Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

7 October 2015 *

(Community trade mark — Applications for Community word marks ΧΑΛΛΟΥΜΙ and HALLOUMI — Absolute ground for refusal — Lack of distinctive character — Descriptive character — Article 7(1)(b) and (c) of Regulation (EC) No 207/2009)

In Joined Cases T-292/14 and T-293/14,

Republic of Cyprus, represented by S. Malynicz, Barrister, and V. Marsland, Solicitor,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by P. Geroulakos, acting as Agent,

defendant,

TWO actions brought against two decisions of the Fourth Board of Appeal of OHIM of 19 February 2014 (Case R 1849/2013-4 and Case R 1503/2013-4), concerning applications for registration of the word sign ΧΑΛΛΟΥΜΙ and the word sign HALLOUMI, respectively, as Community trade marks,

THE GENERAL COURT (Fourth Chamber),

composed of M. Prek (Rapporteur), President, I. Labucka and V. Kreuschitz, Judges,

Registrar: I. Dragan, Administrator,

having regard to the applications lodged at the Court Registry on 28 April 2014,

having regard to the response lodged at the Court Registry on 16 September 2014,

having regard to the order of 28 August 2014 joining Cases T-292/14 and T-293/14 for the purposes of the written and oral parts of the procedure and the judgment,

further to the hearing on 20 May 2015,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

1 On 13 and 15 February 2013, the applicant, the Republic of Cyprus, lodged two applications for registration of Community trade marks at the Office for Harmonisation in the Internal Market (OHIM) pursuant to Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

2 The marks in respect of which registration was sought are the word signs HALLOUMI and ΧΑΛΛΟΥΜΙ.

3 The goods for which registration was sought are in Class 29 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: 'Cheese; milk and milk products'.

4 On 1 and 14 March 2013, the OHIM examiner informed the applicant that in his view the signs at issue could not be accepted for registration because of the existence of absolute grounds for refusal provided for in Article 7(1)(b) and (c) and Article 7(2) of Regulation No 207/2009.

5 By letters of 26 April and 14 May 2013, the applicant presented its arguments against the position adopted by the examiner.

6 By decisions of 21 June and 24 July 2013, the examiner rejected the Community trade mark applications on the basis of Article 7(1)(b) and (c) and Article 7(2) of Regulation No 207/2009.

7 On 2 August and 20 September 2013, the applicant filed two appeals at OHIM against the examiner's decisions, pursuant to Articles 58 to 64 of Regulation No 207/2009.

8 By two decisions of 19 February 2014 ('the contested decisions'), the Fourth Board of Appeal of OHIM dismissed those appeals. It took the view that the marks applied for were descriptive of the goods concerned, for the purpose of Article 7(1)(c) of Regulation No 207/2009, and that they were devoid of distinctive character, within the meaning of Article 7(1)(b) of that regulation.

9 First, the Board of Appeal stated that the words 'HALLOUMI' and 'ΧΑΛΛΟΥΜΙ', in capital letters, referred to a speciality cheese from Cyprus and therefore directly described, at least for the Cypriot public, the kind and geographical origin of the cheese, milk and milk products applied for. The Board of Appeal thus took the view that the perception of the English-speaking public, according to which the online *Oxford English Dictionary* defined the word 'halloumi' (written in Latin letters) as a registered trade mark (a proprietary name), was irrelevant. As regards the word 'ΧΑΛΛΟΥΜΙ', in capital letters, the Board of Appeal considered that the average English consumer would not be able to read the Greek alphabet. Secondly, the Board of Appeal noted that, since Regulation No 207/2009 does not provide for the registration of certification marks, such marks had to be filed as individual marks and could only be registered if not in conflict with any of the absolute grounds for refusal listed in Article 7(1) of Regulation No 207/2009. The Board of Appeal stated in this regard that the rejection of the registration applications by the examiner was based on the descriptive meaning of the words 'HALLOUMI' and 'ΧΑΛΛΟΥΜΙ', in capital letters, and not on the fact that the applicant operated certification schemes under those words. Thirdly, the Board of Appeal took the view that the fact that the signs INTEL INSIDE and FAIRTRADE had been registered as individual Community trade marks and were now licensed to communicate characteristics of goods or services could have no bearing in the present cases. Fourthly, the Board of Appeal held that, since the marks applied for

described the characteristics of the goods covered by the applications for registration of a trade mark, they were necessarily devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 207/2009.

