JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

20 May 2009 *

In Joined Cases T-405/07 and T-406/07,

Caisse fédérale du Crédit mutuel Centre Est Europe (CFCMCEE), established in Strasbourg (France), represented by P. Greffe, J. Schouman and L. Paudrat, lawyers,

applicant,

v

Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. Folliard-Monguiral, acting as Agent,

defendant,

ACTIONS brought against the decisions of the First Board of Appeal of OHIM of 10 July 2007 (Case R 119/2007-1) and of 12 September 2007 (Case R 120/2007-1)

* Language of the case: French.

respectively, relating to applications for registration of the word signs P@YWEB CARD and PAYWEB CARD as Community trade marks,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of J. Azizi (Rapporteur), President, E. Cremona and S. Frimodt Nielsen, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the applications lodged at the Registry of the Court of First Instance on 14 November 2007,

having regard to the order of 10 January 2008 joining Cases T-405/07 and T-406/07,

having regard to the response lodged at the Registry of the Court of First Instance on 1 February 2008,

further to the hearing on 3 December 2008,

gives the following

Judgment

Background to the dispute

1 On 1 June 2004, the applicant, the Caisse fédérale du Crédit mutuel Centre Est Europe (CFCMCEE), submitted two applications for Community trade marks to the Office for Harmonization 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. The trade marks for which registration was sought are the word signs P@YWEB CARD and PAYWEB CARD. The goods and services registration of which was applied for are within Classes 9, 36 and 38 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.

2 By decisions of 5 and 7 December 2006, based on Article 7(1)(b) and (c) and Article 7(2) of Regulation No 40/94, the Examiner refused registration of the trade marks applied for in respect of all the goods and services concerned. Those goods and services correspond to the following descriptions in each class:

— Class 9: photographic, cinematographic, signalling, checking (supervision) apparatus and instruments, apparatus for recording, transmission or reproduction of sound or images; recording discs, electronic diaries, automatic vending machines, video tapes, bank note dispensers, ticket dispensers, dispensers of statements of account and account summaries, cameras (cinematographic cameras), video cameras, integrated circuit cards (smart cards), magnetic encoded cards, magnetic or smart identity cards, magnetic or smart payment

cards, both credit and debit, video cassettes, CD-ROMs, bar code readers, compact discs (audio-video), compact discs (read-only memory), false coin detectors, floppy disks, magnetic data media, optical data media, video screens, data processing equipment, intercommunication equipment, computer interfaces, computer readers, software (recorded programs), monitors (computer programs), computers, computer peripheral devices, recorded computer programs, recorded computer operating programs, radiotelephony sets, audio-receivers and video-receivers, telephone apparatus, television apparatus, coin-operated mechanisms for television sets, time recording apparatus, transmitters (telecommunication), central processing units (processors);

— Class 36: real estate affairs, accident insurance underwriting, factoring, banking affairs, financial affairs, monetary affairs, credit bureaux, debt collection agencies, financial analysis, insurance underwriting, lease-purchase financing, real estate appraisal, issue of tokens of value, provident funds, mutual funds and investment of capital, credit card services, debit card services, guarantees, exchanging money, cheque verification, issuing of travellers' cheques, financial consultancy, insurance brokerage, housing agents, stocks and bonds brokerage, deposits of valuables, safe deposit services, savings banks, financial evaluation and assessments (insurance, banking, real estate), fiduciary, financing services, financial information (insurance, banking, real estate), capital investment services, electronic transfer of funds, financial management, financial information, rent collection, health insurance underwriting, marine insurance underwriting, mortgage loans, financial transactions, monetary transactions, financial sponsorship, loans (financing), banking, life insurance underwriting, management of securities accounts, online financial information services, computerised interactive financial information services, excluding, for all the services set out in the trade mark applications, healthcare services and medical technology by third-party payers;

— Class 38: telecommunications, news agencies, in particular in the banking sector, communications by computer terminals, communications by radio, communications by telephone, sending of telegrams, transmission of telegrams, broadcasting

of television programmes, radio broadcasting, television broadcasting, information about telecommunication, leasing of telecommunications equipment, leasing of equipment for the transmission of messages, leasing of telephones, electronic mail, message sending, computer-aided transmission of messages and images, cellular telephone communication, satellite transmission, telephone services, transmission of information by internet, intranet and extranet, interactive computerised transmission of information services, transmission of information from a computerised databank, international transmission of data between computerised network systems services, online data transmission, excluding, for all the services set out in the trade mark applications, healthcare services and medical technology by third-party payers.

3 On 16 January 2007, the applicant filed appeals under Articles 57 to 62 of Regulation No 40/94 against the decisions of the Examiner.

4 By decisions of 10 July 2007 in Case R 119/2007-1 (Case T-405/07) and 12 September 2007 in Case R 120/2007-1 (Case T-406/07) ('the contested decisions'), the First Board of Appeal of OHIM dismissed the applicant's appeals.

5 In support of the contested decisions, the Board of Appeal found essentially that in this case the relevant public comprised average European consumers with knowledge of the English language. The words 'p@y' and 'pay', both of which refer to the concept of 'payment', could be associated with the internet and computing fields given that the average consumer is accustomed to using the internet and electronic means of payment for distance purchasing (paragraphs 15 and 16 of the contested decisions). The direct reference to the internet, electronic business and electronic telecommunications in general which is immediately perceptible to such consumers is reinforced by the '@' sign in the sign P@YWEB CARD (paragraphs 15 and 16 of the decision contested in Case T-405/07). With regard to the word 'web', the Board of Appeal pointed out that it is regularly employed to designate the internet as a whole. Having regard to the goods and

services for which registration was sought, this word would immediately be understood by the relevant public as a direct reference to the internet and more generally to computer networks (paragraphs 17 and 18 of the contested decisions). With regard to the word 'card', the Board of Appeal considered that it was mostly used in computing, financial and banking jargon. The average consumer would understand it as a direct reference to credit cards and, more generally, to smart cards, and not as an indication of the commercial origin of the goods and services in question (paragraphs 19 and 20 of the contested decisions). Therefore, each of the components of the trade marks sought is devoid of any distinctive character for the goods and services concerned (paragraph 21 of the contested decisions).

6 Nor, further, is the combination of the three words in a single expression arbitrary or unusual in its structure, nor does it alter the relevant public's perception or understanding of them. Indeed, it is clear from the combinations 'p@yweb card' and 'payweb card' that the three component words mean exactly the same as those same words taken separately (paragraphs 22 to 24 of the contested decisions). Therefore, from the point of view of the relevant public, the structure of the combinations is not perceptibly different from the terminology used in everyday language to indicate their commercial origin (paragraph 25 of the contested decisions).

