Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

22 June 2017*

(EU trade mark — Application for EU figurative mark ZUM wohl — Absolute grounds for refusal — Descriptive character — Article 7(1)(c) of Regulation (EC) No 207/2009 — Reference to statement submitted to the Board of Appeal reproduced in the application — Evidence annexed to the request for a hearing)

In Case T-236/16,

Biogena Naturprodukte GmbH & Co. KG, established in Salzburg (Austria), represented by I. Schiffer and G. Hermann, lawyers,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by S. Hanne, acting as Agent,

defendant,

ACTION brought against the decision of the First Board of Appeal of EUIPO of 23 February 2016 (case R 1982/2015-1), relating to the application for registration of the figurative sign ZUM wohl as an EU trade mark,

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni (Rapporteur), President, L. Madise and R. da Silva Passos, Judges,

Registrar: A. Lamote, Administrator,

having regard to the application lodged at the Court Registry on 10 May 2016,

having regard to the response lodged at the Court Registry on 29 June 2016,

having regard to the Court's written questions to the parties and the parties' oral responses at the hearing,

further to the hearing on 9 February 2017,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

1 On 23 January 2015, the applicant, Biogena Naturprodukte GmbH & Co. KG, filed an application for registration of an EU trade mark with the European Union Intellectual Property Office (EUIPO) pursuant to Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

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



3 The goods and services in respect of which registration was sought are in Classes 29, 30, 32 and 43 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of Registration of Marks of 15 June 1957, as revised and amended, and correspond, for each of those classes, to the following description:

— Class 29: 'Meat; poultry, not live; game, not live; meat extracts; consommés; jams and tinned fruit; cooked fruits; frozen fruits; dried fruits; edible jellies; jams; compotes; fruit and vegetable jellies, jams, compotes, spreads; fruit salads; fruit-based snack food; vegetable salads; milk; milk products; edible oils; oils and fats; processed vegetables; processed fruits, mushrooms and vegetables (including nuts and dried vegetables); fish, not live';

— Class 30: 'Coffee; tea; tea mixtures; cocoa; sugar; rice; tapioca; sago; artificial coffee; flour; cereal; bread; confectionery made from pastry dough; sweets; ice for refreshment; ketchup [sauce]; honey; salt; mustard; sauces [condiments]; seasonings; vinegars';

— Class 32: 'Beer; mineral water; aerated water; non-alcoholic beverages; fruit drinks; juice; syrups for beverages; extracts for making beverages; preparations for making beverages';

— Class 43: 'Food and drink preparation services; takeaway services; provision of information relating to the preparation of food and drink'.

4 By decision of 31 July 2015, the examiner refused registration of the mark applied for in respect of all the goods and services referred to in paragraph 3 above, on the basis of Article 7(1)(b) and (c) of Regulation No 207/2009.

5 On 30 September 2015, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009, against the examiner's decision.

6 By decision of 23 February 2016 ('the contested decision'), the First Board of Appeal of EUIPO dismissed the appeal. It explained, as a preliminary point, that the relevant public was both the general public and a specialist public being German-speaking or having at least a sufficient knowledge of German (paragraphs 13 and 14 of the contested decision). The Board of Appeal then found that the mark applied for was descriptive of the goods and services concerned, within the meaning of Article 7(1)(c) of Regulation No 207/2009, since the German expression 'zum Wohl' would be

immediately recognised by the relevant public as meaning that the goods and services would contribute to the well-being of the targeted consumers and the figurative elements of the mark applied for would not divert the consumer's attention from the clear laudatory advertising message conveyed by this expression (paragraphs 15 to 23 of the contested decision). It also held that the mark applied for was devoid of distinctive character, within the meaning of Article 7(1)(b) of Regulation No 207/2009 (paragraphs 25 to 32 of the contested decision).

Forms of order sought

7 The applicant claims that the Court should:

— annul the contested decision;

— allow the mark applied for to proceed to registration as an EU trade mark in respect of all the goods and services in Classes 29, 30, 32 and 43 for which registration is sought;

— order EUIPO to pay the costs, including those incurred in the proceedings before EUIPO;

8 EUIPO contends that the Court should:

— dismiss the second head of claim as inadmissible;

— dismiss the action as unfounded as to the remainder;

— order the applicant to pay the costs.

