Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

23 February 2022 *

(EU trade mark – Opposition proceedings – EU word mark CODE-X – Earlier national word and figurative marks Cody's – Earlier international figurative mark Cody's – Relative ground for refusal – No likelihood of confusion – Article 8(1)(b) of Regulation (EU) 2017/1001)

In Case T-198/21,

Ancor Group GmbH, established in Igersheim (Germany), represented by J. Wachsmuth and W. Berlit, lawyers,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by M. Eberl and E. Markakis, acting as Agents,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO being:

Cody's Drinks International GmbH, established in Bremen (Germany),

ACTION brought against the decision of the Fifth Board of Appeal of EUIPO of 4 February 2021 (Case R 208/2020-5), relating to opposition proceedings between Cody's Drinks International and Ancor Group,

THE GENERAL COURT (Fifth Chamber),

composed of D. Spielmann, President, U. Öberg (Rapporteur) and M. Brkan, Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 12 April 2021,

having regard to the response lodged at the Court Registry on 15 June 2021,

* Language of the case: German.

having regard to the fact that no request for a hearing was submitted by the parties within three weeks after service of notification of the close of the written part of the procedure, and having decided to rule on the action without an oral part of the procedure, pursuant to Article 106(3) of the Rules of Procedure of the General Court,

gives the following

Judgment

Background to the dispute

1 On 30 April 2018, the applicant, Ancor Group GmbH, filed an application for registration of an EU trade mark with the European Union Intellectual Property Office (EUIPO), pursuant to 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 word sign CODE-X.

3 The goods in respect of which registration was sought are in Class 32 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description: 'Soft drinks; Non-alcoholic beverages, Vitamin fortified non-alcoholic beverages, Essences for making non-alcoholic drinks not in the nature of essential oils, Energy drinks, Energy drinks containing caffeine'.

4 On 28 August 2018, Cody's Drinks International GmbH filed a notice of opposition to registration of the mark applied for in respect of the goods referred to in paragraph 3 above.

5 The opposition was based on the following earlier marks:

– the German word mark Cody's filed on 4 February 2013 and registered on 7 March 2013 under number 302013015320, covering goods in Class 32 corresponding to the following description: 'Beers; mineral and aerated waters and other non-alcoholic beverages; fruit beverages and fruit juices; syrups and other preparations for making beverages.';

– the German figurative mark reproduced below, filed on 10 March 2016 and registered on 12 April 2016, covering goods in Class 32 corresponding to the following description: 'Beers; mineral waters; aerated waters; non-alcoholic beverages; fruit beverages; fruit juices; syrups for making beverages; preparations for making beverages':



– the international registration designating the European Union of the abovementioned figurative mark, obtained on 11 March 2016 and bearing the number 1300293, covering the goods in Class 32 mentioned above in the first indent of this paragraph 5.

6 The ground relied on in support of the opposition was that set out in Article 8(1)(b) of Regulation 2017/1001, relating to a likelihood of confusion on the part of the relevant public.

7 On 28 November 2019, the Opposition Division rejected the opposition in its entirety, on the ground that there was no likelihood of confusion.

8 On 27 January 2020, Cody's Drinks International filed a notice of appeal with EUIPO, pursuant to Articles 66 to 71 of Regulation 2017/1001, against the decision of the Opposition Division.

9 By decision of 4 February 2021 ('the contested decision'), the Fifth Board of Appeal of EUIPO upheld the appeal and annulled the decision of the Opposition Division. First of all, after stating that it would examine the appeal in relation to the earlier word mark, the Board of Appeal found that the relevant public was the general public in Germany, which displayed a level of attention ranging from below average to normal, and that the goods at issue were identical or similar to a high degree. Next, it stated that the signs at issue, which had a normal level of distinctiveness, had an above-average degree of visual similarity and a high degree of phonetic similarity such that, although those signs were conceptually different, they were overall similar to a high degree. Lastly, it found that the differences between those signs were not sufficient to distinguish them and that there was no need to contemplate a cancelling out of the visual and phonetic similarities on the basis of the conceptual dissimilarity. Accordingly, it concluded that there was a likelihood of confusion on the part of the relevant public and extended its conclusion to include the earlier figurative mark and the international registration designating the European Union of that figurative mark.

