Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

8 July 2020 *

(EU trade mark — Opposition proceedings — Application for the EU figurative mark mediFLEX easySTEP — Earlier EU figurative mark Stepeasy — Relative grounds for refusal — Article 8(1)(b) of Regulation (EU) 2017/1001)

In Case T-21/19,

Pablosky, SL, established in Madrid (Spain), represented by M. Centell, lawyer,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by J. Crespo Carrillo, H. O'Neill 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

docPrice GmbH, established in Koblenz (Germany), represented by K. Landes, lawyer,

ACTION brought against the decision of the Fourth Board of Appeal of EUIPO of 8 November 2018 (Case R 76/2018-4), relating to opposition proceedings between Pablosky and docPrice,

THE GENERAL COURT (Second Chamber),

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

Registrar: A. Juhász-Tóth, Administrator,

having regard to the application lodged at the Court Registry on 11 January 2019,

having regard to the response of EUIPO lodged at the Court Registry on 23 April 2019,

having regard to the response of the intervener lodged at the Court Registry on 17 April 2019,

having regard to the decision of 27 November 2019 joining Cases T-20/19 and T-21/19 for the purposes of the oral part of the procedure,

* Language of the case: English.

further to the hearing on 15 January 2020, in the course of which a number of questions were put to the applicant and to EUIPO,

gives the following

Judgment [1]

Background to the dispute

1 On 3 August 2016, the intervener, docPrice GmbH, 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 Registration as a mark was sought for the following figurative sign:



3 The goods in respect of which registration of the mark applied for was sought are in Classes 10 and 25 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 10: 'Orthopaedic footwear, orthopaedic soles and shoe insoles, arch supports; boots for medical purposes; orthopaedic bandages and splints';

– Class 25: 'Clothing; headgear; footwear, and parts therefor, in particular shoe soles, shoe buckles and heels, health shoes'.

4 On 15 September 2016, the applicant, Pablosky, SL, filed a notice of opposition to registration of the mark applied for in respect of all of the goods referred to in paragraph 3 above.

1 Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

5 The opposition was based on the EU figurative mark reproduced below, which was filed on 4 February 2016 and registered on 22 June 2016 under the number 15076961 in respect of 'clothing', 'footwear' and 'headwear' in Class 25:



6 The grounds relied on by the applicant were those set out in Article 8(1)(b) of Regulation No 207/2009 (now Article 8(1)(b) of Regulation 2017/1001).

7 On 6 December 2017, the Opposition Division partially upheld the opposition on the ground that there was a likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation 2017/1001, and that it was necessary, on that ground, to reject the application for registration in respect of 'orthopaedic footwear' and 'boots for medical purposes' in Class 10 and in respect of 'clothing', 'headgear', 'footwear' and 'health shoes' in Class 25 (taken together, 'the contested goods'), but that the mark applied for could be registered in respect of the other goods, namely 'orthopaedic soles and shoe insoles, arch supports' and 'orthopaedic bandages and splints' in Class 10 and 'parts [for footwear], in particular shoe soles, shoe buckles and heels' in Class 25.

8 On 11 January 2018, the intervener filed a notice of appeal with EUIPO, in accordance with Articles 66 to 71 of Regulation 2017/1001, against the decision of the Opposition Division, in so far as the Opposition Division had partially upheld the opposition as regards the contested goods or, at the very least, as regards 'orthopaedic footwear' and 'boots for medical purposes' in Class 10.

9 By decision of 8 November 2018 ('the contested decision'), the Fourth Board of Appeal of EUIPO found that there was no likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation 2017/1001, with regard to any of the goods at issue, even with regard to those which were identical. Consequently, it annulled the Opposition Division's decision and rejected the opposition in its entirety, including with regard to the contested goods.

Forms of order sought

10 The applicant claims, in essence, that the Court should:

– annul the contested decision;

– reject the application for registration of the mark applied for in respect of all of the goods in Classes 10 and 25 referred to in the application;

– order EUIPO and the intervener to pay the costs.

11 EUIPO contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

12 The intervener contends, in essence, that the Court should:

– uphold the contested decision and dismiss the action;

– order the applicant to pay the costs.

Law

…

Substance

23 In support of its claims for annulment and alteration, the applicant relies, in essence, on a single plea in law alleging infringement of Article 8(1)(b) of Regulation 2017/1001.