9 At the hearing, the applicant withdrew the second head of claim, which was noted in the minutes of the hearing.

Law

Admissibility

Reference to statement submitted to the Board of Appeal

10 In its application, the applicant refers to the written statement setting out the grounds of appeal before the Board of Appeal of EUIPO, claiming that this statement 'forms an integral part of the reasons for this action'.

11 In this regard, it should be recalled that, in accordance with the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union and Article 177(1)(d) of the Rules of Procedure of the General Court, the application must contain the pleas and arguments on which the application is based as well as a summary of those pleas. That statement must be apparent from the text of the application itself and be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information (see judgments of 9 July 2010, *Exalation* v *OHIM (Vektor-Lycopin)*, T-85/08, EU:T:2010:303, paragraph 33 and the case-law cited, and of 12 November 2015, *CEDC International* v *OHIM — Fabryka Wódek Polmos Łańcut (WISENT)*, T-449/13, not published, EU:T:2015:839, paragraph 16 and the case-law cited; see also, to that effect, judgment of 18 July 2006, *Rossi* v *OHIM*, C-214/05 P, EU:C:2006:494, paragraph 37).

12 Moreover, whilst the text of the application can be supported by references to extracts in documents annexed to it, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, the annexes having a purely evidential and instrumental function (see judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:2201, paragraphs 40 and 41 and the case-law cited; order of 14 April 2016, *Best-Lock (Europe)* v *EUIPO*, C-452/15 P, not published, EU:C:2016:270, paragraph 14 and the case-law cited, and judgment of 2 December 2015, *Kenzo* v *OHIM — Tsujimoto (KENZO ESTATE)*, T-528/13, not published, EU:T:2015:921, paragraph 38 and the case-law cited). It follows that an application, in so far as it refers to pleadings submitted to EUIPO, is inadmissible to the extent that the general references in it cannot be linked to the pleas and arguments put forward in that application itself (see, to that effect, judgments of 13 February 2007, *Mundipharma* v *OHIM — Altana Pharma (RESPICUR)*, T-256/04, EU:T:2007:46, paragraphs 14 and 15, and of 25 November 2015, *Masafi* v *OHIM — Hd1 (JUICE masafi)*, T-248/14, not published, EU:T:2015:880, paragraph 14).

13 Furthermore, the same applies where the reference pertains to a measure reproduced in the body of the application without indication of which specific points of the statement of the grounds of the application the applicant wishes to support, or which extracts of the measure in question represent the elements that may support or supplement the grounds of the application, since such incorporation is in no way different, in this case, from reference to an annex to an application (see, to that effect, with regard to the civil service, concerning a reference to a complaint reproduced in the body of the application, order of 28 April 1993, *De Hoe* v *Commission*, T-85/92, EU:T:1993:39, paragraph 23, confirmed on appeal by order of 7 March 1994, *De Hoe* v *Commission*, C-338/93 P, EU:C:1994:85, paragraph 29). Otherwise, by simply reproducing the annexes in the body of the application, the applicants would be able to circumvent the case-law concerning the incompatibility of general references to annexes with the formal requirements laid down by the provisions of the Statute of the Court of Justice of the European Union and of the Rules of Procedure referred to in paragraph 11 above.

14 Thus, in the present case, even if the statement submitted to the Board of Appeal is entirely reproduced in the background to the dispute presented in the application, it is not for the Court to search, either in that statement or in the extracts in the application reproducing that statement, for the arguments to which the applicant might be referring and to examine them, since those arguments are inadmissible. This is particularly so since the statement was drafted for the purpose of contesting the examiner's decision and cannot be considered relevant to supporting the action brought against the contested decision.

Evidence presented in the annex to the request for a hearing

15 The applicant attached as an annex to its request for a hearing, presented within the period of three weeks after service on the parties of notification of the close of the written part of the procedure, in accordance with Article 106 of the Rules of Procedure, copies of photographs of products bearing the mark applied for and press articles regarding the hostel 'Zum Wohl' as well as extracts from Wikipedia regarding the press titles concerned.

16 It should be recalled that, according to Article 85(1) and (3) of the Rules of Procedure, evidence is to be submitted in the first exchange of pleadings, the main parties exceptionally having the opportunity to produce further evidence before the oral part of the procedure is closed, provided that the delay in the submission of such evidence is justified.

