view, proved genuine use of its mark. Secondly, as regards the services in Class 43, it rejected the opposition because those services and the product for which use of the mark had been proved were not similar.

10 On 21 June 2013, the intervener filed a notice of appeal with OHIM, pursuant to Articles 58 to 64 of Regulation No 207/2009, against the decision of the Opposition Division.

11 By decision of 14 February 2014 ('the contested decision'), the Fourth Board of Appeal of OHIM upheld the appeal and annulled the decision of the Opposition Division in its entirety.

12 In the first place, the Board of Appeal declared inadmissible the applicant's submissions seeking a decision altering the decision of the Opposition Division in respect of the services in Class 43, on the ground that they widened the scope of the appeal and did not satisfy the conditions laid down in Article 60 of Regulation No 207/2009. In the second place, it found, in respect of the goods in Class 29, that there was no likelihood of confusion between the marks at issue on the part of the relevant public, within the meaning of Article 8(1)(b) of Regulation No 207/2009, given that, in particular, their similarity was confined to the descriptive element 'mini'.

Forms of order sought

13 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to pay the costs.

14 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

15 The intervener contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs incurred by the intervener.

Law

16 In support of its action, the applicant relies on two pleas in law, alleging (i) infringement of Article 8(3) of Commission Regulation (EC) No 216/96 of 5 February 1996 laying down the rules of procedure of the Boards of Appeal of OHIM (OJ 1996 L 28, p. 11), as amended, and (ii) infringement of Article 8(1)(b) of Regulation No 207/2009.

First plea in law, alleging infringement of Article 8(3) of Regulation No 216/96

17 As a preliminary point, it should be noted that the intervener filed a notice of appeal before the Board of Appeal against the decision of the Opposition Division. In the context of that appeal, the applicant, as the respondent, in its response, sought a decision altering that decision in respect of the services in Class 43. The Board of Appeal declared those submissions inadmissible.

18 In the present action, the applicant complains that the Board of Appeal infringed Article 8(3) of Regulation No 216/96 by declaring its submissions seeking a decision altering the decision of the Opposition Division inadmissible. By virtue of that provision, the applicant notes that 'in *inter partes* proceedings, the defendant may, in his or her response, seek a decision annulling or altering the contested decision on a point not raised in the appeal' and 'such submissions shall cease to have effect should the appellant discontinue the proceedings'. Moreover, contrary to what the Board of Appeal appears to suggest in paragraph 21 of the contested decision, that provision is not inconsistent with Regulation No 207/2009. Finally, the applicant considers that its submissions seeking a decision altering the decision of the Opposition Division, had they been declared admissible, would have affected the substance of the case.

19 OHIM acknowledges that the Boards of Appeal differ concerning the interpretation of Article 8(3) of Regulation No 216/96. In that respect, it draws the Court's attention to the judgment of 7 April 2011 in *Intesa Sanpaolo* v *OHIM — MIP Metro (COMIT)* (T-84/08, ECR, EU:T:2011:144). Nevertheless, OHIM considers that it is not necessary to rule on that question, given that, first, the applicant's submissions in respect of the services concerned would not have been accepted as regards the substance of the case and, secondly, the applicant's rights of the defence were not infringed.

20 The intervener submits that the Board of Appeal correctly interpreted Regulation No 216/96 in the light of Regulation No 207/2009 and declared the applicant's submissions in its response inadmissible.

21 First, it should be noted that, contrary to what the Board of Appeal stated in paragraph 26 of the contested decision, the wording of Article 8(3) of Regulation No 216/96 makes no mention of 'requests' in the sense of requests for proof of use, suspension or an oral hearing.

