



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber, Extended Composition)

7 July 2021 *

(EU trade mark – Application for EU trade mark consisting of a combination of sounds on opening a can of soft drink – Absolute ground for refusal – No distinctive character – Article 7(1)(b) of Regulation (EU) 2017/1001 – Article 95(1) of Regulation 2017/1001)

In Case T-668/19,

Ardagh Metal Beverage Holdings GmbH & Co. KG, established in Bonn (Germany),
represented by S. Abrar, avocat,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by M. Fischer, D. Hanf and
D. Walicka, acting as Agents,

defendant,

ACTION brought against the decision of the Second Board of Appeal of EUIPO of 24 July 2019 (Case R 530/2019-2), relating to an application for registration of a combination of sounds produced on opening a can of soft drink as an EU trade mark,

THE GENERAL COURT (Fifth Chamber, Extended Composition),

composed of S. Papasavvas, president, D. Spielmann, U. Öberg (Rapporteur), O. Spineanu-Matei and R. Norkus, Judges,

Registrar: R. Ūkelytė, Administrator,

having regard to the application lodged at the Registry of the General Court on 1 October 2019,

having regard to the response lodged at the Registry of the General Court 19 December 2019,

having regard to the measures of organisation of procedure of 28 April and 30 October 2020,

having regard to the referral of this case to the Fifth Chamber (Extended Composition) of the General Court,

* Language of the case: German.

following the hearing of 10 February 2021,

gives the following

Judgment

Background to the dispute

- 1 On 6 June 2018, the applicant, Ardagh Metal Beverage Holdings GmbH & Co. KG, filed an application for registration of a European Union trade mark at the European Union Intellectual Property Office (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).
- 2 The trade mark in respect of which registration was sought is the sound sign which recalls the sound made by a drinks can being opened, followed by a silence of approximately one second and a fizzing sound lasting approximately nine seconds. An audio file was submitted by the applicant when the registration application was filed.
- 3 The goods in respect of which registration was applied for are in Classes 6, 29, 30, 32 and 33 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, each of those classes, to the following description:
 - Class 6: Metal containers for transport and storage, in particular metal containers, metal capsules [boxes], metal tanks, metal containers for chemicals, compressed gas and liquids;
 - Class 29: Milk products, in particular yoghurt [drinks], coconut milk (drinks), yoghurt drinks, milk-based drinks or drinks containing milk, yoghurt-based drinks, thickened dairy drinks [yoghurt], beverages made from milk products, drinks made with yoghurt, drinks based on yoghurt, drinks based on coconut milk, drinks based on peanut milk, drinks based on almond milk; soya-based drinks used as milk substitutes;
 - Class 30: Coffee, in particular beverages prepared with coffee substitutes, coffee-based beverages, beverages produced with coffee, beverages composed principally of coffee; tea, in particular tea-based beverages, fruit-flavoured tea-based beverages, non-medicinal tea-based beverages; cocoa, in particular cocoa-based beverages, beverages prepared with cocoa, beverages consisting primarily of cocoa, ready-to-drink cocoa beverages, beverages made from cocoa and cocoa-based; carbonated drinks [coffee, cocoa or chocolate-based], beverages made with chocolate, beverages made with chocolate, chocolate-based beverages, chocolate-flavoured beverages, drinks, flavoured with chocolate, beverages consisting primarily of chocolate, beverages with a chocolate base, beverages based on chocolate, milk-based chocolate drinks;
 - Class 32: Beers, in particular beer-based beverages; mineral water (beverages), in particular water [beverages], mineral-enriched water (beverages), vitamin-enriched sparkling mineral water [beverages], water-based beverages with tea extracts; carbonated water, in particular mineral water [beverages], tonic water [non-medicinal beverages]; non-alcoholic beverages, in particular isotonic beverages, de-alcoholised beverages, non-alcoholic beverages, non-alcoholic carbonated drinks, cola [non-alcoholic drinks], frozen non-alcoholic carbonated drinks, colas