Forms of order sought

10 The applicant claims that the Court should:

— annul the contested decisions;

— order OHIM to pay the costs.

11 OHIM contends that the Court should:

— dismiss the actions;

— order the applicant to pay the costs.

Law

12 In support of its actions, the applicant raises a single plea in law, alleging infringement of Article 7(1)(b) and (c) of Regulation No 207/2009. It is therefore necessary to examine, first of all, that single plea in so far as it relates to infringement of Article 7(1)(c) of that regulation.

13 Article 7(1)(c) of Regulation No 207/2009 provides that 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, are not to be registered. In addition, Article 7(2) of Regulation No 207/2009 states that paragraph 1 is to apply notwithstanding that the grounds of non-registrability obtain in only part of the European Union.

14 The signs and indications referred to in Article 7(1)(c) of Regulation No 207/2009 are those which may serve in normal usage from the point of view of the target public to designate, either directly or by reference to one of their essential characteristics, the goods or services in respect of which registration is sought (judgments of 20 September 2001 in *Procter & Gamble* v *OHIM*, C-383/99 P, ECR, EU:C:2001:461, paragraph 39, and of 22 June 2005 in *Metso Paper Automation* v *OHIM (PAPERLAB)*, T-19/04, ECR, EU:T:2005:247, paragraph 24).

15 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 (judgments in *PAPERLAB*, cited in paragraph 14 above, EU:T:2005:247, paragraph 25, and of 30 November 2011 in *Hartmann* v *OHIM (Complete)*, T-123/10, EU:T:2011:706, paragraph 21).

16 Accordingly, the descriptive character of a sign can be assessed only by reference to the goods or services concerned and to the way in which it is understood by the relevant public (judgments of 16 March 2006 in *Telefon & Buch* v *OHIM — Herold Business Data (WEISSE SEITEN)*, T-322/03, ECR, EU:T:2006:87, paragraph 90, and of 15 January 2015 in *MEM* v *OHIM (MONACO)*, T-197/13, ECR, EU:T:2015:16, paragraph 50).

17 The arguments of the parties relating to the assessment set out by the Board of Appeal in the contested decisions must be examined in the light of those principles.

18 In the first place, as mentioned in paragraph 13 of the contested decisions, the goods at issue address consumers at large, a fact which is not, moreover, contested by the applicant. The Board of Appeal's approach — also not contested by the applicant — consisting in referring to the Cypriot public for the purpose of conducting its analysis of the descriptive character of the marks applied for must also be approved.

19 The Board of Appeal correctly assessed, pursuant to Article 7(2) of Regulation No 207/2009, the absolute ground for refusal in relation to the Cypriot public alone. As the Board of Appeal notes in paragraph 11 of the contested decision in Case T-292/14, the word 'ΧΑΛΛΟΥΜΙ', in capital letters, is written in the Greek alphabet and the assessment of registrability can be based on the Cypriot public, for which the Greek alphabet is used as the standard alphabet. Likewise, in respect of the words 'HALLOUMI' and 'ΧΑΛΛΟΥΜΙ', in capital letters, the applicant accepts that these refer to a speciality cheese from Cyprus. That reason is also sufficient to justify the fact that, in Case T-293/14, the Board of Appeal referred to the Cypriot public alone in order to assess the absolute ground for refusal.

20 In the second place, the Board of Appeal found that the words 'HALLOUMI' and 'ΧΑΛΛΟΥΜΙ', in capital letters, refer to a speciality cheese from Cyprus and therefore directly describe, for the Cypriot public, the kind and geographical origin of the cheese, milk and milk products applied for (paragraph 14 of the contested decisions).

21 That finding must be upheld. It is confirmed by the applicant itself in its written pleadings. The applicant notes that the words 'HALLOUMI' and 'ΧΑΛΛΟΥΜΙ', in capital letters, indicate a particular type of cheese exported from Cyprus, made in a certain way and with particular taste, texture and cooking properties.

