



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

22 September 2021 *

(EU trade mark – Opposition proceedings – Application for EU figurative mark chic ÁGUA ALCALINA 9,5 PH – Earlier EU word mark CHIC BARCELONA – Relative ground for refusal – No likelihood of confusion – Article 8(1)(b) of Regulation (EU) 2017/1001)

In Case T-195/20,

Sociedade da Água de Monchique, SA, established in Caldas de Monchique (Portugal), represented by M. Osório de Castro, lawyer,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by A. Folliard-Monguiral, I. Ribeiro da Cunha and J. Crespo Carrillo, acting as Agents,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO being

Pere Ventura Vendrell, residing in Sant Sadurni d'Anoia (Spain),

ACTION brought against the decision of the Fourth Board of Appeal of EUIPO of 20 January 2020 (Case R 2524/2018-4), relating to opposition proceedings between Mr Ventura Vendrell and Sociedade da Água de Monchique,

THE GENERAL COURT (Second Chamber),

composed of V. Tomljenović (Rapporteur), President, F. Schalin and P. Škvařilová-Pelzl, Judges,

Registrar: A. Juhász-Tóth, Administrator,

having regard to the application lodged at the Court Registry on 6 April 2020,

having regard to the response lodged at the Court Registry on 25 September 2020,

further to the hearing on 15 March 2021,

* Language of the case: Portuguese.

gives the following

Judgment

Background to the dispute

1 On 25 July 2017, the applicant, Sociedade Água de Monchique, SA, 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 was sought for the following figurative sign:



3 The goods in respect of which registration was sought are in Class 32 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description: ‘Non-alcoholic beverages; bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’.

4 The EU trade mark application was published in *European Union Trade Marks Bulletin* No 2017/199 of 19 October 2017.

5 On 17 January 2018, Mr Pere Ventura Vendrell filed a notice of opposition pursuant to Article 46 of Regulation 2017/1001 to registration of the mark applied for in respect of the goods referred to in paragraph 3 above.

6 The opposition was based, in particular, on the earlier EU word mark CHIC BARCELONA, registered on 1 November 2017 under No 16980195 in respect of goods in Class 33 and corresponding to the following description: ‘Alcoholic beverages (except beer); wine; sparkling wines; liqueurs; spirits [beverages]; brandy’.

7 The ground relied on in support of the opposition was that set out in Article 8(1)(b) of Regulation No 207/2009 (now Article 8(1)(b) of Regulation 2017/1001).

8 By decision of 29 October 2018, the Opposition Division upheld the opposition in so far as it was directed against ‘non-alcoholic beverages’ in Class 32 covered by the mark applied for. In that regard, it noted, inter alia, that ‘non-alcoholic beverages’ in Class 32 covered by the mark applied for were similar to a low degree to ‘alcoholic beverages (except beer)’ in Class 33 covered by the earlier mark. There was therefore a likelihood of confusion as regards those goods.

9 On the other hand, it rejected the opposition on the ground that there was no likelihood of confusion in so far as it was directed against the goods ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’ in Class 32 covered by the mark applied for. In that

regard, the Opposition Division, in essence, considered, inter alia, that those goods were different to the goods in Class 33 covered by the earlier mark. The goods had a different nature, purpose and method of use. Furthermore, those goods were consumed on different occasions, corresponded to different price segments and did not have the same commercial origin.

- 10 On 19 December 2018, Mr Ventura Vendrell filed a notice of appeal with EUIPO, pursuant to Articles 66 to 71 of Regulation 2017/1001, against the decision of the Opposition Division, seeking the annulment of that decision in so far as it dismissed his opposition. In support of his appeal, Mr Ventura Vendrell claimed, inter alia, that there was a similarity between the goods ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’ in Class 32 covered by the mark applied for and the goods in Class 33 covered by the earlier mark. In his view, it should have been concluded that there was also a likelihood of confusion in respect of the goods for which the Opposition Division had dismissed the opposition.
- 11 By decision of 20 January 2020 (‘the contested decision’), the Fourth Board of Appeal of EUIPO upheld the appeal in its entirety. In essence, first, it found that there was a low degree of similarity between the goods ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’ in Class 32 covered by the mark applied for and ‘alcoholic beverages’ in Class 33 covered by the earlier mark. Secondly, the Board of Appeal found that the marks at issue displayed a high degree of visual, phonetic and conceptual similarity. On the basis of those two findings, the Board of Appeal concluded that there was a likelihood of confusion within the meaning of Article 8(1) of Regulation 2017/1001, which, in its view, was applicable in the present case.

Forms of order sought

- 12 Following a partial withdrawal at the hearing, the applicant claims that the Court should:
- annul the contested decision;
 - order EUIPO to pay the costs.
- 13 EUIPO contends that the Court should:
- declare the action to be well founded;
 - order the parties to pay the costs in their respective proportions.