17 It is apparent from case-law that evidence in rebuttal and the amplification of previous evidence, submitted in response to evidence in rebuttal put forward by the opposing party in his defence, are not covered by the time-bar rule in Article 85(1) of the Rules of Procedure. Indeed, that provision concerns fresh evidence and must be read in the light of Article 92(7) of those rules, which expressly

provides that evidence may be submitted in rebuttal and previous evidence may be amplified (see, by analogy, judgments of 17 December 1998, *Baustahlgewebe* v *Commission*, C-185/95 P, EU:C:1998:608, paragraph 72, and of 12 September 2012, *Italy* v *Commission*, T-394/06, not published, EU:T:2012:417, paragraph 45).

18 In the present case, the applicant produced, for the first time, the evidence referred to in paragraph 15 above, as an annex to its request for a hearing after the close of the written part of the procedure, without giving the slightest explanation for this delay. The applicant explained at the hearing, in answer to a question asked by the Court (see, to that effect, judgment of 6 February 2013, *Bopp* v *OHIM (Representation of a green octagonal frame)*, T-263/11, not published, EU:T:2013:61, paragraph 31 and the case-law cited), that it had not been able to submit this evidence at the time of lodging the application because of changes to the personnel in its legal service and the maternity leave of one of its directors.

19 Such unsupported allegations referring to purely internal problems, in relation to a company with its own legal service, moreover, cannot be considered to justify late submission of the evidence in question.

20 Furthermore, EUIPO presented nothing, in either the body or annex of its response, which would suggest that the applicant should be permitted to submit evidence at this stage of the procedure in order to ensure observance of the adversarial principle.

21 It follows that the evidence presented in the annex to the applicant's request for a hearing must be declared inadmissible, especially as this evidence is not included in the file relating to the proceedings before the Board of Appeal and it is not the Court's function to re-evaluate the factual circumstances in the light of evidence produced for the first time before it (see order of 13 September 2011, *Wilfer* v *OHIM*, C-546/10 P, not published, EU:C:2011:574, paragraph 41 and the case-law cited).

Substance

22 In its application, the applicant put forward two pleas in law, the first alleging infringement of Article 7(1)(c) of Regulation No 207/2009, and the second alleging infringement of Article 7(1)(b) of that regulation. The applicant clarified at the hearing, in response to a question asked by the Court, that by its arguments set out in the request for a hearing it did not further submit infringement of Article 7(3) of Regulation No 207/2009, formal note of which was taken in the minutes of the hearing.

23 At the hearing, the applicant added that it wished to raise a third plea in law, alleging breach of the obligation to state reasons, which should be considered first.

Plea in law alleging breach of the obligation to state reasons

24 At the hearing, the applicant submitted that the contested decision was vitiated by inadequate reasoning, in that the Board of Appeal did not give specific reasons for its assessment of the descriptive and non-distinctive character of the mark applied for, for each of the goods and services in question.

25 Even without there being any need to rule on the admissibility of this plea and on the requirements of a trial *inter partes*, it must be held that the reasoning of the contested decision is, in any event, sufficient.

26 In this regard, it must be recalled that, in accordance with the first sentence of Article 75 of Regulation No 207/2009, decisions of EUIPO must state the reasons on which they are based. According to settled case-law, that duty has the same scope as that laid down by Article 296 TFEU and its purpose is, first,

to allow interested parties to know the justification for the measure so as to enable them to protect their rights and, second, to enable the EU judicature to exercise its power to review the legality of the decision (see judgment of 28 April 2004, *Sunrider* v *OHIM — Vitakraft-Werke Wührmann and Friesland Brands (VITATASTE and METABALANCE 44)*, T-124/02 and T-156/02, EU:T:2004:116 paragraphs 72 and 73 and the case-law cited).

27 It must equally be borne in mind that, although the decision by which the competent authority refuses to register a trade mark must in principle state reasons in respect of each of the goods or services concerned, the competent authority may, where the same ground of refusal is given for a category or group of goods or services, use only general reasoning for all of the goods and services which are sufficiently directly and specifically connected, to the point that they comprise a category or group of goods of sufficient homogeneity (see judgment of 16 October 2014, *Larrañaga Otaño* v *OHIM (GRAPHENE)*, T-458/13, EU:T:2014:891, paragraph 26; see also, to this effect, order of 18 March 2010, *CFCMCEE* v *OHIM*, C-282/09 P, EU:C:2010:153, paragraphs 37 to 40, and, by analogy, judgment of 15 February 2007, *BVBA Management, Training en Consultancy*, C-239/05, EU:C:2007:99, paragraphs 34 to 38).

