



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

7 May 2019*

(EU trade mark — Application for the EU word mark *vita* — Absolute grounds for refusal — No distinctive character — Descriptiveness — Concept of characteristic — Name of a colour — Article 7(1)(b) and (c) of Regulation (EU) 2017/1001)

In Case T-423/18,

Fissler GmbH, established in Idar-Oberstein (Germany), represented by G. Hasselblatt and K. Middelhoff, lawyers,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by W. Schramek and D. Walicka, acting as Agents,

defendant,

ACTION brought against the decision of the Fifth Board of Appeal of EUIPO of 28 March 2018 (Case R 1326/2017-5), relating to an application for registration of the word sign *vita* as an EU trade mark,

THE GENERAL COURT (Eighth Chamber),

composed of A.M. Collins, President, M. Kancheva (Rapporteur) and G. De Baere, Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 6 July 2018,

having regard to the response lodged at the Court Registry on 24 September 2018,

having regard to the reassignment of the case to a new Judge-Rapporteur sitting in the Eighth Chamber,

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

gives the following

* Language of the case: German.

Judgment

Background to the dispute

- 1 On 27 September 2016, the applicant, Fissler GmbH, 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), as amended (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)).
- 2 Registration as a mark, under the number 15857188, was sought for the word sign *vita*.
- 3 The goods in respect of which registration was sought are in Classes 7, 11 and 21 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, for each of those classes, to the following description:
 - Class 7: ‘Food processors, electric; parts and accessories for the aforesaid goods’;
 - Class 11: ‘Pressure cookers, electric; parts and accessories for the aforesaid goods’;
 - Class 21: ‘Household or kitchen utensils and containers; cooking pot sets; pressure cookers, non-electric; parts and accessories for the aforesaid goods’.
- 4 By decision of 28 April 2017, the examiner refused registration of the mark applied for in respect of the goods concerned on the grounds that it was descriptive and devoid of any distinctive character for the purposes of Article 7(1)(b) and (c) of Regulation No 207/2009 (now Article 7(1)(b) and (c) of Regulation 2017/1001).
- 5 On 20 June 2017, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009 (now Articles 66 to 71 of Regulation 2017/1001), against the examiner’s decision.
- 6 By decision of 28 March 2018 (‘the contested decision’), the Fifth Board of Appeal of EUIPO dismissed the appeal. In the first place, as regards the relevant public, it found that the goods concerned were aimed above all at the general public, but also in part at a specialist public, for example chefs, and that the level of attention varied from average to high. It added that, as the mark applied for was a Swedish term, it was necessary to take into account the Swedish-speaking public in the European Union.
- 7 In the second place, as regards the descriptiveness of the mark applied for, the Board of Appeal, first, pointed out that the sign *vita* is the definite plural form of the word ‘vit’, which means ‘white’ in Swedish. Next, it found that, for the purposes of applying Article 7(1)(c) of Regulation 2017/1001, the question whether or not white was a common colour for those goods was not determinative. It was sufficient that those goods could exist in white and that the sign could be descriptive of them. After stating that the colour white was not the most common colour for ‘electronic and non-electronic’ (that is to say, electric and non-electric) pressure cookers and other household utensils, but that it was at least a fairly usual colour for those goods, it found that that showed that an average consumer would associate the goods concerned with the colour white and therefore found that the mark applied for was descriptive. Furthermore, the Board of Appeal pointed out that some kitchen utensils and household appliances are often referred to as ‘white goods’ in English and Swedish (‘vitvaror’). On the basis of an extract from the website which could be accessed via the internet address <http://www.vitvara.nu/vad-ar-vitvaror>, it deduced that some of the goods concerned, such as electric

food processors or electric pressure cookers, could collectively be described as ‘white goods’. It stated that, even if that were not possible, because it is mainly large household appliances, like washing machines and dishwashers, which are described as ‘white goods’, it clearly demonstrated that the colour white was generally associated with household utensils. Lastly, it found that the mark applied for was purely descriptive.

- 8 In the third place, as regards the lack of distinctive character of the mark applied for, the Board of Appeal found that the mark applied for would be understood by the relevant public as a simple statement of fact in the sense that the goods concerned were goods that were available in white. It concluded that that mark was purely descriptive and, consequently, had no distinctive character. It took the view that any manufacturer of food processors and cooking pot sets could manufacture its goods in white and that that mark was not therefore capable of distinguishing the applicant’s goods from those of other undertakings. Furthermore, the Board of Appeal rejected the applicant’s argument that there are other registered trade marks which consist solely of colours.

Forms of order sought

- 9 The applicant claims that the Court should:

- annul the contested decision;
- order EUIPO to pay the costs.

- 10 EUIPO contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

Law

- 11 In support of its action, the applicant puts forward two pleas in law, alleging infringement of Article 7(1)(c) of Regulation 2017/1001 and infringement of Article 7(1)(b) of that regulation respectively. In essence, it submits that the mark applied for is not descriptive with regard to the goods concerned and has the requisite distinctive character with regard to those goods.