Law

EUIPO’s first head of claim

- 14 EUIPO’s first head of claim (‘declare the action to be well founded’) calls for the following observations.
- 15 According to settled case-law, EUIPO cannot be obliged to defend systematically every contested decision of a Board of Appeal or automatically to claim that every action challenging such a decision should be dismissed (see judgment of 7 May 2019, *mobile.de v EUIPO (Representation of*

a car in a speech bubble), T-629/18, EU:T:2019:292, paragraph 18 and the case-law cited). It is also settled case-law that nothing precludes EUIPO from endorsing the heads of claim of the applicant or from simply leaving the decision to the discretion of the Court, while putting forward all the arguments that it considers appropriate for giving guidance to the Court. Conversely, it may not seek an order annulling or altering the decision of the Board of Appeal on a point not raised in the application or put forward pleas in law not raised in the application (see judgment of 29 April 2020, *Lidl Stiftung v EUIPO – Plásticos Hidrosolubles (green cycles)*, T-78/19, not published, EU:T:2020:166, paragraph 47 and the case-law cited).

- 16 In the present case, EUIPO's first head of claim is admissible in so far as it, and the arguments set out in its support, do not go beyond the forms of order sought and the pleas in law put forward by the applicant.
- 17 Furthermore, it is true, as is apparent from a combined reading of the arguments relied on by the applicant in its application and EUIPO's responses in that regard, that the parties agree on certain points relating to the substance of the case (see paragraphs 37 and 38 below). Moreover, those points which the parties have in common are capable of resulting in the annulment of the contested decision (see paragraph 79 below). Notwithstanding those factors, however, the action has not become devoid of purpose. As matters stand, the contested decision has been neither amended nor withdrawn by the Board of Appeal. EUIPO does not possess the power to do so or to give instructions to that effect to the Boards of Appeal, whose independence is enshrined in Article 166(7) of Regulation 2017/1001. Therefore, the Court is not relieved of the need to examine the lawfulness of the contested decision in the light of the pleas in law put forward in the application initiating the proceedings and there is still a need to adjudicate on the substance.

Substance

- 18 As a preliminary point, it should be recalled that, given the date on which the application for registration at issue was filed, namely 25 July 2017, which is decisive for the purpose of identifying the applicable substantive law, the facts of the case are governed by the substantive provisions of Regulation No 207/2009 (see, to that effect, judgments of 8 May 2014, *Bimbo v OHIM*, C-591/12 P, EU:C:2014:305, paragraph 12, and of 18 June 2020, *Primart v EUIPO*, C-702/18 P, EU:C:2020:489, paragraph 2 and the case-law cited).
- 19 Since the relevant substantive provisions which apply to the present case are identical in the version following the adoption of Regulation No 207/2009 and Regulation 2017/1001 respectively, the fact that the parties referred to the provisions of the latter regulation is irrelevant for the purpose of the present proceedings and their arguments are to be interpreted as being based on the relevant provisions of Regulation No 207/2009 (judgment of 5 October 2020, *nanoPET Pharma v EUIPO – Miltenyi Biotec (viscover)*, T-264/19, not published, EU:T:2020:470, paragraph 23).
- 20 In support of its action, the applicant relies on a single plea in law, alleging infringement of Article 8(1)(b) of Regulation No 207/2009.
- 21 Article 8(1)(b) of Regulation No 207/2009 provides that, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for must not 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. The likelihood of confusion includes the likelihood of association with the earlier trade mark.

- 22 According to settled case-law, the risk that the public may believe that the goods or services in question come from the same undertaking or from economically linked undertakings constitutes a likelihood of confusion. According to the same case-law, the likelihood of confusion must be assessed globally, according to the relevant public's perception of the signs and goods or services in question and taking into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs and that of the goods or services covered (see judgment of 9 July 2003, *Laboratorios RTB v OHIM – Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)*, T-162/01, EU:T:2003:199, paragraphs 30 to 33 and the case-law cited).
- 23 Where the protection of the earlier trade mark extends to the entirety of the European Union, it is necessary to take into account the perception of the marks at issue by the consumer of the goods or services in question in that territory. However, it must be borne in mind that, for an EU trade mark to be refused registration, it is sufficient that a relative ground for refusal for the purposes of Article 8(1)(b) of Regulation No 207/2009 exists in part of the European Union (see, to that effect, judgment of 14 December 2006, *Mast-Jägermeister v OHIM – Licorera Zacapaneca (VENADO with frame and others)*, T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 76 and the case-law cited).
- 24 For the purposes of applying Article 8(1)(b) of Regulation No 207/2009, a likelihood of confusion presupposes both that the marks at issue are identical or similar and that the goods or services which they cover are identical or similar. Those conditions are cumulative (see judgment of 22 January 2009, *Commercy v OHIM – easyGroup IP Licensing (easyHotel)*, T-316/07, EU:T:2009:14, paragraph 42 and the case-law cited).