Forms of order sought

10 The applicant claims that the Court should:

– annul the contested decision;

– uphold the Opposition Division's decision by which the opposition was rejected;

– order EUIPO to pay the costs.

11 EUIPO contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

12 In support of its action, the applicant relies on a single plea in law, alleging infringement of Article 8(1)(b) of Regulation 2017/1001, in so far as the Board of Appeal erred in finding, as regards the mark applied for, the earlier word mark and the earlier figurative marks, that there was a likelihood of confusion on the part of the relevant public.

The claim for annulment of the contested decision

13 Under Article 8(1)(b) of Regulation 2017/1001, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered if, because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the 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 mark.

14 The risk that the public may believe that the goods or services in question come from the same undertaking or from economically linked undertakings constitutes a likelihood of confusion. 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 account of all factors relevant to the circumstances of the case. That global assessment of the likelihood of confusion implies some interdependence between the factors taken into account, and in particular similarity between the trade marks and the goods or services covered (see, to that effect, 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).

The relevant public and the goods in question

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

16 In the present case, the Board of Appeal found that the relevant public for the goods in question was the general public in Germany, the level of attention of which ranged from below average to normal, and that the goods in question had to be considered to be identical or similar to a high degree.

17 As a preliminary point, the Court notes that the parties do not dispute the Board of Appeal's findings in paragraph 21 of the contested decision, according to which the relevant public consists of the general public in Germany, or that the goods in question are identical or similar to a high degree.

18 By contrast, the applicant does dispute, in essence, the level of attention of the relevant public and submits that it displays an average or normal level of attention.

19 EUIPO contends that in any event, the Board of Appeal took into account at most an average level of attention.

20 The Court notes that, according to settled case-law, the goods in question are everyday consumer goods aimed at the general public, which has an average level of attention (see, to that effect, judgments of 24 February 2016, *Coca-Cola* v *OHIM* (*Shape of a contour bottle without fluting*), T-411/14, EU:T:2016:94, paragraph 41; of 16 March 2017, *Sociedad agraria de transformación n 9982 Montecitrus* v *EUIPO – Spanish Oranges (MOUNTAIN CITRUS SPAIN)*, T-495/15, not

published, EU:T:2017:173, paragraph 27; and of 26 June 2018, *Staropilsen* v *EUIPO – Pivovary Staropramen (STAROPILSEN; STAROPLZEN)*, T-556/17, not published, EU:T:2018:382, point 25 and the case-law cited).

21 The case-law referred to by the Board of Appeal in paragraph 20 of the contested decision does not call into question that conclusion, since the Court found, in each of those cases, that the relevant public had an average or normal level of attention.

22 Consequently, the Board of Appeal was wrong to take into account also a relevant public with a lower than average level of attention, since the level of attention is average as it is neither particularly low nor particularly high.

The comparison of the signs

23 The global assessment of the likelihood of confusion must, so far as concerns the visual, phonetic or conceptual similarity of the signs at issue, be based on the overall impression given by the signs, bearing in mind, in particular, their distinctive and dominant elements. The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the global assessment of that likelihood of confusion. In this regard, the average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details (see judgment of 12 June 2007, *OHIM* v *Shaker*, C-334/05 P, EU:C:2007:333, paragraph 35 and the case-law cited).

24 However, although the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details, the fact remains that, when perceiving a word sign, he or she will break it down into word elements which, for that consumer, suggest a concrete meaning or which resemble words known to him or her (see judgment of 13 February 2007, *RESPICUR*, T-256/04, EU:T:2007:46, paragraph 57 and the case-law cited).

25 It is in the light of those principles that it is necessary to examine, having regard to the arguments of the parties, whether the similarity of the signs at issue was correctly assessed in the contested decision.

26 In the present case, the mark applied for is a word mark made up of the elements 'code' and 'x', linked by a hyphen, and the earlier word mark consists of the elements 'cody' and 's', separated by an apostrophe.

– *Visual similarity*

27 The Board of Appeal found that, on account of the initial part 'cod', common to the signs at issue, and the final consonants 'x' and 's', linked to the first element of those signs by a hyphen and an apostrophe, respectively, those signs had to be regarded as being visually similar to an above average degree. It added that they were the same length.

