



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Tenth Chamber)

24 May 2023*

(EU trade mark – International registration designating the European Union – Word mark EMMENTALER – Absolute ground for refusal – Descriptive character – Article 7(1)(c) of Regulation (EU) 2017/1001 – Collective mark – Article 74(2) of Regulation 2017/1001 – Obligation to state reasons – Article 94 of Regulation 2017/1001)

In Case T-2/21,

Emmentaler Switzerland, established in Berne (Switzerland), represented by S. Völker and M. Pemsel, lawyers,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by A. Graul and D. Hanf, acting as Agents,

defendant,

supported by

Federal Republic of Germany, represented by J. Möller, M. Hellmann, U. Bartl and J. Heitz, acting as Agents,

and by

French Republic, represented by A.-L. Desjonquères and G. Bain, acting as Agents,

and by

Centre national interprofessionnel de l'économie laitière (CNIEL), established in Paris (France), represented by E. Baud and P. Marchiset, lawyers,

interveners,

THE GENERAL COURT (Tenth Chamber),

* Language of the case: German.

composed, at the time of the deliberations, of A. Kornezov, President, K. Kowalik-Bańczyk and D. Petrлік (Rapporteur), Judges,

Registrar: R. Ūkelytė, Administrator,

having regard to the written part of the procedure,

further to the hearing on 14 September 2022,

gives the following

Judgment

- 1 By its action under Article 263 TFEU, the applicant, Emmentaler Switzerland, seeks annulment of the decision of the Second Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 28 October 2020 (Case R 2402/2019-2) ('the contested decision').

Background to the dispute

- 2 On 4 October 2017, the applicant obtained international registration No 1378524 of the word sign EMMENTALER from the International Bureau of the World Intellectual Property Organisation. On 7 December 2017, that international registration was notified to EUIPO, pursuant to 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).
- 3 The goods in respect of which registration was sought are in Class 29 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description: 'Cheeses with the protected designation of origin "emmentaler"'.
- 4 By decision of 9 September 2019, the examiner rejected the application for registration on the basis of Article 7(1)(b) and (c) of Regulation 2017/1001, read in conjunction with Article 7(2) of that regulation.
- 5 On 25 October 2019, the applicant lodged an appeal with EUIPO against the examiner's decision.
- 6 By the contested decision, the Board of Appeal dismissed the appeal on the basis of Article 7(1)(c) of Regulation 2017/1001, on the ground that the mark applied for was descriptive.

Forms of order sought

- 7 The applicant claims that the Court should:
 - annul the contested decision;
 - order EUIPO to pay the costs, including those incurred before the Board of Appeal.

- 8 EUIPO, the Federal Republic of Germany, the French Republic and the Centre national interprofessionnel de l'économie laitière (CNIEL) claim that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.

Law

- 9 In support of its action, the applicant relies on two pleas in law, alleging, first, infringement of Article 74(2) of Regulation 2017/1001 and, secondly, infringement of Article 7(1)(b) and (c) of that regulation.
- 10 Article 74(2) of Regulation 2017/1001 provides that, by way of derogation from Article 7(1)(c) of that regulation, signs or indications which may serve, in trade, to designate the geographical origin of the goods or services in question may constitute EU collective marks.
- 11 However, that provision, which provides for a derogation from the absolute ground for refusal laid down in Article 7(1)(c) of Regulation 2017/1001, must be interpreted strictly, such that its scope cannot cover signs which will be regarded as an indication of the kind, quality, quantity, intended purpose, value, time of production or other characteristic of the goods in question, but only those signs which will be regarded as an indication of the geographical origin of those goods (see, to that effect, judgment of 17 May 2011, *Consejo Regulador de la Denominación de Origen Txakoli de Álava and Others v OHIM (TXAKOLI)*, T-341/09, EU:T:2011:220, paragraphs 33 and 35 and the case-law cited).
- 12 In the light of those principles, it is necessary first to examine the second plea in law, by which the applicant submits, inter alia, that the sign at issue does not designate a characteristic of the goods at issue, namely a type of cheese.

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

- 13 By its second plea, the applicant submits that the Board of Appeal infringed Article 7(1)(b) and (c) of Regulation 2017/1001. This plea is divided into two parts. The first part alleges that the contested decision infringes Article 7(1)(b) of Regulation 2017/1001, since that decision is based exclusively on Article 7(1)(c) of that regulation. The second part alleges, first, that the Board of Appeal incorrectly assessed the evidence and thus wrongly concluded that the mark applied for was descriptive of the goods at issue and, secondly, that it infringed its obligation to state reasons.

