



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 17 October 2019¹

Case C-766/18 P

Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi

v

European Union Intellectual Property Office (EUIPO)

(Appeal — EU trade mark — Collective mark — Geographical designation — Distinctive character — Opposition proceedings — Application for registration of a figurative mark containing the word BBQLOUMI — Rejection of the opposition)

I. Introduction

1. Although the procedure for establishing a protected designation of origin which would reserve use of the designation Halloumi for cheese made by Cypriot producers has been ongoing since 2014, it has not yet been concluded by the Commission.² In the meantime, Cyprus and other bodies have been attempting to prevent certain undertakings from using the designation Halloumi as a trade mark.³

2. In the present case, the Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi ('the Foundation') has secured the designation HALLOUMI as an EU collective mark for cheese. It is now attempting, on the basis of that trade mark, to prevent a Bulgarian undertaking from acquiring a figurative mark containing the word BBQLOUMI for cheese. According to the Foundation, other cases based on the collective mark are pending before the European Union Intellectual Property Office (EUIPO) and the General Court; in a first case, the Court of Justice has already ruled definitively against the Foundation.⁴

¹ Original language: German.

² Publication of an application pursuant to Article 50(2)(a) of Regulation (EU) No 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs (OJ 2015 C 246, p. 9). See also <http://ec.europa.eu/agriculture/quality/door/publishedName.html?denominationId=12050> and Commission Press Release IP/15/5448 of 28 July 2015, 'Cyprus "Χαλλουμι" (Halloumi)/"Hellim" cheese set to receive Protected Designation of Origin status' (http://europa.eu/rapid/press-release_IP-15-5448_en.htm).

³ See, for example, judgments of 13 June 2012, *Organismos Kypriakis Galaktokomikis Viomichanias v OHIM — Garmo (HELLIM)* (T-534/10, EU:T:2012:292); of 7 October 2015, *Cyprus v OHIM (ΧΑΛΛΟΥΜΙ and HALLOUMI)* (T-292/14 and T-293/14, EU:T:2015:752); of 13 July 2018, *Cyprus v EUIPO — Papouis Dairies (Pallas Halloumi)* (T-825/16, EU:T:2018:482); of 13 July 2018, *Cyprus v EUIPO — POA (COWBOYS HALLOUMI)* (T-847/16, not published, EU:T:2018:481); of 25 September 2018, *Cyprus v EUIPO — M.J. Dairies (BBQLOUMI)* (T-384/17, not published, EU:T:2018:593); and of 23 November 2018, *Cyprus v EUIPO — Papouis Dairies (Papouis Halloumi)* (T-703/17, not published, EU:T:2018:835).

⁴ Order of 21 March 2013, *Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v OHIM* (C-393/12 P, not published, EU:C:2013:207).

3. The Foundation's efforts in this case to date have proved unsuccessful because EUIPO and the General Court consider the designation HALLOUMI to have only low distinctive character, as it describes the abovementioned cheese. Therefore, despite a certain similarity, it is unlikely that the relevant public will establish a link with the producers in the Foundation in connection with use of BBQLOUMI.

4. The Foundation, on the other hand, takes the view that a collective mark necessarily enjoys increased protection, a factor to which the General Court did not give sufficient consideration.

II. Legal framework

5. Recital 8 of the Trade Mark Regulation⁵ concerns the function of the trade mark as an indication of origin:

'The protection afforded by a Community trade mark, the function of which is in particular to guarantee the trade mark as an indication of origin, should be absolute in the case of identity between the mark and the sign and the goods or services. The protection should apply also in cases of similarity between the mark and the sign and the goods or services. An interpretation should be given of the concept of similarity in relation to the likelihood of confusion. The likelihood of confusion, the appreciation of which depends on numerous elements and, in particular, on the recognition of the trade mark on the market, the association which can be made with the used or registered sign, the degree of similarity between the trade mark and the sign and between the goods or services identified, should constitute the specific condition for such protection.'

6. Article 4 of the Trade Mark Regulation sets out the fundamental requirements for a trade mark:

'A Community trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.'

7. Article 7(1)(c) and (d) of the Trade Mark Regulation prohibits the registration of descriptive marks:

'The following shall not be registered:

- (a) ...
- (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;
- (d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade;
- (e) ...'

⁵ Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), as amended by Annex III, point 2(l) of the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (OJ 2012 L 112, p. 41), now replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

8. The ground for opposition of likelihood of confusion follows from Article 8(1)(b) of the Trade Mark Regulation concerning relative grounds for refusal:

‘1. Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:

(a) ...

(b) if because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark.’

9. Article 65(3) of the Trade Mark Regulation sets out the powers of the EU Courts in respect of actions brought pursuant to the Trade Mark Regulation:

‘The Court of Justice has jurisdiction to annul or to alter the contested decision.’