Preliminary observation on the definition of the relevant public

- 12 It is necessary, at the outset, to define the relevant public in order to assess those two absolute grounds for refusal.
- 13 First, in paragraphs 13 to 15 of the contested decision, the Board of Appeal found that the average consumer of the goods concerned was primarily the ‘general consumer’, that is to say the general public, but also, in part, a specialist public, for example chefs, and that the level of attention therefore varied from average to high. However, it added that it was apparent from the case-law concerning relative grounds for refusal that, if the goods and services were aimed at average consumers as well as at a specialist public, the public with the lowest level of attention had to be taken into consideration and that, in the present case, the level of attention of the general public had to be taken into account. Lastly, it stated that, even if the sign were aimed at a specialist public with a higher level of attention, that did not mean that it would gain in distinctiveness, because a sign the descriptive meaning of

which is not understood by the average consumer may be understood immediately by a specialist public (see, to that effect, judgment of 11 October 2011, *Chestnut Medical Technologies v OHIM (PIPELINE)*, T-87/10, not published, EU:T:2011:582, paragraphs 27 and 28).

- 14 In that regard, it is apparent from the case-law that the fact that the relevant public is a specialist one cannot have a decisive influence on the legal criteria used to assess the distinctive character of a sign. Although it is true that the level of attention of the relevant specialist public is, by definition, higher than that of the average consumer, it does not necessarily follow that a weaker distinctive character of a sign is sufficient where the relevant public is specialist. The principle deriving from settled case-law, namely that, in order to assess whether or not a trade mark has any distinctive character, the overall impression given by it must be considered, might be undermined if the distinctiveness threshold of a sign depended generally on the degree of specialisation of the relevant public (see judgment of 12 July 2012, *Smart Technologies v OHIM*, C-311/11 P, EU:C:2012:460, paragraphs 48 to 50 and the case-law cited). The same is true of the assessment of the descriptiveness of a sign.
- 15 In the present case, the Board of Appeal was fully entitled to take into account the general public's perception of the mark applied for and not to regard its perception by a specialist public, for example chefs, as having any particular effect.
- 16 Secondly, in paragraph 16 of the contested decision, the Board of Appeal pointed out that, under Article 7(2) of Regulation 2017/1001, a sign is to be refused registration even if the ground for refusal exists only in part of the European Union. It found that, given that the mark applied for is a term which comes from Swedish, the assessment of its eligibility for protection had to be based primarily on the Swedish-speaking public of the European Union.
- 17 In that regard, without ruling at this stage on whether the mark applied for is actually perceived as a Swedish term, it is sufficient to point out that the assessment in respect of the absolute grounds for refusal by the examiner and the Board of Appeal proceeds on this basis, with the result that the relevant public for the purposes of that assessment is the Swedish-speaking public in the European Union, namely the Swedish or Finnish consumer (see, to that effect, judgment of 9 July 2014, *Pågen Trademark v OHIM (giffjar)*, T-520/12, not published, EU:T:2014:620, paragraphs 19 and 20).

The first plea in law, alleging infringement of Article 7(1)(c) of Regulation 2017/1001

- 18 By the first plea, the applicant claims, in the first place, that, when it is used on its own, the mark applied for does not have any clearly descriptive content and that it therefore seems unlikely that the word 'vita' will actually be understood by Swedish consumers as meaning 'white'. It complains that EUIPO did not sufficiently take into account the fact that the mark applied for is not the adjective 'vit' ('white') in the basic form in which it appears in dictionaries, but the term 'vita' on its own. It maintains that in Swedish that term is never used on its own but always in connection with a noun placed after it and to which it relates. The applicant submits that EUIPO has not established that, when used on its own, the word 'vita' has any key content which relates to certain characteristics of the goods in question and has not provided any proof to that effect. The applicant argues that, when it is used on its own, the word 'vita' will thus not immediately be recognised by the Swedish consumer and will not therefore be associated directly with 'white'. Furthermore, the applicant submits that the meaning of 'vita' is not clear and requires interpretation, because that word can relate to various circumstances and have various meanings in a number of languages, inter alia 'life' or 'way of life' in Latin and in Italian.
- 19 In the second place, the applicant maintains that, even if the Swedish consumer is taken into account and it is assumed that the term 'vita' is associated with an indication of colour, it is not true that the indication of colour 'white' has a purely descriptive meaning with regard to the goods concerned because there is, from the point of view of the relevant public, no sufficiently direct and specific link

between the term ‘vita’ and the goods concerned. The applicant submits that that applies in particular to pressure cookers and pots, which are almost exclusively manufactured out of silver-coloured stainless steel and for which the colour ‘white’ is not usually used. Furthermore, it asserts that the goods concerned cannot be regarded as ‘white goods’, an expression which refers to household appliances such as fridges, freezers, dishwashers or tumble-dryers, but is not used to refer to pressure cookers, pots, pans or kitchen bowls and so forth. It maintains that the relevant public associates pressure cookers, pots, pans or kitchen bowls and so forth with silver-coloured stainless steel goods and that names of colours are irrelevant. Given that in the sector to which the goods concerned belong, the names of colours are irrelevant and the relevant public does not associate any particular colours with cooking appliances, the name of a colour, no matter which one, will also not be perceived as a characteristic of those goods. It maintains that it is therefore irrelevant that the goods concerned could also come in the colour white, because the decisive factor is rather whether the sign can be used for that purpose and whether, in the perception of the relevant public, it can be understood as an indication that describes a characteristic of those goods.