24 EUIPO and the intervener contend that the action should be dismissed in its entirety on the ground that the Board of Appeal was right in finding, in the contested decision, that there was no likelihood of confusion within the meaning of Article 8(1)(b) of Regulation 2017/1001.

25 It is important to bear in mind that Article 8(1)(b) of Regulation 2017/1001 provides that, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for must not 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.

26 The fact that parties which claim that a decision of a Board of Appeal should be annulled do not dispute certain factors that are essential to the analysis of the likelihood of confusion does not mean that the Court may not or must not review the merits of those factors, since those factors constitute an essential stage of the reasoning which the Court is required to engage in in order to carry out that review. Where one of the parties claiming that the Board of Appeal's decision should be annulled has called into question the Board of Appeal's assessment relating to the likelihood of confusion, the Court has, by virtue of the principle of interdependence between the factors taken into account, in particular the similarity of the trade marks and that of the goods and services covered, jurisdiction to examine the Board of Appeal's assessment of those factors (see, to that effect, judgment of 18 December 2008, *Les Éditions Albert René* v *OHIM*, C-16/06 P, EU:C:2008:739, paragraph 47). Where it is called upon to assess the legality of a decision of a Board of Appeal of EUIPO, the Court cannot be bound by an incorrect assessment of the facts by that Board of Appeal, since that assessment is part of the findings the legality of which is being disputed before it (judgment of 18 December 2008, *Les Éditions Albert René* v *OHIM*, C-16/06 P, EU:C:2008:739, paragraph 48).

…

The relevant public and its level of attention

32 In paragraph 11 of the contested decision, the Board of Appeal stated that, in its view, the goods at issue were aimed 'mainly at the general public, who w[ould] display an average level of attention in relation to them, given that they are durable items which are not normally purchased particularly frequently'.

33 The applicant does not dispute that the relevant public corresponds to the general public, but seems to take the view that the level of attention of that public, when it purchases the goods at issue, is low and not average, as the Board of Appeal assumes in the contested decision, because those goods are everyday consumer goods which average consumers do not spend much time in choosing.

34 EUIPO and the intervener dispute the applicant's arguments, while maintaining that the Board of Appeal made certain incorrect assessments of the facts.

35 EUIPO concurs that the relevant public corresponds to the general public, but observes that, although it agrees with the Board of Appeal in considering that the level of attention of that public is average in respect of the 'clothing', 'headgear' and 'footwear' in Class 25, it takes the view, by contrast, that that level of attention is high as regards the 'health shoes', namely shoes which are beneficial for the health of the feet of the persons wearing them, in Class 25 and the 'orthopaedic footwear' and 'boots for medical purposes' in Class 10. It submits that, because of the special needs for which the 'health shoes' in Class 25 and the 'orthopaedic footwear' and 'boots for medical purposes' in Class 10 are bought and because of the possibility that those goods may be made to measure or require adjustments on account of the personal handicaps of the persons for whom they are intended and also because of the case-law relating to the general public's level of attention when purchasing goods that affect health, it should be held that that public displays a high level of attention when purchasing those goods.

36 Although the intervener does not dispute that the relevant public is the general public, the level of attention of which is average in relation to the 'clothing', 'headgear' and 'footwear' in Class 25, it submits that the 'health shoes' in Class 25 and the 'orthopaedic footwear' and 'boots for medical purposes' in Class 10 are not aimed at the general public, but at healthcare professionals specialising in orthopaedics and at a specific category of consumers suffering from specific physical disorders requiring them to wear orthopaedic footwear, whose level of attention will be high as regards health-related products.

37 Where the marks at issue are registered or registration of those marks is sought in respect of different goods or services, the Board of Appeal is required to identify the consumers who, in the relevant territory, are likely to use each of those goods or services (judgment of 17 February 2017, *Construlink* v *EUIPO — Wit-Software (GATEWIT)*, T-351/14, not published, EU:T:2017:101, paragraph 44).

38 In addition, according to the case-law, the relevant public to be taken into account for the purposes of assessing whether there is a likelihood of confusion is composed solely of consumers who are likely to use both the goods or services covered by the earlier trade mark and those covered by the mark in respect of which registration is sought (see, to that effect, judgments of 1 July 2008, *Apple Computer* v *OHIM — TKS-Teknosoft (QUARTZ)*, T-328/05, not published, EU:T:2008:238, paragraph 23, and of 30 September 2010, *PVS* v *OHIM — MeDiTA Medizinische Kurierdienst (medidata)*, T-270/09, not published, EU:T:2010:419, paragraph 28).