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

- 14 According to EUIPO and the French Republic, the first part of the second plea is inadmissible, since the applicant submits that the contested decision infringed Article 7(1)(b) of Regulation 2017/1001 even though that decision is based exclusively on Article 7(1)(c) of that regulation.

- 15 The applicant submits that Article 7(1)(c) of Regulation 2017/1001 constitutes a *lex specialis* in relation to Article 7(1)(b) of that regulation, with the result that the fact that the contested decision is based exclusively on the first of those provisions is irrelevant in the present case. According to the applicant, the contested decision cannot be based solely on an analysis under Article 7(1)(c) of Regulation 2017/1001, but should also take account of Article 7(1)(b) of that regulation.
- 16 According to settled case-law, each of the grounds for refusal of registration listed in Article 7(1) of Regulation 2017/1001 is independent of the others and requires a separate examination (see judgments of 29 April 2004, *Henkel v OHIM*, C-456/01 P and C-457/01 P, EU:C:2004:258, paragraph 45 and the case-law cited, and of 31 January 2018, *Novartis v EUIPO – SK Chemicals (Representation of a transdermal patch)*, T-44/16, not published, EU:T:2018:48, paragraph 20 and the case-law cited).
- 17 Furthermore, it follows from Article 7(1) of Regulation 2017/1001 that it is sufficient that one of the absolute grounds for refusal listed in that provision applies for the sign not to be registerable as an EU trade mark (see judgments of 8 July 2008, *Lancôme v OHIM – CMS Hasche Sigle (COLOR EDITION)*, T-160/07, EU:T:2008:261, paragraph 51 and the case-law cited, and of 17 April 2013, *Continental Bulldog Club Deutschland v OHIM (CONTINENTAL)*, T-383/10, EU:T:2013:193, paragraph 71 and the case-law cited).
- 18 Moreover, according to settled case-law, a trade mark which is descriptive of the characteristics of goods or services for the purposes of Article 7(1)(c) of Regulation 2017/1001 is, on that account, necessarily devoid of any distinctive character in relation to those goods or services within the meaning of Article 7(1)(b) of that regulation (see judgment of 17 April 2013, *CONTINENTAL*, T-383/10, EU:T:2013:193, paragraph 72 and the case-law cited).
- 19 It follows that the Board of Appeal was entitled to confine itself to examining whether the mark applied for was descriptive within the meaning of Article 7(1)(c) of Regulation 2017/1001, without ruling on the application of other absolute grounds for refusal, such as that provided for in Article 7(1)(b) of that regulation.
- 20 Consequently, without it being necessary to rule on its admissibility, the first part of the second plea in law must be rejected as unfounded.

The second part of the second plea in law, alleging infringement of Article 7(1)(c) of Regulation 2017/1001 and of the obligation to state reasons

- 21 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’ are not to be registered.
- 22 Those signs or indications 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 (judgments of 23 October 2003, *OHIM v Wrigley*, C-191/01 P, EU:C:2003:579, paragraph 30; of 27 February 2002, *Eurocool Logistik v OHIM (EUROCOOL)*, T-34/00, EU:T:2002:41, paragraph 37; and of 24 February 2021, *Liga Nacional de Fútbol Profesional v EUIPO (El Clasico)*, T-809/19, not published, EU:T:2021:100, paragraph 29).