22 Similarly, it should be observed that the Court has already held that the word 'HALLOUMI', in capital letters, referred to the specialty cheese from Cyprus and that that word was descriptive of that product (see, to that effect, judgment of 13 June 2012 in *Organismos Kypriakis Galaktokomikis Viomichanias* v *OHIM — Garmo (HELLIM)*, T-534/10, ECR, EU:T:2012:292, paragraphs 41 and 55).

23 At the hearing, the applicant disputed that interpretation of the judgment in *HELLIM*, cited in paragraph 22 above (EU:T:2012:292), arguing that, in paragraph 41 of that judgment, the Court did not rule on the distinctive character of the earlier mark HALLOUMI, but merely assessed the Greek word converted into Turkish, that it merely stated that the Turkish translation of the word 'halloumi' was 'hellim', and that consumers knew that those two words referred to the same product. The applicant also argued that, in paragraph 52 of the judgment in *HELLIM*, cited in paragraph 22 above (EU:T:2012:292), the Court acknowledged that the earlier mark HALLOUMI had a distinctive character.

24 Those arguments must be rejected as ineffective. The Court observes that the applicant does not call into question the fact that the word 'HALLOUMI', in capital letters, is descriptive of the product at issue, namely that it is a specialty cheese from Cyprus, as was, moreover, held in paragraph 55 of the judgment in *HELLIM*, cited in paragraph 22 above (EU:T:2012:292).

25 In relation to the goods or services for which its registration as a mark is applied for, it should be recalled that a sign which has descriptive character for the purposes of Article 7(1)(c) of Regulation No 207/2009 is — save where Article 7(3) applies — devoid of any distinctive character as regards those goods or services (see judgments of 10 March 2011 in *Agencja Wydawnicza Technopol* v *OHIM*, C-51/10 P, ECR, EU:C:2011:139, paragraph 33 and the case-law cited, and of 11 May 2005 in *Naipes Heraclio Fournier* v *OHIM — France Cartes (A sword in a pack of cards)*, T-160/02 to T-162/02, ECR, EU:T:2005:167, paragraph 59 and the case-law cited).

26 However, the applicant has not invoked Article 7(3) of Regulation No 207/2009 or shown that its sign had become distinctive in relation to the goods at issue in consequence of the use which had been made of it within the meaning of the aforementioned provision.

27 The fact that, in the judgment in *HELLIM*, cited in paragraph 22 above (EU:T:2012:292), the Court acknowledged, following a challenge relating to the likelihood of confusion between the marks HALLOUMI and HELLIM, that the earlier Community collective word mark HALLOUMI had a weak distinctive character — as is, moreover, required by the case-law (see judgment of 24 May 2012 in *Formula One Licensing* v *OHIM*, C-196/11 P, ECR, EU:C:2012:314, paragraph 47) — does not call into question the assessment set out in the previous paragraph. First, the Court notes, in that judgment, the lack of any particularly distinctive character of the mark HALLOUMI and its descriptive character (judgment in *HELLIM*, cited in paragraph 22 above, EU:T:2012:292, paragraph 55). Consequently, the finding that the Community collective word mark HALLOUMI is of weak distinctive character is insufficient to counteract the descriptive character of that mark. Secondly, it does not appear in the judgment in question that the weak distinctive character was acquired through use, as required by Article 7(3) of Regulation No 207/2009.

28 In the light of the foregoing, it must be accepted that the descriptive meaning of the sign HALLOUMI, as found by the Board of Appeal, is established, at least for the Cypriot public. For identical reasons, the same conclusion can be drawn in respect of the sign ΧΑΛΛΟΥΜΙ.

29 It follows that the Board of Appeal made no error of assessment in finding that the marks applied for could not be accepted for registration because of their descriptive meaning of the goods in respect of which registration was sought, at least for the Cypriot public.

30 The applicant puts forward five grounds of complaint seeking to call those findings into question.

The first ground of complaint: Regulation No 207/2009 does not exclude certification marks

31 The applicant submits that Regulation No 207/2009 allows the registration of certification marks which meet the criteria of Community trade marks. It criticises the Board of Appeal for failing to mention that Regulation No 207/2009 did not preclude the registration, as ordinary Community trade marks, of those certification marks which are compatible with the general provisions of that regulation.

32 OHIM submits that certification marks can be registered as individual Community trade marks if they fulfil the conditions set by Article 7(1) of Regulation No 207/2009.