- 20 The applicant thus submits that the average Swedish consumer will not immediately conclude, without further thought, that the term ‘vita’ relates to a white kitchen utensil. It maintains that, on the contrary, that consumer must engage in a thought process involving a number of steps in order to get from the designation of colour as such to the colour of the goods. Furthermore, it asserts that it is not clear to that consumer which element of the goods the indication of colour refers to, since pots, pans, food processors or kitchen bowls usually consist of a number of elements or, at least, of an inside and an outside. It submits that that consumer will not deduce, without further thought, from a mere indication of colour whether the goods concerned include white elements, whether they are entirely white or whether, for example, only the inside is white.
- 21 In the third place, the applicant argues that the Court and EUIPO have repeatedly held that the term ‘vita’ has no descriptive meaning with regard to the respective goods concerned and that it therefore, in the absence of any direct relationship or link with those goods and despite the allusiveness of the word ‘vita’ to vitality, has an average degree of distinctive character (see judgment of 14 January 2016, *The Cookware Company v OHIM — Fissler (VITA+VERDE)*, T-535/14, not published, EU:T:2016:2, paragraph 40 and the case-law cited).
- 22 The applicant concludes that for Swedish consumers the term ‘vita’, used on its own, does not mean ‘white’ and that, on account of its numerous meanings and the necessity of interpreting it, it does not contain any key descriptive content which concerns a characteristic of the goods in respect of which registration has been sought that is significant for the relevant public. It adds that the mere fact that, in the abstract, an element is capable of indicating a characteristic cannot suffice to justify a requirement of availability for the purposes of Article 7(1)(c) of Regulation 2017/1001.
- 23 EUIPO disputes the applicant’s arguments and regards the first plea as ‘ineffective’. It submits that the examination of the sign must be carried out specifically in relation to the goods concerned, and that consumers are faced with an EU trade mark in direct connection with the goods to which it is affixed, for example when making a purchase or in advertising. EUIPO argues that the applicant’s claim that a thought process involving a number of steps is necessary to attribute a sensible meaning to the sign applied for is not convincing and that, in so far as the goods are white, its claim that for Swedish-speaking consumers the characteristics of the goods are not easily recognisable in the sign is also unfounded.
- 24 EUIPO maintains that the word ‘vita’, which is used as an adjective in Swedish, corresponds to the word ‘weiße’ (‘white’) in German or to ‘blanche’ (‘white’) in French and that the Swedish-speaking public does not need any translation. It adds that the fact that the word ‘vita’ is also used in other languages in no way alters its being understood by Swedish native speakers. Even though it concedes that the word ‘vita’ is not generally used on its own, EUIPO states that in an examination relating specifically to the goods in question, it is not necessary for the sign to be the expression ‘white’

electric food processors' and that the goods are perceived and added mentally by the relevant public. It claims that the relevant Swedish-speaking public knows that a colour may refer to a characteristic of the goods and perceives an informative message to the effect that the goods are white and not a different colour, for example steel grey.