10. Article 66 of the Trade Mark Regulation permits applications for collective marks:

‘1. A Community collective mark shall be a Community trade mark which is described as such when the mark is applied for and is capable of distinguishing the goods or services of the members of the association which is the proprietor of the mark from those of other undertakings. Associations of manufacturers, producers, suppliers of services, or traders which, under the terms of the law governing them, have the capacity in their own name to have rights and obligations of all kinds, to make contracts or accomplish other legal acts and to sue and be sued, as well as legal persons governed by public law, may apply for Community collective marks.

2. In derogation from Article 7(1)(c), signs or indications which may serve, in trade, to designate the geographical origin of the goods or services may constitute Community collective marks within the meaning of paragraph 1. A collective mark shall not entitle the proprietor to prohibit a third party from using in the course of trade such signs or indications, provided he uses them in accordance with honest practices in industrial or commercial matters; in particular, such a mark may not be invoked against a third party who is entitled to use a geographical name.

3. The provisions of this Regulation shall apply to Community collective marks, unless Articles 67 to 74 provide otherwise.’

11. Article 67 of the Trade Mark Regulation provides for the adoption of regulations governing use of the mark:

‘1. An applicant for a Community collective mark must submit regulations governing its use within the period prescribed.

2. The regulations governing use shall specify the persons authorised to use the mark, the conditions of membership of the association and, where they exist, the conditions of use of the mark, including sanctions. The regulations governing use of a mark referred to in Article 66(2) must authorise any person whose goods or services originate in the geographical area concerned to become a member of the association which is the proprietor of the mark.’

III. Procedure to date

12. On 9 July 2014, M. J. Dairies EOOD filed an application with EUIPO for registration of the colour figurative mark reproduced below:⁶



13. The goods and services for which registration was sought are in Classes 29, 30 and 43 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 cover certain foodstuffs, including cheese, and certain catering services.

14. The Foundation is the proprietor of the collective word mark HALLOUMI, which was registered by EUIPO on 14 July 2000 under number 1082965 for goods in Class 29 with the description 'cheese'.⁷ On 12 November 2014, it filed a notice of opposition against the application, relying in particular on a likelihood of confusion within the meaning of Article 8(1)(b) of the Trade Mark Regulation.

15. The Opposition Division rejected the opposition and the appeal filed against its decision was also unsuccessful. Finally, by the judgment under appeal of 25 September 2018, *Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v EUIPO — M. J. Dairies (BBQLOUMI)* (T-328/17, not published, EU:T:2018:594), the General Court also dismissed the action brought against the decision made by the Board of Appeal.

16. The reasoning on which these decisions are based is, in essence, that the HALLOUMI mark corresponds to the designation of a well-known Cypriot cheese, with the result that it has only low distinctive character. In the light of the differences with the mark applied for, the adjudicating bodies of EUIPO and the General Court did not therefore establish a likelihood of confusion.

17. The Court is now required to adjudicate on the appeal which the Foundation lodged on 5 December 2018.

⁶ The photograph of a fishing harbour was apparently taken in the harbour at Naousa on the Greek island of Paros (<https://www.gtp.gr/lopage.asp?id=12121&lng=1>), to be precise, in an easterly direction at 37.124862 degrees north and 25.237685 degrees east.

⁷ According to the EUIPO database, <https://euipo.europa.eu/eSearch/#details/trademarks/001082965>, cancellation proceedings are in progress there. However, it also indicates one earlier instance of (apparently unsuccessful) cancellation proceedings.

18. The Foundation claims that the Court should:

1. allow the appeal against the judgment of the General Court in Case T-328/17, *Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v European Union Intellectual Property Office (EUIPO)*, EU:T:2018:594, and grant its application for annulment;
2. order EUIPO and M. J. Dairies EOOD to bear their own costs and to pay those of the Foundation.

19. EUIPO and M. J. Dairies EOOD each contend that the Court should:

1. dismiss the appeal; and
2. order the Foundation to pay the costs.

20. Written observations were submitted by the parties, which also presented oral argument at the hearing on 12 September 2019.

IV. Assessment

21. The Foundation raises four grounds of appeal which are, to some extent, interconnected. The first two grounds of appeal concern the question whether collective marks must be acknowledged as having particular distinctive character (see under B). By the third ground of appeal, the Foundation complains that the General Court applied an incorrect criterion in assessing the likelihood of confusion between the two marks (see under A). By the fourth ground of appeal, it objects that, although the General Court found errors made by the Board of Appeal in the assessment of its mark, it nevertheless failed to remit the case to the Boards of Appeal (see under C).

A. *The standard of review of the General Court*

22. The Court could confine itself to ruling on the third ground of appeal since in the original English version, the language of the case, paragraph 71 of the judgment under appeal was vitiated by an error in law.

