ORDER OF THE COURT (Fifth Chamber)

18 March 2010 *

In Case C-282/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 17 July 2009,

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

applicant,

the other party to the proceedings being:

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

defendant at first instance,

* Language of the case: French.

THE COURT (Fifth Chamber),

composed of E. Levits, President of the Chamber, M. Ilešič (Rapporteur) and M. Berger, Judges,

Advocate General: P. Cruz Villalón,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By its appeal, the Caisse fédérale du Crédit mutuel Centre Est Europe (CFCMCEE) seeks to have set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 20 May 2009 in Joined Cases T-405/07 and T-406/07 *CFCMCEE* v *OHIM (P@YWEB CARD and PAYWEB CARD)* [2009] ECR II-1441 ('the judgment under appeal'), in which the latter partially dismissed its action for the annulment of the decisions of the First Board of Appeal of the Office for Harmonisation 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) ('the contested decisions') which dismissed the application for registration of the signs P@YWEB CARD and PAYWEB CARD as Community trade marks ('the signs at issue').

Legal context

2 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) was repealed by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version) (OJ 2009 L 78, p. 1), which entered into force on 13 April 2009. Nevertheless, the case in the main proceedings remains governed, having regard to the time when the facts occurred, by Regulation No 40/94.

3 Article 7(1)(b) and (c) of Regulation No 40/94 provides:

'The following shall not be registered:

…

(b) trade marks which are devoid of any distinctive character;

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service.'

4 Article 73 of that regulation, concerning the statement of reasons on which decisions are based, provides:

'Decisions of [OHIM] shall state the reasons on which they are based. They shall be based only on reasons or evidence on which the parties concerned have had on opportunity to present their comments.'

Background to the dispute

5 On 1 June 2004, CFCMCEE applied to OHIM for registration as Community trade mark of the signs at issue.

6 The goods and services in respect of which registration of the mark was sought are in Classes 9, 36, and 38 of the Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, as revised and amended ('the Nice Agreement'), and correspond, for each of those classes, to the description included in paragraph 2 of the judgment under appeal.

7 By decisions of 18 and 19 January 2005, the OHIM Examiner refused registration of the signs at issue on the basis of Article 7(1)(b) and (c) of Regulation No 40/94.

8 On 18 March 2005, CFCMCEE submitted observations in response to OHIM's objections.

9 On 5 and 7 December 2006, the OHIM Examiner confirmed the refusal decisions for the goods and services referred to in the applications for registration.

10 On 16 January 2007, CFCMCEE filed an appeal against both of those decisions.

11 The First Board of Appeal of OHIM, by the contested decisions, dismissed those appeals, relying solely on Article 7(1)(b) of Regulation No 40/94.

12 CFCMCEE lodged appeals against those decisions before the General Court.

The judgment under appeal

13 Concerning the meaning of the signs at issue, in the light of Article 7(1)(b) of Regulation No 40/94, the General Court considered, in paragraph 46 of the judgment under appeal, that those signs are composed of words which individually have a meaning for average English-speaking consumers or consumers with an elementary knowledge of English. The General Court adds, at paragraph 47 of that judgment, 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'.

14 The General Court held that the Board of Appeal of OHIM was entitled to consider that the relevant English-speaking public would readily perceive the signs at issue both individually and as a whole as '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' (paragraph 50 of the judgment under appeal).

15 In the context of the assessment of the distinctive character of the signs at issue, the General Court first of all noted, in paragraph 53 of the judgment under appeal, 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'.

16 Next, the General Court noted, in paragraphs 54 and 55 of the judgment under appeal, that, where the same ground of refusal is given for a category or group of goods or services, it was possible to use only general reasoning for all the goods and services concerned, but that, none the less, the fact that OHIM is able to use general reasoning must not frustrate the objective of the obligation to state reasons under Article 253 EC and the first sentence of Article 73 of Regulation No 40/94. Therefore, according to the General Court, it was necessary to examine whether those goods and services are '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'. Lastly, the Court, considered that 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.

17 With regard to the goods in Class 9 of that agreement, the General Court held, in paragraph 59 of the judgment under appeal, that the 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 constitute a homogeneous category of products 'by reason of their characteristics and their similar or even identical functions'.

18 In paragraphs 61 and 62 of the judgment under appeal, the General Court rejected the plea alleging infringement of Article 7(1)(b) of Regulation No 40/94 with regard to the goods mentioned in the previous paragraph of this order, but upheld it, in paragraphs 64 and 65 of that judgement, for magnetic data media.