- 25 EUIPO maintains that it is not required to prove that the mark applied for may designate a characteristic of the goods, because Article 7(1)(c) of Regulation 2017/1001 does not concern the current use of the sign. Although it does not dispute that there are many pots and other kitchen-related goods made of steel, it submits that other colours, including white, are also used for the goods concerned, with the result that a white pressure cooker would not be unusual or striking. EUIPO adds that, even if white were rarely used in connection with household appliances, that would not contradict the fact that it can be the main characteristic of those goods. It submits that colour may be a key purchasing criterion, indeed that it must be considered to be an essential characteristic, and that nothing precludes those goods from being completely or mainly white.
- 26 EUIPO claims that it is not necessary for the characteristic to be the main element or the purchasing criterion and that, according to the case-law, the ground for refusal set out in Article 7(1)(c) of Regulation 2017/1001 applies regardless of whether the sign describes an essential or ancillary characteristic or indeed 'any characteristic whatsoever' of the goods designated. It adds that a sign must be refused registration if at least one of its possible meanings designates a characteristic of the goods concerned. According to EUIPO, that is so in the present case because the mark applied for does not need to be interpreted and does not trigger any complex thought process, since the word 'vita' is used adjectivally in Swedish as a form of 'white'. EUIPO 'cannot therefore understand' why such a thought process would be triggered when that word, the message of which is simple and remains informative, without being indeterminate or vague, is perceived. Lastly, it submits that the cases concerning earlier registrations are not comparable and do not have any binding effect in the present case.
- 27 Article 7(1)(c) of Regulation 2017/1001 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 must not be registered. According to Article 7(2) of that regulation, paragraph 1 is to apply notwithstanding that the grounds of non-registrability obtain in only part of the European Union.
- 28 According to settled case-law, for a sign to be caught by the prohibition set out in that provision, there must be a sufficiently direct and specific link between the sign and the goods or services in question to enable the relevant public immediately to perceive, without further thought, a description of those goods or services or of one of their characteristics (judgments of 22 June 2005, *Metso Paper Automation v OHIM (PAPERLAB)*, T-19/04, EU:T:2005:247, paragraph 25; of 12 May 2016, *Chung-Yuan Chang v EUIPO — BSH Hausgeräte (AROMA)*, T-749/14, not published, EU:T:2016:286, paragraph 23; and of 25 October 2018, *Devin v EUIPO — Haskovo (DEVIN)*, T-122/17, EU:T:2018:719, paragraph 18).
- 29 Whether a sign is descriptive must therefore be assessed, first, by reference to the goods or services in respect of which registration has been sought and, secondly, by reference to the perception that the relevant public, which consists of the consumers of those goods or services, has of that sign (see, to that effect, judgments of 27 February 2002, *Ellos v OHIM (ELLOS)*, T-219/00, EU:T:2002:44, paragraph 29; of 12 May 2016, *AROMA*, T-749/14, not published, EU:T:2016:286, paragraph 24; and of 17 January 2019, *Ecolab USA v EUIPO (SOLIDPOWER)*, T-40/18, not published, EU:T:2019:18, paragraph 25).

- 30 Furthermore, a word sign must be refused registration under Article 7(1)(c) of Regulation 2017/1001 if at least one of its possible meanings designates a characteristic of the goods or services concerned (judgments of 23 October 2003, *OHIM v Wrigley*, C-191/01 P, EU:C:2003:579, paragraph 32, and of 12 May 2016, *AROMA*, T-749/14, not published, EU:T:2016:286, paragraph 29).
- 31 Lastly, the general interest underlying Article 7(1)(c) of Regulation 2017/1001 is that of ensuring that signs which describe one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services (judgment of 10 March 2011, *Agencja Wydawnicza Technopol v OHIM*, C-51/10 P, EU:C:2011:139, paragraph 37). That provision prevents those signs or indications from being reserved to one undertaking alone because they have been registered as trade marks (judgment of 23 October 2003, *OHIM v Wrigley*, C-191/01 P, EU:C:2003:579, paragraph 31) and prevents an undertaking from monopolising the use of a descriptive term to the detriment of other undertakings, including its competitors, whose range of available vocabulary for describing their own goods would thereby be limited (judgments of 16 October 2014, *Larrañaga Otaño v OHIM (GRAPHENE)*, T-458/13, EU:T:2014:891, paragraph 18; of 7 December 2017, *Colgate-Palmolive v EUIPO (360°)*, T-332/16, not published, EU:T:2017:876, paragraph 17; and of 25 October 2018, *DEVIN*, T-122/17, EU:T:2018:719, paragraph 19).
- 32 It is in the light of those principles that the applicant's first plea, alleging infringement of Article 7(1)(c) of Regulation 2017/1001, must be ruled on. To that effect, it is appropriate to examine, in turn, the meaning of the term 'vita' in Swedish and the link between that meaning and the goods concerned.

The meaning of the term 'vita' in Swedish

- 33 The applicant claims that the term 'vita', used on its own, will not immediately be recognised by the Swedish consumer and will not therefore be associated directly with the meaning of 'white'. Furthermore, it submits that that term can have various meanings in a number of languages, inter alia 'life' or 'way of life' in Latin and Italian.
- 34 In paragraph 20 of the contested decision, the Board of Appeal found that the term 'vita' is the definite plural form of the Swedish word 'vit', which means 'white'.
- 35 In that regard, although it is true that the term 'vita' is not identical to the common indefinite form of the word 'vit' which appears in Swedish dictionaries, it must be held that that term is nonetheless capable of immediately being recognised by the Swedish-speaking consumer as meaning the adjective 'white' in its plural form and its definite singular form, even when it is used on its own. As regards an adjective which is as common as that meaning 'white', the mere fact that there is no noun next to that term cannot preclude it from being recognised as such by that consumer.
- 36 Furthermore, although it is true that the term 'vita' can have various meanings in a number of languages, inter alia 'life' or 'way of life' in Latin and Italian, such a fact is nonetheless irrelevant in the present case, since the meaning of 'white' in Swedish constitutes 'at least one of its possible meanings' in accordance with the case-law referred to in paragraph 30 above.
- 37 The applicant's arguments seeking to call into question the meaning that the Board of Appeal established that the term 'vita' has for the relevant Swedish-speaking public must therefore be rejected.