39 Furthermore, in the global assessment of the likelihood of confusion, account should be taken of the average consumer of the goods or services in question, who is deemed to be 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 goods or services in question (see, to that effect, judgment of 13 February 2007, *Mundipharma* v *OHIM — Altana Pharma (RESPICUR)*, T-256/04, EU:T:2007:46, paragraph 42 and the case-law cited).

40 In that regard, it is apparent from the case-law that 'clothing', 'footwear' and 'headgear' in Class 25 are considered to be everyday consumer goods that are aimed at the general public, which will display an average level of attention when purchasing them (see, to that effect, judgments of 27 September 2012, *Tuzzi fashion* v *OHIM — El Corte Inglés (Emidio Tucci)*, T-535/08, not published, EU:T:2012:495, paragraphs 3, 6 and 29; of 24 November 2016, *CG* v *EUIPO — Perry Ellis International Group (P PRO PLAYER)*, T-349/15, not published, EU:T:2016:677, paragraphs 3, 6 and 27 and the case-law cited, and of 8 February 2019, *Serendipity and Morgese* v *EUIPO — CKL Holdings (CHIARA FERRAGNI)*, T-647/17, not published, EU:T:2019:73, paragraphs 3, 6, 20 and 21).

41 Furthermore, it has been held that the relevant public, as regards orthopaedic articles, is composed of professionals in that sector and patients suffering from malformations or dysfunctions which need to be corrected by the wearing of such articles, with the result that the level of technical knowledge of that public has to be regarded as high (judgment of 16 December 2010, *Fidelio* v *OHIM (Hallux)*, T-286/08, EU:T:2010:528, paragraph 42). It has also been held that, although 'orthopaedic footwear' in Class 10 can be purchased by consumers as part of the general public or by health professionals, it is always chosen with care (judgment of 9 November 2016, *Birkenstock Sales* v *EUIPO (Representation of a pattern of wavy, crisscrossing lines)*, T-579/14, EU:T:2016:650, paragraphs 29 and 32). Health-related goods and services may be aimed both at professionals and at end consumers who will display a high level of attention as regards goods and services related to the state of their health (see judgment of 8 October 2014, *Laboratoires Polive* v *OHIM — Arbora & Ausonia (DODIE)*, T-77/13, not published, EU:T:2014:862, paragraph 25 and the case-law cited).

42 Lastly, the global assessment of the likelihood of confusion must be carried out having regard to the average consumer who has the lowest level of attention (see, to that effect, judgment of 15 July 2011, *Ergo Versicherungsgruppe* v *OHIM — Société de développement et de recherche industrielle (ERGO)*, T-220/09, not published, EU:T:2011:392, paragraph 21 and the case-law cited).

43 In opposition proceedings based on Article 8(1)(b) of Regulation 2017/1001, EUIPO may take account only of the list of goods applied for as it appears in the application for registration of the mark concerned, subject to any amendments thereto (see judgment of 16 September 2013, *Oro Clean Chemie* v *OHIM — Merz Pharma (PROSEPT)*, T-284/12, not published, EU:T:2013:454, paragraph 42 and the case-law cited).

44 In the present case, it must be pointed out that, in the light of the case-law cited in paragraph 40 above, the Board of Appeal did not err in finding that the 'clothing', 'headgear' and 'footwear' in Class 25 covered by the marks at issue were everyday consumer goods that were aimed at the general public, which would display an average level of attention when purchasing them.

45 By contrast, it must be held, in the light of the case-law cited in paragraph 41 above, that the Board of Appeal erred, in the contested decision, in finding that the 'orthopaedic footwear' and 'boots for medical purposes' in Class 10 covered by the mark applied for were aimed at the general public which had an average level of attention, rather than at healthcare professionals specialising in orthopaedics and at consumers belonging to the general public who suffered from orthopaedic problems requiring them to wear adapted footwear, whose level of attention is high as regards goods connected with their professional activity or the state of their health. The same is true as regards the 'health shoes' in Class 25 covered by the mark applied for, which, as is apparent from the name chosen in the application for registration, are a specific category of footwear which is, secondarily, beneficial for the health of the feet of the persons wearing them and is therefore purchased by consumers belonging to the general public who suffer from health problems of an orthopaedic nature and have a high level of attention.