23. In that paragraph, the General Court found that, despite the fact that, with the exception of the services covered by the mark applied for, the goods covered by the marks at issue are in part identical and in part similar to some degree, there cannot be any likelihood of confusion on the part of the relevant public since the existence of a visual, phonetic and conceptual similarity is not, in the case of an earlier descriptive mark with low distinctive character, sufficient to give rise to a presumption of a likelihood of confusion.⁸

24. This finding is incomprehensible in and of itself as, in assessing a likelihood of confusion, it is not a matter of whether this can be presumed. Rather, it is settled case-law that the existence of a likelihood of confusion on the part of the public must be assessed globally, taking into account all factors relevant to the circumstances of the case.⁹ It must therefore be *decided* whether a likelihood specifically exists.

⁸ The text reads as follows: ‘Despite the fact that, with the exception of the services covered by the mark applied for, the goods covered by the marks at issue are in part identical and in part similar to some degree, there cannot be any likelihood of confusion on the part of the relevant public since the existence of a visual, phonetic and conceptual similarity is not, in the case of an earlier descriptive mark with low distinctive character, sufficient to give rise to a presumption of a likelihood of confusion (...).’

⁹ Judgments of 11 November 1997, *SABEL* (C-251/95, EU:C:1997:528, paragraph 22); of 23 March 2006, *Mühlens v OHIM* (C-206/04 P, EU:C:2006:194, paragraph 18); and of 4 July 2019, *FTI Touristik v EUIPO* (C-99/18 P, EU:C:2019:565, paragraph 13); and order of 21 March 2013, *Organismos Kypriakis Galaktokomikis Viomichanias v OHIM* (C-393/12 P, not published, EU:C:2013:207, paragraph 32).

25. The Court has also already ruled that it is necessary to acknowledge a certain degree of distinctiveness of a registered descriptive mark and a likelihood of confusion may therefore exist between it and a later mark.¹⁰ Furthermore, the General Court also acknowledges the theoretical possibility of a likelihood of confusion between the two marks in paragraph 49 of the judgment under appeal.

26. According to the original English version of paragraph 71 of the judgment under appeal, however, the General Court did not specifically assess whether a likelihood of confusion exists, but accepted a principle whereby the existence of a visual, phonetic and conceptual similarity is not, in the case of an earlier descriptive mark with low distinctive character, sufficient for a likelihood of confusion.

27. Paragraph 71 of the judgment under appeal in the original version in the language of the case was thus vitiated by an error in law which should, in principle, result in it being set aside. Furthermore, because the Court of Justice cannot itself undertake the assessment of the relevant factors which the General Court failed to carry out, the case would have to be remitted to the General Court.

28. As EUIPO also notes, however, the General Court actually gave the judgment under appeal on the basis of the version in French, the Court's internal working language. In paragraph 71 of that version, the General Court states in particular that the evidence available was not sufficient to conclude that there was a likelihood of confusion. The General Court did therefore in fact assess the specific case and only the translation of its judgment in the language of the case is defective.

29. Although EUIPO and M. J. Dairies propose that the English version of paragraph 71 of the judgment under appeal be interpreted, in the light of the overall context, in the same way as the French version, I consider that in any case this is ruled out as far as the assessment of the likelihood of confusion is concerned. It is certainly advisable, in case of doubt over statements made by the Court in certain language versions of its judgments, to consult the French version, but the rules on the language of the case would be rendered absurd if clear statements in that language could be modified to a certain extent *contra iudicium*¹¹ by simply being interpreted in the light of the French version. Such modifications are instead to be made by means of a rectification under Article 164 of the Rules of Procedure of the General Court.

30. Contrary to the Foundation's view, a rectification of the translation error is not precluded in any event by the time limit of two weeks after delivery of the judgment laid down in Article 164(2) of the Rules of Procedure of the General Court. M. J. Dairies rightly asserts that this time limit relates only to applications for rectification made by the parties, but not to a rectification of the Court's own motion.¹²

31. A rectification under Article 164(1) of the Rules of Procedure of the General Court is possible in the case of clerical mistakes, errors in calculation and obvious inaccuracies. This includes translation errors,¹³ presumably as an obvious inaccuracy.

32. More compelling, however, is the objection that through the rectification the General Court deprives the appeal of its basis, at least to some extent. Nevertheless, it would merely further extend the proceedings and give rise to additional costs to set aside the judgment under appeal on account of an obvious translation error if the General Court has already rectified it. This is because, after the case has been remitted, the General Court would ultimately dismiss the action once again on the same grounds, only this time correctly translated.

10 Judgment of 8 November 2016, *BSH v EUIPO* (C-43/15 P, EU:C:2016:837, paragraphs 67, 68 and 71).

11 Compared with interpretation *contra legem* in judgments of 16 June 2005, *Pupino* (C-105/03, EU:C:2005:386, paragraph 47); of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraphs 100 and 103); and of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 76).