38 Furthermore, the case-law that the applicant cites regarding the lack of descriptiveness of the term ‘vita’ (see paragraph 21 above) is irrelevant in the present case, because it concerns the perception of that term by the Italian, Spanish, French, German, Portuguese and Romanian public, whereas, in the present case, the question that arises relates to the meaning of that term for the Swedish and Finnish public.

The link between the meaning of the term ‘vita’ in Swedish and the goods concerned

39 The applicant submits that, from the point of view of the relevant public, there is not a sufficiently direct and specific link between the term ‘vita’ in Swedish and the goods concerned. According to the applicant, the colour white is not usually used for those goods, which are almost exclusively made of silver-coloured stainless steel. Furthermore, it submits that those goods cannot be regarded as ‘white goods’, that is to say household electrical appliances.

40 In paragraphs 21 to 23 of the contested decision, the Board of Appeal essentially based its finding that the mark applied for is descriptive on two grounds. In the first place, it stated that the goods concerned are fairly usually available in white, although they are not most commonly available in that colour. In the second place, it stated that those goods are often referred to as ‘vitvaror’ (‘white goods’) in Swedish.

41 In the first place, regarding the more or less common use of the colour white in manufacturing the goods concerned, it is necessary to examine first of all whether such use may be categorised as a ‘characteristic’ of those goods for the purposes of the case-law.

42 In that regard, it should be borne in mind that, by using the terms ‘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’ in Article 7(1)(c) of Regulation 2017/1001, the EU legislature made it clear, first, that those terms must all be regarded as corresponding to characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of goods or services may also be taken into account (judgments of 10 March 2011, *Agencja Wydawnicza Technopol v OHIM*, C-51/10 P, EU:C:2011:139, paragraph 49; of 10 July 2014, *BSH v OHIM*, C-126/13 P, not published, EU:C:2014:2065, paragraph 20; and of 17 January 2019, *SOLIDPOWER*, T-40/18, not published, EU:T:2019:18, paragraph 22).

43 The fact that the EU legislature chose to use the word ‘characteristic’ highlights the fact that the signs referred to in Article 7(1)(c) of Regulation 2017/1001 are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. Consequently, a sign can be refused registration on the basis of that provision only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics (see judgments of 10 March 2011, *Agencja Wydawnicza Technopol v OHIM*, C-51/10 P, EU:C:2011:139, paragraph 50 and the case-law cited, and of 10 July 2014, *BSH v OHIM*, C-126/13 P, not published, EU:C:2014:2065, paragraphs 21 and 22 and the case-law cited; judgments of 11 October 2018, *M&T Emporia Ilektrikon-Ilektronikon Eidon v EUIPO (fluo.)*, T-120/17, not published, EU:T:2018:672, paragraph 24; of 12 December 2018, *Bischoff v EUIPO — Miroglio Fashion (CARACTÈRE)*, T-743/17, not published, EU:T:2018:911, paragraph 25; and of 17 January 2019, *SOLIDPOWER*, T-40/18, not published, EU:T:2019:18, paragraph 23).

44 Furthermore, although it is irrelevant whether such a characteristic is commercially essential or ancillary (judgment of 16 October 2014, *GRAPHENE*, T-458/13, EU:T:2014:891, paragraph 20; see also, by analogy, judgment of 12 February 2004, *Koninklijke KPN Nederland*, C-363/99, EU:C:2004:86, paragraph 102), a characteristic, within the meaning of Article 7(1)(c) of Regulation 2017/1001, must nevertheless be ‘objective’ and ‘inherent to the nature of that product’ or service (judgment of 6 September 2018, *Bundesverband Souvenir — Geschenke — Ehrenpreise v EUIPO*, C-488/16 P,

EU:C:2018:673, paragraph 44) and ‘intrinsic and permanent’ with regard to that product or service (judgments of 23 October 2015, *Geilenkothen Fabrik für Schutzkleidung v OHIM (Cottonfeel)*, T-822/14, not published, EU:T:2015:797, paragraph 32; of 5 July 2016, *Bundesverband Souvenir — Geschenke — Ehrenpreise v EUIPO — Freistaat Bayern (NEUSCHWANSTEIN)*, T-167/15, not published, EU:T:2016:391, paragraph 30; and of 11 October 2018, *fluo.*, T-120/17, not published, EU:T:2018:672, paragraph 40).