- 23 Under Article 7(2) of Regulation 2017/1001, Article 7(1)(c) of that regulation is to apply notwithstanding that the grounds of non-registrability obtain in only part of the European Union. Such a part may be comprised of a single Member State (see, to that effect, judgment of 22 June 2006, *Storck v OHIM*, C-25/05 P, EU:C:2006:422, paragraphs 81 and 83).
- 24 For a sign to fall within the scope of the prohibition set out in Article 7(1)(c) of Regulation 2017/1001, it must suggest a sufficiently direct and concrete link to the goods or services in question to enable the public concerned immediately, and without further thought, to perceive a description of the category of goods and services in question or one of their characteristics (see judgments of 12 January 2005, *Deutsche Post EURO EXPRESS v OHIM (EUROPREMIUM)*, T-334/03, EU:T:2005:4, paragraph 25 and the case-law cited, and of 22 June 2005, *Metso Paper Automation v OHIM (PAPERLAB)*, T-19/04, EU:T:2005:247, paragraph 25 and the case-law cited).
- 25 The descriptive character of a sign can be assessed only by reference to the goods or services concerned and to the way in which it is understood by the relevant public (see judgments of 25 October 2005, *Peek & Cloppenburg v OHIM (Cloppenburg)*, T-379/03, EU:T:2005:373, paragraph 37 and the case-law cited, and of 7 October 2015, *Cyprus v OHIM (ΧΑΛΛΟΥΜΙ and HALLOUMI)*, T-292/14 and T-293/14, EU:T:2015:752, paragraph 16 and the case-law cited.)
- 26 In the present case, the goods covered by the mark applied for, as set out in paragraph 3 above, are goods intended for all consumers. Consequently, the relevant public consists of the general public, as the Board of Appeal correctly found in paragraph 23 of the contested decision, without being challenged by the applicant.
- 27 In paragraph 24 of the contested decision, the Board of Appeal then found, essentially, that the sign EMMENTALER would be immediately understood by the part of the relevant public who speak Bulgarian, Danish, German, Estonian, Irish, French, Croatian, Hungarian, Dutch, Polish, Romanian, Slovak, Finnish, Swedish or English as designating a type of hard cheese containing holes.
- 28 The Board of Appeal justified that conclusion by relying on a series of factors which concerned, inter alia, the German- and French-speaking part of the relevant public.
- 29 The applicant submits that, by basing the contested decision on those factors, the Board of Appeal infringed Article 7(1)(c) of Regulation 2017/1001.
- 30 In paragraph 24 of the contested decision, the Board of Appeal relied, as regards the relevant German public, on several factors in support of its conclusion that the public understood the sign EMMENTALER as designating a type of cheese, the relevance of which is disputed by the applicant. These factors must now be examined.

– *The definition of the term ‘emmentaler’ in the Duden dictionary*

- 31 In order to demonstrate that the sign EMMENTALER designates a type of cheese, the Board of Appeal relied on the definition of the corresponding term in the *Duden* dictionary, according to which that term designates a ‘full-fat Swiss cheese with cherry-sized holes and a taste of walnut kernels; emmental cheese’.

- 32 The applicant submits that the Board of Appeal wrongly relied on that definition, since the *Duden* dictionary does not state that that term designates, in German, a type of cheese; rather, it expressly states that it is a Swiss cheese.
- 33 In that respect, it should be noted that, although the definition mentioned above contains the expression ‘Swiss cheese’, the fact remains that it is supplemented by a second definition, namely, ‘emmental cheese’. The succinct nature of that definition, which does not contain any other specification, in particular as regards the geographical origin of the product concerned, supports the conclusion that, according to that dictionary, the term ‘emmentaler’ should be understood as designating a particular type of cheese.
- 34 That conclusion is also confirmed by the fact that that definition refers to the characteristics of a cheese as such, when it states that that term refers to a cheese ‘with cherry-sized holes and a taste of walnut kernels’.
- 35 In those circumstances, the applicant’s complaint that the Board of Appeal could not use the definition of the term ‘emmentaler’ in the *Duden* dictionary as one indication, among others, of the descriptive character of the sign, must be rejected.

– *The production of emmentaler*

- 36 In finding that the sign EMMENTALER designates a type of cheese, the Board of Appeal took into account the fact that, at the time when the application for the trade mark was filed, emmentaler was a cheese produced in several Member States, including Germany.
- 37 The applicant claims that the Board of Appeal’s factual finding that emmentaler is a cheese produced in several Member States, including Germany, has not been proven. By basing its conclusion as to the descriptive character of the name Emmentaler on that assertion, the Board of Appeal thus infringed its obligation to state reasons.
- 38 Furthermore, according to the applicant, even if it is true that emmentaler was a cheese produced in those Member States at the time of the application for registration of the mark applied for, it could not have been lawfully placed on their market under the name Emmentaler on its own, that is to say, without that name being accompanied by the indication of the place of production. As regards, more particularly, Germany, that circumstance arises from the fact that that Member State is bound by the Treaty of 7 March 1967 concluded with Switzerland on the protection of indications of source and other geographical names (‘the Switzerland-Germany Agreement’). That agreement reserves the use of that name for cheese produced in Switzerland and allows the use of the name Emmentaler to designate cheeses produced in Germany provided that that designation is accompanied by an indication of the country of production in characters identical in type, size and colour to those used for the name.
- 39 As regards, first, the complaint alleging failure to state reasons, it is apparent from the first sentence of Article 94(1) of Regulation 2017/1001 that decisions of EUIPO must state the reasons on which they are based. However, it follows from the case-law that the statement of reasons may be implicit, provided that it enables the persons concerned to know the reasons for the Board of Appeal’s decision and provides the competent court with sufficient material for it to exercise its power of review (see judgments of 25 March 2009, *Anheuser-Busch v OHIM – Budějovický Budvar*