22 According to the case-law, it is apparent from the wording of Article 8(3) of Regulation No 216/96 that, in the context of proceedings before the Board of Appeal, the defendant may, in its submissions, exercise its right to challenge the decision that is contested. Thus, simply by virtue of its status as a defendant, it is allowed to challenge, inter alia, the validity of the Opposition Division's decision. Nor does that provision limit that right to the pleas in law already raised in the appeal. It provides, in fact,

that the submissions may relate to a point not raised in the appeal. Moreover, that provision does not make any reference to the fact that the defendant could itself have brought an appeal against that decision. Accordingly, that decision may be challenged either in separate proceedings, as provided for in Article 60 of Regulation No 207/2009, or in the submissions provided for in Article 8(3) of Regulation No 216/96 (see, to that effect, judgment in *COMIT*, cited in paragraph 19 above, EU:T:2011:144, paragraph 23).

23 Secondly, contrary to the incorrect finding of the Board of Appeal, to accept of the admissibility of the applicant's submissions in its response does not amount to permitting the defendant before the Board of Appeal to bring an action disregarding the time limit and payment of the fee for appeal provided for in Article 60 of Regulation No 207/2009.

24 It is clear from the wording of Article 8(3) of Regulation No 216/96 that the possibility of seeking a decision annulling or altering the contested decision on a point not raised in the appeal is limited to inter partes proceedings. Those submissions may be made in the response submitted in the context of those proceedings. That is why, as the applicant correctly noted, that provision states that those submissions are to cease to have effect should the appellant discontinue the proceedings before the Board of Appeal. Thus, in order to challenge a decision of the Opposition Division, separate proceedings, as provided for in Article 60 of Regulation No 207/2009, are the only legal remedy by which it is certain that the appellant's objections may be asserted. It follows that submissions seeking a decision annulling or altering the contested decision on a point not raised in the appeal within the meaning of Article 8(3) of Regulation No 216/96 differ from the appeal provided for in Article 60 of Regulation No 207/2009. Accordingly, as the applicant correctly stated, the conditions laid down in Article 60 of Regulation No 207/2009 do not apply to those submissions.

25 In the present case, it should be noted that, in accordance with Article 8(3) of Regulation No 216/96, the applicant, as the defendant before the Board of Appeal, submitted, in its response, within the prescribed time limit, submissions seeking a decision altering the decision of the Opposition Division in respect of the services in Class 43. Furthermore, as indicated in paragraphs 23 and 24 above, it was not required, in that context, to comply with the time limit or to pay the fee for appeal provided for in Article 60 of Regulation No 207/2009. Consequently, the Board of Appeal erred in rejecting those submissions as inadmissible.

26 Moreover, as regards the arguments of the applicant and OHIM concerning the merits of the applicant's arguments relating to the services in Class 43, it should be noted that the review carried out by the General Court under Article 65 of Regulation No 207/2009 is a review of the legality of the decisions of the Boards of Appeal of OHIM. In the context of that review, the General Court may annul or alter a decision against which an action has been brought if, at the time the decision was adopted, it was vitiated by one of the grounds for annulment or alteration set out in Article 65(2) of that regulation (judgment of 18 December 2008 in *Les Éditions Albert René* v *OHIM*, C-16/06 P, ECR, EU:C:2008:739, paragraph 123). Nevertheless, that power of the General Court to alter decisions does not have the effect of conferring on that Court the power to carry out an assessment on which that Board of Appeal has not yet adopted a position (see, to that effect, judgment of 5 July 2011 in *Edwin* v *OHIM*, C-263/09 P, ECR, EU:C:2011:452, paragraphs 71 and 72).

27 Accordingly, in the present case, it is not for the Court to assess the merits of an argument which was not assessed by the Board of Appeal.

28 In conclusion, it is necessary to uphold the first plea in law, alleging infringement of Article 8(3) of Regulation No 216/96, and, consequently, to annul partially the contested decision, in so far as it rejected the applicant's submissions concerning the services in Class 43.

The second ground of appeal, alleging infringement of Article 8(1)(b) of Regulation No 207/2009

29 As a preliminary point, it must be noted that the applicant's second plea in law concerns the dismissal of the opposition as regards the goods in Class 29.

30 The applicant states, in essence, that the Board of Appeal wrongly concluded, first, that the distinctive character of the earlier Community trade mark was not above average, and, secondly, that the relevant public's level of attention was average and, finally, that there was no likelihood of confusion between the marks at issue.