19 With regard to credit card services and debit card services within Class 36 of the Nice Agreement, the General Court held, thereby upholding the contested decisions, that they are homogeneous in so far as 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. Therefore, it acknowledged that those services could be covered by general reasoning and held that the Board of Appeal of OHIM was entitled to find that the function of the signs at issue is to represent the services commercially and to conclude that the marks lack distinctive character in relation to those services (paragraphs 75 to 78 of the judgment under appeal).

20 The General Court then stated, in paragraph 80 of the judgment under appeal, that there is 'some connection' between the other services concerned within Class 36 since they have the same purpose, which is to carry out, in the real property, banking, financial and computing sectors, commercial transactions including payment by card and, where appropriate, by electronic means. Consequently, the General Court acknowledged that it was possible to consider them as coming within a homogeneous group of services for the purposes of a general statement of reasons.

21 The General Court next held, in paragraph 81 of the judgment under appeal, that the signs at issue do not have distinctive character in relation to those services since they cover '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'.

22 As regards the services within Class 38 of the Nice Agreement, the General Court held, in paragraph 84 of the judgment under appeal, that the 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 system services and online data transmission services are homogeneous since they all have the function of transmission of data via the internet or other communication networks. The Court then held that the signs at issue describe a quality of those services, namely the ability to access the internet or other communication networks by means of a card and transmit data and carry out other transactions online, for example, in order to make a distance purchase by means of a magnetic or microchip card.

23 Finally, having noted, in paragraph 12 of the judgment under appeal, that the contested decisions are based exclusively on Article 7(1)(b) of Regulation No 40/94, the General Court held, in paragraph 93 of that judgment, that the application of Article 7(1)(c) of that regulation did not form part of the subject-matter of the case before it.

24 In conclusion, the General Court, first, partially annulled the contested decisions, in so far as they refused the registration of the signs at issue as Community trade marks for the following goods and services:

— 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 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, time recording apparatus, transmitters (telecommunication), central processing units (processors) within Class 9 of the Nice Agreement;

— 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 of the Nice Agreement.

25 Secondly, the General Court dismissed the actions in relation to the registration of the signs at issue as Community trade marks for the following goods and services:

— integrated circuit cards (smart cards), magnetic encoded cards, magnetic or smart identity cards, magnetic or smart payment cards, both credit and debit, coin-operated mechanisms for television sets within Class 9 of the Nice Agreement;

— credit card services and debit card services within Class 36 of the Nice Agreement;

— 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, 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 within Class 36 of the Nice Agreement, in so far as the provision of those services requires or involves the use of a card;

— telecommunications, news agencies, in particular in the banking sector, communications by radio, communications by telephone, 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, 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 within Class 38 of the Nice Agreement, in so far as the provision of those services requires or involves the use of a card.

Forms of order sought by the parties

26 By its appeal, CFCMCEE asks the Court to set aside in part the judgment under appeal and to order OHIM to pay the costs.

27 OHIM asks the Court to dismiss the appeal as being inadmissible or, at the very least, as being unfounded and to order CFCMCEE to pay the costs.

The appeal

28 Pursuant to Article 119 of its Rules of Procedure, where the appeal is clearly inadmissible in whole or in part or clearly unfounded, the Court may at any time, acting on a report from the Judge-Rapporteur and after hearing the Advocate General, dismiss it in whole or in part by reasoned order.

Arguments of the parties

29 In the context of the first of the two pleas that it puts forward in support of its appeal, CFCMCEE claims that the General Court infringed Article 73 of Regulation No 40/94 by confirming the contested decisions with regard to the refusal to register the signs at issue for the following goods and services:

— magnetic or smart identity cards within Class 9 of the Nice Agreement;

— real estate affairs, accident insurance underwriting, debt collection agencies, financial analysis, insurance underwriting, real estate appraisal, issue of tokens of value, provident funds, exchanging money, cheque verification, issuing of travellers' cheques, financial consultancy, insurance brokerage, housing agents, stocks and bonds brokerage, deposits of valuables, safe deposit services, financial evaluation and assessments (insurance, banking, real estate), financial information (insurance, banking, real estate), financial management, financial information, rent collection, health insurance underwriting, marine insurance underwriting, life insurance underwriting, online financial information services, computerised interactive financial information services within Class 36 of that agreement;

— communications by computer terminals, sending of telegrams, information about telecommunication, electronic mail, message sending, computer aided transmission of messages and images, satellite transmission within Class 38 of that agreement.