(*BUDWEISER*), T-191/07, EU:T:2009:83, paragraph 128 and the case-law cited, and of 13 April 2011, *Safariland v OHIM – DEF-TEC Defense Technology (FIRST DEFENSE AEROSOL PEPPER PROJECTOR)*, T-262/09, EU:T:2011:171, paragraph 92 and the case-law cited).

- 40 From that point of view, a statement of reasons by reference to another document may be acceptable provided that it enables the persons concerned to know the reasons for the decision in question and provides the competent court with sufficient material for it to exercise its power of review (see, to that effect, judgments of 30 March 2000, *Kish Glass v Commission*, T-65/96, EU:T:2000:93, paragraph 51; of 12 May 2016, *Zuffa v EUIPO (ULTIMATE FIGHTING CHAMPIONSHIP)*, T-590/14, not published, EU:T:2016:295, paragraph 43 and the case-law cited; and of 5 February 2018, *Edeka-Handelsgesellschaft Hessenring v Commission*, T-611/15, EU:T:2018:63, paragraph 32 and the case-law cited).
- 41 In the present case, the Board of Appeal did not expressly identify, in the contested decision, the evidence on which it had based its finding relating to the production of emmentaler in the Member States concerned.
- 42 However, the Board of Appeal referred in paragraph 25 of the contested decision ‘to the observations of third-parties referred to in [paragraph 4 of that decision]’.
- 43 First, the applicant had the opportunity to acquaint itself with those observations and to submit its comments on them during the proceedings before EUIPO and before the Court. Secondly, those observations contain sufficiently precise, quantified and consistent information concerning the production of emmentaler in the Member States concerned, with the result that they enable the applicant to ascertain the reasons why the Board of Appeal reached its conclusion concerning that production and provide the Court with sufficient material for it to exercise its power of review.
- 44 In those circumstances, it must be concluded that the Board of Appeal did not infringe its obligation to state reasons.
- 45 As regards, secondly, the production of emmentaler in Germany, it is apparent, first, from the observations of the Bundesministerium für Ernährung und Landwirtschaft (Federal Ministry of Food and Agriculture, Germany), the Milchwirtschaftlicher Verein Bayern eV (Dairy Association of Bavaria, Germany) and the MIV Milchindustrie-Verband eV (Dairy Industry Association, Germany), to which the Board of Appeal referred in paragraph 25 of the contested decision, that Germany produced 135 000 tonnes of emmentaler in 2016.
- 46 Next, it is not disputed that a substantial part of that production was placed on the German market. In that regard, it is apparent from the observations of the Dairy Association of Bavaria that, of the 135 000 tonnes of emmentaler produced in Germany in 2016, only 80 000 were exported. It follows that a substantial part of the quantity of emmentaler produced in Germany was placed on the market directly in Germany.
- 47 Finally, it follows from the aforementioned observations that the cheese production and marketing referred to in paragraphs 45 and 46 above concerned the name Emmentaler on its own. That finding is supported by a number of examples, reproduced in the observations referred to in paragraph 25 of the contested decision. Those cheeses, which come from a number of economic operators and were produced and placed on the market in Germany, bear that name without any indication of the country or place of production.