Goods which are the subject matter of the action

- 25 In the first place, it must be pointed out that 'non-alcoholic beverages' in Class 32 covered by the mark applied for (see paragraph 3 above) are not the subject of the present action. Nor were those goods the subject of the proceedings before the Board of Appeal. That is because, first, as regards those goods, the Opposition Division upheld Mr Ventura Vendrell's opposition, so that, in accordance with Article 67 of Regulation 2017/1001, which was applicable on the date on which his appeal was lodged with the Board of Appeal, namely 19 December 2018 (see paragraph 10 above), the proceedings before the Board of Appeal did not cover those goods. Under Article 67 of Regulation 2017/1001, in essence, an appeal may be brought before the Board of Appeal against a lower level decision only in so far as that decision has dismissed a claim or an application. Secondly, the applicant itself did not bring any action – whether it be a main appeal or a cross-appeal – before the Board of Appeal capable of extending the scope of the action beyond all the goods that were already addressed in the proceedings before the Board of Appeal as a result of the application brought by Mr Ventura Vendrell. Furthermore, it must be held that the Opposition Division's decision became final in so far as it concerned 'non-alcoholic beverages' in Class 32 covered by the mark applied for (see paragraph 3 above).
- 26 In the second place, it must be held that, when the Board of Appeal referred to the goods in Class 33 which had to be compared with the goods in Class 32, it referred to all the beverages mentioned in paragraph 6 above and not only to 'alcoholic beverages (except beer)'.

- 27 As is apparent from the EUIPO file, the other party to the proceedings, in his application of 19 December 2018 before the EUIPO Board of Appeal, not only mentioned ‘alcoholic beverages (except beer)’, but also insisted on the comparability of the goods covered by the mark applied for, in particular with wine. That fact was mentioned by the Board of Appeal in paragraph 7 of the contested decision. Furthermore, in paragraph 23 of the contested decision, the Board of Appeal stated that, in its view, ‘by using the expression “alcoholic beverages (except beer)”, the earlier mark protect[ed] not only high alcoholic beverages but also goods with a low alcohol content, such as sangria, cider or mixtures and combinations of alcoholic and non-alcoholic beverages, such as vermouth and soda, whisky and cola, and pastis with water’.
- 28 Goods referred to as ‘spirits [beverages]; brandy’ covered by the earlier mark, are goods with a high alcoholic strength, whereas goods referred to as ‘wine; sparkling wines; liqueurs’ are low-alcohol goods. The underlying logic of the contested decision was therefore to take the view that ‘alcoholic beverages (except beer)’ belong to the broader category of a set of goods which must also necessarily include the goods including ‘wine; sparkling wines; liqueurs; spirits [beverages]; brandies’.
- 29 That is also the understanding of the applicant, as is apparent from paragraphs 23 and 25 of the application.
- 30 It should also be observed that it has been held that according to the clear and unambiguous wording of Class 33, that class includes all alcoholic beverages with the sole exception of beers (judgment of 18 June 2008, *Coca-Cola v OHIM – San Polo (MEZZOPANE)*, T-175/06, EU:T:2008:212, paragraph 74).
- 31 Therefore, for the sake of clarification, it must be held that the goods which are the subject of the action in the present case are the beverages referred to as ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’ in Class 32 covered by the mark applied for and all the goods in Class 33 covered by the earlier mark, as mentioned in paragraph 6 above (together, ‘the goods in question’).

The relevant public and its degree of attentiveness

- 32 According to the case-law, in the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of goods concerned, who is reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer’s level of attention is likely to vary according to the category of goods or services in question (see judgment of 13 February 2007, *Mundipharma v OHIM – Altana Pharma (RESPICUR)*, T 256/04, EU:T:2007:46, paragraph 42 and the case-law cited).
- 33 In paragraph 17 of the contested decision, the Board of Appeal stated that the goods in Class 33 covered by the earlier mark were aimed at the general public. That general public is reasonably well informed and reasonably observant and circumspect. It is apparent from paragraph 18 of the contested decision that, according to the Board of Appeal, the goods in Class 32 covered by the mark applied for are also aimed at the general public. As regards those goods, the general public has at most an average or often a low level of attention when consuming and purchasing them. Finally, it is implicit in paragraphs 31 and 43 of the contested decision that the relevant public is the Spanish-speaking public and that the relevant territory is the territory of the European Union.

- 34 Those findings of the Board of Appeal, which, moreover, are not disputed by the applicant, must be upheld.