7 With regard to the meaning of the three components of the signs in question, the Board of Appeal pointed out that the average consumer, who has daily contact with internet and electronic technology, is deemed readily to understand the link between those technologies and the goods and services relating thereto, on the one hand, and the words 'pay' or 'p@y', 'web' and 'card', which are in general use in computing and e-commerce jargon, on the other (paragraph 27 of the contested decisions). The combination of those three elements, associated with the goods and services in question, would therefore be understood by the relevant public to indicate a card used to make purchases on the internet and more generally using new electronic information and communication technologies (paragraph 28 of the contested decisions).

8 Therefore, the trade marks sought are principally intended to induce the consumer to buy the goods and use the services in question in order to be able to make card payments online. This is true of 'photographic, cinematographic, signalling, checking (supervision) apparatus and instruments, apparatus for recording, transmission or reproduction of sound or images; recording discs, electronic diaries, automatic vending machines, video tapes, bank note dispensers, ticket dispensers, dispensers of statements of account and account summaries, cameras (cinematographic cameras), video cameras, video tapes, CD-ROMs, bar code readers, compact discs (audio-video), compact discs (read-only memory), false coin detectors, floppy disks, optical data media, video screens, data processing equipment, intercommunication equipment, computer interfaces, computer readers, software (recorded programs), monitors (computer programs), computers, computer peripheral devices, recorded computer programs, recorded computer operating programs, radiotelephony sets, audio-receivers and video-receivers, telephone apparatus, television apparatus, time recording apparatus, transmitters (telecommunication), central processing units (processors)' within Class 9 of the Nice Agreement. The specific and necessary function of all those goods is to ensure the operation of telecommunications services and banking and financial services that are essential to effect online payment transactions (paragraphs 30 and 31 of the contested decisions).

9 Furthermore, the marks sought, taken as a whole, could serve to designate both the nature and purpose of 'integrated circuit cards (smart cards), magnetic encoded cards, magnetic or smart identity cards, magnetic or smart payment cards, both credit and debit, magnetic data media, coin-operated mechanisms for television sets' within the same class. According to the Board of Appeal, those goods are smart cards used for payment on the internet. Furthermore the specific function of those goods is to ensure the operation of online communication and information transmission services offered by the applicant that are essential to effect distance purchasing transactions. There is, therefore, from the point of view of the relevant public, a direct and specific link between the trade marks sought and those goods (paragraphs 32 and 33 of the contested decisions).

10 The fact that the marks sought are of a purely informative and promotional nature in relation to the services within Classes 36 and 38 of the Nice Agreement precludes them from being perceived by the relevant public as an indication of the commercial origin of those services. They all relate principally or secondarily to electronic communication services including those provided by the internet and online banking, financial and insurance services (paragraph 34 of the contested decisions). With regard to the services within Class 36, the Board of Appeal found that the marks sought carried a clear informative message, namely that the information and transactions relating to the services in question may be obtained or carried out at a distance thanks to the availability of a payment card connected to the internet or to a computer network in general. In addition, in so far as the services within Class 38 relate to electronic data transmission, they are directly linked with the operation and use of the internet, and, more generally, to new information technologies (paragraphs 35 and 36 of the contested decisions).

11 It follows from the above that, taken as a whole, the trade marks sought are mainly perceived as a commercial representation of the goods and services in question and that their main, if not exclusive, function is to indicate to the relevant consumer that they are goods or services that will enable him to make online payments using a card (paragraph 37 of the contested decisions).

12 The Board of Appeal concluded from this that the Examiner rightly decided that the ground for refusal laid down in Article 7(1)(b) of Regulation No 40/94 precluded registration of the trade marks sought. It held that, in those circumstances, there was no need to consider the possible application of Article 7(1)(c) of that regulation (paragraphs 39 and 40 of the contested decisions).

Forms of order sought by the parties

13 The applicant claims that the Court should:

— annul the contested decisions;

— order registration of the trade marks sought for all the goods and services within Classes 9, 36 and 38 of the Nice Agreement.

14 At the hearing, in response to a question from the Court, the applicant stated that it was seeking annulment of the contested decisions only, and that it abandoned the second head of its form of order sought, which was formally noted in the record of the hearing.

15 OHIM contends that the Court should:

— dismiss the actions;

— order the applicant to pay the costs.

Law

1. *Arguments of the parties*

16 The applicant raises a single plea of infringement of Article 7(1)(b) of Regulation No 40/94.

17 First, the applicant claims essentially that the word 'pay' or 'p@y' refers to the verb 'to pay' and bears no relation to the internet or computing fields. Moreover, in the case of the sign P@YWEB CARD, the 'p@y' element is unusual and surprising owing to the presence of the '@' sign.

18 Secondly, with regard to the word 'web', the applicant argues that the English-speaking public understands it mainly as designating a web, web network or net and, by analogy, any complex combination or network of links and branches and not as a direct reference to the internet or to computer networks. The word 'web' can be associated with the internet or other telecommunications networks only as an abbreviation of the expression 'world wide web' and is, in that case, always preceded by the definite article 'the'.

19 Thirdly, the applicant claims that the word 'card' means first and foremost a piece of paper or cardboard and is not understood by the consumer as a reference to the computing, banking or financial spheres.

20 Fourthly, with regard to the unusual combinations 'payweb' and 'p@yweb', whose two components belong to different fields and call to mind different concepts, the applicant argues that they do not have a direct, certain and readily identifiable meaning for the English-speaking consumer of the goods and services concerned and are therefore distinctive. The same is true of the combinations made up of the elements 'pay' or 'p@y', 'web' and 'card' as a whole, which demand close scrutiny and do not comply with the English rules of syntax.

21 Therefore, the marks sought are arbitrary combinations for the goods and services concerned, stemming from the unusual and individual combinations of the words 'pay' or 'p@y','web' and 'card' and they do not have a clearly or readily identifiable meaning. In fact, the Board of Appeal could have reached its conclusion only by a complex reasoning process, in which the average reasonably observant consumer does not engage. Since they have no direct, certain and immediate meaning for the relevant public, the marks sought cannot be regarded as descriptive of the goods and services concerned or of any of their qualities and are distinctive in relation thereto.

22 With regard to the goods within Class 9 of the Nice Agreement set out in paragraph 8 above, the applicant rejects as manifestly erroneous the Board of Appeal's statement that the specific and necessary function of all these goods is to ensure the operation of telecommunications and banking and financial services that are essential for online payment transactions. In relation to those goods, the marks sought would not be perceived by the relevant public as an indication of their commercial origin. It was only by a complex reasoning process, which the average reasonably observant consumer

does not undertake, that the Board of Appeal was able to conclude that the marks sought lacked distinctiveness in relation to the goods and services concerned.

23 With regard to the other goods within Class 9 set out in paragraph 9 above, the applicant submits, essentially for the reasons set out in paragraphs 21 and 22 above, that the Board of Appeal's assessment is also manifestly erroneous. Finally, the applicant claims that the Board of Appeal's determination concerning the services within Classes 36 and 38 of the Nice Agreement is also manifestly erroneous, for similar reasons.