31 OHIM and the intervener dispute the applicant's arguments.

32 Article 8(1)(b) of Regulation No 207/2009 provides that, upon opposition by the proprietor of an earlier trade mark, 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 two 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.

33 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 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).

34 For the purposes of applying Article 8(1)(b) of Regulation No 207/2009, a likelihood of confusion presupposes both that the two 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 in *Commercy* v *OHIM — easyGroup IP Licensing (easyHotel)*, T-316/07, ECR, EU:T:2009:14, paragraph 42 and the case-law cited).

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

Relevant public

36 The applicant considers, first, that since the goods in question are inexpensive, the public's level of attention when purchasing them will be low. Secondly, it considers that the Board of Appeal, in its assessment, neglected the Italian public and the fact that the consumer rarely had the chance to make a direct comparison between the different marks.

37 According to case-law, in the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of goods 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).

38 Where the protection of the earlier trade mark extends to the entirety of the European Union, it is necessary to take into account the perception of the marks at issue by the consumer of the goods or services in question in that territory. However, it must be borne in mind that, for a Community trade mark to be refused registration, it is sufficient that a relative ground for refusal for the purposes of Article 8(1)(b) of Regulation No 207/2009 exist in part of the European Union (see, to that effect, judgment 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 76 and the case-law cited).

39 In the present case, as OHIM correctly stated, the Board of Appeal was correct in finding that, since the goods concerned were everyday consumer goods, the relevant public was the average consumer of the European Union, who was deemed to be reasonably well informed and reasonably observant and circumspect (see, to that effect, judgment of 13 December 2007 in *Cabrera Sánchez* v *OHIM — Industrias Cárnicas Valle (el charcutero artesano)*, T-242/06, EU:T:2007:391, paragraph 38).

40 That conclusion cannot be invalidated by the applicant's arguments. The Board of Appeal in no way failed to take into consideration the Italian public. It explicitly referred to that public in paragraph 39 of the contested decision, in which it stated that the word 'mini' was understood throughout the European Union, including Italy, as meaning 'small'. Similarly, in paragraph 45 of that decision, after recalling the case-law arising from the judgment of 22 June 1999 in *Lloyd Schuhfabrik Meyer* (C-342/97, ECR, EU:C:1999:323), the Board of Appeal correctly stated that, contrary to the applicant's claim, the consumer rarely had the chance to make a direct comparison between the different marks but had to place his trust in the imperfect picture of them that he had kept in his mind.

41 Consequently, the applicant's arguments relating to the relevant public must be rejected.

The comparison of the goods

42 According to settled case-law, in assessing the similarity of the goods or services at issue, all the relevant factors relating to those goods or services should be taken into account. Those factors include, in particular, their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary. Other factors may also be taken into account such as the distribution channels of the goods concerned (see judgment of 11 July 2007 in *El Corte Inglés* v *OHIM — Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)*, T-443/05, ECR, EU:T:2007:219, paragraph 37 and the case-law cited).

43 In the present case, all the goods covered by the mark applied for are covered by the earlier mark. Consequently, it must be concluded that the goods concerned are identical to those of the earlier mark, which is not, moreover, contested.

The comparison of the signs

44 First, the applicant submits that the dominant elements of the signs in question are, for the mark applied for, the element 'minimini' and secondly, for the earlier mark, the expression 'mini wini'. It considers that those signs are highly similar since they both contain the word 'mini' are pronounced in a similar manner, in so far as the pronunciation of that word is followed by pronunciation of the group of letters 'ini' in both of those signs. In the applicant's view, the two elements create, for each of the marks, a rhyme and, consequently, are more easily memorised and recognised by the relevant public. Secondly, the applicant complains that the Board of Appeal failed to take into account the fact that the element 'minimini' was the central element of the mark applied for on account of its prominent size and position. Finally, the applicant considers that, visually, the letter 'w' of the mark applied for may be perceived as an inverted letter 'm'.