28 In the present case, the Board of Appeal took the view that the mark applied for was, firstly, descriptive of the food goods in Classes 29, 30 and 32 and of the food-related services in Class 43, because the German expression 'zum Wohl' would be understood as meaning that the goods and services concerned would contribute to well-being and the figurative elements accompanying this expression would be insufficient to divert attention from this message, and, secondly, non-distinctive, it being a usual laudatory indication of these goods and services (see paragraph 6 above). Certainly, in order to facilitate drafting and for want of any challenge concerning any one of the goods or services in question specifically, the Board of Appeal on several occasions referred to the goods and services generally, referring in particular to 'goods and services of the food industry' (see paragraphs 18 and 28 of the contested decision). Nevertheless, when the analysis required it, it adapted its reasoning according to whether it was goods or services in question and specified its reasoning for those products, grouping some of them by food or drink type and mentioning separately those products that could not be grouped (see paragraphs 20 and 21 of the contested decision).

29 It should be added that the goods and services in question can, by the fact that they are all food goods of everyday consumption or services with a direct link to such goods, be considered to have a sufficiently direct and specific link between them, to the point that they comprise a category of sufficient homogeneity as to enable all the considerations of fact and law constituting the grounds of the contested decision, first, to explain adequately the reasoning followed by the Board of Appeal for each of the goods and services belonging to that category and, second, to be applied without distinction to each of the goods or services concerned (see, to that effect, judgment of 25 October 2007, *Develey* v *OHIM*, C-238/06 P, EU:C:2007:635, paragraph 92).

30 It follows that the Board of Appeal cannot be criticised for having, in the present case, for the most part used global reasoning in its assessment of the absolute grounds for refusal of registration of the mark applied for.

The plea in law alleging breach of Article 7(1)(c) of Regulation No 207/2009

31 Under Article 7(1)(c) of Regulation No 207/2009, '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' may not be registered.

32 According to case-law, Article 7(1)(c) of Regulation No 207/2009 prevents the signs or indications to which it refers being reserved to one undertaking alone because they have been registered as trade marks. That provision thus pursues an aim which is in the public interest, namely, that such signs or indications may be freely used by all (judgments of 23 October 2003, *OHIM* v *Wrigley*, C-191/01 P, EU:C:2003:579, paragraph 31; of 27 February 2002, *Ellos* v *OHIM (ELLOS)*, T-219/00, EU:T:2002:44, paragraph 27; and of 2 May 2012, *Universal Display* v *OHIM (UniversalPHOLED)*, T-435/11, not published, EU:T:2012:210, paragraph 14).

33 In addition, signs and indications which may serve in trade to designate the characteristics of the goods or services in respect of which registration is sought are, by virtue of Article 7(1)(c) of Regulation No 207/2009, regarded as incapable of performing the essential function of a trade mark, namely that of identifying the commercial origin of the goods or services, thus enabling the consumer who acquired them to make the same choice, when making a subsequent acquisition, if the experience has proved positive, or to make another choice, if it has proved negative (judgments of 23 October 2003, *OHIM* v *Wrigley*, C-191/01 P, EU:C:2003:579, paragraph 30, and of 2 May 2012, *Universal Display* v *OHIM (UniversalPHOLED)*, T-435/11, not published, EU:T:2012:210, paragraph 15).

34 It follows that, for a sign to be caught by the prohibition set out in that provision, there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics (see judgment of 16 October 2014, *Larrañaga Otaño* v *OHIM (GRAPHENE)*, T-458/13, EU:T:2014:891, paragraph 16 and the case-law cited).

35 Lastly, it is important to bear in mind that the distinctiveness of a mark may only be assessed, first, in relation to the understanding of the mark by the relevant public and, second, in relation to the goods or services concerned (see judgment of 7 June 2005, *Münchener Rückversicherungs-Gesellschaft* v *OHIM (MunichFinancialServices)*, T-316/03, EU:T:2005:201, paragraph 26 and the case-law cited).

36 In the present case, the Board of Appeal took the view that the relevant public for the purposes of the perception of the descriptive character of the mark applied for was made up of the general public and a specialist public being German-speaking or having at least a sufficient knowledge of German (paragraphs 13 and 14 of the contested decision).