[non-alcoholic beverages], non-alcoholic drinks containing vegetable juices, flavoured carbonated drinks, non-alcoholic drinks with aloe vera; non-alcoholic beverages, beer-flavoured non-alcoholic beverages, tea-flavoured non-alcoholic beverages, non-alcoholic beverages tasting of tea; non-alcoholic cola drinks, non-alcoholic drinks tasting of coffee, coffee-flavoured non-alcoholic drinks, non-carbonated non-alcoholic drinks, non-alcoholic flavoured carbonated drinks, nutritionally enriched drinks, vitamin-enriched non-alcoholic drinks, tea-flavoured fruit-based non-alcoholic drinks, malt-free soft drinks for non-medicinal use; non-alcoholic; fruit drinks, in particular sorbets [drinks], fruit-flavoured drinks, fruit drinks, drinks made from smoked plums, frozen fruit-based non-alcoholic drinks, fruit-based drinks; fruit juices, in particular vegetable juices [drinks], tomato juice [drinks], vegetable juices [drinks], non-alcoholic drinks containing fruit juices, beverages consisting primarily of fruit juices, juices, syrups [non-alcoholic drinks], drinks made of a mixture of fruit and vegetable juices; nut and soya-based beverages; isotonic beverages for non-medicinal use; beverages containing vitamins (not for medicinal use); brown rice-based beverages other than milk substitutes;

- Class 33: Alcoholic beverages [except beers], in particular distilled beverages, spirits, wine-based and fruit juice-based drinks, drinks containing wine [sprinters], alcoholic fruit cocktail drinks, rum-based drinks, low alcohol drinks, alcoholic fruit drinks, coffee-based alcoholic drinks, tea-based alcoholic drinks, carbonated drinks other than beers.
- 4 On 2 July 2018, the examiner informed the applicant that the trade mark applied for could not be registered. He stated, in particular, that that mark, which was made up of a sound reproducing the opening of a can of drink, followed by a pause and then a long fizzing sound, could not be perceived as an indicator of the commercial origin of the goods.
 - 5 By decision of 8 January 2019, the examiner refused the application for registration on the grounds that the trade mark applied for was devoid of distinctive character, within the meaning of Article 7(1)(b) of Regulation 2017/1001.
 - 6 By decision of 24 July 2019 ('the contested decision'), the Second Board of Appeal of EUIPO dismissed the applicant's appeal against the examiner's decision. First of all, it found that the relevant public was composed, for the goods in Classes 29, 30, 32 and 33, of the general public with a normal level of attention and, for the goods in Class 6, mainly commercial customers with a high level of attention. Having pointed out that the criteria for assessing the distinctive character of sound marks were no different from those applicable to other categories of trade mark, the Board of Appeal stated that the general public was not necessarily used to regarding a sound as an indication of the commercial origin of unopened beverage packaging and packaged beverages. It added that, in order to be registered as a trade mark, a sound had to have a certain evocative quality or a certain recognition value so as to indicate to consumers the commercial origin of the goods or services at issue. Lastly, the Board of Appeal considered that the trade mark applied for consisted of a sound inherent to the use of the goods at issue, so that the relevant public would perceive that trade mark as a functional element and an indication of the qualities of the goods at issue and not as an indication of their commercial origin. It concluded that the trade mark applied for was devoid of distinctive character.

Forms of order sought by the parties

7 The applicant claims that the Court should:

- annul the contested decision;
- order EUIPO to pay the costs of the proceedings, including those incurred in the proceedings before the Board of Appeal.

8 EUIPO contends that the Court should:

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

Law

The subject matter of the dispute

9 It should be noted at the outset that, as regards the scope of the dispute, the applicant does not deny that the trade mark applied for is devoid of distinctive character for the goods in Class 6 and it is therefore not challenging the contested decision in respect of the goods in that class.