33 First, it should be observed that, in paragraph 16 of the contested decisions, the Board of Appeal stated that a trade mark could not be rejected owing to the fact that it was used as a certification mark. However, the Board of Appeal explains that, since Regulation No 207/2009 does not provide for the registration of certification marks, such marks have to be filed as individual trade marks and can be registered only if they are not in conflict with any of the absolute grounds for refusal listed in Article 7(1) of that regulation.

34 In so doing, the Board of Appeal expressly stated that certification marks could be registered as Community trade marks provided that there were no absolute grounds, within the meaning of Article 7(1) of Regulation No 207/2009, preventing their registration. The applicant's argument that the Board of Appeal failed to mention that Regulation No 207/2009 did not preclude the registration of certification marks must, in any event, be rejected.

35 Secondly, OHIM is right to state that Regulation No 207/2009 does not provide for the protection of certification marks. That regulation provides for the protection only of individual or collective Community trade marks.

36 In the present cases, the applicant filed two applications for individual marks and those applications for registration of individual marks were examined in the light of the criteria laid down in Regulation No 207/2009, including those mentioned in Article 7(1) of that regulation.

37 It follows that the first ground of complaint must be rejected.

The second ground of complaint: erroneous criteria were applied for the purpose of assessing the descriptive character of the marks applied for

38 The applicant submits that, since 1992, it has been the proprietor of two national certification marks, namely the marks HALLOUMI and ΧΑΛΛΟΥΜΙ, and that, since at least 1992, Cypriot consumers have perceived the signs at issue as certification marks guaranteeing compliance with a specific set of legal requirements set out in a specification.

39 OHIM argues in reply that the refusal of the marks applied for is based on the descriptive character of the individual marks and not on the criteria relating to certification marks, and it observes that the applicant itself admits that the marks applied for describe the kind and origin of the goods.

40 First of all, it must be stated that the applicant acknowledges that the marks applied for have always been perceived by Cypriot consumers and by consumers across the European Union as referring to a particular type of cheese exported from Cyprus, made in a certain way and with particular taste, texture and cooking properties.

41 The Board of Appeal did not therefore make an error of assessment in stating, in paragraph 14 of the contested decisions, that the signs directly describe, at least for the Cypriot public, the kind and geographical origin of the cheese.

42 Next, as OHIM states, the refusal to register the marks applied for is based on the descriptive character of the individual marks and not on the criteria relating to certification marks.

43 It follows that the fact that the applicant has been the proprietor of identical certification marks since 1992 has no bearing on the descriptive character of the signs at issue.

44 In that context, it is necessary to examine the applicant's argument that, in essence, the existence of the certification marks since 1992 has caused the Cypriot consumers' perception of the signs at issue to develop in a way that extends well beyond the simply descriptive character of the goods concerned. According to the applicant, Cypriot consumers now perceive the signs as guaranteeing compliance with a specific set of legal requirements set out in a specification.

45 That argument is ineffective. The criteria mentioned by the applicant, linked to the geographical origin of the product, its nature and its characteristics, are those inherent in certification marks. They cannot be used to show that the Cypriot consumer does not perceive the signs at issue — which are the subject of applications for registration as individual marks — as being descriptive of the goods concerned.

46 Thus, even if some Cypriot consumers have for several years been perceiving the signs at issue as certification marks guaranteeing compliance with a specific set of legal requirements, that perception does not affect the descriptive character, for the purpose of Article 7(1)(c) of Regulation No 207/2009, of the marks at issue for those consumers or, *a fortiori*, for other consumers, who do not make the connection with the certification mark.

47 Lastly, the applicant submits that the approach adopted by the Board of Appeal is tantamount to taking the view that all certification marks per se must be excluded. In the applicant's view, it is only if the mark is no more than a banal statement which directly and exclusively indicates the characteristics of goods or services that it cannot be registered as a Community trade mark. The applicant refers, by way of example, in particular to the expression '100% beef'.

48 As OHIM correctly states, the approach taken by the applicant cannot be accepted, on the ground that it corresponds to a restrictive definition of the notion of descriptive character for the purpose of Article 7(1)(c) of Regulation No 207/2009.

49 It must be observed that the criteria on which the applicant relies in order to claim that, unlike the expression '100% beef', the signs at issue are much more than a banal statement which directly and exclusively indicates the characteristics of goods or services are those of the certification mark, which are descriptive precisely because they are linked to the geographical origin of the product, its nature and its characteristics.