37 The applicant does not call into question the Board of Appeal's finding that the relevant public is made up of both the general public and a specialist public, but criticises the assessment of the descriptive character of the mark applied for with regard to just the German-speaking public or those having a basic knowledge of German. In addition, the applicant disputes the contested decision in respect of the meaning attributed to the verbal element of the mark applied for, the insufficient account taken of the figurative elements of that mark, and the descriptive link established between that mark and the products and services concerned.

– *The linguistic knowledge of the relevant public*

38 It is settled case-law that the descriptive character of a sign comprising a verbal element must be assessed with regard to consumers with a sufficient knowledge of the language from which the verbal element in question stems (see, to that effect, judgments of 11 June 2009, *ERNI Electronics* v *OHIM (MaxiBridge)*, T-132/08, not published, EU:T:2009:200, paragraph 34 and the case-law cited, and of 9 July 2014, *Pågen Trademark* v *OHIM (gifflar)*, T-520/12, not published, EU:T:2014:620, paragraphs 19 and 20). Indeed, Article 7(2) of Regulation No 207/2009, which provides that paragraph 1 applies even if the grounds for refusal exist in only part of the EU, implies that if the word element of a mark is descriptive in just one of the languages used in trade within the EU, that is sufficient to render it ineligible for registration as an EU trade mark (see, in respect to a word mark,

judgment of 20 September 2001, *Procter & Gamble* v *OHIM*, C-383/99 P, EU:C:2001:461, paragraph 41). By contrast, if the consumer with knowledge of the language in which the word element has meaning does not perceive it as being descriptive, *a fortiori*, the other consumers in the EU who don't understand that language will not perceive it as descriptive and the absolute grounds for refusal based on descriptive character will not apply to the mark at issue.

39 It follows that the applicant's complaint criticising the assessment of the descriptive character of the mark applied for with regard to only the German-speaking public or those with a basic understanding of German, must be rejected.

– *The meaning of the word element of the mark applied for*

40 The Board of Appeal took the view that the German expression 'zum Wohl' was a common expression used to 'wish well-being' for someone, and that the mark applied for would immediately be understood as meaning that the goods and services concerned would contribute to the well-being of the targeted consumers. It explained that the differences in the use of upper and lower case letters between the German expression 'zum Wohl' and the mark applied for would not enable the understanding of the mark to be called into question (paragraphs 16 to 18 of the contested decision).

41 The applicant maintains that the word element of the mark applied for cannot be understood as meaning 'for well-being' on the ground that 'zum' was written in upper-case letters and 'wohl' in lower-case letters, the latter therefore referring to an adverb and not to the German noun 'Wohl', which starts with the upper-case letter 'W' and means 'well-being'.

42 It is settled case-law that the grammatically incorrect structure of a sign is not sufficient to conclude an absence of descriptive character of that sign, since the possible mismatch created with respect to a word respecting the grammar rules of the language concerned is not such as to confer on the mark applied for a meaning sufficiently distanced from that of this word (see, to that effect, judgments of 7 June 2005, *Münchener Rückversicherungs-Gesellschaft* v *OHIM (MunichFinancialServices)*, T-316/03, EU:T:2005:201, paragraph 36, and of 2 December 2015, *adp Gauselmann* v *OHIM (Multi Win)*, T-529/14, not published, EU:T:2015:919, paragraph 32).

43 In the present case, which concerns a German expression that has a common meaning when written 'zum Wohl' — namely that of 'to wish well-being' for a person, particularly when toasting or following a sneeze — and that does not when the adverb 'wohl', meaning 'probably', is attached to the term 'zum', the pertinent German-speaking public will notice the mistake made and substitute the word 'wohl', incorrectly written in this case, with that of 'Wohl' (see, to that effect, judgment of 12 June 2007, *MacLean-Fogg* v *OHIM (LOKTHREAD)*, T-339/05, not published, EU:T:2007:172, paragraph 55).

44 This is particularly so since, as the Board of Appeal rightly pointed out in paragraph 18 of the contested decision, as the mark applied for is a figurative mark, the use of upper and lower-case letters will be perceived more as being part of the stylisation of the word element of the mark rather than changing the meaning of this word element.

45 It follows that the Board of Appeal correctly found that the word element of the mark applied for would be understood as meaning 'for well-being'.