- 45 In the present case, it must be stated that the colour white does not constitute an ‘intrinsic’ characteristic which is ‘inherent to the nature’ of the goods concerned (such as food processors, electric pressure cookers and household utensils), but a purely random and incidental aspect which only some of them may have and which does not, in any event, have any direct and immediate link with their nature. Such goods are available in a multitude of colours, among them the colour white, which is not more prevalent than the others. The Board of Appeal itself acknowledges this because the website that it mentions in paragraph 23 of the contested decision states that ‘these days, [household] utensils come in all colours’.
- 46 The mere fact that the goods concerned are more or less usually available in white, among other colours, is not disputed, but is irrelevant, since it is not ‘reasonable’, within the meaning of the case-law referred to in paragraph 43 above, to believe that for that reason alone the colour white will actually be recognised by the relevant public as a description of an intrinsic characteristic which is inherent to the nature of those goods.
- 47 The applicant is therefore right that it is irrelevant that the goods concerned could also come in white, because the decisive factor is whether, in the perception of the relevant public, the sign can be understood as a description of a characteristic of those goods.
- 48 That is not the case here because the term ‘vita’, perceived as meaning ‘white’ cannot be understood, by the relevant Swedish-speaking public, as an indication that describes an intrinsic characteristic which is inherent to the nature of the goods concerned.
- 49 Moreover, the present case must be distinguished from the case which gave rise to the judgment of 9 December 2008, *Colgate-Palmolive v OHIM — CMS Hasche Sigle (VISIBLE WHITE)* (T-136/07, not published, EU:T:2008:553, paragraphs 42 and 43), in which the Court held that the terms ‘visible’ and ‘white’ allowed the relevant public to detect immediately and without further reflection the description of a fundamental characteristic of the goods concerned, namely ‘toothpaste and mouthwash’, in the sense that their use makes the white colour of teeth visible. In that case, ‘visible white’ described an intrinsic characteristic that is inherent to the nature of the goods concerned, namely the point of using them or their intended purpose. The present case must also be distinguished from the case which gave rise to the judgment of 7 July 2011, *Cree v OHIM (TRUEWHITE)* (T-208/10, not published, EU:T:2011:340, paragraph 23), in which the Court held that the term ‘truewhite’, as a whole, could be regarded as referring to a true white and that, applied to light-emitting diodes (LED), that mark merely described an essential characteristic of those goods, namely their ability to reproduce light of such whiteness that it could be considered to be similar to natural light. In that case, the ‘true white’, that is to say one comparable to that of natural light, also described an intrinsic characteristic inherent to the nature of the goods concerned, namely the quality of those goods.
- 50 In the second place, as regards the common Swedish term ‘vitvaror’, which EUIPO claims designates the goods concerned, it must first be stated that the link between the term ‘vita’ (meaning ‘white’) and the term ‘vitvaror’ (meaning ‘white goods’) is only an indirect one and requires some interpretation and thought on the part of the relevant public.

- 51 Furthermore, it must be held that the common Swedish term ‘vitvaror’ applies exclusively to ‘large household electrical appliances’ (such as fridges, cookers, dishwashers, washing machines, dryers, and so forth) and not to ‘small household electrical appliances’ (such as food processors, electric pressure cookers, coffee machines, toasters, and so forth), between which there is an acknowledged difference in size and portability.
- 52 The Board of Appeal itself accepts that finding and that acknowledged difference when it admits, in paragraph 23 of the contested decision, that ‘it is above all large household appliances, like, for example washing machines and dishwashers, which are described as white goods’. It errs, however, in adding that that demonstrates that the colour white is generally associated with household utensils, because there can be at most only an indirect association, and not a direct and specific link in the mind of the relevant public.
- 53 Consequently, the Board of Appeal’s transition, first, from the adjective ‘white’ to ‘white goods’ and, secondly, from ‘large household electrical appliances’ to ‘small household electrical appliances’ or kitchen utensils establishes only that there is a doubly indirect link, which requires a thought process involving a number of steps, and not a direct and immediate link in the mind of the relevant public.
- 54 The evocation of the goods concerned, or of one of their characteristics, which the term ‘vita’ might convey to the relevant public, through the association, first, with the Swedish term ‘vitvaror’ or with ‘large household electrical appliances’ and then, secondly, with ‘small household electrical appliances’, is at most doubly indirect and does not enable that public immediately, and without further thought, to perceive a description of the goods in question or of one of their characteristics. Such a link is ‘too vague and indeterminate’ (see, to that effect, judgment of 27 February 2002, *ELLOS*, T-219/00, EU:T:2002:44, paragraphs 43 and 44) to make the sign ‘vita’ descriptive.
- 55 In addition, the present case must be distinguished from the case which gave rise to the judgment of 16 March 2006, *Telefon & Buch v OHIM — Herold Business Data (WEISSE SEITEN)* (T-322/03, EU:T:2006:87, paragraphs 95 to 99), in which the Court pointed out that the term ‘weiße Seiten’ (meaning ‘white pages’) had become synonymous, in the German language, with ‘telephone directories for private individuals’ and could therefore be considered to be descriptive of the goods for which it was a common term, as a synonym for such a directory and not due to the white-coloured pages of that directory. In that case, the contested mark itself constituted the common term, unlike the term ‘vita’ being taken for the term ‘vitvaror’, and directly designated the goods concerned and not another category of goods, like ‘small household electrical appliances’ as opposed to ‘large household electrical appliances’ in the present case.
- 56 Consequently, neither of the two grounds relied upon by the Board of Appeal (see paragraph 40 above) is sufficient to establish that there is a sufficiently direct and specific link, within the meaning of the case-law referred to in paragraph 28 above, between the term ‘vita’ in Swedish and the goods concerned. The Board of Appeal did not show that the relevant public, when faced with the mark applied for, would immediately perceive it, without further thought, as a description of those goods or of one of the intrinsic characteristics of those goods that is inherent to their nature.
- 57 The term ‘vita’ is thus not descriptive of a characteristic of the goods in question and is not therefore covered by the ground for refusal set out in Article 7(1)(c) of Regulation 2017/1001.
- 58 It follows that the Board of Appeal infringed Article 7(1)(c) of Regulation 2017/1001 when it erroneously found that there was a sufficiently direct and specific link between the mark applied for and the goods concerned for that mark to be descriptive with regard to those goods.
- 59 The first plea in law must therefore be upheld.