30 CFCMCEE states in that regard that the Board of Appeal of OHIM merely assessed the distinctive character of the signs at issue in relation to the goods and services concerned, globally, without giving reasons for its decision in relation to each of the goods and services referred to.

31 However, as those goods and services do not constitute a homogenous group, the decisions at issue and the judgment under appeal contain clearly insufficient statements of reasons in infringement of Article 73 of Regulation No 40/94.

32 According to CFCMCEE, goods and services are homogenous only if they share the same character and purpose. If those two cumulative criteria are not satisfied, which is the position in the present case, general reasoning is excluded.

33 By its second plea, relating to the infringement of Article 7(1)(b) of Regulation No 40/94 concerning integrated circuit cards (smart cards), magnetic encoded cards, magnetic or smart identity cards, magnetic or smart payment cards, both credit and debit, coin-operated mechanisms for television sets within Class 9 of the Nice Agreement, CFCMCEE claims that the General Court inferred the lack of distinctive character of the signs at issue from their descriptive character. As a result, the General Court incorrectly interpreted paragraph 54 of the judgment in Case C-304/06 P *Eurohypo* v *OHIM* [2008] ECR I-3297, according to which each of the grounds for refusal to register listed in Article 7(1)(b) to (d) of that regulation is independent of the others and must be examined separately.

34 According to OHIM, where the same ground of refusal is given for a category or group of goods or services, the competent authority may use only general reasoning for all the goods and services concerned. OHIM states, furthermore, that CFCMCEE confuses the question of the homogeneous character of the categories of goods and

services and that of the meaning (and lack of distinctive character) of the marks which are the subject of an application for registration where they are examined in the light of each of those categories. However, only the first question is relevant in the context of the examination of a plea alleging infringement of the first sentence of Article 73 of Regulation No 40/94. The second question is relevant only in the context of the examination of a plea alleging infringement of Article 7(1)(b) of Regulation No 40/94.

35 Furthermore, OHIM considers as manifestly unfounded the argument put forward by CFCMCEE according to which goods and services are homogeneous, that being a necessary condition for the use of general reasoning for a refusal to register, only if they share the same character and purpose. CFCMCEE fails to show that the criteria relating to character and purpose must be cumulatively satisfied. In any event, the General Court took into consideration both the character and purposes of the goods concerned.

36 Finally, OHIM contends that, as to the remainder, CFCMCEE's appeal is inadmissible in the absence of inaccuracy of the General Court's findings of fact.

Findings of the Court

37 As the Court has already held, first, an examination of the absolute grounds for refusal must be carried out in relation to each of the goods and services for which trade mark registration is sought and, 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 (see, by analogy, Case C-239/05 *BVBA Management, Training en Consultancy* [2007] ECR I-1455, paragraph 34).

38 However, with regard to that last requirement, the Court has stated that the competent authority may use only general reasoning for all of the goods and services concerned where the same ground of refusal is given for a category or group of goods or services (*BVBA Management, Training en Consultancy*, paragraph 37).

39 Moreover, that power of the competent authority cannot in particular prejudice the essential requirement for any decision 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 (see, to that effect, *BVBA Management, Training en Consultancy*, paragraph 36 and case-law cited).

40 In the present case, it is apparent from paragraph 55 of the judgment under appeal, first, that the General Court correctly inferred from that case-law that such a power extends only to goods and services which are interlinked in a sufficiently direct and specific way, to the point where they form a sufficiently homogeneous category or group of goods or services. Secondly, it was correct to find that the mere fact that the goods and services concerned are within the same class of the Nice Agreement is not sufficient for a finding that such homogeneity exists, as those classes often contain a large variety of goods and services which are not necessarily interlinked in a sufficiently direct and specific way.

41 Having held, in paragraph 56 of the judgment under appeal, that defective reasoning constitutes a ground involving a question of public order, the General Court determined, in paragraphs 58 to 92 of that judgment, whether the Board of Appeal had examined and provided an adequate statement of reasons in relation to the lack of distinctive character of the signs at issue for the goods and services for which the registration of those signs as Community trade marks was refused.

42 Concerning goods within Class 9 of the Nice Agreement in respect of which the applicant seeks to have the judgment under appeal set aside, the General Court held, in paragraph 59 of the judgment under appeal, that, by reason of their characteristics

and their similar or even identical functions, they constitute a sufficiently homogeneous group to permit OHIM to use general reasoning.