The comparison of the goods

- 35 In paragraph 29 of the contested decision, the Board of Appeal found that the ‘contested goods which [were] the subject of the appeal’ before it, namely ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’ in Class 32 covered by the mark applied for, were similar to a low degree to ‘alcoholic beverages (except beer)’ covered by the earlier mark and falling within Class 33, bearing in mind that that category includes, inter alia, goods referred to as ‘wine; sparkling wines; liqueurs; spirits [beverages]; brandies’, as covered by the earlier mark (see paragraphs 26 to 31 above).
- 36 In order to reach the conclusion set out in paragraph 29 of the contested decision, first, the Board of Appeal stated that the beverages referred to as ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’ and some of the goods on which the opposition was based, namely ‘alcoholic beverages (except beer)’, were liquids intended for human consumption. As a result, they were all of the same nature (see paragraph 22 of the contested decision). Next, according to the Board of Appeal, some of the goods covered by the term ‘alcoholic beverages (except beer)’ are therefore, in part, goods which serve above all to quench thirst and which are therefore, to a certain extent, in competition (see paragraph 23 of the contested decision). Moreover, according to the Board of Appeal, the fact that the goods in question are alcoholic or non-alcoholic, although relevant, cannot be considered decisive in determining whether, in the mind of the relevant public, the goods in question may have the same or related commercial origin (see paragraph 25 of the contested decision). It is true that the alcoholic beverages covered by the earlier mark are generally consumed on special occasions and social or family meetings, whereas mineral water and bottled water are, for a large number of people, an everyday consumer product. However, that does not mean that there is no ‘type of similarity’ between the goods in question (see paragraph 26 of the contested decision). According to the Board of Appeal, even if the average consumer is aware of the distinction between water and alcoholic beverages (including those with a low alcoholic strength), the Court has already held that those differences were insufficient to exclude a low degree of similarity between alcoholic beverages and mineral and bottled waters. In that respect, the Board of Appeal referred to paragraph 46 of the judgment of 9 March 2005, *Osotspa v OHMI – Distribution & Marketing (Hai)* (T-33/03, EU:T:2005:89), and to paragraphs 31 and 32 of the judgment of 5 October 2011, *Cooperativa Vitivinícola Arousana v OHMI – Sotelo Ares (ROSALIA DE CASTRO)* (T-421/10, not published, EU:T:2011:565) (see paragraph 27 of the contested decision).
- 37 The applicant takes the view that those findings of the Board of Appeal are vitiated by error. It observes that the goods covered by the mark applied for, on the one hand, and the alcoholic beverages covered by the earlier mark, on the other, differ in nature due to the presence or absence of alcohol in their composition and as regards their basic ingredients, their method of production, their colour, smell and taste. Contrary to the view of the Board of Appeal, those issues prevail, according to the applicant, over any common purpose and method of use for the relevant consumer. As regards the purpose and use of water and non-alcoholic beverages, the applicant submits that the consumption of alcoholic beverages – even those with a low alcohol content – does not exclude the consumption of non-alcoholic beverages (water) and vice versa, but the consumption of one of those beverages does not necessarily imply consumption of the other. Furthermore, alcoholic beverages – even those with a low alcohol content – are generally intended to be savoured and not to quench thirst, still less to protect human health, whereas the

non-alcoholic beverages covered by the mark applied for are generally, or even exclusively in the case of mineral and aerated waters, intended to quench thirst and to preserve human health. Consumers are buying more and more water, not only because they are thirsty but also because they are influenced by the adage ‘a healthy mind in a healthy body’. Finally, in the applicant’s view, the goods in question are neither complementary nor in competition with each other.