Substance

- 10 In support of its application, the applicant raises, in essence, six pleas in law. The first plea alleges infringement of Article 72(2) and Article 95(1) of Regulation 2017/1001, in that the Board of Appeal committed errors of assessment. The second plea alleges infringement of Article 72(2) of Regulation 2017/1001, in that the Board of Appeal infringed its duty to state reasons. The third plea alleges, in essence, an error of law, in that the Board Appeal applied an incorrect criterion for assessing the distinctive character of the trade mark applied for. The fourth plea alleges infringement of Article 72(2) and of Article 7(1)(b) of Regulation 2017/1001, in that the Board of Appeal wrongly concluded that the trade mark applied for was devoid of distinctive character. The fifth plea alleges infringement of Article 72(2) and Article 95(1) of Regulation 2017/1001, in that the Board of Appeal incorrectly assessed certain facts. The sixth plea alleges infringement of Article 72(2) of Regulation 2017/1001, in that the Board of Appeal infringed the applicant's right to be heard.
- 11 It is necessary to examine, first, the third and fourth pleas, which relate, in essence, to the assessment of the distinctive character of the trade mark, secondly, the first and fifth pleas, in that they relate, in essence, to the alleged errors of assessment, thirdly, the second plea, in that it concerns an infringement of the duty to state reasons and, fourthly, the sixth plea, relating to the infringement of the right to be heard.

The assessment of the distinctive character of the trade mark applied for

- 12 In essence, the applicant maintains that the Board of Appeal, in the analysis of the distinctive character of the trade mark sought, applied criteria which were not 'covered' by Article 7(1)(b) of Regulation 2017/1001. The Board of Appeal started from the premiss that the trade mark applied for must depart significantly from the norm or customs of the sector in order to fulfil its function of indicating the commercial origin of the goods at issue. However, that criterion, laid down in respect of three-dimensional trade marks, cannot be applied in the present case.
- 13 According to the applicant, the sound reproduced by the trade mark applied for is unusual for the goods in Classes 29, 30, 32 and 33 which are not carbonated, so that the already existing distinctive character of that trade mark is reinforced. The same is true of the goods in Classes 29, 30, 32 and 33 which are carbonated, since the various sound elements making up the trade mark applied for are different from the sound produced when the fizzy drinks usually on the market are opened, so that the relevant public would perceive them as an indication of the commercial origin of those goods.
- 14 In its reply to the questions posed by the General Court, although the applicant claims that the judgment of 13 September 2016, *Globo Comunicação e Participações v EUIPO (Sound mark)* (T-408/15, EU:T:2016:468), cannot be transposed to the present case, since the goods and services concerned are different, it maintains that the Court stated in that case that a minimum degree of distinctive character is sufficient to set aside the absolute ground for refusal to register a trade mark within the meaning of Article 7(1)(b) of Regulation 2017/1001, including sound marks.
- 15 EUIPO contests the applicant's arguments.
- 16 Under Article 7(1)(b) of Regulation 2017/1001, trade marks which are devoid of any distinctive character shall not be registered.
- 17 For a trademark to possess distinctive character for the purposes of Article 7(1)(b) of Regulation 2017/1001, it must serve to identify the product or service in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product or service from those of other undertakings (see judgments of 21 January 2010, *Audi v OHIM*, C-398/08 P, EU:C:2010:29, paragraph 33 and the case-law cited, and of 20 October 2011, *Freixenet v OHIM*, C-344/10 P and C-345/10 P, EU:C:2011:680, paragraph 42 and the case-law cited).
- 18 Signs devoid of any distinctive character, referred to in Article 7(1)(b) of Regulation 2017/1001, are deemed incapable of fulfilling the essential function of the trade mark, namely to identify the origin of the product or service, so as to enable the consumer who purchases the product or service which the trade mark designates, when making a subsequent purchase, to make the same choice if the experience has been positive or to make another choice if it has been negative (see, to that effect, judgment of 16 September 2004, *SAT.1 v OHIM*, C-329/02 P, EU:C:2004:532, paragraph 23).
- 19 The distinctive character of a trade mark must be assessed by reference, first, to the goods or services in respect of which registration is sought and, second, to the perception of the relevant public (see judgment of 12 February 2004, *Henkel*, C-218/01, EU:C:2004:88, paragraph 50 and the case-law cited). The level of attention of the average consumer, deemed to be reasonably

well-informed and reasonably observant and circumspect, is likely to vary according to the category of goods or services in question (judgment of 10 October 2007, *Bang & Olufsen v OHIM (Shape of a loudspeaker)*, T-460/05, EU:T:2007:304, paragraph 32).