28 The applicant claims, in essence, that the Board of Appeal attached disproportionate importance to the first part of the signs at issue and that it matters little that they share an identical number of letters. Although they coincide in three out of six letters, they nevertheless differ in the letter 'e' in the mark applied for and the letter 'y' in the earlier word mark, as well as the final consonants 'x' and 's', linked, respectively, by a hyphen and an apostrophe, those differences being more

significant in short signs. The applicant also claims that the earlier word mark is composed of a single word, whereas the mark applied for contains two words. The signs at issue are therefore not visually similar overall.

29 EUIPO disputes the applicant's arguments.

30 First of all, the Court points out that whilst it has previously been held that the first part of a mark tended to have a greater visual impact that the final part, so that the consumer, in general, pays greater attention to the first part of a mark than to the end, such a consideration cannot be valid in all cases (see judgment of 20 September 2018, *Kwizda Holding* v *EUIPO – Dermapharm (UROAKUT)*, T-266/17, EU:T:2018:569, paragraph 51 and the case-law cited).

31 Furthermore, it is clear from the case-law that, the shorter a sign, the easier the public will be able to perceive each of its various elements. Thus, in the case of short words, even slight differences can produce a different overall impression (see, to that effect, judgments of 6 July 2004, *Grupo El Prado Cervera* v *OHIM – Héritiers Debuschewitz (CHUFAFIT)*, T-117/02, EU:T:2004:208, paragraph 48, and of 28 September 2016, *The Art Company B & S* v *EUIPO – G-Star Raw (THE ART OF RAW)*, T-593/15, not published, EU:T:2016:572, paragraph 28 and the case-law cited).

32 In addition, since the alphabet is made up of a limited number of letters, which, moreover, are not all used with the same frequency, it is inevitable that many words will have the same number of letters and even share some of them, but they cannot, for that reason alone, be regarded as visually similar (see judgment of 28 April 2021, *Nosio* v *EUIPO – Tros del Beto (ACCUSÌ)*, T-300/20, not published, EU:T:2021:223, paragraph 42 and the case-law cited).

33 Like the applicant, the Court notes that although the initial element 'cod' is common to the signs at issue, each of those signs consists of only six characters and coincide in only three of them. By contrast, the word elements 'code-x' and 'cody's' differ in their last two letters and by the insertion of a hyphen between the letters 'e' and 'x' in the mark applied for and an apostrophe between the letters 'y' and 's' in the earlier word mark.

34 In this respect, the Court observes that the insertion of a hyphen or an apostrophe and the presence of different vowels and consonants at the end of the signs are significant differences which play a role in the visual perception of the signs at issue, particularly since they are of limited length. The hyphen separating the word elements 'code' and 'x' in the mark applied for will thus enable the relevant public to perceive that the mark consists of two separate elements. By contrast, the apostrophe added to the word element 'cody' and followed by 's' in the earlier word mark will be seen as a reference to the first name Cody in the possessive case, the genitive of proper nouns being thus constructed in English and, in some cases, in German. The relevant public, even if it is not English-speaking, will therefore be likely to understand the apostrophe following a noun of English origin as indicating the possessive. Unlike the hyphen, the apostrophe does not therefore appear, in the present case, to be a visual break.

35 Accordingly, the difference created by the alphabetic characters separated by different punctuation marks is visually perceptible.

36 It must therefore be concluded that, on the basis of an overall impression, the signs at issue can be regarded as visually similar to only a low or perhaps average degree.

37 Accordingly, the Board of Appeal wrongly found that there was an above-average degree of visual similarity between the signs at issue.

– *Phonetic similarity*

38 The Board of Appeal considered that the mark applied for was pronounced 'kodiks' or 'kodex' and that the earlier word mark was pronounced 'kodis', with the result that, although the signs at issue differ in their respective final syllables, namely 'e-x' and 'y's', they were phonetically similar to a high degree.

39 The applicant claims that the mark applied for is perceived by the relevant public as consisting of two words, marked by a clear sound break and pronounced 'kot' and 'iks'. The earlier word mark would be pronounced 'kodis' as a single dissyllabic word, the syllabic break of which occurs before the letter 'd'. In its view, the signs at issue are therefore, at most, phonetically similar to a low degree.

40 EUIPO disputes the applicant's arguments, but adds that, according to the rules of the German language, the relevant public would not pause after the apostrophe.