- 38 EUIPO, for its part, agrees with the applicant’s view and considers that the goods in question are dissimilar. In that regard, EUIPO concedes that, in paragraphs 31 and 32 of its judgment of 5 October 2011, *ROSALIA DE CASTRO* (T-421/10, not published, EU:T:2011:565), the Court held that there was a low degree of similarity between alcoholic beverages and mineral and bottled waters. However, in paragraphs 77 to 85 of the judgment of 4 October 2018, *Asolo v EUIPO – Red Bull (FLÜGEL)* (T-150/17, EU:T:2018:641), the Court departed from that assessment. Likewise, in its decision R 1720/2017 G of 21 January 2019, the Grand Board of Appeal of EUIPO decided that the goods ‘mineral water and aerated water; non-alcoholic beverages; fruit beverages and fruit juices’ in Class 32 were dissimilar to ‘vodka’ in Class 33.
- 39 As a preliminary point, it should be recalled that, according to case-law, in assessing the similarity of the goods or services in question, all the relevant factors relating to those goods or services should be taken into account. Those factors include, in particular, their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary. Other factors may also be taken into account such as the distribution channels of the goods concerned (see, to that effect, judgment of 11 July 2007, *El Corte Inglés v OHIM – Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)*, T-443/05, EU:T:2007:219, paragraph 37 and the case-law cited).
- 40 In the first place, just as is argued by the applicant, it must be held that, due to the absence of alcohol in their composition, the nature of the goods referred to as ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’ covered by the mark applied for is different to the nature of all the goods covered by the earlier mark.
- 41 It has already been held that the presence or absence of alcohol in a beverage is perceived as a significant difference, as regards the nature of the beverages at issue, by the general public of the European Union as a whole. Members of the general public of the European Union are observant, and differentiate between alcoholic and non-alcoholic beverages even when they choose a beverage on impulse (judgment of 12 December 2019, *Super bock group v EUIPO – Agus (Crystal)*, T-648/18, not published, EU:T:2019:857, paragraph 32).
- 42 It has also been held that the distinction between alcoholic and non-alcoholic beverages was necessary, since some consumers do not wish to or cannot consume alcohol (see, to that effect, judgments of 15 February 2005, *Lidl Stiftung v OHIM – REWE-Zentral (LINDENHOF)*, T-296/02, EU:T:2005:49, paragraph 54; of 18 June 2008, *MEZZOPANE*, T-175/06, EU:T:2008:212, paragraphs 79 to 81; and of 4 October 2018, *FLÜGEL*, T-150/17, EU:T:2018:641, paragraph 82). It is true that the latter assessments were made in relation to German and Austrian consumers (judgments of 15 February 2005, *LINDENHOF*, T-296/02, EU:T:2005:49, paragraph 45; of 18 June 2008, *MEZZOPANE*, T-175/06, EU:T:2008:212, paragraph 21; and of 4 October 2018, *FLÜGEL*, T-150/17, EU:T:2018:641, paragraph 69). It must be noted, however, that there is no evidence to support the conclusion that that assessment is not also true for the average Spanish-speaking consumer who is also used to and aware of the distinction between the alcoholic beverages covered by the earlier mark and ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’ covered by the mark applied for. Thus, first, for

the vast majority of consumers – Spanish-speaking or EU consumers in general – alcohol consumption may, depending on the quantity consumed, lead to a state of intoxication which may be manifested by a reduction in certain reflexes or less vigilance. It may lead to impaired motor skills (balance or speech difficulties) and a reduction in field of vision and a difficulty in assessing distances, which may prove to be important in everyday life, especially where consumers intend to pursue a particular activity that requires a certain degree of attention, such as driving a vehicle. Those effects in the consumption of alcohol are not found in the consumption of bottled water or mineral waters. Secondly, for a non-negligible part of the Spanish-speaking public – or public of the European Union in general – alcohol consumption is likely to pose a genuine health problem.

- 43 In the second place, as the applicant also rightly points out, the purpose and method of use of the goods in question are different. First, alcoholic beverages, including those with a low alcohol content, are generally intended to be savoured and not to quench thirst. Secondly, the consumption of alcoholic beverages such as those covered by the earlier mark does not correspond to a vital need and may even harm health. Furthermore, as the applicant has rightly pointed out, alcoholic beverages covered by the earlier mark, even those with a low alcohol content, are generally less light and significantly more expensive than beverages referred to as ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’. Finally, a large number of the beverages covered by the earlier mark are drunk on special occasions and not on a daily basis.
- 44 By contrast, beverages referred to as ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’ covered by the mark applied for, are above all intended to quench thirst (see, for sparkling wines, on the one hand, and mineral and aerated waters and other non-alcoholic beverages, on the other hand, judgment of 15 February 2005, *LINDENHOF*, T-296/02, EU:T:2005:49, paragraph 55). The consumption of water corresponds to a vital need and its intake several times a day makes it a basic necessity (see also paragraph 27 of the contested decision). Mineral water is only a subcategory of the category of waters. It is an everyday consumer item.
- 45 In the third place, the goods in question are not complementary.
- 46 In that regard, it should be noted that complementary goods or services are those between which there is a close connection, in the sense that one is indispensable or important for the use of the other, with the result that consumers may think that the same undertaking is responsible for manufacturing those goods or for providing those services (judgments of 1 March 2005, *Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI)*, T-169/03, EU:T:2005:72, paragraph 60, and of 11 July 2007, *PiraÑAM diseño original Juan Bolaños*, T-443/05, EU:T:2007:219, paragraph 48; see, also, judgment of 22 January 2009, *easyHotel*, T-316/07, EU:T:2009:14, paragraph 57 and the case-law cited).
- 47 The goods in question are not closely connected in the sense that the purchase of one is indispensable or important for the use of the other. Indeed, it cannot be considered that the purchaser of one of the goods in Class 32, namely ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’, covered by the mark applied for, will be obliged to purchase a product in Class 33 covered by the earlier mark and vice versa (see, for wines, on the one hand, and mineral and aerated waters and other non-alcoholic beverages, on the other hand, judgment of 18 June 2008, *MEZZOPANE*, T-175/06, EU:T:2008:212, paragraph 84).