12 See, to that effect, order of 17 March 2006, *Commission v Greece* (C-417/02, EU:C:2006:189).

13 See, to that effect, order of 17 March 2006, *Commission v Greece* (C-417/02, EU:C:2006:189).

33. It should also be noted that a rectification may not affect the legal remedies available to the parties. Accordingly, upon rectification a new period should in principle begin for bringing an appeal against the rectified parts of the judgment, and only against the rectified parts. Alternatively, the Court could prescribe the parties in this case a period for amending their submissions.

34. Since the General Court rectified the translation error in the judgment of 17 September 2019, *Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v EUIPO — M. J. Dairies (BBQLOUMI)* (T-328/17, not published, EU:T:2019:662), the third ground of appeal is therefore redundant in its present form.

35. Therefore I will turn to the other grounds of appeal.

B. Distinctive character of collective marks

36. By the first two grounds of appeal, the Foundation challenges, first and foremost, paragraph 41 of the judgment under appeal and also paragraph 71, but in fact it requests that the Trade Mark Regulation, particularly the rules on likelihood of confusion, be applied to collective marks differently than to individual marks. The Foundation's submissions contain three stages of reasoning. *First*, the Foundation claims that the General Court requires it to show that its registered collective mark has distinctive character. *Second*, it maintains that a registered collective mark must necessarily be acknowledged as having increased distinctive character, even if it is descriptive. *Third*, it asserts that in any event the distinctive character of geographical collective marks under Article 66(2) of the Trade Mark Regulation, that is, of collective marks with signs or indications which may serve, in trade, to designate the geographical origin of the goods or services, cannot be assessed by reference to general criteria.

37. These arguments must first be placed in the context of the ground for refusal of likelihood of confusion relied on by the Foundation.

1. The ground for refusal of likelihood of confusion

38. The Foundation's arguments relate to the likelihood of confusion which it claims exists between its own mark and the mark at issue.

39. Article 8(1)(b) of the Trade Mark Regulation — which is, in the absence of any provision to the contrary in Articles 67 to 74 of that regulation, applicable to EU collective marks pursuant to Article 66(3) — provides that, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered if, because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected.¹⁴

40. For the purposes of applying Article 8(1)(b) of the Trade Mark Regulation, the likelihood of confusion presupposes both that the trade mark applied for and the earlier trade mark are identical or similar and that the goods or services covered in the application for registration are identical or similar to those in respect of which the earlier trade mark was registered, those conditions being cumulative.¹⁵

¹⁴ Judgment of 20 September 2017, *The Tea Board v EUIPO* (C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 46).

¹⁵ Judgments of 23 January 2014, *OHIM v riha WeserGold Getränke* (C-558/12 P, EU:C:2014:22, paragraph 41), and of 20 September 2017, *The Tea Board v EUIPO* (C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 47 and the case-law cited).

41. A global assessment of the likelihood of confusion implies some interdependence between the relevant factors, and in particular a similarity between the trade marks and between these goods or services. Accordingly, a lesser degree of similarity between these goods or services may be offset by a greater degree of similarity between the marks, and vice versa. The interdependence of these factors is expressly mentioned in the eighth recital of Trade Mark Regulation, which states that it is indispensable to give an interpretation of the concept of similarity in relation to the likelihood of confusion, the appreciation of which depends, in particular, on the recognition of the trade mark on the market and the degree of similarity between the mark and the sign and between the goods or services identified.¹⁶

42. Furthermore, according to the case-law on individual trade marks, the more distinctive the earlier mark, the greater the risk of confusion.¹⁷ Therefore, marks with a highly distinctive character, either per se or because of the reputation they possess on the market, enjoy broader protection than marks with a less distinctive character.¹⁸ It will nevertheless be examined below to what extent these considerations can be applied to geographical collective marks (see under 4).

43. The notion of distinctive character designates, in connection with individual marks, the capacity to identify the product or service covered by that mark as originating from a particular undertaking, and thus to distinguish that product from goods of other undertakings.¹⁹

44. Under Article 66(1) of the Trade Mark Regulation, on the other hand, a collective mark is intended to distinguish the goods or services of the members of the association which is the proprietor of the mark from those of other undertakings. The essential function of such a collective mark is thus to guarantee the collective commercial origin of goods and services.²⁰

2. *The burden of proof for the distinctive character of a registered collective mark*

45. The Foundation objects in particular to paragraph 41 of the judgment under appeal, which states that it is for the holder of a collective mark to show what level of distinctive character it has, since he intends to rely on it in support of opposition proceedings.

46. To some extent, the Foundation evidently understands the General Court to mean that the very existence of the distinctive character of a registered collective mark must be proven.

47. The finding made by the General Court does in fact appear questionable in so far as neither the decision in *Tulliallan Burlington v EUIPO*,²¹ which is directly invoked by the General Court, nor the judgment in *Anheuser-Busch v Budějovický Budvar*,²² which is referred to indirectly, contains a statement regarding the burden of proof for the distinctive character of a registered collective mark.