24 In the light of the foregoing considerations, the applicant argues that the trade marks sought are distinctive as regards all the goods and services concerned and are not descriptive.

25 OHIM contends that the actions should be dismissed essentially on the ground that, taken as a whole, the marks sought are perceived to denote a payment card for electronic internet transactions on the one hand, and a card that facilitates payment for access to the internet on the other.

26 With regard to the first of those meanings, OHIM argues that the signs P@YWEB CARD and PAYWEB CARD directly describe the nature and/or purpose of magnetic or smart payment cards, both credit and debit, and integrated circuit cards (smart cards) and magnetic encoded cards within Class 9 of the Nice Agreement, since they may be used as payment cards. The same reasoning applies to credit and debit card services

within Class 36 and, more generally, to all property and finance services designated by the marks sought, whose purpose is, particularly, to transfer a sum of money. That meaning also describes the function of all the computing goods within Class 9, as well as telecommunications services within Class 38 which are necessary for the implementation of a computerised payment system on the internet.

27 As to the second of those meanings, OHIM maintains that it describes the nature and function of magnetic or smart identity cards within Class 9 since they enable an internet user to be identified so as to guarantee confidentiality in regard to the information exchanged or transactions effected on the internet. The same is true for magnetic data media and optical data media within the same class since they may take the form of cards and enable payment for access to the internet. That meaning also describes the function of telecommunications services within Class 38.

28 The trade marks sought describe the function of all those services which may have in common the receipt or transmission (for payment) of data by the internet. This covers services involving radio communication, broadcasting of television programmes, radio broadcasting, television broadcasting, cellular telephone communication, satellite transmission, and telephone services, since radio and television broadcasts can, as is well known, be received and telephonic communications made by the internet.

29 Accordingly, OHIM submits that the marks sought are understood as an indication of the nature or purpose of and/or of the ways in which the goods and services function, rather than as a reference to their commercial origin. None of the marks' components enable the relevant public to retain them easily or readily as distinctive marks for those goods or services.

2. *Findings of the Court*

Legal bases and relevant case-law

30 Under Article 7(1)(b) of Regulation No 40/94, 'trade marks which are devoid of any distinctive character' are not to be registered.

31 The concept of general interest underlying Article 7(1)(b) of Regulation No 40/94 is indissociable from the essential function of a trade mark, which is to guarantee the identity of the origin of the marked product or service to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin (see, to that effect, Case C-304/06 P *Eurohypo* v *OHIM* [2008] ECR I-3297, paragraph 56 and the case-law cited).

32 Thus, for a trade mark to possess distinctive character within the meaning of that provision, it must serve to identify the product or service in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product or service from those of other undertakings (Joined Cases C-456/01 P and C-457/01 P *Henkel* v *OHIM* [2004] ECR I-5089, paragraph 34). To this end, it is not necessary for the mark to convey exact information about the identity of the manufacturer of the product or the supplier of the services. It is sufficient that the mark enables members of the public concerned to distinguish the product or service that it designates from those which have a different trade origin and to conclude that all the goods or services that it designates were manufactured, marketed or supplied under the control of the owner of the mark and that the owner is responsible for their quality (see the judgment of 10 October 2008 in Joined Cases T-387/06 to T-390/06 *Inter-IKEA* v *OHIM (Representation of a pallet)* (not published in the ECR), paragraph 27 and the case-law cited).

33 On the other hand, signs which do not enable the relevant public to repeat a purchase experience if positive, or avoid it if negative, when purchasing the goods or services in question on a subsequent occasion, are devoid of any distinctive character within the meaning of that provision. That is so, in particular, in relation to signs commonly used to market the goods or services concerned. Such signs are in fact deemed to be incapable of performing the essential function of a trade mark, which is to identify the origin of the goods or service in question (see, to that effect, the judgment of 12 March 2008 in Case T-341/06 *Compagnie générale de diététique* v *OHIM (GARUM)* (not published in the ECR), paragraph 29 and the case-law cited).

34 Finally, the distinctive character of a mark must be assessed, first, in relation to the goods or services for which registration has been requested and, secondly, in relation to the perception of the relevant public, consumers who are reasonably well informed and reasonably observant and circumspect (*Representation of a pallet*, cited in paragraph 32 above, paragraph 28 and the case-law cited).

Perception by the relevant public of the trade marks applied for

General comments

35 With regard, first of all, to identifying the relevant public, it must be stated that the goods and services within Classes 9, 36 and 38 of the Nice Agreement for which registration was sought in this case relate, in particular, to electronics, computing, the use of communication and data exchange networks, electronic, computer and telecommunications apparatus and equipment, and to commercial transactions within the financial, banking, insurance and real property sectors as required by average European consumers as a whole. Having regard to the fact that the marks

sought are composed of three English words and that the use of English is common in the financial, banking, electronic and computing sectors to which those classes relate, the Board of Appeal was correct to have regard to average English-speaking consumers, and average consumers with an elementary knowledge of English, who, in any event, represent a very large proportion of the relevant European public.

36 Next, it is necessary to examine whether the Board of Appeal correctly analysed the meaning of the three components of the marks sought, taken separately and together, from the point of view of the relevant public, in order to find that they were not distinctive in relation to the goods and services for which registration was sought.

37 As the case-law has made clear, in the case of compound word marks, the relevant meaning, established on the basis of all their constituent elements and not only one of them, must be taken into account (Case T-28/06 *RheinfelsQuellen H. Hövelmann* v *OHIM (VOM URSPRUNG HER VOLLKOMMEN)* [2007] ECR II-4413, paragraph 32). As regards such compound trade marks, the assessment of their distinctive character cannot be limited to an evaluation of each of their words or components, considered in isolation, but must, on any view, be based on the overall perception of those marks by the relevant public and not on the presumption that elements individually devoid of distinctive character cannot, on being combined, have a distinctive character. The mere fact that each of those elements, considered separately, is devoid of any distinctive character does not mean that their combination cannot present such character (*Eurohypo* v *OHIM*, cited in paragraph 31 above, paragraph 41). In other words, in order to assess whether or not a trade mark has any distinctive character, the overall impression given by it must be considered, which may however mean examining, first, in the overall assessment, each of the components of which the trade mark concerned is composed (Case C-238/06 P *Develey* v *OHIM* [2007] ECR I-9375, paragraph 82).

38 It is therefore necessary to analyse the marks sought, not only with regard to the various elements of which they are composed and the relationships between those elements, but also overall.

The three elements of which the marks sought are composed and the relationship between them

39 With regard to the English word 'pay' or 'p@y', the Board of Appeal correctly found that it means 'to pay' and the replacement of the letter 'a' by the '@' sign — which is just the small 'a' in cursive script surrounded by a circle — has no appreciable effect on the average consumer's understanding of it. As OHIM argues, the fact that this word is used mainly as a verb in English does not preclude its use as a noun as in the combinations 'pay TV' or 'payphone'. Accordingly, it must be held that, from the average consumer's point of view, the word 'pay' or 'p@y' has a strong financial and banking connotation.