- 20 In the present case, the trade mark applied for is the sound sign corresponding to the sequence of the sound of a drinks can being opened, a silence of approximately one second and a fizzing sound of approximately nine seconds.
- 21 In the first place, it should be stated that the parties do not dispute the definition of the relevant public, in paragraph 10 of the contested decision, according to which the goods in Classes 29, 30, 32 and 33 target the general public who have an average level of attention.
- 22 In the second place, as regards the applicant's argument that the Board of Appeal used incorrect criteria when analysing the distinctive character of the trade mark applied for in respect of the goods in Classes 29, 30, 32 and 33, the Board of Appeal, in paragraph 17 of the contested decision, stated that, where the sound applied for reproduces a sound which is inherent to the goods or their use, that trade mark must, in order to display the required distinctive character, depart significantly from the norm or customs of the sector, in the same way as a three-dimensional trade mark reproducing the external appearance of the product or of its packaging.
- 23 In that regard, it should be noted that the criteria for assessing distinctiveness are the same for all categories of trade mark, and that Article 7(1) of Regulation 2017/1001 draws no distinction between the various categories. The criteria for assessing the distinctiveness of sound marks are therefore no different from those applicable to the other categories of mark (see, to that effect, judgment of 13 September 2016, *Sound mark*, T-408/15, EU:T:2016:468, paragraph 41 and the case-law cited).
- 24 It is also apparent from the case-law that it is necessary for the sound sign in respect of which registration is sought to have a certain resonance which enables the target consumer to perceive and regard it as a trade mark and not as a functional element or as an indicator without any inherent characteristics. That consumer must first regard the sound sign as having the ability to identify, in the sense that it will be identifiable as a trade mark (judgment of 13 September 2016, *Sound mark*, T-408/15, EU:T:2016:468, paragraph 45).
- 25 Although the public is used to perceiving word or figurative marks as signs which identify the commercial origin of goods or services, the same is not necessarily true when the sign consists solely of a sound element. The consumer of the goods or services in question must, by the perception alone of the mark, without its being combined with other elements such as, inter alia, word or figurative elements, or even another mark, be able to associate it with that commercial origin.
- 26 In that regard, EUIPO rightly pointed out, in reply to a question from the Court, that the customs in an economic sector were not fixed, but could change over time, in some circumstances, even dynamically. Thus, it is well known that operators in the food sector market, which is characterised by strong competition, are faced with the necessity of packaging for marketing the goods, and are highly motivated to make their goods identifiable in order to draw the attention of consumers, including by sound marks and marketing and advertising efforts.

- 27 Although the resonance and capability necessary to generate some form of attention in the target public and to fulfil the function of identifying the commercial origin of the sound mark were denied in respect of the sequence of notes for which registration was sought in the case referred to in paragraph 24 above, that was justified by the 'excessive simplicity' and the 'banality' of the sequence. In the present case, in order to refuse registration of the trade mark applied for, the Board of Appeal did not base its decision on the criteria and grounds for refusal of registration established by the General Court in a previous case relating to a sound mark.
- 28 Instead, as stated in paragraph 22 above, the Board of Appeal applied as a criterion for assessing the distinctive character of the sound mark at issue that used by the case-law concerning three-dimensional marks constituted by the appearance of the product itself or of its packaging.
- 29 According to the case-law relating to three-dimensional trade marks constituted by the appearance of the product itself or of its packaging, the more closely the shape for which registration is sought resembles the shape most likely to be taken by the product in question, the greater the likelihood of the shape being devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation 2017/1001. In those circumstances, only a mark which departs significantly from the norm or customs of the sector and therefore fulfils its essential function of indicating origin is not devoid of any distinctive character for the purposes of that provision (judgment of 7 October 2004, *Mag Instrument v OHIM*, C-136/02 P, EU:C:2004:592, paragraph 31).
- 30 It is important to note that that case-law was developed in respect of the specific situation in which a trade mark sought consists of the shape of the product itself or of its packaging, whereas there are norms or customs of the sector relating to that shape. In such circumstances, the consumer concerned who is accustomed to seeing one or several shapes corresponding to the norm or customs of the sector will not perceive the trade mark sought as an indication of the commercial origin of the goods covered by the trade mark application if the shape constituting that mark is identical or similar to the usual shape or shapes.
- 31 That case-law does not establish new criteria for assessing the distinctive character of a trade mark but merely states that, in the context of the application of those criteria, the perception of the relevant public is likely to be influenced by the nature of the sign for which registration is sought. The perception of the average consumer is not necessarily the same in relation to a three-dimensional mark consisting of the appearance of the product itself or of its packaging, as it is in relation to a word, figurative or sound mark consisting of a sign which is independent of the external appearance or shape of the products it designates (see, to that effect, judgment of 12 December 2019, *EUIPO v Wajos*, C-783/18 P, not published, EU:C:2019:1073, paragraph 24 and the case-law cited).
- 32 That is why the case-law referred to in paragraph 29 above cannot, in principle, be applied to sound marks.
- 33 In the present case, as the trade mark sought reproduces neither the shape of the goods at issue nor that of their packaging, the Board of Appeal was wrong to consider that the case-law referred to in paragraph 29 above was applicable by analogy, and to apply the criterion consisting of determining whether the trade mark sought departed 'significantly' from the norm or customs of the sector.