16 Judgment of 29 September 1998, *Canon* (C-39/97, EU:C:1998:442, paragraph 17).

17 Judgments of 11 November 1997, *SABEL* (C-251/95, EU:C:1997:528, paragraph 24); of 29 September 1998, *Canon* (C-39/97, EU:C:1998:442, paragraph 18); and of 8 November 2016, *BSH v EUIPO* (C-43/15 P, EU:C:2016:837, paragraph 62).

18 Judgment of 29 September 1998, *Canon* (C-39/97, EU:C:1998:442, paragraph 18).

19 Judgments of 4 May 1999, *Windsurfing Chiemsee* (C-108/97 and C-109/97, EU:C:1999:230, paragraph 49); of 22 June 1999, *Lloyd Schuhfabrik Meyer* (C-342/97, EU:C:1999:323, paragraph 22); and of 8 April 2003, *Linde and Others* (C-53/01 to C-55/01, EU:C:2003:206, paragraph 40).

20 Judgment of 20 September 2017, *The Tea Board v EUIPO* (C-673/15 P to C-676/15 P, EU:C:2017:702, paragraphs 50 and 57).

21 Judgment of 6 December 2017, *Tulliallan Burlington v EUIPO — Burlington Fashion (BURLINGTON)* (T-123/16, not published, EU:T:2017:870, paragraph 60).

22 Judgment of 29 March 2011 (C-96/09 P, EU:C:2011:189, paragraph 189).

48. On the other hand, Article 76 of the Trade Mark Regulation, which is also cited by the General Court, is relevant in so far as, under the second sentence of paragraph 1, in proceedings relating to relative grounds for refusal of registration the Office is restricted to the facts, evidence and arguments provided by the parties and the relief sought. However, like the two abovementioned judgments, that provision does not require specific proof of the distinctive character of registered collective marks.

49. Greater clarity is provided by the judgment in *Formula One Licensing v OHIM*,²³ which is applied by the General Court ‘by analogy’, as was requested by the Foundation in its application.²⁴ I understand that judgment to mean that a registered trade mark necessarily has a minimum degree of distinctive character unless it has been cancelled.²⁵ Specific proof in this regard cannot be required.

50. The same conclusion follows from paragraph 41 of the judgment under appeal, which states that only the level (‘niveau’) of distinctive character is to be shown, while the General Court acknowledges a minimum degree of distinctive character (‘a certain degree’, ‘un certain degré), as is reaffirmed in paragraph 47. This is confirmed by paragraph 71 of the judgment under appeal, to which the Foundation also objects, in which the General Court states that the collective mark HALLOUMI has only low distinctive character, but at the same time also suggests that there is a minimum degree of distinctive character.

51. In so far as the Foundation submits that the General Court required that it be shown that a registered collective mark actually has distinctive character, it thus relies on a misunderstanding of the judgment under appeal. That submission must therefore be rejected.

3. *Distinctive character of a registered collective mark*

52. In fact, the issue for the Foundation is not whether a minimum degree of distinctive character of its collective mark is acknowledged, rather it is claiming increased distinctive character of collective marks in general. This would also satisfy the need for specific proof.

53. That claim must be rejected, however.

54. Because under Article 66(1) of the Trade Mark Regulation a collective mark is intended to guarantee collective commercial origin, in accordance with Article 4, which is applicable to collective marks by virtue of Article 66(3), only signs that are capable of distinguishing the commercial origin of the goods or services which they designate may constitute EU trade marks.²⁶ The registration of a collective mark, just like the registration of other marks, therefore presupposes its distinctive character.

55. On the other hand, there are no grounds to assume that a collective mark necessarily — even by virtue of its registration — enjoys particular distinctive character.²⁷ Rather, just like all other marks, collective marks can have varying degrees of distinctive character. As EUIPO clearly demonstrates with the aid of examples, the degree of distinctive character depends, first, on the sign chosen and, second, on the acquisition of additional distinctive character through use of the sign. The distinctive character of collective marks must therefore be assessed in principle by reference to general rules.

²³ Judgment of 24 May 2012 (C-196/11 P, EU:C:2012:314, paragraphs 40 to 47).

²⁴ Paragraph 29 of the application in Case T-328/17.

²⁵ My Opinion in *Pandalis v EUIPO* (C-194/17 P, EU:C:2018:725, point 51). See also judgment of 8 November 2016, *BSH v EUIPO* (C-43/15 P, EU:C:2016:837, paragraph 67).

²⁶ Judgment of 20 September 2017, *The Tea Board v EUIPO* (C-673/15 P to C-676/15 P, EU:C:2017:702, paragraphs 50 and 51).

²⁷ As is also stated in judgment of 5 December 2012, *Consorzio vino Chianti Classico v OHIM — FFR (F.F.R.)* (T-143/11, not published, EU:T:2012:645, paragraph 61).

56. Consequently, the first two grounds of appeal are also unfounded in so far as the Foundation claims the necessarily increased distinctive character of registered collective marks.