40 The applicant is also wrong to contest the existence of a connection between the word 'pay' or 'p@y' on the one hand, and the computing and internet fields on the other. With regard to the mark sought in Case T-405/07, there is such a connection solely by virtue of the fact that the word 'p@y' contains an '@' sign, which is in itself evocative of the internet and in particular of e-mails, that is to say, electronic communications exchanged by the internet.

41 In addition, the marks sought combine the word 'pay' or 'p@y' with the words 'web' and 'card', the connections between the words 'pay' or 'p@y' and 'web' being particularly strong owing to the fact that they are combined in one word. Therefore, having regard to the connotation of the word 'web' in computing terminology (see paragraph 42 below), the Board of Appeal was correct to find, in paragraph 16 of the contested decisions, that the relevant public readily perceives the term 'pay' or 'p@y' as being connected with the internet and the act of electronic payment, which is particularly true of distance purchasing and paid access to a communication network.

42 With regard to the word 'web', the applicant's argument that this word principally means 'web', 'web network' or 'net' and is not sufficiently associated with the computing and internet fields must be rejected. Nowadays, the word 'web' forms part of basic English computing vocabulary and is a reference to the internet, a worldwide electronic and computing infrastructure that is well known and widely used. That is borne out by the abbreviation 'www' in domain names, designating the synonymous expression 'world wide web', or expressions such as 'surf the web' to denote browsing on the internet. Therefore, the Board of Appeal correctly found, in paragraphs 17 and 18 of the contested decisions, that the word 'web' is readily understood by the average consumer as a direct reference to the internet and, more generally, to computer networks.

43 With regard to the word 'card', the Board of Appeal correctly found that in current English that word very often refers to credit or debit cards and to bank cards in general including smart cards (paragraphs 19 and 20 of the contested decisions). That financial and banking connotation is not called into question by the fact that the main general English dictionaries also define that word as designating a piece of paper or cardboard. In this case, that connotation is also specifically strengthened by the combination of the word 'card' with the word 'pay' or 'p@y', even though in the marks sought those words are separated by a space.

44 Nor, further, can the applicant's argument that there is no connection between the word 'card' and the computing and internet field be upheld. In particular, the ability to access a communication network via a public or private electronic terminal, for payment where appropriate, by means of a card, and to carry out commercial and financial transactions and the ability to purchase services or goods online using a credit card have become widespread phenomena for the average European consumer (see, to that effect, the judgment of 25 November 2008 in Case T-325/07 *CFCMCEE* v *OHIM (SURFCARD)* (not published in the ECR), paragraphs 56 and 67).

45 Accordingly, having regard to the meaning of the word 'pay' or 'p@y', and to its close connection with, first, the word 'web' with which it is combined, and, secondly, the word 'card', which means, in particular, bank card or credit or debit card, the average consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect, necessarily and, without any need for detailed analysis, associates those three different elements, both with the financial and banking sectors in the broad sense and with computing and the internet.

Assessment of the trade marks sought as a whole

46 It must be pointed out that the word signs P@YWEB CARD and PAYWEB CARD are composed of a main noun (card) and two qualifying nouns (pay or p@y and web). The main noun is separated by a space from the two qualifying nouns, which are combined in a single word. As the Board of Appeal found in paragraph 24 of the contested decisions, the structure of that combination is not unusual and is fully in accordance with English lexical and syntactical rules, like neologisms such as 'payphone' or 'pay TV', which are used, in particular, in the computing, electronic, media and telecommunications sectors covered by Classes 9, 36 and 38 of the Nice Agreement (see, to that effect and by analogy, *SURFCARD*, cited in paragraph 44 above, paragraph 53).

47 In that regard, it must be added that the combinations 'p@yweb' and 'payweb', which may designate a paid-for electronic or computing infrastructure, as well as paid-for services supplied in that context, are unlikely to convey to the average consumer the impression that the marks sought are unusual or arbitrary. That applies even more strongly since those combinations also contain the word 'card', which indicates a means of payment which can be used within that infrastructure or for purchasing such services (see paragraphs 43 and 45 above).

48 It follows from the foregoing considerations that the Board of Appeal correctly found, in paragraph 24 of the contested decisions, that the meaning of the combinations 'p@yweb card' and 'payweb card' is no different from that of the expression composed of those words in isolation and that, accordingly, those combinations as such are not unusual or arbitrary.

49 The Court must also reject the applicant's argument advanced in support of its action in Case T-405/07 that the word mark P@YWEB CARD is distinctive on the ground that the letter 'a' is replaced by the typographic '@' sign, which is unusual and surprising to the average consumer. Conceptually, the '@' sign is not an imaginative element of the mark such as to create a perceptible difference compared to the everyday language used by the relevant public, namely the word 'pay'. In the context of the internet and computing, which must be the relevant one, particularly given the presence of the additional word 'web', the average consumer does not pay particular attention to the @ sign, the figurative element of which is merely a stylised version of the letter 'a' (see paragraph 39 above). The applicant also acknowledged that the term 'p@y' may be likened to the verb 'pay' which means 'to pay'.

50 In the light of all the foregoing considerations, it must be concluded that the Board of Appeal was entitled to consider, essentially, that the relevant English-speaking public would readily perceive the trade marks sought both individually and as a whole as denoting cards which enable either paid access to a computer or electronic communication network such as the internet, or electronic payment in commercial transactions made using such a network.

51 Having regard to that perception by the relevant public of the trade marks sought, it is necessary to review whether or not the marks are sufficiently distinctive in relation to the various goods and services concerned within Classes 9, 36 and 38 of the Nice Agreement.

The distinctive character of the trade marks sought in relation to the goods and services concerned

Preliminary observations

52 First of all, it must be noted, in particular, that the signs commonly used to market the goods or services concerned are devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94 because they are deemed to be incapable of performing the essential function of a trade mark, which is to identify the commercial origin of the good or service in order thus to enable the consumer purchasing the good or service designated by the mark to repeat a purchase experience if positive, or avoid it if negative (see the case-law cited in paragraph 32 above).

53 Next, with regard to the nature of the relationship between the signs P@YWEB CARD and PAYWEB CARD on the one hand, and the goods and services concerned on the other, the Board of Appeal found, essentially, in paragraphs 30 to 37 of the contested decisions, that the average consumer would perceive the marks sought mainly as a commercial representation for advertising purposes of the goods and services which did not enable their commercial origin to be identified. Yet it must be noted that the goods and services concerned falling within Classes 9, 36 and 38 of the Nice Agreement are very varied and encompass various groups and categories of goods and services.