The comparison of the goods at issue

46 In paragraph 13 of the contested decision, the Board of Appeal confirmed the Opposition Division's assessment that the 'clothing', 'headgear', 'footwear' and 'health shoes' in Class 25 covered by the mark applied for were identical to the 'clothing', 'headwear' and 'footwear' in that class covered by the earlier mark, stating that 'health shoes' were included in the broader category of 'footwear'. In paragraph 15 of that decision, it also confirmed the Opposition Division's assessment that the 'orthopaedic footwear' and 'boots for medical purposes' in Class 10 covered by the mark applied for were similar, at least to a low degree, to the 'footwear' in Class 25 covered by the earlier mark. It took the view that the consumer could choose between purchasing general footwear, including certain types of health shoes, or more specialised orthopaedic footwear or boots for medical purposes, depending on the extent of his or her specific medical or orthopaedic needs. However, according to the Board of Appeal, in general terms, all of those goods were similar on account of their similar nature, method of use, method of manufacture and end users and also because they might be in competition with each other given that they serve the same purpose, namely to protect the foot.

47 The applicant claims that there is a 'close similarity' between the 'orthopaedic footwear' and 'boots for medical purposes' in Class 10 covered by the mark applied for and the 'footwear' in Class 25 covered by the earlier mark, for the same reasons as those set out by the Board of Appeal in the contested decision. However, it requests that the Court hold that the goods at issue, namely, on the one hand, the contested goods covered by the mark applied for and, on the other hand, the 'clothing', 'footwear' and 'headwear' in Class 25 covered by the earlier mark are 'identical'. In spite of that apparent contradiction, it therefore seems to be calling into question the merits of the Board of Appeal's assessment, in the contested decision, that the 'orthopaedic footwear' and 'boots for medical purposes' in Class 10 covered by the mark applied for are merely similar, albeit to a low degree, to the 'footwear' in Class 25 covered by the earlier mark.

48 EUIPO and the intervener dispute the applicant's arguments. The intervener, however, claims that certain assessments of the facts on the part of the Board of Appeal are incorrect. It submits that the 'health shoes' in Class 25 and the 'orthopaedic footwear' and 'boots for medical purposes' in Class 10 covered by the mark applied for cannot be considered to be similar to the goods covered by the earlier mark.

49 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 or services at issue (see judgment of 11 July 2007, *El Corte Inglés* v *OHIM — Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)*, T-443/05, EU:T:2007:219, paragraph 37 and the case-law cited).

50 Where the goods or services covered by the earlier mark include the goods covered by the trade mark application, those goods or services are considered to be identical (see judgment of 24 November 2005, *Sadas* v *OHIM — LTJ Diffusion (ARTHUR ET FELICIE)*, T-346/04, EU:T:2005:420, paragraph 34 and the case-law cited).

51 In the present case, the Board of Appeal did not err in finding, in the contested decision, that the 'clothing', 'headgear' and 'footwear' in Class 25 covered by each of the marks at issue were, respectively, identical goods.

52 Likewise, in the light of the case-law cited in paragraph 50 above, the Board of Appeal did not err in finding, in the contested decision, that the 'health shoes' in Class 25 covered by the mark applied for were identical to the 'footwear' in that class covered by the earlier mark. Unlike orthopaedic footwear, which is primarily understood as being a health product, health shoes are a specific category of

footwear which are, secondarily, beneficial for the health of the feet of the persons wearing them. Consequently, 'health shoes' are indeed included, as the Board of Appeal points out in the contested decision, in the more general category of 'footwear'.

53 By contrast, it must be held, departing from the Board of Appeal's erroneous assessment in that regard in the contested decision, that the 'orthopaedic footwear' and 'boots for medical purposes' in Class 10 covered by the mark applied for and the 'footwear' in Class 25 covered by the earlier mark are similar to a low degree and not, as the Board of Appeal points out, 'at least to a low degree', which suggests that the similarity might be higher in degree than 'low'.