The second plea in law, alleging infringement of Article 7(1)(b) of Regulation 2017/1001

- 60 By the second plea, the applicant submits that, since the relevant public will not perceive in the mark applied for a purely descriptive content connected with the goods concerned and since that mark fully fulfils its function as an indication of origin, it cannot be regarded as not having any distinctive character nor can the absolute ground for refusal set out in Article 7(1)(b) of Regulation 2017/1001 be upheld. It maintains, in particular, that the purpose of that article, which is to protect the public against monopolisations, is not undermined, because other market operators are not dependent on the use of the term ‘vita’ in the specific form applied for.
- 61 The applicant adds that, to the extent that the term ‘vita’ is perceived as an indication of colour, the large number of EU trade mark registrations claiming names of colours militates in favour of the distinctive character of indications of colour. That shows that the name of a colour may, from the point of view of the relevant consumers, be perceived as an indication of origin even if the goods covered by the mark exhibit the corresponding colour (such as the EU trade marks No 3115136 BLUE in respect of ‘razors’, No 3757663 WHITE in respect of ‘sewing machines’, No 1078989 ORANGE in respect of ‘household or kitchen utensils and containers’ and No 12131314 PURPLE in respect of ‘confectionery’).
- 62 The applicant concludes that the mark applied for is likewise not devoid of the required distinctive character, within the meaning of Article 7(1)(b) of Regulation 2017/1001, with regard to the goods concerned.
- 63 EUIPO disputes the applicant’s arguments and regards the second plea as ‘ineffective’. It claims that the mark applied for designates the colour of the goods in question and is regarded as an informative reference to it, with the result that it does not function as an indication of origin and has no distinctive character. It adds that the fact that, in decisions which clearly did not concern the Swedish language and the Swedish-speaking public, distinctive character was attributed to the element ‘vita’ in compound words is not relevant in the present case.
- 64 In that regard, it is important to bear in mind that each of the absolute grounds for refusal of registration listed in Article 7(1) of Regulation 2017/1001 is independent of the others and requires separate examination, even though there is an obvious degree of overlap between their respective scopes. Furthermore, those grounds for refusal must be interpreted in the light of the public interest underlying each of them (see, by analogy, judgments of 8 April 2003, *Linde and Others*, C-53/01 to C-55/01, EU:C:2003:206, paragraphs 67 and 71; of 12 February 2004, *Koninklijke KPN Nederland*, C-363/99, EU:C:2004:86, paragraphs 68 and 69; see also, to that effect, judgment of 16 September 2004, *SAT.1 v OHIM*, C-329/02 P, EU:C:2004:532, paragraph 25 and the case-law cited).
- 65 It follows that the fact that a mark is not covered by one of those absolute grounds for refusal does not mean that it cannot be covered by another. In particular, it therefore cannot be concluded that a mark is not devoid of any distinctive character in relation to certain goods or services purely on the ground that it is not descriptive of them (see, by analogy, judgments of 8 April 2003, *Linde and Others*, C-53/01 to C-55/01, EU:C:2003:206, paragraph 68, and of 12 February 2004, *Koninklijke KPN Nederland*, C-363/99, EU:C:2004:86, paragraphs 70 and 71).
- 66 The public interest underlying Article 7(1)(b) of Regulation 2017/1001 concerns consumer protection by enabling the consumer, without any possibility of confusion, to distinguish the origin of the goods or services covered by the mark, in accordance with its essential function as an indication of origin, whereas the public interest underlying the rule set out in Article 7(1)(c) of Regulation 2017/1001 is focused on the protection of competitors against a risk of monopolisation by a single trader of indications which are descriptive of characteristics of such goods or services (see paragraph 31 above).