54 In this connection, it is clear from the case-law of the Court of Justice with regard to the scope of the obligation on the national authorities to state reasons when it comes to the application of the grounds for refusal set out in Article 3 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), which is applicable by analogy in this case since the legislative content of the provision is essentially identical to that of Article 7(1) of Regulation No 40/94 (see, to that effect, the judgment of 12 March 2008

in Case T-128/07 *Suez* v *OHIM (Delivering the essentials of life)* (not published in the ECR), paragraph 33, and the judgment of 2 April 2008 in Case T-181/07 *Eurocopter* v *OHIM (STEADYCONTROL)* (not published in the ECR), paragraph 42; see also *Develey* v *OHIM*, cited in paragraph 37 above, paragraphs 91 and 92), that, first, an examination of the absolute grounds for refusal must be carried out in relation to each of the goods or services for which trade mark registration is sought and that, secondly, the decision of the competent authority refusing registration of a trade mark must, in principle, state reasons in respect of each of those goods or services. The Court stated that this duty to state reasons also arises from the essential requirement for any decision of an authority refusing the benefit of a right conferred by Community law to be subject to judicial review which is designed to secure effective protection for that right and which, accordingly, must cover the legality of the reasons for the decision. However, where the same ground of refusal is given for a category or group of goods or services, that authority may use only general reasoning for all the goods and services concerned (Case C-239/05 *BVBA Management, Training en Consultancy* [2007] ECR I-1455, paragraphs 34 to 37).

55 None the less, the fact that OHIM is able to use general reasoning with regard to the application of an absolute ground for refusal to a category or group of goods or services must not frustrate the objective of the duty to state reasons under Article 253 EC and the first sentence of Article 73 of Regulation No 40/94, which is to subject a decision refusing registration of a Community trade mark to effective judicial review (see, to that effect, the judgment of 21 November 2007 in Case T-111/06 *Wesergold Getränkeindustrie* v *OHIM — Lidl Stiftung (VITAL FIT)* (not published in the ECR), paragraph 62). Accordingly, the goods or services concerned must be interlinked in a sufficiently direct and specific way, to the point where they form a category or group of goods or services sufficiently homogeneous to permit OHIM to use general reasoning (see, to that effect and by analogy, the judgment of 14 December 2006 in Case T-392/04 *Gagliardi* v *OHIM — Norma Lebensmittelfilialbetrieb (MANÜ MANU MANU)* (not published in the ECR), paragraphs 91 and 92). However, the mere fact that the goods or services in question come within the same class of the Nice Agreement is not sufficient for that purpose, since the classes often contain a wide variety of goods or services which are not necessarily interlinked in a sufficiently direct and specific way.

56 In addition, defective or inadequate reasoning, which is a matter of infringement of essential procedural requirements under Article 253 EC, constitutes a ground involving a question of public policy, which the Community Courts must raise of their own motion (see the judgment of 17 April 2008 in Case T-389/03 *Dainichiseika Colour & Chemicals Mfg.* v *OHIM — Pelikan (Representation of a pelican)* (not published in the ECR), paragraph 85 and the case-law cited).

57 It is in the light of those principles that it must be determined whether the Board of Appeal examined and provided an adequate statement of reasons in relation to the lack of distinctive character of the trade marks sought for the goods and services concerned. Having regard to the fact that a minimum degree of distinctiveness is, as a rule, sufficient to preclude the application of the ground for refusal provided for in Article 7(1)(b) of Regulation No 40/94 (Case T-441/05 *IVG Immobilien* v *OHIM (I)* [2007] ECR II-1937, paragraph 42), it is all the more important that OHIM comply with that duty to state reasons in relation to all those goods and services.

The goods described as 'integrated circuit cards (smart cards), magnetic encoded cards, magnetic or smart identity cards, magnetic or smart payment cards, both credit and debit', 'magnetic data media' and 'coin-operated mechanisms for television sets' within Class 9

58 The Board of Appeal essentially found, in paragraphs 32 and 33 of the contested decisions, in relation to the goods described as 'integrated circuit cards (smart cards), magnetic encoded cards, magnetic or smart identity cards, magnetic or smart payment cards, both credit and debit, magnetic data media, coin-operated mechanisms for television sets' within Class 9 of the Nice Agreement, that the trade marks sought may, taken as a whole, serve to designate both their nature and purpose, since they are 'smart cards'. Furthermore, according to the Board of Appeal, from the average consumer's point of view, the fact that they are connected with internet payment is a quality or even essential characteristic of those goods whose specific and necessary function is to

ensure the operation of online information communication and transmission services and the execution of distance purchasing transactions.

59 First of all, in so far as such goods take the form of a card equipped with a magnetic strip, a microprocessor or a microchip capable of recording and transmitting information by means of a (digital) tool to read and process data, which is not proven in relation to 'magnetic data media' (see paragraphs 63 to 65 below), the goods, by reason of their characteristics and their similar or even identical functions, constitute a homogeneous group of products. First, they enable the information and data recorded on them to be transferred within a communication network such as the internet, or a cable or satellite network, to a service provider, in particular a provider of access to the internet, or an operator of telecommunications or televised services, in order to enable the latter to identify their holder and confirm his or her right of access. Secondly, such cards enable their holder, where appropriate for payment, to access the communication network in question in order to transmit, receive and record other information and data and to carry out certain transactions online, including electronic payments for distance purchasing (see, to that effect, *SURFCARD*, cited in paragraph 44 above, paragraph 64). The same is also true of 'coin-operated mechanisms for television sets' since those mechanisms, such as a decoder or a paid-for receiver box for television programmes offered on a cable or satellite network, are equipped both with a card (often referred to as a 'smart card') and with a device enabling the card to be inserted in order to authorise paid access to such a network.

60 Therefore, the Board of Appeal was entitled to conclude, in paragraph 33 of the contested decisions, that the word signs P@YWEB CARD and PAYWEB CARD have a direct and specific connection with those cards. The mere fact that the Board of Appeal classed those goods as 'smart cards' in paragraph 32 of the contested decisions cannot affect the correctness of its finding since those cards may have the same qualities and functions as magnetic cards, and are often also equipped with a magnetic strip although

the average consumer is not necessarily able to distinguish them or their differing characteristics and functions from one another (see, to that effect, *SURFCARD*, cited in paragraph 44 above, paragraph 65).

61 The fact that the Board of Appeal thus made an assessment based essentially on the descriptive nature of the trade marks sought in relation to the characteristics and functions of the goods concerned cannot cast any doubt on that conclusion. Indeed, it is plain from settled case-law that there is a clear overlap between the respective scope of the absolute grounds for refusal set out in Article 7(1)(b), (c) and (d) of Regulation No 40/94, which implies, in particular, that a word mark which is descriptive of characteristics of goods or services may, on that account, be devoid of any distinctive character in relation to those goods or services, without prejudice to other reasons why it may be devoid of distinctive character (see, to that effect, Case C-265/00 *Campina Melkunie* [2004] ECR I-1699, paragraphs 18 and 19, and *Eurohypo* v *OHIM*, cited in paragraph 31 above, paragraphs 54 and 69).