4. *Distinctive character of a geographical collective mark*

57. It is more difficult to answer the question whether the distinctive character of geographical collective marks under Article 66(2) of the Trade Mark Regulation can be assessed by reference to general criteria.

58. Under Article 66(2) of the Trade Mark Regulation, in derogation from Article 7(1)(c), signs or indications which may serve, in trade, to designate the geographical origin of the goods or services may constitute collective marks. In particular, Article 7(1)(c) provides that trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the geographical origin of the goods or the service are not to be registered.

59. The collective mark DARJEELING,²⁸ which was the subject of the most important judgment concerning collective marks so far, is a good example of the application of Article 66(2) of the Trade Mark Regulation, as it is the name of a city and a district in India. At the same time, it stands for a well-known black tea which is grown there.

60. The claim made by the Foundation can be construed as meaning that the distinctive character of *geographical* collective marks at least cannot be assessed by reference to general criteria, but that they must be acknowledged, as a matter of course, as having increased distinctive character.

(a) *Admissibility of the claim made by the Foundation*

61. The admissibility of this claim made by the Foundation is questionable.

62. The Foundation's arguments regarding Article 66(2) of the Trade Mark Regulation identify at most errors in law in the judgment under appeal which may have been made indirectly, without, however, indicating precisely, as required by Article 169(2) of the Rules of Procedure of the Court of Justice, which of the General Court's findings might be vitiated by errors in law.

63. In particular, the Foundation does not distinguish clearly in its arguments between collective marks in general and geographical collective marks.

64. The claim made by the Foundation regarding a possible infringement of Article 66(2) of the Trade Mark Regulation is also contradictory. On the one hand, it asserts that it is not Article 66(2) that means that its opposition should have succeeded,²⁹ while, on the other, the provision is nevertheless relevant.³⁰ Such a lack of coherence is incompatible with the requirements governing an appeal laid down in Article 168(1)(d) of the Rules of Procedure of the Court of Justice and likewise results in the claim being inadmissible.³¹

65. Consequently, the claim made by the Foundation regarding the distinctive character of geographical collective marks is inadmissible.

²⁸ Judgment of 20 September 2017, *The Tea Board v EUIPO* (C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 18). See also order of the German Bundesgerichtshof (Federal Court of Justice) of 30 November 1995, *MADEIRA* (I ZB 32/93, *Gewerblicher Rechtsschutz und Urheberrecht* 1996, p. 270).

²⁹ Paragraph 51 of the appeal.

³⁰ Paragraph 63 of the appeal.

³¹ See, to that effect, judgment of 28 June 2007, *Commission v Spain* (C-235/04, EU:C:2007:386, paragraph 47).

66. Even if the claim made by the Foundation regarding the legal consequences connected with geographical collective marks were admissible, it could still not be upheld.

67. EUIPO rightly asserts that it is doubtful whether the HALLOUMI mark is actually a mark within the meaning of Article 66(2) of the Trade Mark Regulation and that the General Court did not make any findings in this regard.

68. The Foundation does not object to the failure to make findings in this regard.

69. And unlike DARJEELING, HALLOUMI does not designate a specific place, but is merely associated with a place, namely Cyprus, at least in accordance with the previous case-law of the General Court.³² Even this might be doubtful, as this kind of cheese seemingly is also widespread across other countries in the region, often under identical or similar designations.

70. It cannot therefore be assumed that HALLOUMI is a mark within the meaning of Article 66(2) of the Trade Mark Regulation and any findings regarding the legal effects of that provision could no longer influence the outcome of the dispute.

(b) In the alternative: substance

71. In case the Court nevertheless wishes to consider the substance of Article 66(2) of the Trade Mark Regulation, it should be stated, first of all, that that provision is a foreign body in trade mark law. The reason behind the prohibition of descriptive marks under Article 7(1)(c) and (d) is clearly the need to keep such terms free.³³ Other operators must also be entitled to use those descriptions for their goods or services. At the same time, however, the public does not necessarily understand descriptive marks as an indication of commercial origin, but as a description of the product.³⁴

72. This also applies to geographical indications under Article 7(1)(c) of the Trade Mark Regulation. The public may perceive them as an indication of geographical origin or even as a description of a product associated with a particular place, rather than as an indication of (collective) commercial origin.

73. At the hearing, EUIPO thus rightly argued that preferential status under Article 66(2) of the Trade Mark Regulation has a similar effect to registration of a descriptive mark in accordance with the previously mentioned judgment in *Formula One Licensing v OHIM*.³⁵ Such a mark is accorded the necessary minimum degree of distinctive character to justify its registration, but not necessarily increased distinctive character.

74. The General Court does not find otherwise when, in paragraph 71 of the judgment under appeal, it acknowledges the HALLOUMI mark as having only a minimum degree of distinctive character and thus rejects a likelihood of confusion.