- 48 Furthermore, as regards the name under which those products were marketed in Germany, the applicant disputed, at the hearing, that they had been placed on the German market under the name Emmentaler on its own. However, despite the fact that the applicant was invited by a measure of organisation of procedure to comment on the information referred to in paragraphs 45 to 47 above, it merely maintained that the placing on the market of such products would have been contrary to the Switzerland-Germany Agreement. Nevertheless, it did not submit to the Court any specific evidence seeking to challenge the data in those paragraphs.
- 49 As regards the impact of that production of emmentaler in Germany on the relevant public's perception of the descriptive character of the sign EMMENTALER, it is apparent from the case-law that the production and marketing of a product under a certain name, without that name being used in a way which refers to the origin of that product, may constitute a relevant indication of whether that name has become generic (see, to that effect, judgments of 25 October 2005, *Germany and Denmark v Commission*, C-465/02 and C-466/02, EU:C:2005:636, paragraphs 75 to 100, and of 26 February 2008, *Commission v Germany*, C-132/05, EU:C:2008:117, paragraphs 53 to 57).
- 50 The considerations set out in that case-law, although they concern the generic nature of a name, are also relevant to the examination of the descriptive character of signs. The characterisation of a sign as generic or descriptive is closely linked, as such a sign lacks distinctive character in both situations (see, to that effect, judgment of 24 May 2012, *Formula One Licensing v OHIM*, C-196/11 P, EU:C:2012:314, paragraph 41).
- 51 Thus, in particular, the fact that several economic operators produce and market goods in a Member State bearing a certain sign, without that sign referring to a commercial or geographical origin of those goods, is likely to suggest that the relevant public perceives that sign as designating a characteristic of those goods and, therefore, as being descriptive.
- 52 It follows from the foregoing, first, that the applicant has not succeeded in disputing the fact that, as is apparent from the information set out in paragraphs 45 to 47 above, a significant quantity of cheese produced in Germany was marketed in that Member State under the name Emmentaler on its own. Secondly, as pointed out in paragraphs 49 to 51 above, that fact constitutes a valid indication that the relevant public perceives that designation as designating a characteristic of those goods and, therefore, as being descriptive.
- 53 In those circumstances, the question whether the placing on the German market of cheeses produced in Germany under the name Emmentaler on its own is compatible with the Switzerland-Germany Agreement is irrelevant, since the perception of the relevant public, in relation to which the descriptive character of the sign at issue must be assessed, in accordance with the case-law cited in paragraph 25 above, is formed, inter alia, by its exposure to that sign as placed on the market. The relevant public will generally assume that the goods marketed in a Member State have been lawfully placed on the market of that Member State, without necessarily questioning whether there are alleged conflicts between legal norms.
- 54 Consequently, the applicant's complaint that the Board of Appeal could not rely on the production in Germany of the cheese described as Emmentaler as one indication among others of the descriptive character of that sign must be rejected.

– *The German cheese regulation*

- 55 In order to demonstrate that the sign EMMENTALER designates a type of cheese, the Board of Appeal also relied on the German cheese regulation, according to which emmentaler is classified as a standard type of cheese.
- 56 The applicant claims that the contested decision could not rely on that regulation because it is not compatible with the Switzerland-Germany Agreement, which prevails over it.
- 57 In that respect, it is clear from Paragraph 7 of, and Annex 1 to the German cheese regulation that emmentaler is classified by that regulation as ‘Standardsorte’, that is to say, as a standard type of cheese.
- 58 That classification is likely to reflect the perception of the relevant public concerning the descriptive character of that sign.
- 59 In those circumstances, the applicant’s argument that the German cheese regulation is allegedly incompatible with the Switzerland-Germany Agreement is irrelevant for reasons analogous to those set out in paragraph 53 above.
- 60 Consequently, the applicant’s complaint that the Board of Appeal could not rely on the German cheese regulation as an indication among others of the descriptive character of the sign must be rejected.

– *The European Union’s position during the negotiation of the Agreement between Switzerland and the European Union*

- 61 In finding that the sign EMMENTALER designates a type of cheese, the Board of Appeal took into account the fact that, during the negotiation of the Agreement of 17 May 2011 between the European Union and the Swiss Confederation on the protection of designations of origin and geographical indications for agricultural products and foodstuffs, amending the Agreement between the European Community and the Swiss Confederation on trade in agricultural products (OJ 2011 L 297, p. 3) (‘the Agreement between Switzerland and the European Union’), the European Union opposed the inclusion of the designation ‘Emmentaler’ on the list of geographical indications protected by that agreement.
- 62 The applicant disputes the Board of Appeal’s finding that the descriptive character of the mark applied for may also be inferred from the fact that the European Union had opposed the inclusion of the designation ‘Emmentaler’ as such among the designations of origin and geographical indications which are protected by the Agreement between Switzerland and the European Union.
- 63 According to the applicant, it is true that the European Union did not agree to include that designation in the list of geographical indications protected by the Agreement between Switzerland and the European Union. However, that fact alone does not lead to the conclusion that no protection by means of an EU collective mark is possible for the name Emmentaler on its own.