- 34 Nevertheless, that error of law with regard to the legal criterion applicable for assessing the distinctive character of the trade mark applied for is not such as to vitiate the reasoning set out in the contested decision, since it is clear, from reading all the reasons for that decision, that the Board of Appeal did not base its reasoning solely on the case-law developed in respect of three-dimensional trade marks.
- 35 According to settled case-law, if, in the particular circumstances of the case, an error could not have had a decisive effect on the outcome, the argument based on such an error is nugatory and thus cannot suffice to justify annulling the contested decision (see, to that effect, judgment of 7 September 2017, *VM v EUIPO – DAT Vermögensmanagement (Vermögensmanufaktur)*, T-374/15, EU:T:2017:589, paragraph 143 and the case-law cited). Therefore, even though the Board of Appeal incorrectly applied the criterion of the norm and customs of the sector with regard to the appearance of the products claimed and their packaging, it is necessary to determine whether that error of law had any impact on the meaning of the contested decision, since the decision is also based on another ground.
- 36 The Board of Appeal also, in paragraphs 12 to 16, 21 and 22 of the contested decision, recalled the judgment of 13 September 2016, *Sound mark* (T-408/15, EU:T:2016:468), and applied it to the present case. Accordingly, it stated that, in order to be registered as a trade mark, a sound must have a certain resonance or a certain recognition value which enables the targeted consumers to regard it ‘as an indication of origin and not merely as a functional element or as an indication without any statement’. It added, in essence, that the examiner correctly explained that the sound constituting the trade mark applied for had an immediate relationship to the claimed goods and was inherent to the use of those goods. It concluded that the trade mark applied for would be perceived by the relevant public as a functional element of the goods at issue, since the fizzing sound was an indication of the qualities of those goods and not an indication of their commercial origin, so the mark is devoid of any distinctive character.
- 37 In the third place, it is necessary to determine whether that other ground, based on the perception of the mark applied for by the relevant public as being a functional element, a ground that would justify the lack of distinctiveness of that mark, is well founded.
- 38 In that regard, it must be observed that, contrary to the Board of Appeal’s submissions in paragraph 18 of the contested decision, the goods at issue are not ‘all beverages that may contain carbon dioxide’. That is true, inter alia for the category of ‘non-carbonated non-alcoholic drinks’ in Class 32, which contains no fizzy drinks.
- 39 However, in the present case, that error is not capable of rendering unlawful the conclusion of the Board of Appeal concerning the lack of distinctiveness of the trade mark applied for in respect of all the goods included in Classes 29, 30, 32 and 33.
- 40 First, the sound emitted when a can is opened will be considered, having regard to the type of goods concerned, to be a purely technical and functional element, since the opening of a can or bottle is inherent to a certain technical solution connected to the handling of drinks in order to consume them, irrespective of whether or not those goods contain carbon dioxide.
- 41 Since an element is perceived by the relevant public as fulfilling above all a technical and functional role, it will not be perceived as an indication of the commercial origin of the goods concerned (see, by analogy, judgment of 18 January 2013, *FunFactory v OHIM (Vibrateur)*, T-137/12, not published, EU:T:2013:26, paragraph 27 and the case-law cited).