62 Therefore, the plea of infringement of Article 7(1)(b) of Regulation No 40/94 must be dismissed with regard to the goods described as 'integrated circuit cards (smart cards), magnetic encoded cards, magnetic or smart identity cards, magnetic or smart payment cards, both credit and debit' and 'coin-operated mechanisms for television sets' within Class 9 of the Nice Agreement.

63 With regard, secondly, to the goods described as 'magnetic data media', the Board of Appeal found, first, in paragraph 32 of the contested decisions, that they also constitute smart cards and secondly, in paragraph 33 of those decisions, that the specific and necessary function of those goods is to ensure the operation of online data communication and transmission services essential for the carrying-out of distance purchasing transactions. In its submissions, OHIM added that those goods may take the form of cards and enable paid access to the internet or to another communication network.

64 Regardless of the question whether the Board of Appeal was entitled to confine itself to such general reasoning, it is clear from the list of goods within Class 9, as set out in the application for registration, which refers to 'integrated circuit cards (smart cards), magnetic encoded cards' and 'magnetic data media' as separate goods that, unless proven otherwise, such media do not generally comprise smart cards and do not necessarily have the same qualities and functions as those cards as described in paragraph 59 above. It is therefore for OHIM to establish that those media may take the form of a card, possess the essential characteristics of a card and therefore be perceived as such by the relevant public, and to provide, to that end, specific substantiation or evidence, which it failed to do. This is all the more necessary given that it is hardly plausible that the average consumer might associate the characteristics of a card with a magnetic hard disk or an audiovisual magnetic tape (see, to that effect, *SURFCARD*, cited in paragraph 44 above, paragraphs 71 and 72).

65 Having regard to the meaning from the relevant public's point of view of the trade marks sought, namely a payment card to carry out electronic transactions, particularly on the internet, or in order to access the internet for payment, it must be held that in this case the Board of Appeal did not establish to the requisite legal standard that the word signs P@YWEB CARD and PAYWEB CARD are incapable of fulfilling the essential function of a trade mark, namely indicating the commercial origin of the goods described as 'magnetic data media'.

66 Therefore, the plea of infringement of Article 7(1)(b) of Regulation No 40/94 must be upheld as regards the latter goods.

The other goods within Class 9

67 As regards the other goods within Class 9 set out in paragraph 8 above, the Board of Appeal essentially found in paragraphs 30 and 31 of the contested decisions that, in general, having regard to the fact that the trade marks sought are mainly intended to induce the consumer to purchase the goods and to use the services in question in order

to be able to make online card payments, the goods all have the specific and necessary function of ensuring the operation of telecommunications services and banking and financial services which are indispensable to such payments.

68 However, on the basis of that very general and vague reasoning, and having regard to the great variety and the heterogeneity of the goods mentioned in paragraph 8 above, the essential characteristics of which are not described in the contested decisions, it is impossible to verify whether there is a sufficiently direct and specific link between the various goods and the cards with the functions and characteristics referred to in paragraph 59 above in order thus to determine whether the goods constitute a homogeneous group of goods which may be the subject of general reasoning, like that set out in paragraphs 30 and 31 of the contested decisions.

69 In fact, the contested decisions offer no reason whatsoever as to why, first, the Board of Appeal appears to take the view that the goods none the less share characteristics with the goods described in paragraph 62 above such as to justify classifying them in a homogeneous group or, secondly, the signs P@YWEB CARD and PAYWEB CARD are not distinctive specifically in relation to those goods. In any event, since the very general description of their alleged function, which is to ensure the operation of the telecommunications services and the banking and financial services essential to online card payment transactions, is clearly not relevant to goods such as 'photographic, cinematographic, signalling, checking (supervision) apparatus and instruments', 'recording discs, electronic diaries, automatic vending machines, video tapes, bank note dispensers, ticket dispensers, dispensers of statements of account and account summaries, cameras (cinematographic cameras), video cameras', 'video tapes, CD-ROMs, bar code readers, compact discs (audio-video), compact discs (read-only memory), false coin detectors, floppy disks' and 'telephone apparatus, television apparatus', whose functions and characteristics may vary considerably. In this connection, the vague argument advanced by OHIM during the hearing to the effect that the goods, like a webcam, constitute necessary accessories to carrying out, by means of a card, transactions on a computer network cannot, even if it were well founded, which OHIM did not however claim for other relevant goods within Class 9, mitigate that lack of reasoning in the contested decisions since OHIM is not allowed, in the course of the proceedings, to advance supplementary reasons for a decision vitiated

by a defective statement of reasons under Article 253 EC (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 463; see Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 95 and the case-law cited; see also, to that effect, Case T-93/02, *Confédération nationale du Crédit mutuel* v *Commission* [2005] ECR II-143, paragraph 126).

70 Accordingly, the general reasoning in paragraphs 30 and 31 of the contested decisions does not comply with the requirements of Article 253 EC or the first sentence of Article 73 of Regulation No 40/94 as established by the case-law cited in paragraph 54 above, in that it does not enable the contested decisions to be submitted to effective judicial review of the legality of the Board of Appeal's finding that the trade marks sought were not distinctive in relation to the goods within Class 9 of the Nice Agreement.

71 In accordance with the case-law cited in paragraph 56 above, the Court must therefore raise, of its own motion, the ground involving a question of public policy concerning the defective statement of reasons and annul the contested decisions in this connection.

The services within Classes 36 and 38

— Grounds for the contested decisions

72 With regard to the finding and reasoning in the contested decisions on the lack of distinctiveness of the signs P@YWEB CARD and PAYWEB CARD in relation to the

services concerned within Classes 36 and 38 of the Nice Agreement, the Board of Appeal found in paragraph 34 of those decisions that in general the signs are purely informative and promotional with regard to all the services in those classes, and could not therefore be perceived by the relevant public as an indication of the commercial origin of the services, all of which have as their main or secondary purpose electronic telecommunications services, in particular by internet, intranet or extranet networks, and online services in the banking, financial and insurance sectors.

73 Next, the Board of Appeal found, in paragraph 35 of the contested decisions, that the word signs P@YWEB CARD and PAYWEB CARD carry, with regard to the services within Class 36, a clear informative message, namely that information may be obtained or transactions carried out relating to those services at a distance thanks to the availability of a payment card connected to the internet and more generally to a computer network. With regard to the services within Class 38, the Board of Appeal found, in paragraph 36 of the contested decisions, that those services, which relate to a group of processes for transmitting electronic information, have an immediate link with the functioning and use of the internet and, more generally, new information technologies. Therefore, from the average consumer's point of view, the ability to make payments on that network by means of a smart card constitutes a quality of those services.

74 Finally, the Board of Appeal concluded, in paragraph 37 of the contested decisions, that the trade marks sought, taken as a whole, are perceived principally as a commercial representation of the goods and services concerned and that their main if not exclusive function is to indicate to the relevant consumer that they are goods or services enabling him to make online payments using a card.