- 64 In that regard, it should be noted that, first, the Agreement between Switzerland and the European Union contains, in Appendix 1 thereto, a list of names of cheeses which are subject to mutual protection by the contracting parties as designations of origin and geographical indications.
- 65 However, the name Emmentaler was not included in that list.
- 66 Secondly, the reasons for that non-inclusion were described in a press release of the Swiss Federal Office for Agriculture of 17 December 2009, to which the Board of Appeal referred in paragraph 24 of the contested decision.
- 67 In that press release, the Federal Office for Agriculture noted that the negotiations on the Agreement between Switzerland and the European Union had been hampered for a long time by their divergent positions concerning the inclusion of the name Emmentaler in the list of designations of origin and geographical indications in the context of that agreement, since ‘[the European Union had considered] the name “[E]mmentaler” to be a generic name’ and that ‘[it had] required that that name [could] be used in all Member States’. According to that press release, it was because of those differences that Switzerland and the European Union decided not to include the name Emmentaler in that list.
- 68 It is plausible that that position of the European Union has its origin in the fact that, as is apparent from paragraph 48 above, products bearing the designation Emmentaler on its own were placed on the market in at least some Member States, such as Germany, with the result that that position is likely to reflect the perception of the relevant public in the Member States, including the German public.
- 69 In those circumstances, the applicant’s complaint that the Board of Appeal could not rely on that position as one indication among others that the term ‘emmentaler’ would be perceived by the German public as descriptive of a type of cheese must be rejected.
- *The general standard for emmental drawn up by the Codex Alimentarius Commission*
- 70 The applicant criticises the Board of Appeal for having taken account of the general standard for emmental drawn up by the Codex Alimentarius Commission. According to the applicant, that general standard does not contain binding rules for trade mark proceedings in the European Union and cannot therefore prevail over the Switzerland-Germany Agreement, which granted protection to the name Emmentaler as described in paragraph 38 above.
- 71 In that respect, it is clear, first of all, from the case-law that the fact that a name is defined as generic in the Codex Alimentarius is a relevant aspect for assessing whether the mark applied for may be descriptive of a type of cheese (see, to that effect and by analogy, judgments of 12 September 2007, *Consorzio per la tutela del formaggio Grana Padano v OHIM – Biraghi (GRANA BIRAGHI)*, T-291/03, EU:T:2007:255, paragraph 67, and of 14 December 2017, *Consejo Regulador ‘Torta del Casar’ v EUIPO – Consejo Regulador ‘Queso de La Serena’ (QUESO Y TORTA DE LA SERENA)*, T-828/16, not published, EU:T:2017:918, paragraph 34 and the case-law cited).

- 72 Next, according to the general standard for emmental (CXS 269-1967) drawn up by the Codex Alimentarius Commission, the term ‘emmental’ designates a ripened hard cheese which complies with the requirements listed in that standard. Under Article 7.1 of that standard, the sign EMMENTALER may be used in accordance with the general standard for the labelling of pre-packaged foodstuffs, provided that the product complies with the emmental standard.
- 73 It follows that the sign EMMENTALER is, in the context of the Codex Alimentarius, perceived as a name of a type of cheese with the characteristics set out in that standard.
- 74 That conclusion is not called into question by Article 7.2 of that standard for emmental, according to which the name of the country of origin must be indicated on the product label. The minutes of the 35th meeting of the Committee on the Labelling of Foodstuffs of the Codex Alimentarius Commission stated, with the consent of the European Commission and all the Member States of the European Union, that that rule on designation was intended to maintain the generic character of the name of the cheese.
- 75 Similarly, the relevance of the general rule for emmental referred to above is not called into question by the Switzerland-Germany Agreement, to which the applicant refers, for reasons similar to those set out in paragraph 53 above.
- 76 In those circumstances, the Board of Appeal was entitled to rely on the general standard for emmental drawn up by the Codex Alimentarius Commission as one indication among others in order to conclude that the term ‘emmentaler’ was descriptive of the goods at issue.