45 The global assessment of the likelihood of confusion must, so far as concerns the visual, phonetic or conceptual similarity of the signs in question, be based on the overall impression given by the signs, bearing in mind, in particular, their distinctive and dominant elements. The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the global assessment of that likelihood of confusion. In this regard, the average consumer normally perceives a mark as a whole and does not engage in an analysis of 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).

46 Assessment of similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components (see judgment in *OHIM* v *Shaker*, cited in paragraph 45 above, EU:C:2007:333, paragraph 41 and the case-law cited). It is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element (judgments in *OHIM* v *Shaker*, cited in paragraph 45 above, EU:C:2007:333, paragraph 42, and of 20 September 2007 in *Nestlé* v *OHIM*, C-193/06 P, EU:C:2007:539, paragraph 42). That could be the case, in particular, where that component is capable on its own of dominating the image of that mark which members of the relevant public retain, with the result that all the other components are negligible in the overall impression created by that mark (judgment in *Nestlé* v *OHIM*, EU:C:2007:539, paragraph 43).

47 Furthermore, according to case-law, it should be noted that the public will not generally regard a descriptive element forming part of a composite mark as the distinctive and dominant element of the overall impression conveyed by that mark (judgments of 3 July 2003 in *Alejandro* v *OHIM — Anheuser Busch (BUDMEN)*, T-129/01, ECR, EU:T:2003:184, paragraph 53; 6 October 2004 *New Look* v *OHIM — Naulover (NLSPORT, NLJEANS, NLACTIVE and NLCollection)*, T-117/03 to T-119/03 and T-171/03, ECR, EU:T:2004:293, paragraph 34; and 7 July 2005 *Miles International* v *OHIM — Biker Miles (Biker Miles)*, T-385/03, ECR, EU:T:2005:276, paragraph 44).

– The visual comparison

48 According to the case-law, for the purpose of assessing the distinctive character of an element making up a mark, an assessment must be made of the greater or lesser capacity of that element to identify the goods or services for which the mark was registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings. In making that assessment, account should be taken, in particular, of the inherent characteristics of the element in question in the light of whether it is at all descriptive of the goods or services for which the mark has been registered (see judgment of 13 June 2006 in *Inex* v *OHIM — Wiseman (Representation of a cowhide)*, T-153/03, ECR, EU:T:2006:157, paragraph 35 and the case-law cited).

49 In the present case, it should be noted that the signs in question both contain the word ‘mini’, which alludes to a characteristic of the goods concerned. As the Board of Appeal correctly stated in paragraph 39 of the contested decision, that word refers to the small size of the goods, which the applicant, moreover, does not dispute. Accordingly, that word carries descriptive resonance and, consequently, is less capable of identifying the goods for which the mark was registered as coming from a particular undertaking.

50 Furthermore, contrary to the applicant’s claim, the repetition of the word ‘mini’ in the element ‘minimini’ of the mark applied for does not have the effect of making that element more distinctive. Even if it were necessary to assess that element as a whole, as the applicant claims, the relevant public

will perceive that element as straightforward repetition of the word 'mini'. That public will therefore see it only as an indication of the very small size of the goods concerned. That public will not perceive the element in question as a distinctive element.

51 Furthermore, the public will not generally consider a descriptive element forming part of a composite mark to be the distinctive and dominant element of the overall impression conveyed by that mark. However, the weak distinctive character of an element of a composite mark does not necessarily imply that that element cannot constitute a dominant element since, because of, in particular, its position in the sign or its size, it may make an impression on consumers and be remembered by them (see, to that effect, judgment in *Representation of a cowhide*, cited in paragraph 48 above, EU:T:2006:157, paragraph 32 and the case-law cited).

52 It must therefore be examined whether the element 'minimini' of the mark applied for is capable of being the dominant element of that mark because of its size or position.

53 In that regard, it should be noted that a composite trade mark cannot be regarded as being similar to another trade mark which is identical or similar to one of the components of the composite mark, unless that component forms the dominant element within the overall impression created by the composite mark. That is the case where this component is likely to dominate, by itself, the image of that mark which the relevant public keeps in mind, with the result that all the other components of the mark are negligible within the overall impression created by it (judgment of 23 October 2002 in *Matratzen Concord* v *OHIM — Hukla Germany (MATRATZEN)*, T-6/01, ECR, EU:T:2002:261, paragraph 33). However, it is only if all the other elements of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element.