50 The second ground of complaint must consequently be rejected.

The third ground of complaint: there is no public interest in keeping the marks applied for free

51 The applicant submits that there is no public interest to justify keeping the marks applied for free for third parties to use. It notes that the grounds for refusal of registration listed in Article 7(1) of Regulation No 207/2009 must be interpreted in the light of the general interest underlying each of them. In this regard, the applicant relies on the judgment of 4 May 1999 in *Windsurfing Chiemsee* (C-108/97 and C-109/97, ECR, EU:C:1999:230, paragraphs 29 and 30), which, in its view, clearly established that public interest is the touchstone of Article 7(1)(c) of Regulation No 207/2009. The applicant therefore considers that the Board of Appeal ought to have asked itself whether it was reasonable to assume that third parties would wish to use the marks in future. The applicant observes that the only reason why traders would wish to use the marks applied for without complying with the standards imposed by the certification marks would be to deceive the public. According to the applicant, there is therefore no public interest in traders being able to misdescribe their goods. By contrast, there is a very strong public interest in the protection of certification marks. The applicant adds that the registration of certification marks will not lead to abuses or otherwise facilitate the registration of descriptive marks, since the latter do not have the 'cachet' or reputation of certification marks.

52 OHIM disputes those arguments.

53 It must be noted that the concept of general interest underlying Article 7(1)(c) of Regulation No 207/2009 requires that signs or indications which may serve, in trade, to designate characteristics of the goods or services in respect of which registration is sought may be freely used by all. That provision prevents such signs or indications from being reserved to one undertaking alone because they have been registered as trade marks (judgments of 23 October 2003 in *OHIM* v *Wrigley*, C-191/01 P, ECR, EU:C:2003:579, paragraph 31, and of 12 January 2006 in *Deutsche SiSi-Werke* v *OHIM*, C-173/04 P, ECR, EU:C:2006:20, paragraph 62) and prevents an undertaking from monopolising the use of a descriptive term to the detriment of other undertakings, including its competitors, for whom the extent of the vocabulary available to describe their own products is thereby reduced (judgments of 6 March 2007 in *Golf USA* v *OHIM (GOLF USA)*, T-230/05, EU:T:2007:76, paragraph 32, and of 30 April 2013 in *ABC-One* v *OHIM (SLIM BELLY)*, T-61/12, EU:T:2013:226, paragraph 18).

54 In that context, the applicant submits, first, that the Board of Appeal was obliged to ask itself whether there was a public interest in keeping the marks applied for free for the use of third parties, and that it did not do so. The applicant claims, secondly, that, in the present cases, the response to that question is that there is no public interest in keeping the marks applied for free. Those arguments cannot succeed.

55 It is apparent from the case-law cited in paragraph 53 above that the general interest or public interest in keeping descriptive marks free for third parties to use is pre-established and presumed. It follows that, where the mark applied for is descriptive, it is sufficient for the Board of Appeal to make the finding of that descriptive character without, however, having to examine the question whether, notwithstanding its descriptive character, there is in fact a public interest in keeping the mark applied for free for third parties to use. Accordingly, for the purposes of Article 7(1)(c) of Regulation No 207/2009, it need only be examined, on the basis of a given meaning of the word sign at issue, whether, from the point of view of the relevant public, there is a sufficiently direct and specific relationship between the sign and the characteristics of the categories of goods or services in respect of which registration is sought (judgments of 3 December 2003 in *Audi* v *OHIM (TDI)*, T-16/02, ECR, EU:T:2003:327, paragraph 29, and of 23 October 2007 in *BORCO-Marken-Import Matthiesen* v *OHIM (Caipi)*, T-405/04, EU:T:2007:315, paragraph 44). In that context, it is also worth recalling that the application of Article 7(1)(c) of Regulation No 207/2009 does not depend on the existence of a real, current or serious need to leave a sign free (see, to that effect, judgments of 27 February 2002 in *Streamserve* v *OHIM (STREAMSERVE)*, T-106/00, ECR, EU:T:2002:43, paragraph 39; of 9 February 2010 in *PromoCell bioscience alive* v *OHIM (SupplementPack)*, T-113/09, EU:T:2010:34, paragraph 27; and of 8 July 2010 in *Trautwein* v *OHIM (Representation of a horse)*, T-386/08, EU:T:2010:296, paragraph 45).