– *The judgment of 5 December 2000, Guimont (C-448/98)*

- 77 The applicant submits that the generic nature of the term ‘emmentaler’ is not apparent from the judgment of 5 December 2000, *Guimont* (C-448/98, EU:C:2000:663). According to the applicant, in that judgment, the Court of Justice noted that it was common ground that emmental was a cheese lawfully manufactured and marketed in Member States other than France. However, that fact is only one criterion among others which must be taken into account in order to assess the registrability of the term ‘emmentaler’.
- 78 On that point, it should be noted that, in paragraph 32 of the judgment of 5 December 2000, *Guimont* (C-448/98, EU:C:2000:663), the Court of Justice confirmed that, as can be seen from paragraphs 45 to 53 above, emmental cheese is lawfully manufactured and marketed in Member States other than France.
- 79 As the applicant itself admits, that fact is one of a number of criteria which must be taken into account in assessing the registrability of the term ‘emmentaler’. It follows that the applicant has not asserted, let alone demonstrated, that that fact is irrelevant in the present case, if only as one of the factors to be taken into account, among others, when assessing the descriptive character of the name Emmentaler.
- 80 In those circumstances, the applicant’s complaint that the Board of Appeal could not rely on the judgment of 5 December 2000, *Guimont* (C-448/98, EU:C:2000:663), as one indication among others of the descriptive character of the trade mark applied for, must be rejected.

– *Conclusion on descriptiveness*

- 81 In the light of the evidence examined in paragraphs 31 to 80 above, the Board of Appeal was entitled to find, in paragraph 24 of the contested decision, without making an error of assessment, that the relevant German public immediately understood the sign EMMENTALER as designating a type of cheese.
- 82 In the light of the case-law referred to in paragraph 23 above, the Board of Appeal was therefore right to conclude that that sign was descriptive for the purposes of Article 7(1)(c) and Article 7(2) of Regulation 2017/1001, bearing in mind that it is sufficient that that ground for refusal exists in part of the European Union, which may consist, as the case may be, of a single Member State.
- 83 Finally, given that the evidence examined in paragraphs 31 to 76 above demonstrates to the requisite legal standard that the sign EMMENTALER is descriptive in Germany, it is not necessary to examine the merits of the other complaints raised in the context of the second plea, relating to the other elements on which the Board of Appeal relies in paragraph 24 of the contested decision, since those elements do not concern the perception of the relevant German public.
- 84 In the light of the foregoing, the second plea must be rejected.

The first plea, alleging infringement of Article 74(2) of Regulation 2017/1001

- 85 The applicant submits that the name Emmentaler on its own should enjoy protection as a collective mark under Article 74(2) of Regulation 2017/1001, since it refers to the geographical origin of the goods in question.
- 86 EUIPO, the Federal Republic of Germany and the French Republic dispute that argument.
- 87 As is apparent from paragraphs 10 and 11 above, the derogation from Article 7(1)(c) of Regulation 2017/1001, which is provided for in Article 74(2) of that regulation, must be interpreted strictly. In particular, the scope of that derogation cannot cover signs which will be regarded as an indication of the kind, quality, quantity, intended purpose, value, time of production or other characteristic of the goods in question, but only signs which will be regarded as an indication of the geographical origin of those goods.
- 88 In the present case, it is apparent from paragraphs 31 to 82 above that the Board of Appeal was fully entitled to conclude that the term ‘emmentaler’ was descriptive of a type of cheese for the relevant German public and was not perceived as an indication of the geographical origin of that cheese.
- 89 Similarly, the applicant has not submitted to the Court any other specific evidence intended to show that that public understands that sign in that sense.
- 90 In those circumstances, the applicant cannot claim that the mark applied for must be protected under Article 74(2) of Regulation 2017/1001.
- 91 Consequently, the first plea in law must be rejected and, accordingly, the action must be dismissed in its entirety.

Costs

- 92 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 93 Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by EUIPO, the Federal Republic of Germany, the French Republic and the CNIEL.

On those grounds,

THE GENERAL COURT (Tenth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders the Emmentaler Switzerland to pay the costs.**

Kornezov

Kowalik-Bańczyk

Petrлік

Delivered in open court in Luxembourg on 24 May 2023.

[Signatures]