54 In the present case, it must be noted that, having regard to the words 'stick', 'fratelli', 'beretta', '1812', and 'gli originali' which surround it, the element 'minimini' is not the dominant element of the mark applied for within the meaning of the case-law cited in paragraph 53 above.

55 It is true that, as the Board of Appeal observed, the words 'fratelli', '1812' and 'gli originali' of the mark applied for attract the relevant public's attention less because of their small size, and the element 'stick' of that mark will become part of the overall impression for the English-speaking public, which will understand it as descriptive of the shape of the goods concerned.

56 However, the public's attention will be held by the element 'beretta' of the mark, which, unlike the word 'mini', has no meaning in the relevant languages. It should be specified, as it was by the Board of Appeal in paragraph 41 of the contested decision, that the fact that the average Italian consumer might recognise that element as a surname is not relevant because it has no equivalent in the earlier sign and is not similar to it. It should be observed that that element is written in white inside a dark oval shape, which makes it stand out visually.

57 Accordingly, all the elements comprising the mark applied for, and in particular the element 'beretta', contribute to forming the image of that mark that the relevant public keeps in mind and are consequently not negligible. It must therefore be considered that the visual comparison between the signs in question must be made on the basis of the entirety of their elements and not solely on the basis of the elements 'minimini', in respect of that mark, and 'mini wini', in respect of the earlier mark.

58 In the light of the above, the contested decision must be endorsed, in so far as it concludes, in paragraph 41 thereof, that the signs in question display only a low degree of visual similarity.

59 Moreover, even if the letter 'w' of the mark applied for can be perceived as an inverted letter 'm', that argument of the applicant has no bearing on the alleged dominant character of the element 'minimini' of the mark applied for and cannot increase the degree of similarity between the signs in question.

– The phonetic comparison

60 As regards the phonetic comparison, the finding of the Board of Appeal that there is a low degree of similarity between the signs in question must be endorsed.

61 It should be noted, as the Board of Appeal found in paragraph 42 of the contested decision, that the relevant public will direct its attention to the element 'beretta' of the mark applied for, which is more distinctive, and, to a certain extent, to the element 'stick' of that mark for the part of the public which does not understand its meaning. Neither of the two words has equivalents in the earlier mark. Accordingly, contrary to the applicant's claim, the signs in question are not pronounced in the same way.

62 It follows that the Board of Appeal was correct in considering that the degree of phonetic similarity between the signs in question was low.

– The conceptual comparison

63 As regards the conceptual comparison, the Board of Appeal was right to find that the signs in question display only a low degree of similarity, given that they share only the word 'mini', which merely describes a characteristic of the goods concerned.

64 Consequently, it must be held that the Board of Appeal was right to consider that the signs in question displayed a low degree of conceptual similarity.

The likelihood of confusion

65 The applicant complains that the Board of Appeal did not conclude from the evidence it adduced that the earlier mark had an enhanced distinctive character. It also complains that sufficient attention was not paid to the Italian consumer in the Board of Appeal's assessment. It considers, moreover, that the relevant public will tend to abbreviate the mark applied for when memorising or naming the goods concerned. Furthermore, it considers that the words 'stick', 'gli originali' and 'fratelli beretta 1812' of the mark applied for will not be perceived as elements as important as the element 'minimini' of that mark. In the applicant's view, the element 'minimini', in addition to having no meaning, is the most readable element of that mark. The Board of Appeal should therefore have considered the element in question to be the most dominant in the overall impression given by the mark applied for or should, at the very least, have recognised its independent distinctive role. Consequently, the Board of Appeal erred in ruling out the existence of a likelihood of confusion.

66 The global assessment of the likelihood of confusion implies some interdependence between the factors taken into account, and in particular between the similarity of the marks and that of the goods or services covered. Accordingly, a low degree of similarity between the goods covered may be offset by a high 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 *VENADO with frame and others*, cited in paragraph 38 above, EU:T:2006:397, paragraph 74).