56 In the present case, as has been observed in paragraphs 18 to 29 above, the existence of a direct and specific relationship between the marks applied for and the characteristics of the goods in respect of which registration is sought has been sufficiently established by the contested decisions.

57 Moreover, the applicant argues to no avail that acceptance of the existence of a public interest in keeping the marks applied for free would amount to allowing traders to use those marks without complying with the standards imposed by the certification marks and to deceive the public.

58 As OHIM correctly observes, considerations regarding the future use of the marks applied for or possible risks deriving from them are not relevant to the assessment of whether those marks are descriptive in character.

59 Lastly, the fact that institutes researching European law have expressed support for the need to protect certification marks has no effect on the resolution of the present cases. It should be borne in mind that, according to the case-law, the legality of the decisions of Boards of Appeal must be assessed solely on the basis of Regulation No 207/2009, as interpreted by the European Union Courts (judgments of 15 September 2005 in *BioID* v *OHIM*, C-37/03 P, ECR, EU:C:2005:547, paragraph 47; in *Deutsche SiSi-Werke* v *OHIM*, cited in paragraph 53 above, EU:C:2006:20, paragraph 48; and in *PAPERLAB*, cited in paragraph 14 above, EU:T:2005:247, paragraph 39). However, the existing legislation on the Community trade mark precisely does not provide for the possibility of registering certification marks.

60 In the light of the foregoing, the third ground of complaint must be rejected.

The fourth ground of complaint: the registration of certification marks as Community trade marks

61 The applicant submits that the Board of Appeal has demonstrated a lack of coherence by allowing the registration of certification marks such as FREEDOM FOOD, ENERGY STAR, FAIRTRADE or UNDERWRITERS LABORATORIES as ordinary Community trade marks. The applicant criticises the Board of Appeal, in essence, for failing to explain why the ground for refusal was not raised against those marks but was raised against the marks applied for.

62 OHIM disputes those arguments.

63 In respect of earlier decisions of OHIM, suffice it to recall that, whilst it may be accepted that factual or legal grounds contained in an earlier decision of OHIM might constitute arguments to support a plea alleging infringement of a provision of Regulation No 207/2009, decisions concerning registration of a sign as a Community trade mark which the Boards of Appeal are called on to take under that regulation are adopted in the exercise of circumscribed powers and are not a matter of discretion. Accordingly, the legality of the decisions of Boards of Appeal must be assessed solely on the basis of that regulation, as interpreted by the European Union Courts, and not on the basis of a previous decision-making practice of those boards (judgments in *BioID* v *OHIM*, cited in paragraph 59 above, EU:C:2005:547, paragraph 47; in *Deutsche SiSi-Werke* v *OHIM*, cited in paragraph 53 above, EU:C:2006:20, paragraph 48; and in *PAPERLAB*, cited in paragraph 14 above, EU:T:2005:247, paragraph 39). That being said, clearly there is nothing to preclude the European Union Courts from agreeing with and repeating any of the arguments identified by the decision-making practice of OHIM.

64 Two hypotheses exist. If, by accepting, in a previous case, the registrability of a sign as a Community mark, the Board of Appeal correctly applied the relevant provisions of Regulation No 207/2009 and in a later case comparable to the previous one the Board of Appeal adopted a contrary decision, the European Union Courts will be required to annul the latter decision because of infringement of the relevant provisions of Regulation No 207/2009. In this first hypothesis, the plea alleging breach of the principle of non-discrimination must therefore fail (judgment in *STREAMSERVE*, cited in paragraph 55 above, EU:T:2002:43, paragraph 67).