– *Consideration of figurative elements in the mark applied for*

46 After describing the figurative elements of the mark applied for, the Board of Appeal took the view that these elements would not divert the consumer's attention from the clear laudatory advertising message conveyed by the German expression 'zum Wohl'. It noted, in support of this finding, that the circular black background as well as its white outlines, the typefaces used and the size of the word elements corresponded to normal graphic elements (paragraphs 15 and 19 of the contested decision).

47 The applicant considers, however, that the figurative elements (typefaces, background, play of colours), because of their unusual and creative character, are sufficient to confer on the sign, when taken as a whole, a character that is not purely descriptive. It also criticises the Board of Appeal for having given insufficient reasons for its assessment of the figurative elements of the mark applied for.

48 It is apparent from case-law that, for the purposes of assessing the descriptive character of a sign comprising word elements and figurative elements, the decisive question is whether the figurative elements divert the relevant consumer from the message conveyed by the word element of the mark applied for in respect of the goods and services concerned (see, to that effect, judgments of 9 July 2014, *Pågen Trademark* v OHIM (gifflar), T-520/12, not published, EU:T:2014:620, paragraph 24 and the case-law cited, and of 10 September 2015, *Laverana* v *OHIM (BIO PROTEINREICHER PFLANZENKOMPLEX AUS EIGENER HERSTELLUNG)*, T-571/14, not published, EU:T:2015:626, paragraph 20 and the case-law cited).

49 In the present case, the Board of Appeal made precisely such an analysis in paragraph 19 of the contested decision, examining whether or not each of the figurative elements had a normal character in order to conclude that they would not allow the consumer to be diverted from the message conveyed by the mark (see paragraph 46 above). Therefore, it cannot be criticised for insufficient reasoning in this regard.

50 Furthermore, the Board of Appeal correctly took the view that the figurative elements would not divert the relevant German-speaking public from the message of well-being that is apparent from the word element of the mark applied for.

51 Indeed, the black circular background and the circles constituting the outline correspond to a basic geometric shape as well as to standard borders (see, to that effect, judgment of 10 September 2015, *Laverana* v *OHIM (BIO PROTEINREICHER PFLANZENKOMPLEX AUS EIGENER HERSTELLUNG)*, T-571/14, not published, EU:T:2015:626, paragraph 20). Likewise, the difference in size between the two word elements as well as the different typefaces used for those two elements cause the consumer's attention to be drawn to the word 'Wohl' and, thus, to the idea of well-being. Lastly, the colours black and white are frequently used to attract consumers' attention (judgment of 3 December 2015, *Infusion Brands* v *OHIM (DUALTOOLS)*, T-648/14, not published, EU:T:2015:930, paragraph 30) and, in the present case, contribute to making the word element 'zum wohl', written in white on a black background, stand out, thus highlighting this element. Accordingly, even taken together, the figurative elements of the mark applied for do not divert the relevant public from the message conveyed by the German expression 'zum Wohl'.

52 The complaints relating to insufficient reasoning and to error of assessment in considering the figurative elements of the mark applied for must, therefore, be rejected.

– *The link between the mark applied for and the goods and services referred to*

53 The Board of Appeal took the view that the mark applied for was a 'qualitative and therefore descriptive indication' of the goods and services in question, since the relevant public would immediately and without further reflection understand that the food goods in question contributed to the well-being of the consumers and that the services in question were proposed for the well-being of the consumers (paragraphs 20 to 23 of the contested decision).

54 The applicant submits that the message 'for well-being' provides no concrete indication of the quality of the goods and services so designated and, on that basis, does not describe any characteristic of those goods and services.

55 It should be recalled that it is settled case-law that the 'quality' mentioned in Article 7(1)(c) of Regulation No 207/2009 equally covers laudatory terms describing intrinsic qualities of the goods or services, provided, however, that there is a sufficiently direct and specific link between this indication of quality and the goods and services in question (see, to that effect, judgments of 9 December 2009, *Earle Beauty* v *OHIM (SUPERSKIN)*, T-486/08, not published, EU:T:2009:487, paragraphs 33, 37 and 38, and of 28 April 2015, *Saferoad RRS* v *OHIM (MEGARAIL)*, T-137/13, not published, EU:T:2015:232, paragraphs 47 and 48).