- 42 Second, the relevant public will immediately perceive the sound of fizzing bubbles as referring to drinks.
- 43 Moreover, the sound elements and the silence of approximately one second which make up the trade mark applied for, taken as a whole, do not have any inherent characteristics to suggest that, as well as being perceived as an indication of functionality and as referring to the goods at issue for the relevant public, they may also be perceived by the public as an indication of commercial origin.
- 44 It is true that the trade mark applied for has two characteristics, namely the fact that the silence lasts for approximately one second and that the sound of fizzing bubbles lasts approximately nine seconds.
- 45 However, those nuances, in relation to the typical sounds made by drinks when they are opened, cannot, in the present case, be sufficient to rule out the objection based on Article 7(1)(b) of Regulation 2017/1001, since they will be perceived by the relevant public, as referred to in paragraphs 19 and 21 above, only as a variant of the sounds usually emitted by drinks when their contents are opened, and do not therefore give the sound mark applied for the capacity to identify in such a way that it will be identifiable as a trade mark.
- 46 Accordingly, as EUIPO correctly points out, the silence after the sound of a can opening and the length of the fizzing sound, of about nine seconds, are not resonant enough to distinguish them from comparable sounds in the field of drinks. The mere fact that a short fizzing sound immediately following the opening of a can is more usual in the field of drinks than a silence of about one second followed by a long fizzing sound is not enough for the relevant public to attribute to those sounds any significance enabling it to identify the commercial origin of the goods at issue.
- 47 Contrary to the applicant's submissions, the combination of the sound elements and the silence element is therefore not unusual in its structure, since the sounds of a can opening, a silence and a fizzing sound correspond to the foreseeable and usual elements on the drinks market.
- 48 That combination therefore does not enable the relevant public to identify those goods as those of a specific undertaking and to distinguish them from those of another undertaking.
- 49 It is apparent from the foregoing that the Board of appeal was right to conclude that the trade mark applied for was devoid of any distinctive character for all the products in Classes 29, 30, 32 and 33.
- 50 Therefore, the third and fourth pleas, alleging an incorrect assessment of the distinctive character of the trade mark applied for, must be dismissed.

The alleged errors of assessment

- 51 According to the applicant, the Board of Appeal wrongly considered that the goods concerned were all drinks which might contain carbon dioxide, at least so far as concerns the categories of non-carbonated non-alcoholic drinks and mineral waters. It also wrongly considered that it was unusual on the markets in question of drinks and drinks packaging to indicate the commercial origin of a product with sounds alone, since many methods of distribution using a sound may be envisaged. It also inserted in its assessment an incorrect personal finding, instead of a well-known fact.

- 52 Although EUIPO acknowledges the error made by the Board of Appeal concerning the category of 'non-carbonated non-alcoholic drinks' in Class 32, it maintains that that does not justify annulling the contested decision and contests the applicant's other arguments.
- 53 In that regard, in the first place, it must be observed that it is apparent from paragraphs 39 to 50 above that, in the present case, that error on the part of the Board of Appeal did not have a decisive influence, within the meaning of the case-law cited in paragraph 35 above, since the latter rightly concluded that the trade mark applied for was devoid of a distinctive character for all the goods in Classes 29, 30, 32 and 33, whether or not they contained carbon dioxide.
- 54 The applicant's argument based on that error by the Board of Appeal is therefore ineffective and, consequently, cannot lead to the annulment of the contested decision.
- 55 In the second place, as regards the statement, made in paragraph 14 of the contested decision, that it was still unusual on the relevant markets of drinks and drinks packaging to indicate the commercial origin of the product solely with the aid of sounds, it must be observed that the Board of Appeal did not maintain that this was a well-known fact. On the contrary, in paragraph 15 of the contested decision, it justified that view by stating that the goods at issue were generally silent, at least until they were consumed. According to the Board of Appeal, if the sound only occurs when the product in question is consumed, therefore after it has been purchased, it cannot help to guide the relevant public in its choice of purchase.
- 56 However, that finding cannot be supported. Most products are silent in themselves, and make a sound only when they are consumed. That argument therefore cannot support the assertion made by the Board of Appeal in paragraph 14 of the contested decision. The mere fact that a sound occurs only when the product is consumed does not mean that the use of sounds to indicate the commercial origin of the product on a particular market is still unusual.
- 57 However, and in any event, irrespective of whether or not it is still unusual to indicate the commercial origin of goods, particularly on the relevant markets of drinks and drinks packaging, solely with the aid of sounds, any error on the part of the Board of Appeal in that regard did not have a decisive influence on the operative part of the contested decision.
- 58 As pointed out in paragraph 49 above, the General Court has confirmed the conclusion of the Board of Appeal that the trade mark applied for was devoid of any distinctive character for all the products in Classes 29, 30, 32 and 33. The applicant's argument based on a possible error by the Board of Appeal regarding the habitual use of sounds on the markets in question cannot therefore lead to the annulment of the contested decision.
- 59 Therefore, the first and fifth pleas alleging, in essence, errors of assessment, must be dismissed.