32 Paragraphs 50 and 66 of the judgment under appeal. See also judgments of 13 June 2012, *Organismos Kypriakis Galaktokomikis Viomichanias v OHIM — Garmo (HELLIM)* (T-534/10, EU:T:2012:292, paragraph 41); of 7 October 2015, *Cyprus v OHIM (XAAAOYMI and HALLOUMI)* (T-292/14 and T-293/14, EU:T:2015:752, paragraphs 20 and 21); of 13 July 2018, *Cyprus v EUIPO — Papouis Dairies (Pallas Halloumi)* (T-825/16, EU:T:2018:482, paragraphs 41 and 42); of 13 July 2018 *Cyprus v EUIPO — POA (COWBOYS HALLOUMI)* (T-847/16, not published, EU:T:2018:481, paragraphs 39 and 40); and of 23 November 2018, *Cyprus v EUIPO — Papouis Dairies (Papouis Halloumi)* (T-703/17, not published, EU:T:2018:835, paragraph 61).

33 Judgments of 4 May 1999, *Windsurfing Chiemsee* (C-108/97 and C-109/97, EU:C:1999:230, paragraphs 25 and 26); of 10 July 2014, *BSH v OHIM* (C-126/13 P, not published, EU:C:2014:2065, paragraph 19); and of 20 September 2017, *The Tea Board v EUIPO* (C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 59).

34 See, by way of illustration, judgment of 31 January 2019, *Pandalis v EUIPO* (C-194/17 P, EU:C:2019:80, paragraphs 87 to 93 and 103 to 105).

35 Judgment of 24 May 2012, (C-196/11 P, EU:C:2012:314, paragraphs 40 to 47).

75. In paragraphs 50 to 53 and 70 of the judgment under appeal, it expressly held that the HALLOUMI mark is not perceived as a designation of (individual or collective) commercial origin, but as a designation of a speciality cheese.³⁶ The description of certain goods is not, however, accorded preferential status by Article 66(2) of the Trade Mark Regulation, even though the public might associate them with a particular geographical origin. Moreover, the assessment of the perception of a mark is a factual assessment and thus falls outside the scope of the review by the Court of Justice in appeal proceedings.³⁷

76. This explains the Foundation's view that the express authorisation of geographical collective marks would be rendered ineffective if such collective marks were acknowledged as having only low distinctive character for the purposes of the assessment of the likelihood of confusion.

77. The aim pursued by the Foundation of strengthening its HALLOUMI mark cannot, however, be achieved by acknowledging geographical collective marks as having increased distinctive character as a matter of course because that distinctive character would remain notional. The public would still not perceive the geographical indication as an indication of the collective commercial origin of the product.

78. Instead, a very different function would have to be attributed to geographical collective marks, for example, to the effect that such marks exclusively guarantee a particular geographical origin of the goods or services concerned.

79. Express provision would have had to be made, however, as under Article 66(3) of the Trade Mark Regulation the (general) provisions of the regulation apply, unless Articles 67 to 74 provide otherwise.

80. Thus, in the judgment concerning the geographical collective mark DARJEELING, the Court confirmed the application of general principles to geographical collective marks. It held that, as is clear from the very wording of Article 66(2) of the Trade Mark Regulation, collective marks consisting of signs or indications which may serve, in trade, to designate the geographical origin of goods or services constitute collective marks within the meaning of paragraph 1 of that article. According to that paragraph, only trade marks that are capable of distinguishing the goods or services of the members of the association which is the proprietor of the trade mark from those of other undertakings may constitute EU collective marks.³⁸

81. The essential function of a trade mark is to guarantee the origin of the goods to consumers, in the sense that it serves to identify the goods or services covered by the trade mark as originating from a particular undertaking and thus to distinguish those goods or services from those of other undertakings.³⁹

82. Therefore, if it were held that the essential function of a geographical collective mark within the meaning of Article 66(2) of the Trade Mark Regulation is to indicate the geographical origin of the goods or services offered under such a mark, and not to indicate their commercial origin, that would disregard that essential function.⁴⁰

36 See also judgments of 13 June 2012, *Organismos Kyprakis Galaktokomikis Viomichanias v OHIM — Garmo (HELLIM)* (T-534/10, EU:T:2012:292, paragraph 41); of 7 October 2015, *Cyprus v OHIM (XALLOYMI and HALLOUMI)* (T-292/14 and T-293/14, EU:T:2015:752, paragraph 28); of 13 July 2018, *Cyprus v EUIPO — Papouis Dairies (Pallas Halloumi)* (T-825/16, EU:T:2018:482, paragraphs 42 and 43); of 13 July 2018, *Cyprus v EUIPO — POA (COWBOYS HALLOUMI)* (T-847/16, not published, EU:T:2018:481, paragraphs 40 and 41); and of 23 November 2018, *Cyprus v EUIPO — Papouis Dairies (Papouis Halloumi)* (T-703/17, not published, EU:T:2018:835, paragraph 49).