41 The Court notes that the signs at issue are phonetically similar based on the presence of the initial three letters 'c', 'o' and 'd', placed in the same order. Nevertheless, they differ as regards the character strings 'e-x' and 'y's' and as regards their syllabic structure and their sound pattern.

42 Whether the mark applied for is pronounced in three syllables, 'ko', 'de' and 'iks' or 'ex', or in two, 'kod' and 'iks' or 'ex', the presence of a hyphen influences the pronunciation of that mark by punctuating one of the syllabic breaks. The relevant public will therefore pause before the syllable 'iks' or the syllable 'ex', irrespective of whether the first part of the mark applied for is pronounced as two syllables or one syllable. By contrast, the earlier word mark consists of two syllables, 'ko' and 'dis', and the relevant public will make a syllabic break only between those two syllables, and not before the letter 's', since the presence of the apostrophe has no influence on pronunciation.

43 Thus, the letter 'x' and the hyphen which precedes it show a syllabic break in the mark applied for, which is absent in the earlier word mark.

44 Those differences in the final part of the signs at issue have an effect on the relevant public's phonetic perception. The fact that those signs are identical as regards the sequence of the three letters 'c', 'o' and 'd' cannot affect that conclusion.

45 It follows that the signs at issue are phonetically similar to an average degree and that the Board of Appeal was wrong in finding that there was a high degree of similarity in that regard.

– *Conceptual similarity*

46 The Board of Appeal held that the signs at issue were conceptually different, since they have different specific meanings that are immediately understood by the relevant public.

47 The parties do not dispute that finding of the Board of Appeal.

The likelihood of confusion

48 A global assessment of the likelihood of confusion implies some interdependence between the factors taken into account and, in particular, between the similarity of the trade marks and that of the goods or services covered. Accordingly, a low degree of similarity between those goods or services may be offset by a high degree of similarity between the marks, and vice versa (judgments of 29 September 1998, *Canon*, C-39/97, EU:C:1998:442, paragraph 17, and of 14 December 2006, *Mast-Jägermeister* v *OHIM – Licorera Zacapaneca (VENADO with frame and others*), T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 74).

49 In the global assessment of the likelihood of confusion, the visual, phonetic or conceptual aspects of the signs at issue do not always have the same weight and the extent of the similarity or difference between those signs may depend on their inherent qualities (see, to that effect, judgment 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 49).

50 In the present case, after noting that the earlier word mark had normal inherent distinctiveness and recalling that the goods in question were identical or similar to a high degree, the Board of Appeal concluded that there was a likelihood of confusion on the part of the relevant public, which display a level of attention ranging from below average to normal. It based that conclusion on the fact that the signs at issue had an above-average degree of visual similarity and a high degree of phonetic similarity, therefore, despite their conceptual dissimilarity, those signs had to be regarded as similar to a high degree overall. It added that it was not possible for the similarities to be cancelled out on account of the very high degree of visual and phonetic similarities and the fact that the goods at issue would be ordered mainly in a noisy environment, after having been seen on a menu.

51 The applicant submits that the distinctive character of the earlier word mark is weak, since the relevant public understands the word elements 'cody' and ''s' of that mark as the genitive of a proper noun or as a descriptive indication of the geographical origin of the goods in question, namely the town of Cody, located in the United States. It adds that those goods are mass consumption goods primarily sold in retail outlets. Moreover, since the signs at issue are not visually similar and are phonetically similar to a low degree, their conceptual difference is such as to cancel out the similarities, so that there is no likelihood of confusion on the part of the relevant public.

52 EUIPO disputes the applicant's arguments.

53 As a preliminary point, the Court notes that the parties do not dispute that the goods in question are identical or similar to a high degree.

54 In the first place, with regard to the applicant's argument that the distinctive character of the earlier word mark is weak, the Court notes that, first, the word 'cody' will immediately be understood by the relevant public as a reference to a proper noun. Second, the addition of an apostrophe and the letter 's' to a proper noun will be understood as a reference to the first name Cody in the possessive, the genitive of proper nouns being constructed in this way in English and, in some cases, in German. Thus, the relevant public will perceive the word element of the earlier word mark as, for example, the name of an undertaking belonging to a person named 'Cody' or as the name of a person who designed the goods in question. On the whole, the elements making up that mark thus form a single expression.

55 By contrast, the applicant has not adduced any evidence to show that a part of the relevant public would understand the earlier word mark as a reference to the town of Cody, located in the United States.