- 67 Accordingly, a mark which is not descriptive, as in the present case, is not, for that reason, distinctive. In such a case, consideration should also be given to whether the mark is not intrinsically devoid of any distinctive character, that is to say, it is necessary to determine whether it is capable of fulfilling the essential function of a trade mark, which is to guarantee to the consumer or end-user the origin of the goods or services covered by the mark by enabling him, without any possibility of confusion, to distinguish those goods or services from others which have another origin (see, to that effect, judgments of 5 February 2015, *nMetric v OHIM (SMARTER SCHEDULING)*, T-499/13, not published, EU:T:2015:74, paragraph 22 and the case-law cited, and of 12 May 2016, *AROMA*, T-749/14, not published, EU:T:2016:286, paragraph 57).
- 68 Under Article 7(1)(b) of Regulation 2017/1001, trade marks which are devoid of any distinctive character must not be registered. According to settled case-law, the marks covered by that provision are those which are regarded as incapable of performing the essential function of a trade mark, namely that of identifying the commercial origin of the goods or services at issue, thus enabling the consumer who acquired the goods or services designated by the mark to choose to acquire them again if it was a positive experience, or to avoid doing so, if it was negative (see judgment of 12 May 2016, *AROMA*, T-749/14, not published, EU:T:2016:286, paragraph 58 and the case-law cited; judgments of 14 December 2017, *GeoClimaDesign v EUIPO — GEO (GEO)*, T-280/16, not published, EU:T:2017:913, paragraph 56, and of 12 December 2018, *CARACTÈRE*, T-743/17, not published, EU:T:2018:911, paragraph 49).
- 69 That distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been sought and, secondly, by reference to the perception that the relevant public, which consists of the consumers of those goods or services, has of that mark (see judgment of 21 January 2010, *Audi v OHIM*, C-398/08 P, EU:C:2010:29, paragraph 34 and the case-law cited; judgments of 12 May 2016, *AROMA*, T-749/14, not published, EU:T:2016:286, paragraph 59; of 14 December 2017, *GEO*, T-280/16, not published, EU:T:2017:913, paragraph 57; and of 12 December 2018, *CARACTÈRE*, T-743/17, not published, EU:T:2018:911, paragraph 50).
- 70 In the present case, the Board of Appeal found, in paragraph 29 of the contested decision, that the mark applied for would be understood by the relevant public as a simple statement of fact in the sense that the goods concerned were goods that were available in white. It concluded that that mark was purely descriptive and, consequently, had no distinctive character. It took the view that any manufacturer of food processors and cooking pot sets could manufacture its goods in white and that that mark was not therefore capable of distinguishing the applicant's goods from those of other undertakings.
- 71 However, it has been held, in the context of the analysis of the first plea in law, that the colour white does not constitute an intrinsic characteristic which is inherent to the nature of the goods concerned and that the mere fact that the goods concerned are available in white, among other colours, is irrelevant, since it is not reasonable to believe that, for that reason alone, the colour white will actually be recognised by the relevant public as a description of an intrinsic characteristic which is inherent to the nature of those goods (see paragraphs 45 to 47 above).
- 72 Consequently, inasmuch as the Board of Appeal deduced that the mark applied for had no distinctive character as a straightforward consequence of its supposedly 'purely descriptive' character, which has not been established, it must be held that that deduction is based on an erroneous premiss and is therefore unfounded.
- 73 Furthermore, in so far as the Board of Appeal inferred the lack of distinctive character of the mark applied for from its being understood as a simple statement of fact in the sense that the goods concerned are available in white, it must be held that the relevant Swedish-speaking public will not perceive a description of an intrinsic characteristic of the goods concerned in the mark applied for and will not be able to associate it directly with those goods. On the contrary, the term 'vita' requires

some interpretation on the part of Swedish and Finnish consumers. Those consumers will not understand the mark applied for as a simple statement of fact according to which those goods are available in white, but rather as an indication of their origin. That is particularly so because that mark will be affixed to goods of any colour, and not only to those which are white.

- 74 The ground for refusal relied on in the present case cannot therefore preclude the mark applied for from being regarded by the relevant public as being capable of identifying the commercial origin of the goods in question and distinguishing them from those of other undertakings.
- 75 It follows that the Board of Appeal infringed Article 7(1)(b) of Regulation 2017/1001 when it erroneously found that the mark applied for was devoid of any distinctive character with regard to the goods concerned on the basis of the ground for refusal relied on in the present case.
- 76 The second plea in law must therefore also be upheld.
- 77 In the light of all of the foregoing considerations, the action must be upheld in its entirety and the contested decision must therefore be annulled.

Costs

- 78 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.
- 79 Since EUIPO has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the applicant, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

- 1. Annuls the decision of the Fifth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 28 March 2018 (Case R 1326/2017-5);**
- 2. Orders EUIPO to pay the costs.**

Collins

Kancheva

De Baere

Delivered in open court in Luxembourg on 7 May 2019.

[Signatures]

Table of contents

Background to the dispute	2
Forms of order sought	3
Law	3
Preliminary observation on the definition of the relevant public	3
The first plea in law, alleging infringement of Article 7(1)(c) of Regulation 2017/1001	4
The meaning of the term ‘vita’ in Swedish	7
The link between the meaning of the term ‘vita’ in Swedish and the goods concerned	8
The second plea in law, alleging infringement of Article 7(1)(b) of Regulation 2017/1001	11
Costs	13