65 On the other hand, if, by accepting in an earlier case the registrability of a sign as a Community mark, the Board of Appeal erred in law and, in a later case, comparable to the previous one, the Board of Appeal adopted a contrary decision, the first decision cannot be successfully relied on to support an application for the annulment of the latter decision. It follows from the case-law of the Court of Justice that the principle of equal treatment may be invoked only in the context of a review of legality (judgments of 13 July 1972 in *Besnard and Others* v *Commission*, 55/71 to 76/71, 86/71, 87/71 and 95/71, ECR, EU:C:1972:66, paragraph 39, and of 28 September 1993 in *Magdalena Fernández* v *Commission*, T-90/92, ECR, EU:T:1993:78, paragraph 38), and that no person may rely, in support of his claim, on an unlawful act committed in favour of another (judgment of 9 October 1984 in *Witte* v *Parliament*, 188/83, ECR, EU:C:1984:309, paragraph 15). On the basis of this second hypothesis, the plea alleging breach of the principle of non-discrimination must therefore also fail (judgment in *STREAMSERVE*, cited in paragraph 55 above, EU:T:2002:43, paragraph 67).

66 As is apparent from the analysis of the present plea alleging infringement of Article 7(1)(c), and in particular from paragraphs 13 to 29 above, the Board of Appeal correctly found that the marks applied for could not be registered since they were descriptive of the goods concerned.

67 The fourth ground of complaint must therefore be rejected.

The fifth ground of complaint: undermining of the protection of national marks

68 In the applicant's submission, the effect of the contested decisions will be to undermine the protection of national marks. In this respect, the applicant notes that national marks, including certification marks, can be invoked in the context of Community trade mark proceedings. According to the applicant, the effect of the contested decisions is to accord such marks no distinctive character and, therefore, no protection under Article 8(1)(a) and (b) of Regulation No 207/2009. In this context, the applicant refers to the judgment in *Formula One Licensing* v *OHIM*, cited in paragraph 27 above (EU:C:2012:314, paragraphs 42 to 47), in which the Court of Justice held that, in order to avoid infringing Article 8(1)(b) of Regulation No 207/2009, it is necessary to acknowledge a certain degree of distinctiveness of an earlier national mark on which an opposition against the registration of a Community trade mark is based.

69 As OHIM observes, it must be held that the applicant's arguments are entirely irrelevant. The Board of Appeal's reasoning occurred within the context of the procedure for examining absolute grounds for refusal within the meaning of Article 7(1)(b) and (c) of Regulation No 207/2009 and not in the context of *inter partes* proceedings.

70 The fact that the Board of Appeal refused registration of the marks applied for as Community trade marks because of the existence of an absolute ground for refusal does not, however, mean that that OHIM department would not acknowledge any distinctive character of those signs if they had been previously registered as national marks and relied on in opposition proceedings. In this regard, the judgment in *Formula One Licensing* v *OHIM*, cited in paragraph 27 above (EU:C:2012:314), concerns *inter partes* proceedings and is therefore entirely irrelevant in the present context.

71 As OHIM points out, the applicant does not show that the Board of Appeal applied, in the proceedings to confirm that there was an absolute ground for refusal, standards of examination which might undermine the protection of national certification marks.

72 The fifth ground of complaint must therefore be rejected.

73 It follows from all of the foregoing that the applicant's line of argument relating to the infringement of Article 7(1)(c) of Regulation No 207/2009 must be rejected as unfounded.

74 As regards the question of infringement of Article 7(1)(b) of Regulation No 207/2009, it must be pointed out that, as is evident from Article 7(1) of Regulation No 207/2009, it is sufficient that one of the absolute grounds for refusal applies in order for the sign at issue not to be registrable as a Community trade mark (see judgment in *WEISSE SEITEN*, cited in paragraph 16 above, EU:T:2006:87, paragraph 110 and the case-law cited).

75 Consequently, since the examination of the applicant's line of argument relating to the infringement of Article 7(1)(c) of Regulation No 207/2009 has shown that the Board of Appeal acted correctly in finding that the marks applied for were descriptive of the goods concerned and that that was enough in itself to justify the refusal to register the marks applied for, it is not necessary, in any event, to examine the question of infringement of Article 7(1)(b) of Regulation No 207/2009, for which, moreover, the applicant does not put forward any specific argument.

76 In the light of the foregoing considerations, the action must be dismissed.

Costs

77 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. Since the applicant has been unsuccessful, it must be ordered to pay the costs incurred by OHIM, in accordance with the form of order sought by the latter.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the Republic of Cyprus to bear its own costs and to pay those incurred by the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM).**

Prek Labucka Kreuschitz

Delivered in open court in Luxembourg on 7 October 2015.

[Signatures]