56 Therefore, it must be held, as the Board of Appeal did, that the earlier word mark has no particular meaning with regard to the goods in Class 32, with the result that it has normal inherent distinctiveness.

57 In the second place, as regards the Board of Appeal's analysis, in paragraph 45 of the contested decision, according to which particular importance must be given to the degree of phonetic similarity between the signs at issue, first, the Court notes that, in the global assessment of the likelihood of confusion, the respective weight to be given to the visual, phonetic or conceptual aspects of the signs at issue may vary according to the objective circumstances in which the marks may be present on the market. However, in that context, the circumstances in which it is usual to expect the category of goods covered by the marks at issue to be marketed must be taken as a benchmark (see judgment of 24 June 2014, *Rani Refreshments* v *OHIM – Global-Invest Bartosz Turek (Sani)*, T-523/12, not published, EU:T:2014:571, paragraph 42 and the case-law cited).

58 Second, although it is of course not inconceivable that the perception of the phonetic differences between the signs at issue may not be clear in particularly noisy environments, such as in a bar or a nightclub during very busy periods, that cannot be used as the sole basis for assessing whether there is a potential likelihood of confusion between the signs at issue. An assessment of that kind must of necessity, as can in essence be seen from the case-law referred to in the previous paragraph, be carried out while keeping in mind the perception which the relevant public will have of those signs under normal marketing conditions (judgment of 24 June 2014, *Sani*, T-523/12, not published, EU:T:2014:571, paragraph 43).

59 It is true that, in the judgments referred to by the Board of Appeal in paragraph 45 of the contested decision, the Court attached particular importance to the phonetic similarity of the signs at issue, on account of the fact that the goods in question, belonging to the beverages sector, and more particularly the alcoholic beverages sector, could be ordered orally after their name had been seen on the menu or on the wine list.

60 However, it is also clear from the case-law that there is nothing to indicate that, as a general rule, consumers of drinks will buy such goods in the course of a conversation where those goods are being ordered in a busy and noisy bar or restaurant (see judgment of 24 June 2014, *Sani*, T-523/12, not published, EU:T:2014:571, paragraph 43).

61 Furthermore, as the applicant rightly submits, it is also clear from the case-law that, even if bars and restaurants are not negligible sales channels for those types of goods, it is common ground that the consumer will be able to perceive the marks at issue visually in those places, inter alia by examining the bottle which will be served to him or her or by other means, such as on a menu or a drinks list, before placing an order orally. Moreover, and above all, it is not disputed that bars and restaurants are not the only sales channels for the goods concerned. Those goods are also sold in supermarkets or other retail outlets where consumers choose the product themselves and must therefore rely primarily on the image of the trade mark applied to that product. Thus, clearly, when purchases are made in such locations consumers can perceive the marks visually since the drinks are presented on shelves (see, to that effect, judgments of 19 October 2006, *Bitburger Brauerei* v *OHIM – Anheuser-Busch (BUD, American Bud and Anheuser Busch Bud)*, T-350/04 to

T-352/04, EU:T:2006:330, paragraphs 111 and 112 and the case-law cited, and of 3 September 2010, *Companhia Muller de Bebidas* v *OHIM – Missiato Industria e Comercio (61 A NOSSA ALEGRIA)*, T-472/08, EU:T:2010:347, paragraph 106).

62 Consequently, although preponderant importance has sometimes been accorded to the phonetic perception of marks in relation to beverages, that will not be appropriate in all cases (see, to that effect, judgment of 3 September 2010, *61 A NOSSA ALEGRIA*, T-472/08, EU:T:2010:347, paragraph 106).

63 In the present case, no evidence has been provided to show that the goods in question are mainly ordered orally. There is no evidence to suggest that the relevant public will buy those goods in conditions such that the phonetic similarity between the signs at issue would carry more weight than the visual or conceptual similarity in the global assessment of the likelihood of confusion. On the contrary, if the relevant public is led to order them orally in bars and restaurants, they will generally do so after seeing their name on a drinks list or a menu, or will be able to examine the product which will be served to them, so that they will be able to visually perceive the mark in order to express what they wish to purchase.

64 In any event, even giving particular weight to the phonetic similarity of the signs at issue, the fact remains that that similarity is only average.