43 Likewise, concerning the services within Class 36 of that agreement in respect of which the applicant seeks to have the judgment under appeal set aside, the General Court held, in paragraph 80 of that judgment, that those services all share one characteristic or purpose, which is to carry out commercial transactions including payment by card and, where appropriate, by electronic means, so that it is possible to regard them as coming within a homogeneous group of services for the purposes of a general statement of reasons.

44 Finally, concerning the services within Class 38 of that agreement in respect of which the applicant seeks to have the judgment under appeal set aside, the General Court held, in paragraph 84 of that judgment, that they fall within a homogeneous group of services directly connected with the field of computing and the internet and that they all have the ability to access the internet or other communication networks by means of a card and carry out data transmission and other transactions online, such as distance purchases and payments.

45 Therefore, it is necessary to reject as manifestly unfounded CFCMCEE's claim made in the context of the first plea that the General Court infringed Article 73 of Regulation No 40/94 by failing to provide adequate reasoning for its finding that the goods and services in respect of which the applicant seeks to have the judgment under appeal set aside are sufficiently homogeneous.

46 It is also necessary to reject as manifestly unfounded CFCMCEE's claim made in the context of the first plea that the General Court based that finding on wrong criteria. It is in no way apparent from the case-law noted in paragraph 55 of the judgment under appeal that the relevant criteria for determining whether the goods and services are homogeneous are cumulative and that they are limited to the character and purposes

thereof. Therefore, as is apparent from the grounds of the judgment under appeal noted in paragraphs 41 to 43 of the present judgment, the General Court was correct to take account, for the purposes of assessing whether the goods and services concerned are homogeneous, in particular their characteristics, their essential qualities and their purposes.

47 To the extent that, in the context of the first plea, CFCMCEE calls in question the findings of the General Court in connection with that assessment, it must be noted that, under Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal lies on points of law only. The General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, save where they distort the evidence, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see, inter alia, Case C-214/05 P *Rossi* v *OHIM* [2006] ECR I-7057, paragraph 26).

48 Since no distortion of the facts or evidence submitted to the General Court has been invoked with regard to those findings, the first plea, in so far as it criticises those findings, must be rejected as manifestly unfounded.

49 It follows that the first plea must be rejected as in part manifestly unfounded and in part manifestly inadmissible.

50 Concerning the second plea, it should be noted that it is apparent from paragraph 54 of the judgment in *Eurohydro* v *OHIM* that even if there is a degree of overlap between the respective scope of the absolute grounds for refusal to register a trade mark set out in Article 7(1)(b) to (d) of Regulation No 40/94, it is nevertheless the case that, according to established case-law, each of the grounds for refusal to register listed in Article 7(1) of that regulation is independent of the others and requires separate examination.

51 In the present case, the General Court first of all examined, in paragraphs 30 to 34 of the judgment under appeal, whether there is a ground for refusal to register inferred from Article 7(1)(b) of Regulation No 40/94, by noting the legal basis and the principles inferable from the case-law relating to the distinctive character of a trade mark. Next, it analysed, in paragraphs 35 to 51 of that judgment, the perception of the signs at issue by the relevant public. Following that analysis, the General Court concluded that the Board of Appeal was entitled to hold, in essence, that those signs, assessed as a whole, were not unusual or arbitrary and that the relevant English-speaking public would immediately perceive them, 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. Finally, the General Court examined, in paragraphs 58 to 62 of the judgment under appeal, the distinctive character of the signs at issue in relation to the goods within Class 9 of the Nice Agreement, in respect of which the applicant seeks to have the judgment under appeal set aside.

52 As the General Court noted in paragraph 61 of the judgment under appeal, the overlap between the absolute grounds for refusal implies, in particular, that a word mark which is descriptive of characteristics of goods or services may, on that account, be devoid of any descriptive character in relation to those goods or services, without prejudice to other reasons why it may be devoid of distinctive character (see, by analogy, *Eurohypo* v *OHIM*, paragraphs 54 and 69 and case-law cited).

53 Therefore, the General Court was correct to hold, in paragraph 60 of the judgment under appeal, that the signs at issue have a descriptive character with regard to the goods concerned, within Class 9 of the Nice Agreement, such that they are devoid of distinctive character.

54 Therefore, the second ground of appeal must be dismissed as clearly unfounded.

55 In the light of the foregoing, the appeal must be dismissed in its entirety.

Costs

56 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As OHIM has applied for costs and CFCMCEE has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Fifth Chamber) hereby orders:

1. The appeal is dismissed.

2. The Caisse fédérale du Crédit mutuel Centre Est Europe shall pay the costs.

[Signatures]