- 48 It is indeed apparent from paragraph 28 of the contested decision that ‘beverages with a higher alcoholic strength’ may be ‘combined with water ..., to quench thirst or to hydrate’. However, according to the Board of Appeal, ‘the fact that water is obtained directly from nature and that alcoholic beverages have undergone a transformation for the purpose of their manufacture does not mean that the public cannot consider that their commercial origin is the same or that there is an economic link between them’. By arguing in that way and taking account of the factors set out in paragraph 19 of the contested decision, namely the fact that the Board of Appeal intended to apply, *inter alia*, the condition of ‘complementarity’, as developed in the case-law, it must be held that, in paragraph 28 of the contested decision, the Board of Appeal sought to demonstrate that, by virtue of the possibility of mixing alcoholic beverages (except beer) covered by the earlier mark, on the one hand, and the mineral waters covered by the mark applied for, on the other hand, the goods were complementary, such that they were ‘similar to a low degree’ (see paragraph 29 of the contested decision).
- 49 However, that reasoning cannot be accepted in the present case.
- 50 First, it is difficult to reconcile the concept of complementarity relating to the mere possibility of mixing alcoholic beverages with mineral water and the concept of complementarity resulting from the case-law cited in paragraph 46 above.
- 51 The concept of complementarity does not refer to the mere possibility of mixing goods, but requires the existence of a ‘close connection’ as defined in paragraph 46 above. That ‘close connection’ must be understood in the sense that one of the goods is indispensable or important for the use of the other (judgment of 1 March 2005, *SISSI ROSSI*, T-169/03, EU:T:2005:72, paragraph 60).
- 52 It cannot be held that the purchase or consumption of goods in Class 32 covered by the mark applied for is indispensable for the purchase or consumption of alcoholic beverages in Class 33 covered by the earlier mark, and vice versa. Similarly, it cannot be said that the consumption of those goods in Class 32 is important for the consumption of alcoholic beverages in Class 33 covered by the earlier mark.
- 53 Secondly and in any event, it is undoubtedly true that the beverages in Class 32 called ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’, as covered by the mark applied for, can often be mixed with a large number of beverages in Class 33 covered by the earlier mark. In fact, in general, a very large number of alcoholic and non-alcoholic drinks may be mixed, consumed, or indeed marketed together, either in the same establishments or as premixed alcoholic drinks.
- 54 However, this possibility does not eliminate the difference that arises between the goods in question due to the presence or absence of alcohol. Moreover, to consider that those categories of goods should be described as similar, for the simple reason that they may be mixed and consumed as a mixture, when they are not intended to be consumed in either the same circumstances, or in the same state of mind, or, as the case may be, by the same consumers, would put a large number of goods which can be described as ‘drinks’ into one and the same category for the purposes of the application of Article 8(1) of Regulation No 207/2009 (judgments of 15 February 2005, *LINDENHOF*, T-296/02, EU:T:2005:49, paragraph 57, and of 4 October 2018, *FLÜGEL*, T-150/17, EU:T:2018:641, paragraph 80).

- 55 Lastly, in so far as, in paragraph 23 of the contested decision, the Board of Appeal highlighted the example of pastis, without, however, drawing any specific conclusions in that regard, the following points must be noted. It is true that the pastis is drunk only after having been mixed with water. However, pastis is not generally mixed with mineral (or aerated) water, but with tap water. The applicant has not indicated a desire to have the mark applied for registered for tap water. That is the case, moreover, as regards raki and absinthe, since those beverages are drunk, in principle, after being mixed with tap water. It cannot therefore be held that pastis and the waters covered by the mark applied for are complementary.
- 56 In the fourth place, as to whether the goods in question are in competition with each other, it must be noted that, according to the case-law, in order for goods to be regarded as in competition with each other, there must be an element of interchangeability between them (see judgment of 17 February 2017, *Hernández Zamora v EUIPO – Rosen Tantau (Paloma)*, T-369/15, not published, EU:T:2017:106, paragraph 26 and the case-law cited).
- 57 First, because of the difference owing to the presence or absence of alcohol, which is avoided by a large number of consumers for health reasons and which also leads to a difference in taste, it cannot be concluded that the average Spanish-speaking consumer will consider the goods in question to be interchangeable. In fact, the difference owing to the presence or absence of alcohol and the difference in taste have the result that, in general, the average Spanish-speaking consumer seeking to obtain mineral water will not compare that product with the beverages in Class 33 in question. The consumer will buy either mineral water or one of those alcoholic beverages (see, by analogy, judgment of 18 June 2008, *MEZZOPANE*, T-175/06, EU:T:2008:212, paragraph 85).
- 58 That latter assessment is confirmed by the case-law resulting from the judgment of 15 February 2005, *LINDENHOF* (T-296/02, EU:T:2005:49), in which it was held that sparkling wine could not be considered to be in competition with non-alcoholic drinks given that sparkling wines were no more than an atypical replacement for drinks in Class 32 called ‘beers, mixed drinks containing beer, mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices, vegetable juices; syrups and other preparations for making beverages; whey beverages ...’ (judgment of 15 February 2005, *LINDENHOF*, T-296/02, EU:T:2005:49, paragraphs 2 and 56).
- 59 Finally, according to the same line of authority, the average German consumer will consider it normal for sparkling wines, on the one hand, and drinks referred to as ‘mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices’, on the other, to come from different companies, and will therefore expect this (judgment of 15 February 2005, *LINDENHOF*, T-296/02, EU:T:2005:49, paragraph 51). The Court added that sparkling wines and the abovementioned drinks could not be regarded as belonging to the same family of beverages or even as items in a general range of drinks likely to have a common commercial origin (judgment of 15 February 2005, *LINDENHOF*, T-296/02, EU:T:2005:49, paragraph 51).
- 60 That assessment can be transposed to the present case. The average Spanish-speaking consumer – and, moreover, any average EU consumer – in the presence of mineral water, aerated or not, on the one hand, and alcoholic beverages covered by the earlier mark, on the other, will not expect those beverages to have the same commercial origin.
- 61 Secondly, it must be stated that price can have a decisive influence on the question of product interchangeability.