54 That outcome is justified for a number of reasons.

55 First of all, notwithstanding the fact that the Nice Classification was adopted for exclusively administrative purposes, the explanatory notes on the different classes of that classification are relevant in determining the nature and purpose of the goods and services under comparison (see, to that effect, judgments of 23 January 2014, *Sunrider* v *OHIM — Nannerl (SUN FRESH)*, T-221/12, not published, EU:T:2014:25, paragraph 31; of 10 September 2014, *DTM Ricambi* v *OHIM — STAR (STAR)*, T-199/13, not published, EU:T:2014:761, paragraph 36, and of 8 June 2017, *Bundesverband Deutsche Tafel* v *EUIPO — Tiertafel Deutschland (Tafel)*, T-326/16, not published, EU:T:2017:380, paragraph 45). In particular, where the description of the goods or services for which a mark is registered is so general that it may cover very different goods or services, it is possible to take into account, for the purposes of interpretation or as a precise indication of the designation of the goods or services, the classes in the classification that the trade mark applicants have chosen (see, to that effect, judgments of 25 January 2018, *Brunner* v *EUIPO — CBM (H HOLY HAFERL HAFERL SHOE COUTURE)*, T-367/16, not published, EU:T:2018:28, paragraph 50, and of 19 June 2018, *Erwin Müller* v *EUIPO — Novus Tablet Technology Finland (NOVUS)*, T-89/17, not published, EU:T:2018:353, paragraph 33). In the present case, the fact that the explanatory note relating to Class 25 of that classification states that that class, which concerns mainly 'clothing, footwear and headwear for human beings', does not include, in particular, 'orthopaedic footwear', which falls within another class, namely Class 10, which concerns mainly 'surgical, medical, dental and veterinary apparatus, instruments and articles generally used for the diagnosis, treatment or improvement of function or condition of persons and animals', leads to the conclusion that orthopaedic footwear or footwear for medical purposes must primarily be regarded as medical apparatus rather than as items of clothing, which they also are, but to a lesser extent. Although orthopaedic footwear or footwear for medical purposes serves to a lesser extent, like all 'footwear', to cover and protect the feet, it primarily has the function of correcting physical handicaps of an orthopaedic nature.

56 Next, and as the intervener correctly observes, it is a matter of common knowledge that orthopaedic footwear or footwear for medical purposes is either directly provided by a physician, on prescription, or sold in specialist shops for orthopaedic or medical products.

57 Lastly, it is also common knowledge that orthopaedic footwear or footwear for medical purposes is not produced, like footwear in general, industrially or in a standardised manner, but is manufactured to measure or, at the very least, tailored individually by orthopaedic technicians in accordance with each patient's needs (see, to that effect, judgments of 24 March 1994, *3M Medica*, C-148/93, EU:C:1994:123, paragraphs 10 and 12; of 7 November 2002, *Lohmann and Medi Bayreuth*, C-260/00 to C-263/00, EU:C:2002:637, paragraph 42, and of 11 June 2009, *Hans & Christophorus Oymanns*, C-300/07, EU:C:2009:358, paragraph 2).

…

The global assessment of the likelihood of confusion

98 In paragraphs 27 and 28 of the contested decision, the Board of Appeal found that, with regard to all of the goods at issue, even with regard to those which were identical, there was no likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation 2017/1001, on account of the fact that the low degree of similarity between the marks at issue was the result of an overlap which did not relate to the most distinctive or dominant elements of those marks, namely the element 'mediflex' in the mark applied for and the word 'step' in the earlier mark, and on account of the fact that, owing to the characteristic and eye-catching figurative composition, colours and sole device in the earlier mark, that mark produced a very different overall impression to that produced by the mark applied for.

99 The applicant criticises the Board of Appeal for finding that, with regard to all of the goods at issue, even those which were identical, there was no likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation 2017/1001, on account of the fact that the low degree of similarity between the marks at issue was the result of an overlap which did not relate to the most distinctive or dominant elements of those marks. It submits that those marks are highly similar visually and phonetically, because they coincide in the element which is the most distinctive and dominant element in each of them. It maintains that, given that those marks coincide in the words 'easy' and 'step' and that the goods at issue are, moreover, highly similar or identical, the mark applied for could be perceived as a mere variant of the earlier mark. It submits that the Board of Appeal should therefore have found, in the contested decision, that there was a likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation 2017/1001, even if only on the part of the relevant public which does not have a command of basic English vocabulary, such as the Polish and Spanish general public.