— 'Credit card services' and 'debit card services' within Class 36

75 'Credit card services' and 'debit card services' within Class 36 are directly connected with the cards referred to in paragraph 62 above. As the Court of First Instance has held (see, to that effect, *SURFCARD*, cited in paragraph 44 above, paragraphs 75 and 76), those services are very diverse and complex in nature. On the one hand, they include services provided by the bank issuing bank cards to its customers for use where appropriate via a communication network. On the other hand, they also cover a huge range of other services supplied in connection with several distinct commercial relationships, namely those between the issuing banks, the managers of the various networks responsible for the settlement of payments made and the traders whom the customer is authorised to pay using the card. Therefore, those services must clearly be distinguished from the qualities and functions of the cards as such, as described in paragraph 59 above, since they go beyond the single bilateral commercial relationship between the issuing bank and the consumer.

76 None the less, the Board of Appeal was right to identify, in paragraph 35 of the contested decisions, admittedly in fairly abstract and general terms, an essential quality common to all those services, in its finding that they relate, in particular, to transactions carried out at a distance thanks to the availability of a payment card connected to the internet and, more generally, to a computer network, in regard to which the word signs P@YWEB CARD and PAYWEB CARD carry a clear informative message.

77 Having regard to that common computing and internet-related quality and purpose, and notwithstanding their diverse and complex nature, those services may be classified in a sufficiently homogeneous group of services and, therefore, be covered by general reasoning. Similarly, having regard in particular to the 'payweb' and 'p@yweb' components of the trade marks sought, which indicate a function of payment by means of an electronic or computer communication network, the Board of Appeal was entitled to conclude that a reasonably well-informed and reasonably circumspect and observant

consumer would perceive those marks as a whole as being inextricably linked to cards and services intended to enable him to make online payments using those cards.

78 Therefore, the Board of Appeal was entitled to find in paragraph 37 of the contested decisions that the word signs P@YWEB CARD and PAYWEB CARD are likely to be perceived mainly as a commercial representation of the goods and services concerned in so far as they indicate to the relevant public that the goods and services enable online payments to be made by card. The fact that from the public's point of view there is a direct and specific link between the trade marks sought on the one hand and 'credit card services' and 'debit card services' within Class 36 on the other permits a finding that the function of marks is to represent the services commercially and the conclusion that the marks lack distinctive character in relation to those services.

79 Accordingly, in so far as it refused registration of the marks sought for 'credit card services' and 'debit card services' within Class 36 of the Nice Agreement, the Board of Appeal did state sufficient reasons for the contested decisions and correctly applied Article 7(1)(b) of Regulation No 40/94.

— The other services within Class 36

80 With regard to the other services within Class 36, it must be noted, first of all, that these do not have as direct and specific a connection with the cards referred to in paragraph 62 above as do 'credit card services' and 'debit card services', because they are representative of a large variety of commercial transactions in the real property, insurance, banking, financial and computing sectors; it must however be acknowledged that there is some connection between them. Next, it is sufficient from the point of view of the relevant public that the trade marks sought refer to a particular function or characteristic of the services in question for the finding to be made that they are not distinctive. However, those services all share one characteristic or purpose, which is to carry out, in the sectors mentioned, commercial transactions including payment by

card and, where appropriate, by electronic means. In those circumstances, it is possible to regard them as coming within a homogeneous group of services for the purposes of a general statement of reasons. Therefore, the statement of reasons in paragraph 35 of the contested decisions, to the effect that transactions relating to the services in question may be obtained and carried out at a distance thanks to the availability of a payment card connected to the internet and, more generally, to a computer network, is admittedly brief but sufficient to enable the Court of First Instance to review its legality in that regard.

81 In fact, from the average consumer's point of view, there is a sufficiently direct and specific link between the word signs P@YWEB CARD and PAYWEB CARD on the one hand, and a particular quality of all the other services within Class 36 on the other, which is the possibility of making, by means of a card, payments at a distance or electronically in the context of commercial transactions in the real property, insurance, banking, finance and computing sectors. Accordingly, it must be held that the signs tend to constitute a simple commercial representation of those services and it may thus be concluded that they lack distinctiveness in relation to those services.

82 It is none the less necessary to point out that the lack of distinctive character of the word signs P@YWEB CARD and PAYWEB CARD can only be found in so far as the provision of the services referred to in paragraph 80 above effectively presupposes the use of a card, such as a sickness insurance card. Where those services can be provided independently of a card, those signs do not, from the point of view of the relevant public, have a sufficiently direct and specific link with those services because the relevant public would need to engage in complex reasoning to establish such link. Therefore, the lack of distinctive character of the marks sought relates only to the services within Class 36 which, like 'credit card services' and 'debit card services', require or relate to the use of a card (see, to that effect and by analogy, *SURFCARD*, cited in paragraph 44 above, paragraph 82).

83 In those circumstances, it must be held that the Board of Appeal did give a sufficient statement of reasons for the contested decisions and correctly applied Article 7(1)(b) of Regulation No 40/94 in so far as it refused registration of the trade marks sought for all the services concerned within Class 36 of the Nice Agreement.

— Services within Class 38

84 As regards the services within Class 38, described as 'telecommunications, communications by computer terminals, sending of telegrams, transmission of telegrams, information about telecommunication, electronic mail, message sending, computer-aided transmission of messages and images, satellite transmission, transmission of information by internet, intranet and extranet, interactive computerised transmission of information services, transmission of information from a computerised databank, international transmission of data between computerised network systems services, online data transmission', it must be pointed out that, like 'credit card services' and 'debit card services' within Class 36, those services fall within a homogeneous group of services directly connected with the field of computing and the internet. Furthermore, from the point of view of the relevant public they have a direct and specific link with the word signs P@YWEB CARD and PAYWEB CARD in that those signs designate, in particular, the function of transmission of data via the internet or other communication networks, for example, in order to make a distance purchase by means of a card of the type described in paragraph 59 above. Indeed, the ability to access the internet or other communication networks by means of a card and transmit data and carry out other transactions online such as distance purchases and payments constitutes a quality common to those services. In this connection, as was pointed out in paragraph 60 above, the mere fact that the Board of Appeal based its analysis on 'smart cards' cannot put in doubt the correctness of that finding (see, to that effect and by analogy, *SURFCARD*, cited in paragraph 44 above, paragraphs 79 and 80).

85 Therefore, the Board of Appeal rightly considered, in paragraph 37 of the contested decisions, that the relevant public would perceive the word signs P@YWEB CARD and PAYWEB CARD as designating an indissociable group of cards and services enabling them to make online payments. Consequently, the trade marks sought do not fulfil their essential function, which is to identify the commercial origin of the services in question.