- 62 Thus, it has been held that, in view of the significant differences in quality – and, accordingly, in price – between wines, the decisive competitive relationship between wine and beer, a popular and widely consumed beverage, must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and least expensive varieties (judgments of 12 July 1983, *Commission v United Kingdom*, 170/78, EU:C:1983:202, paragraph 8; of 9 July 1987, *Commission v Belgium*, 356/85, EU:C:1987:353, paragraph 10; and of 17 June 1999, *Socridis*, C-166/98, EU:C:1999:316, paragraph 18).
- 63 That also applies to the goods in question. The beverages in Class 32 referred to as ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’ covered by the mark applied for, are, in general, significantly less expensive than the goods in Class 33 called ‘alcoholic beverages (except beer); wine; sparkling wines; liqueurs; spirits [beverages]; brandies’ covered by the earlier mark. Although the reasoning of the Court of Justice set out in paragraph 62 above applies, it must be concluded that, from a price standpoint, the goods in question are not interchangeable.
- 64 It must be concluded that the goods in question are not in competition with each other.
- 65 In the fifth place, as regards the distribution channels of the goods in question, it should be noted that the fact, mentioned by the Board of Appeal in paragraph 24 of the contested decision, that those goods may be sold ‘in the same establishments’ does not support its conclusion that those goods are similar to a low degree.
- 66 The Court has already ruled on the distribution channels of the goods in Classes 32 and 33 as a factor to be taken into account when assessing the degree of similarity of those goods.
- 67 Thus, it has been held that the goods in Classes 32 and 33 are usually subject to widespread distribution, from the food section of a department store to bars and cafes (judgment of 9 March 2005, *Hai*, T-33/03, EU:T:2005:89, paragraph 44). On the basis of that finding, the Court concluded that the goods in Class 33 were linked to the goods in Class 32 to the extent that they had to be regarded as being ‘similar’ (judgment of 9 March 2005, *Hai*, T-33/03, EU:T:2005:89, paragraph 46).
- 68 In addition, in paragraph 82 of the judgment of 18 June 2008, *MEZZOPANE* (T-175/06, EU:T:2008:212), the Court found, in essence, that wines as ‘alcoholic beverages’ were, as such, clearly distinct from ‘non-alcoholic drinks’, both in shops and drinks menus and that the average consumer was used to the distinction between alcoholic and non-alcoholic drinks. In conclusion, the Court held that wine, on the one hand, and non-alcoholic beverages, on the other, had to be considered ‘not to be similar’.
- 69 Lastly, in its judgment of 5 October 2011, *ROSALIA DE CASTRO* (T-421/10, not published, EU:T:2011:565), while recalling the finding made in the case-law referred to in paragraph 67 above, namely that non-alcoholic beverages are often marketed and consumed with alcoholic beverages and that they are subject to widespread distribution, from the food section of a department store to bars and cafes, the Court nevertheless pointed out that those beverages also had different characteristics. The Court also stated that, whereas alcoholic beverages are generally consumed on special and convivial occasions, water and non-alcoholic beverages are consumed on a daily basis. In addition, it stated that water consumption corresponded to a vital need and that the average consumer, deemed to be reasonably well informed and reasonably observant and circumspect, was aware of the distinction between alcoholic and non-alcoholic

beverages, which is necessary since some consumers do not wish to or cannot consume alcohol. In the light of those factors, the Court held that the similarity between those two types of goods could be considered only to be ‘low’ (judgment of 5 October 2011, *ROSALIA DE CASTRO*, T-421/10, not published, EU:T:2011:565, paragraphs 31 and 32).