100 EUIPO and the intervener dispute the applicant's arguments. The intervener observes, in particular, that the earlier mark's distinctive character is weak, on account of the descriptiveness of the element 'stepeasy' and the purely ornamental or descriptive (shoe sole) character of the figurative elements, whereas that of the mark applied for is, at least, average, since the element 'mediflex' has no meaning in English or in any other language of the European Union.

101 According to settled case-law, the risk that the relevant 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 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 concerned (see judgment of 9 July 2003, *Laboratorios RTB* v *OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)*, T-162/01, EU:T:2003:199, paragraphs 30 to 33 and the case-law cited). Accordingly, a low degree of similarity between the goods or services covered may be offset by a high degree of similarity between the marks, and vice versa (see judgment of 23 October 2002, *Fifties*, T-104/01, EU:T:2002:262, paragraph 27 and the case-law cited).

102 For the purposes of applying Article 8(1)(b) of Regulation 2017/1001, 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).

103 It is apparent from the case-law that the more distinctive the earlier mark, the greater will be the likelihood of confusion (judgments of 11 November 1997, *SABEL*, C-251/95, EU:C:1997:528, paragraph 24, and of 29 September 1998, *Canon*, C-39/97, EU:C:1998:442, paragraph 18).

104 Furthermore, the likelihood of confusion varies according to the level of attention which the relevant public displays. Consequently, according to the case-law, although the relevant public only rarely has a chance to compare the various marks directly and must therefore rely on 'an imperfect recollection of them', a high level of attention on the part of the relevant public can lead to the conclusion that it will not confuse the marks at issue despite the lack of any direct comparison between the various marks (see judgment of 13 July 2017, *Migros-Genossenschafts-Bund* v *EUIPO — Luigi Lavazza (CReMESPRESSO)*, T-189/16, not published, EU:T:2017:488, paragraph 86 and the case-law cited).

105 In the present case, it must be held that the goods at issue are, in part, identical, as regards the 'clothing', 'headgear' and 'footwear' in Class 25 covered by the marks at issue and the 'health shoes' in Class 25 covered by the mark applied for, and, in part, similar to a low degree, as regards the 'footwear' in Class 25 covered by the earlier mark and the 'orthopaedic footwear' and 'boots for medical purposes' in Class 10 covered by the mark applied for.

106 Furthermore, it has been held that, for the part of the relevant public which does not have a command of basic English vocabulary, the marks at issue are visually, phonetically and conceptually different and that, for the rest of that public, they are visually and phonetically similar to an average degree and conceptually similar to a low degree. In view of the fact that the goods at issue will generally be chosen on sight in shops, catalogues or on the Internet (judgments of 6 October 2004, *New Look* v *OHIM — Naulover (NLSPORT, NLJEANS, NLACTIVE and NLCollection)*, T-117/03 to T-119/03 and T-171/03, EU:T:2004:293, paragraph 50; of 8 February 2007, *Quelle* v *OHIM — Nars Cosmetics (NARS)*, T-88/05, not published, EU:T:2007:45, paragraph 69, and of 18 May 2011, *IIC* v *OHIM — McKenzie (McKENZIE)*, T-502/07, not published, EU:T:2011:223, paragraphs 50 and 51) or prescribed or recommended orally (see paragraph 56 above), the visual and phonetic standpoints are, in the present case, the most important, with the result that the degree of similarity that exists between those marks, considered as a whole, may be defined as being average for the part of that public which is English speaking or has a command of that basic vocabulary.

107 Consequently, the necessary conditions for a likelihood of confusion to be capable of being held to exist are satisfied, in the present case, only in relation to the part of the relevant public which is English speaking or has a command of basic English vocabulary.

108 In so far as the intervener submits that the earlier mark has a low degree of inherent distinctiveness on account of the descriptiveness of the element 'stepeasy' and the purely ornamental or descriptive (shoe sole) nature of the figurative elements, it is important to point out that the Board of Appeal did not expressly, in the contested decision, adopt a position on the degree of inherent distinctiveness of that mark. That degree of inherent distinctiveness will vary, for the part of the relevant public which is English speaking or has a command of basic English vocabulary, from low, with regard to 'footwear', in respect of which the abstract blue and orange latticed drawing will, like the abovementioned element, be allusive or evocative, to average, with regard to 'clothing' and 'headgear', in relation to which that abstract design will not be allusive or evocative.