67 As regards the evidence submitted by the applicant, it should be noted that the existence of an unusually high level of distinctiveness as a result of the public's recognition of a mark on the market necessarily presupposes that at least a significant part of the relevant public is familiar with it (see judgment of 12 July 2006 in *Vitakraft-Werke Wührmann* v *OHIM– Johnson's Veterinary Products (VITACOAT)*, T-277/04, ECR, EU:T:2006:202, paragraph 34 and the case-law cited). In the present case, it was established that the relevant public is European Union consumers.

68 In order to assess whether a mark has a highly distinctive character as a result of the public's recognition of it, all the relevant facts of the case must be taken into consideration, in particular the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see judgment in *VITACOAT*, cited in paragraph 67 above, EU:T:2006:202, paragraph 35 and the case-law cited).

69 In the present case, the applicant produced the same evidence before the Board of Appeal as it had before the Opposition Division. That evidence is as follows:

— a statement of the applicant's Managing Director, indicating volumes of sales and turnover in the years 2006 to 2009;

— copies of labels of the goods;

— a letter from the applicant's media agency concerning the amounts spent on television advertising from 2005 to 2009 (EUR 358 700 to EUR 476 300, 668 to 934 spots per year);

— promotional leaflets for sausage products;

— a CD of examples of television advertising;

— invoices and orders for goods identified as sausage products sold under the mark MINI WINI;

— copies of screenshots of online foodstuff retailers' websites offering sausage products sold under the mark MINI WINI;

— an extract from the register of the Deutsche Patent-und Markemamt (German Patent and Trade Mark Office) in respect of the word mark MINI WINI;

— copies of screenshots of a website with advertising for sausage products sold under the mark MINI WINI;

— a copy of a photograph of the applicant's goods in a jar and a declaration by the applicant concerning various aspects of its goods, such as their ingredients.

70 It must first be noted that the evidence concerning sales volumes and the advertising material for the earlier mark cannot be considered to be direct evidence of the existence of a high level of distinctiveness as a result of the public's recognition of the mark. Sales volumes and advertising material as such do not show that the public targeted by the goods in question perceives the sign as an indication of commercial origin (see, by analogy, judgment of 12 September 2007 in *Glaverbel* v *OHIM (Texture of a glass surface)*, T-141/06, EU:T:2007:273, paragraph 41).

71 As regards the production and broadcasting of televised spots, the applicant submitted, inter alia, a letter from a media agency indicating, in the form of a table, the number of broadcasts of televised spots promoting the goods of the earlier mark between 2005 and 2009 and the relevant expenditure. It is apparent from that table that, for that period, the televised spots in question were broadcast between 668 and 934 times per year and required expenditure of between EUR 358 700 and EUR 476 300 per year. Those figures, while relevant, do not permit a finding that at least a significant part of the relevant public is familiar with the earlier mark. It is true that those figures are an indication. However, they are not sufficient alone to establish acquisition of an unusually high level of distinctiveness, since they are not supported, in particular, by evidence indicating that the televised

spots in question had an effect on the public targeted by the earlier mark (see, to that effect, judgment of 14 September 2009 in *Lange Uhren* v *OHIM (Geometric shapes on a watch-face)*, T-152/07, EU:T:2009:324, paragraph 145 and the case-law cited).

72 Finally, it should be noted that the applicant has not submitted any evidence, such as opinion polls, market research or declarations from professional associations indicating the proportion of the relevant public which, on account of that mark, identifies the goods as coming from the applicant. Furthermore, as the Board of Appeal noted, the evidence adduced does not give any indication of the applicant's market share.

73 The Board of Appeal was consequently right to consider, in paragraph 50 of the contested decision, that although the evidence submitted showed use of the earlier mark in Germany for sausages, it did not permit a finding that the level of distinctiveness of that mark was greater than average. The fact that a mark has been used in the European Union for a certain number of years is not sufficient, in itself, to prove that the relevant public identifies the goods as coming from a specific undertaking thanks to that mark.