- 70 In the light of the various responses given in accordance with the condition relating to distribution channels in the Court’s case-law, it must be held for the purposes of the present judgment that, contrary to what is stated in paragraph 44 of the judgment of 9 March 2005, *Hai* (T-33/03, EU:T:2005:89), and in paragraph 32 of the judgment of 5 October 2011, *ROSALIA DE CASTRO* (T-421/10, not published, EU:T:2011:565), the mere fact that the goods in Classes 32 and 33 are normally subject to widespread distribution, from the food section of a department store to bars and cafes, is not in itself sufficient to consider that the goods in Classes 32 and 33 ‘must’ be regarded as similar to a low degree, or indeed similar at all.
- 71 In fact, and as is apparent from case-law developed in connection with the condition relating to distribution channels well before delivery of the judgments of 9 March 2005, *Hai* (T-33/03, EU:T:2005:89), and of 5 October 2011, *ROSALIA DE CASTRO* (T-421/10, not published, EU:T:2011:565), the fact that goods may be sold in the same commercial establishments, such as large shops and supermarkets, is not particularly significant since very different kinds of goods may be found in such shops, without consumers automatically believing that they have the same origin (judgment of 13 December 2004, *El Corte Inglés v OHIM – Pucci (EMILIO PUCCI)*, T-8/03, EU:T:2004:358, paragraph 43).
- 72 Since that decision has been confirmed (judgments of 24 March 2010, *2nine v OHIM – Pacific Sunwear of California (nollie)*, T-364/08, not published, EU:T:2010:115, paragraph 40, and of 2 July 2015, *BH Stores v OHIM – Alex Toys (ALEX)*, T-657/13, EU:T:2015:449, paragraph 83), it can be regarded as settled case-law.
- 73 The case-law also makes clear that only the presence of those goods in the same section of such shops would be an indication of their similarity (judgment of 17 February 2017, *Paloma*, T-369/15, not published, EU:T:2017:106, paragraph 28).
- 74 Finally, it must be observed that sparkling wines, on the one hand, and drinks referred to as ‘mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices’, on the other, are often sold side by side both in shops and on drinks menus (see, to that effect, judgment of 15 February 2005, *LINDENHOF*, T-296/02, EU:T:2005:49, paragraph 50). That holds true not only for the sparkling wines at issue in that case, but also for all the alcoholic beverages covered by the earlier trade mark at issue in the present case.
- 75 Except with rare exceptions, the beverages in Class 32 referred to as ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’, covered by the mark applied for and the goods in Class 33 referred to as ‘alcoholic beverages (except beer); wine; sparkling wines; liqueurs; spirits [beverages]; brandies’, covered by the earlier mark are indeed sold in adjacent sections of supermarkets, although not in the same aisles.
- 76 Lastly, in so far as the Court referred to bars and cafes (judgments of 9 March 2005, *Hai*, T-33/03, EU:T:2005:89, paragraph 44, and of 5 October 2011, *ROSALIA DE CASTRO*, T-421/10, not published, EU:T:2011:565, paragraph 31), it is true that those establishments generally offer all the goods in question, often at the same counter. However, the Spanish-speaking consumer will

still be aware of the differences between those categories of goods, and in particular the presence or absence of alcohol, such that the mere fact that they are offered at the same counter does not outweigh the differences between those goods.

- 77 In the light of all the foregoing assessments, it must be held that, contrary to what the Board of Appeal stated in paragraph 29 of the contested decision, the beverages in Class 32 referred to as ‘bottled drinking water; mineral water (non-medicated -); mineral water [beverages]’ covered by the mark applied for are not similar to a low degree to the goods in Class 33 referred to as ‘alcoholic beverages (except beer); wine; sparkling wines; liqueurs; spirits [beverages]; brandies’ covered by the earlier mark. Those goods must instead be regarded as dissimilar.
- 78 In the light of what has been stated in paragraph 24 above, namely, in view of the rule that, in essence, demonstrating that the goods or services covered by the marks at issue are identical or similar is a *sine qua non* for the existence of a likelihood of confusion for the purposes of Article 8(1)(b) of Regulation No 207/2009, the consequence of the error of assessment vitiating the contested decision is that the applicant’s plea must be upheld.
- 79 Accordingly, the plea in law relied on by the applicant must be upheld and, consequently, the contested decision must be annulled, without there being any need to examine whether or not the signs at issue are similar.

Costs

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

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

- 1. Annuls the decision of the Fourth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 20 January 2020 (Case R 2524/2018-4);**
- 2. Orders EUIPO to pay the costs.**

[Signatures]