109 As regards the general public which is English speaking or has a command of basic English vocabulary and is likely to purchase the 'footwear' in Class 25 covered by each of the marks at issue, it must be pointed out that, even though the goods at issue are identical, the average degree of overall similarity that exists between those marks is not sufficient, in the present case, in the light of the average level of attention which the public concerned will display and the low degree of inherent distinctiveness of the earlier mark in relation to 'footwear', for it to be held that that public may believe that those goods come from the same undertaking or, as the case may be, from economically linked undertakings.

110 As regards the general public which is English speaking or has a command of basic English vocabulary and is likely to purchase the 'clothing' and 'headgear' in Class 25 covered by each of the marks at issue, it must be pointed out that, in the light of the average level of attention which the public concerned

will display, the identical nature of the goods at issue and the average degree of inherent distinctiveness of the earlier mark in relation to those goods, the average degree of overall similarity that exists between those marks is sufficient, in the present case, for it to be held that that public may believe that those goods come from the same undertaking or, as the case may be, from economically linked undertakings.

111 As regards the non-negligible part of the general public which is English speaking or has a command of basic English vocabulary and is likely to purchase the 'health shoes' in Class 25 or 'orthopaedic footwear' and 'boots for medical purposes' in Class 10 covered by the mark applied for as well as the 'footwear' in Class 25 covered by the earlier mark, it must be pointed out that, even with regard to those of the goods in question which are identical and not merely similar to a low degree, the average degree of overall similarity that exists between those marks is not sufficient, in the present case, in the light of the high level of attention which the public concerned will display and the low degree of inherent distinctiveness of the earlier mark in relation to 'footwear', for it to be held that that public may believe that those goods come from the same undertaking or, as the case may be, from economically linked undertakings.

112 Accordingly, the applicant is justified in claiming that, in the contested decision, the Board of Appeal erred in finding that there was no likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation 2017/1001, in annulling the Opposition Division's decision of 6 December 2017 and in rejecting the opposition as regards the 'clothing' and 'headgear' in Class 25 covered by the mark applied for.

113 The applicant's claim for annulment of the contested decision must, to that extent, be granted and must, as to the remainder, be dismissed as unfounded.

114 Furthermore, as regards the applicant's claim requesting that the Court alter the contested decision, it must be pointed out that, although the power of the General Court to alter decisions does not have the effect of conferring on that Court the power to substitute its own reasoning for that of a Board of Appeal or to carry out an assessment on which that Board of Appeal has not yet adopted a position, it must be exercised in situations in which the General Court, after reviewing the assessment made by the Board of Appeal, is in a position to determine, on the basis of the matters of fact and of law as established, what decision the Board of Appeal was required to take (judgment of 5 July 2011, *Edwin* v *OHIM*, C-263/09 P, EU:C:2011:452, paragraph 72).

115 In the present case, it must be pointed out that, in the contested decision, the Board of Appeal adopted a position on whether there was a likelihood of confusion between the marks at issue with regard to 'clothing' and 'headgear' in Class 25, with the result that the Court has the power to alter that decision in that regard.

116 As is apparent, in particular, from paragraphs 105 to 112 above, the Board of Appeal was required to find that there was a likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation 2017/1001, with regard to those goods.

117 Accordingly, the appeal which the intervener brought before the Board of Appeal must, by alteration of the contested decision, be dismissed in so far as it concerns those goods. As to the remainder, the claim for alteration of the contested decision must be dismissed as unfounded.

…

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Annuls the decision of the Fourth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 8 November 2018 (Case R 76/2018-4), relating to opposition proceedings between Pablosky, SL and docPrice GmbH, in so far as it concerns 'clothing' and 'headgear' in Class 25 of the Nice Agreement;**

2. **Dismisses the appeal which docPrice brought before the Board of Appeal of EUIPO in so far as it concerns the goods referred to in point 1;**

3. **Dismisses the action as to the remainder;**

4. **Orders each party to bear its own costs.**

Tomljenović Škvařilová-Pelzl Nõmm

Delivered in open court in Luxembourg on 8 July 2020.

E. Coulon
Registrar

S. Papasavvas
President