65 It is apparent from paragraphs 15 to 47 above that, contrary to what the Board of Appeal held, the relevant public has an average level of attention and the signs at issue, taken as a whole, have only a low degree, if not an average degree, of visual similarity and an average degree of phonetic similarity. Moreover, it is not disputed that those signs are conceptually different.

66 In addition, in accordance with the case-law of the Court of Justice, the global assessment of the likelihood of confusion implies that conceptual differences between the signs at issue may counteract phonetic and visual similarities between them, provided that at least one of those signs has, from the point of view of the relevant public, a clear and specific meaning, so that the public is capable of grasping it immediately (see judgment of 4 March 2020, *EUIPO* v *Equivalenza Manufactory*, C-328/18 P, EU:C:2020:156, paragraph 74 and the case-law cited).

67 As regards the earlier word mark, as is apparent from paragraph 54 above, its clear and specific meaning will be immediately perceived by the relevant public as a reference to the name Cody in the possessive.

68 As regards the mark applied for, the element 'code' of that mark must be regarded as forming part of the basic vocabulary of the German language and will be directly understood by the relevant public as referring to a key with the help of which an encrypted text may be sent, to a sequence of instructions in a programming language, to an agreed inventory of linguistic signs and the rules of their association or to a way of using language predetermined by membership to a particular social class.

69 Moreover, it cannot be ruled out that the word element '-x' will immediately be perceived by the relevant public as referring to a character used for an unknown name or an unknown size, to an unknown quantity representing a certain number in an equation or to the sign of an undefined number.

70 Therefore, the earlier word mark will be immediately understood by the relevant public as referring to the possessive form of the name Cody and the mark applied for is a reference to a system of words, letters, figures or symbols used to represent others, particularly with a view to maintaining secrecy.

71 Furthermore, the Board of Appeal itself stated, in paragraph 37 of the contested decision, that the different meanings of the signs at issue would be immediately understood by the relevant public.

72 It must therefore be concluded that, in accordance with the case-law referred to in paragraph 66 above, the conceptual difference between the signs at issue cancels out their phonetic and visual similarities.

73 Accordingly, the relevant public, which has an average level of attention, is not likely to consider that the goods in question come from the same undertaking or from economically linked undertakings.

74 The Board of Appeal therefore erred in finding that there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation 2017/1001.

75 In paragraph 48 of the contested decision, the Board of Appeal found that the two earlier figurative marks shared the same distinctive word element with the earlier word mark examined and that the goods protected were the same, therefore it extended the erroneous conclusion, regarding the existence of a likelihood of confusion between the mark applied for and the earlier word mark, to the earlier figurative mark and to the international registration designating the European Union of that figurative mark.

76 As the applicant has pointed out, as regards the earlier figurative marks, the presence of additional figurative elements, consisting of a white and slightly stylised font and a red parallelogram, contributes to further differentiating the signs at issue and to preventing any likelihood of confusion on the part of the relevant public.

77 Consequently, the single plea in law raised by the applicant must be upheld and the contested decision annulled.

Whether the decision of the Opposition Division should be upheld

78 By its second head of claim, the applicant requests the Court to uphold the decision of the Opposition Division by which the latter rejected the opposition to registration of the mark applied for.

79 It must be held that, by that head of claim, the applicant seeks in essence, to have the Court exercise its power to alter decisions in order to reject the opposition to registration of the mark applied for in respect of all the goods which it covers, thus adopting the decision which, according to the applicant, the Board of Appeal should have taken when the appeal was brought before it.

80 In that regard, it must be borne in mind that the power of the Court to alter decisions pursuant to Article 72(3) of Regulation 2017/1001 must, in principle, be limited to situations in which the 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).

81 In the present case, the conditions for the exercise of the Court's power to alter decisions are met. It follows from the considerations set out in paragraphs 15 to 77 above that the Board of Appeal, like the Opposition Division, was required to find that there was no likelihood of confusion. As a result, the opposition must be rejected.

Costs

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

83 Since EUIPO has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Annuls the decision of the Fifth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 4 February 2021 (Case R 208/2020-5);**

2. **Rejects the opposition brought by Cody's Drinks International GmbH;**

3. **Orders EUIPO to pay the costs.**

Spielmann Öberg Brkan

Delivered in open court in Luxembourg on 23 February 2022.

[Signatures]