74 It follows from the above that the applicant's claims concerning the enhanced distinctiveness of the earlier mark must be rejected. The Board of Appeal was therefore correct in considering in paragraph 47 of the contested decision that, since the sign MINI WINI, when viewed as a whole, has no meaning, the inherent distinctive character of the earlier mark was average.

75 Furthermore, it should be noted that, where the earlier mark is a Community trade mark, the relevant territory for the purpose of analysing the likelihood of confusion is the whole of the European Union. Accordingly, contrary to the applicant's claim, the Board of Appeal did not err in not focusing more on the Italian public. It should also be noted that it had previously been established that the relevant public, including the Italian public, would understand the element 'minimini' of the mark applied for as straightforward repetition of the word 'mini'.

76 Furthermore, while it is possible to abbreviate a mark (see, to that effect, judgment of 6 October 2015 in *Monster Energy* v *OHIM – Balaguer (icexpresso + energy coffee)*, T-61/14, EU:T:2015:750, paragraph 55 and the case-law cited), it has, however, already been established in paragraphs 56 and 61 above that the element 'minimini' of the mark applied for was less distinctive than the element 'beretta' of that mark and would accordingly attract the attention of the relevant public less. The applicant's arguments relating to the customer's tendency to abbreviate the mark applied for so that only the element 'minimini' is retained and the other elements are ignored must therefore be rejected.

77 Finally, contrary to the applicant's claim, the element 'minimini' of the mark applied for is not the only text element that is perfectly readable, within the meaning of the judgment of 20 October 2009 in *Aldi Einkauf* v *OHIM — Goya Importaciones y Distribuciones* (4 OUT Living) (T-307/08, ECR, EU:T:2009:409). As established in paragraphs 56 and 61 above, the element 'beretta' of that mark is not less perceptible than the element 'minimini' of that mark. The applicant's argument must therefore be rejected.

78 It must also be held, in the light of all the foregoing, that the sign applied for does not consist of a juxtaposition of the name of the company of the intervener and the earlier mark used in practically the same manner. Thus, contrary to what the applicant states, it has not been established that the element 'minimini of the mark applied for had an independent distinctive role within the meaning of the judgment of 6 October 2005 in *Medion* (C-120/04, ECR, EU:C:2005:594).

79 In conclusion, it should be noted, first, that the level of attention of the relevant public in respect of the goods concerned is average. Secondly, the earlier mark has average inherent distinctive character for the reasons set out in paragraph 74 above. Thirdly, it should be noted that the goods covered by the signs in question are identical. Fourthly, it is clear from paragraphs 44 to 64 above that those signs have a low degree of visual, phonetic and conceptual similarity.

80 It follows from all the above considerations that the Board of Appeal was correct in finding that there was no likelihood of confusion pursuant to Article 8(1)(b) of Regulation No 207/2009, and, that it was accordingly not necessary to examine the proof of use.

81 Consequently, the applicant's second plea in law must be rejected.

82 It follows from the above that the contested decision must be annulled to the extent that the Board of Appeal rejected the applicant's submissions seeking a decision altering the decision of the Opposition Division in respect of the services in Class 43.

Costs

83 Under the first subparagraph of Article 134(3) of the Rules of Procedure of the General Court, where each party succeeds on some and fails on other heads, the General Court may order that each party bear its own costs. In the present case, since both parties have been partially unsuccessful, each party should be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Annuls the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 14 February 2014 (Case R 1159/2013-4) inasmuch as it rejects the submissions made by Meica Ammerländische Fleischwarenfabrik Fritz Meinen GmbH & Co. KG seeking a decision altering the decision of the Opposition Division in respect of the services in Class 43;**

2. **Dismisses the remainder of the action;**

3. **Orders Meica Ammerländische Fleischwarenfabrik Fritz Meinen GmbH & Co. KG, the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) and Salumificio Fratelli Beretta SpA to bear their own costs.**

Frimodt Nielsen Dehousse Collins

Delivered in open court in Luxembourg on 4 February 2016.

[Signatures]