56 In the present case, it should be borne in mind, following the Board of Appeal (paragraph 22 of the contested decision), that the food and drink goods in Classes 29, 30 and 32, covered by the trade mark application, are, by the fact that they are destined for human consumption, capable of 'do[ing] good to one's body and also car[ing] for the mind', i.e. they contribute to good health and thus to the physical but also psychological well-being of their consumers. The same applies to the food-related services in Class 43, also covered by the trade mark application, since they too can contribute to the good health and well-being of their beneficiaries by providing food and drink or information relating to the preparation of that food and drink.

57 It follows that the quality of the goods and services in question, mentioned in paragraph 56 above, can be considered a characteristic, easily recognised by the target public, of those goods and services for which registration was applied for, and that it is reasonable to assume that the mark applied for will be easily recognisable by that public as a description of one of the characteristics of the goods and services in question.

58 Contrary to what the applicant claims, it is in this respect irrelevant, even if it were proven to be the case, that not all food products and drinks contribute to the well-being of their consumers. Indeed, the fact that a sign is descriptive for only some of the goods and services within a category listed as such in the application for registration does not preclude that sign being refused registration, since, if in such a case the sign at issue was registered as an EU trade mark for the category covered, nothing would prevent the proprietor from using the mark also for goods and services in that category for which it is descriptive (see judgment of 9 July 2008, *Reber* v *OHIM — Chocoladefabriken Lindt & Sprüngli (Mozart)*, T-304/06, EU:T:2008:268, paragraph 92 and the case-law cited). Therefore, the Board of Appeal cannot be criticised for having contradicted itself, in paragraph 22 of the contested decision, by confirming, first, that the mark applied for was descriptive of the goods and services in question and, second, that not all food and drinks contribute to well-being.

59 Also irrelevant is the applicant's claim that the message of well-being concerned all the goods and services bought by a consumer, the latter buying only the goods and services conferring on him advantages and thus contributing to his well-being. Indeed, the claim that the goods and services are all bought because they contribute to the well-being of the consumers does not exclude the possibility that the mark applied for, which conveys exactly such a message of well-being, may have a character descriptive of the food goods and services in question.

60 Nor, finally, does the fact, as alleged by the applicant during the hearing, that a mark identical to that applied for was registered in Austria, allow the descriptive character of the mark applied for to be called into question. Indeed, in addition to the fact that the applicant in no way established the truth of its contention, and that it recognises that the Austrian mark was registered after the contested decision, it must be borne in mind that EUIPO and, where appropriate, the Courts of the European Union are not bound by the decisions given in Member States, even if they may take them into consideration, and that nothing in Regulation No 207/2009 obliges EUIPO or, on appeal the Court, to come to the same conclusions as those arrived at by national administrative or judicial authorities in similar circumstances (see judgment of 15 July 2015, *Australian Gold* v *OHIM — Effect Management & Holding (HOT)*, T-611/13, EU:T:2015:492, paragraph 60 and the case-law cited).

61 It follows that the complaint criticising the sufficiently direct and specific link between the mark applied for and the goods and services concerned must be rejected, as well as, therefore, the plea alleging breach of Article 7(1)(c) of Regulation No 207/2009 in its entirety.

The plea alleging infringement of Article 7(1)(b) of Regulation No 207/2009

62 As is clear from Article 7(1) of Regulation No 207/2009, it is sufficient that one of the absolute grounds for refusal applies for the sign at issue not to be registrable as an EU trade mark (judgments of 19 September 2002, *DKV* v *OHIM*, C-104/00 P, EU:C:2002:506, paragraph 29, and of 7 October 2015, *Cyprus* v *OHIM (ΧΑΛΛΟΥΜΙ and HALLOUMI)*, T-292/14 and T-293/14, EU:T:2015:752, paragraph 74).

63 As a consequence, since it is apparent from examination of the previous plea that the sign submitted for registration is descriptive of the goods and services in question, within the meaning of Article 7(1)(c) of Regulation No 207/2009, and that this ground alone justifies refusal of the contested registration, there is no need, in any event, to examine the merits of the plea alleging breach of Article 7(1)(b) of that regulation (see, to that effect, order of 13 February 2008, *Indorata-Serviços e Gestão* v *OHIM*, C-212/07 P, not published, EU:C:2008:83, paragraph 28).

64 It follows from all the foregoing that the action must be dismissed.

Costs

65 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by EUIPO.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. Dismisses the action;

2. Orders Biogena Naturprodukte GmbH & Co. KG to pay the costs.

Gervasoni Madise da Silva Passos

Delivered in open court in Luxembourg on 22 June 2017.

[Signatures]