86 None the less, the word signs P@YWEB CARD and PAYWEB CARD may be found to lack distinctiveness only in so far as supply of the services referred to in paragraph 84 above actually presupposes the use of a card. Where those services can be provided independently of a card, those signs do not, from the point of view of the relevant public, have a sufficiently direct and specific link with those services because the relevant public would need to engage in complex reasoning to establish such link. Therefore, the lack of distinctive character of the marks sought relates only to the services within Class 38 which, like 'credit card services' and 'debit card services' within Class 36, require or relate to the use of a card.

87 In those circumstances, where the provision of the services within Class 38, such as those referred to in paragraph 84 above, requires the use of a card, the Board of Appeal was right to find that the word signs P@YWEB CARD and PAYWEB CARD are not sufficiently distinctive with regard to those services. Accordingly, the plea of infringement of Article 7(1)(b) of Regulation No 40/94 must be rejected in so far as it relates to the refusal to register the trade marks sought for the aforementioned services.

88 However, with regard to the other services within Class 38, namely 'news agencies, in particular in the banking sector, communications by radio, communications by telephone, sending of telegrams, transmission of telegrams, broadcasting of television programmes, radio broadcasting, television broadcasting, leasing of telecommunications equipment, leasing of equipment for the transmission of messages, leasing of telephones, cellular telephone communication, telephone services', the contested decisions do not give a single reason why the Board of Appeal considers that those services and those set out in paragraph 84 above fall within a homogeneous group which could justify a general statement of reasons such as that set out in paragraphs 36 and 37 of the decisions. Nor, further, do the decisions give any explanation enabling the

Court to review the correctness of the Board of Appeal's finding that the word signs P@YWEB CARD and PAYWEB CARD are not sufficiently distinctive specifically in regard to those other services.

89 Whilst the reasoning in paragraph 36 of the contested decisions — namely that the services in question relate to a group of processes for transmitting electronic information and have an immediate link with the function and use of the internet and, more generally, new information technologies such that the ability to make payments on that network by means of a smart card constitutes a quality of those services — is relevant for the services referred to in paragraph 84 above, that is not necessarily true for the other services within Class 38. In any event, that general reasoning does not explain, in the light of the word signs P@YWEB CARD and PAYWEB CARD, why, from the point of view of the reasonably well-informed and reasonably observant and circumspect consumer, those services present a sufficiently direct and specific link with online card payments.

90 Moreover, the additional argument advanced by OHIM during the hearing to the effect that it is well known that radio and television broadcasts and telephonic communications can be received on the internet is, in any event, of no consequence given that OHIM is not permitted to advance, at that stage, supplementary reasons for a decision vitiated by a defective statement of reasons under Article 253 EC (see the case-law cited in paragraph 69 above).

91 Consequently, the Board of Appeal did not state sufficient reasons for the alleged lack of distinctive character of the trade marks sought, in relation to the services referred to in paragraph 88 above. In this respect, the general statement of reasons in paragraphs 36 and 37 of the contested decisions does not satisfy the requirements of Article 253 EC or

the first sentence of Article 73 of Regulation No 40/94, because it does not enable the decisions to be subjected to effective judicial review.

92 In accordance with the case-law cited in paragraph 56 above, it is therefore necessary for the Court, of its own motion, to raise the defective statement of reasons as a ground involving a question of public policy and to annul the contested decisions also in that regard.

Non-reliance on the ground for refusal under Article 7(1)(c) of Regulation No 40/94

93 Given that the Board of Appeal did not base the contested decisions on the absolute ground for refusal in Article 7(1)(c) of Regulation No 40/94, namely the descriptive character of the trade marks sought (see paragraph 40 of the decisions), and that the applicant claims only the annulment of the contested decisions (see paragraph 14 above), the application of Article 7(1)(c) of Regulation No 40/94 does not form part of the subject-matter of this dispute for the purposes of Article 63 of that regulation or, therefore, of the review of legality which the Community Courts are required to undertake in this case (see, to that effect, *SURFCARD*, cited in paragraph 44 above, paragraph 85 and the case-law cited).

94 Accordingly, the applicant's arguments relating to the possible non-descriptive character of the marks sought are irrelevant and it is not necessary for the Court of First Instance to decide upon them.

95 It follows from all the foregoing considerations that it is necessary to uphold the plea of infringement of Article 7(1)(b) of Regulation No 40/94 and to annul the contested decisions in that they conclude that the trade marks sought have no distinctive character in relation to:

— goods within Class 9, as set out in paragraph 2 above, with the exception of 'integrated circuit cards (smart cards), magnetic encoded cards, magnetic or smart identity cards, magnetic or smart payment cards, both credit and debit' and 'coin-operated mechanisms for television sets';

— services designated as 'news agencies, in particular in the banking sector, communications by radio, communications by telephone, sending of telegrams, transmission of telegrams, broadcasting of television programmes, radio broadcasting, television broadcasting, leasing of telecommunications equipment, leasing of equipment for the transmission of messages, leasing of telephones, cellular telephone communication, telephone services' within Class 38.

Costs

96 Under Article 87(3) of its Rules of Procedure, where each party succeeds on some and fails on other heads, the Court of First Instance may order that the costs be shared or that each party bear its own costs. In the circumstances of this case, having regard to the

partial annulment of the contested decisions and, in particular, the absence of any claim by the applicant for costs, it must be decided that each of the parties is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Annuls the decisions of the First Board of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) of 10 July 2007 (Case R 119/2007-1) and of 12 September 2007 (Case R 120/2007-1) in so far as they refuse registration as Community trade marks of the word signs P@YWEB CARD and PAYWEB CARD for photographic, cinematographic, signalling, checking (supervision) apparatus and instruments, apparatus for recording, transmission or reproduction of sound or images; recording discs, electronic diaries, automatic vending machines, video tapes, bank note dispensers, ticket dispensers, dispensers of statements of account and account summaries, cameras (cinematographic cameras), video cameras, video tapes, CD-ROMs, bar code readers, compact discs (audio-video), compact discs (read-only memory), false coin detectors, floppy disks, magnetic data media, optical data media, video screens, data processing equipment, intercommunication equipment, computer interfaces, computer readers, software (recorded programs), monitors (computer programs), computers, computer peripheral devices, recorded computer programs, recorded computer operating programs, radiotelephony sets, audio-receivers and video-receivers, telephone apparatus, television apparatus, time recording apparatus, transmitters (telecommunication), central processing units (processors) within Class 9 and the services designated as news agencies, in particular in the banking sector, communications by radio, communications by telephone, sending of telegrams, transmission of telegrams, broad-**

casting of television programmes, radio broadcasting, television broadcasting, leasing of telecommunications equipment, leasing of equipment for the transmission of messages, leasing of telephones, cellular telephone communication, telephone services within Class 38 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;

2. Dismisses the actions as to the remainder;

3. Orders the Caisse fédérale du Crédit mutuel Centre Est Europe (CFCMCEE) and OHIM to bear their own costs.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 20 May 2009.

[Signatures]