37 Judgment of 31 January 2019, *Pandalis v EUIPO* (C-194/17 P, EU:C:2019:80, paragraph 93).

38 Judgment of 20 September 2017, *The Tea Board v EUIPO* (C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 50).

39 Judgment of 20 September 2017, *The Tea Board v EUIPO* (C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 52).

40 Judgment of 20 September 2017, *The Tea Board v EUIPO* (C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 54).

83. Thus, the distinctive character of a geographical collective mark is also to be assessed according to the extent to which it identifies the collective commercial origin of the goods or services concerned.

84. As has already been explained, however, according to the factual findings made by the General Court, the HALLOUMI mark gives rise to such identification at most to a low degree. Consequently, the General Court's reasoning regarding the distinctive character of the HALLOUMI mark and the likelihood of confusion, and in particular paragraphs 41 and 71 of the judgment under appeal, in which the General Court acknowledges the HALLOUMI mark as having only a minimum degree of distinctive character which is not sufficient to give rise to a likelihood of confusion with the mark at issue, is not vitiated by an error in law.

85. Nor is this conclusion called into question by the fact that it significantly restricts the effectiveness of Article 66(2) of the Trade Mark Regulation and the protection of geographical collective marks. The proprietors of a geographical collective mark still enjoy minimum protection, permitting them to prevent registration of identical marks for the same products. At the same time, they can influence the perception of the mark if they use it in such a way that it acquires distinctive character.⁴¹

86. Ultimately, there is also no need for more extensive protection because the rules governing protected designations of origin and protected geographical indications⁴² can provide sufficient protection outside the scope of trade mark law. Those rules have the additional benefit, compared with the geographical collective mark, that under Article 12(1) of Regulation No 1151/2012 protected designations of origin and protected geographical indications may be used by any operator marketing a product conforming to the corresponding specification. Membership of an association, as provided for in Article 67(2) of the Trade Mark Regulation, is unnecessary in this regard. Furthermore, EUIPO rightly asserts that it would be contradictory if producers' associations could obtain equivalent or even stronger protection for geographical designations on the basis of trade mark law than in the protected designation of origin system.

87. The first two grounds of appeal must therefore be rejected in their entirety.

C. Failure to remit the case to the Board of Appeal

88. By the fourth ground of appeal, the Foundation objects that the General Court replaced the Board of Appeal rather than remitting the case.

89. In paragraphs 63 and 64 of the judgment under appeal, the General Court takes issue with the Board of Appeal's finding that the two signs are phonetically different. In addition, in paragraphs 64 to 68 of the judgment under appeal, the General Court disagrees with the Board of Appeal's finding that the signs are conceptually different. Rather, there is a low degree of phonetic and conceptual similarity.

90. Then, in paragraph 71 of the judgment under appeal, in the light of these findings, the General Court carries out a global assessment of its own of the likelihood of confusion and concludes that no such likelihood exists.

91. The fourth ground of appeal effectively claims that at least this global assessment is reserved for the Board of Appeal.

⁴¹ Judgment of 4 May 1999, *Windsurfing Chiemsee* (C-108/97 and C-109/97, EU:C:1999:230, paragraph 47).

⁴² Title II of Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ 2012 L 343, p. 1).

92. However, this view is misconceived as, under Article 65(3) of the Trade Mark Regulation, the General Court is not restricted to annulling the decision of the Board of Appeal, but may also alter it.

93. The power of the General Court to alter decisions does not have the effect of conferring on that Court the power to substitute its own reasoning for that of a Board of Appeal or to carry out an assessment on which that Board of Appeal has not yet adopted a position. However, exercise of the power to alter decisions covers situations in which the General Court, after reviewing the assessment made by the Board of Appeal, is in a position to determine, on the basis of the matters of fact and of law as established, what decision the Board of Appeal was required to take.⁴³

94. In the judgment under appeal the General Court did nothing other than correct the assessments of phonetic and conceptual similarity by the Board of Appeal and then carry out a new global assessment in the light of these modified assessments, which produced the same result as the assessment by the Board of Appeal.

95. The fourth ground of appeal must therefore be rejected.

V. Costs

96. Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 138(1), which applies to the procedure on appeal in accordance with Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

97. Since the Foundation has been unsuccessful, it must in principle must be ordered to pay the costs.

98. However, it would be unreasonable to order the Foundation to pay the costs incurred in connection with the third ground of appeal, as that ground of appeal results from a translation error by the Court of Justice of the European Union. All the parties should, in the first place, bear their own costs in this regard. They can then assess whether to make claims for damages against the Court of Justice of the European Union.

VI. Conclusion

99. I therefore propose that the Court should:

- (1) dismiss the appeal;
- (2) order the Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi to pay the costs of the proceedings, except for the costs incurred in connection with the third ground of appeal. In respect of that ground of appeal, all the parties are to bear their own costs.

⁴³ Judgment of 5 July 2011, *Edwin v OHIM* (C-263/09 P, EU:C:2011:452, paragraph 72).