The breach of the duty to state reasons

- 60 The applicant considers, in essence, that the Board of Appeal failed to examine the distinctive character of the trade mark applied for in respect of the products which do not contain carbon dioxide. It adds that the statement by the Board of Appeal that it is still unusual to indicate the commercial origin of products on the markets of drinks and drinks packaging solely with the aid of sounds is not adequately supported, particularly owing to the fact that the applicant lodged publications relating to the current work of sound engineers to provide sound accompaniment for food products placed on the market.

- 61 EUIPO, although it acknowledges a failure to state reasons with regard to the products which do not contain carbon dioxide, nevertheless considers that that cannot lead to the annulment of the contested decision.
- 62 It must be observed that, under the first sentence of Article 94(1) of Regulation 2017/1001, decisions of EUIPO must state the reasons on which they are based.
- 63 The duty to state reasons thus enshrined has the same scope as that deriving from the second paragraph of Article 296 TFEU, as interpreted by settled case-law, according to which the reasons must show clearly and unambiguously the reasoning of the author of the act, in order to enable interested parties to know the purported justification for the measure taken so as to be able to defend their rights and to enable the Courts of the European Union to exercise their jurisdiction to review the legality of the decision (see, by analogy, judgments of 10 May 2012, *Rubinstein and L'Oréal v OHIM*, C-100/11 P, EU:C:2012:285, paragraph 111, and of 6 September 2012, *Storck v OHIM*, C-96/11 P, not published, EU:C:2012:537, paragraph 86).
- 64 In the present case, it must be acknowledged that the Board of Appeal started from the false premiss that all the goods at issue in Classes 29, 30, 32 and 33 were drinks which might contain carbon dioxide, so the contested decision contains no express reasons devoted specifically to the lack of any distinctive character of the sound mark sought in respect of those products which might not contain carbon dioxide, such as, inter alia, 'non-carbonated non-alcoholic drinks' in Class 32, moreover, that is not disputed by EUIPO.
- 65 However, it must be observed that, in spite of the failure to state reasons in respect of that specific point, the contested decision is sufficiently reasoned as a whole, so that the applicant was able to understand the purported justification for the measure taken in its respect and the Courts of the European Union are able to exercise their jurisdiction to review that decision, in accordance with the case-law referred to in paragraph 63 above.
- 66 The fact that the Board of Appeal did not expressly comment on the applicant's argument relating to the current work of sound engineers does not mean that it failed to fulfil its obligation to state reasons.
- 67 EUIPO's duty to state reasons does not constitute an obligation to provide an answer to all the arguments and all the evidence submitted for its assessment (see judgment of 9 July 2008, *Reber v OHIM – Chocodfabriken Lindt & Sprüngli (Mozart)*, T-304/06, EU:T:2008:268, paragraph 55 and the case-law cited. It is sufficient if EUIPO sets out the facts and the legal considerations having decisive importance in the context of its decision (see, to that effect, judgments of 11 January 2007, *Technische Glaswerke Ilmenau v Commission*, C-404/04 P, not published, EU:C:2007:6, paragraph 30, and of 9 December 2010, *Tresplain Investments v OHIM – Hoo Hing (Golden Elephant Brand)*, T-303/08, EU:T:2010:505, paragraph 46).
- 68 Therefore, the applicant's plea alleging infringement of the obligation to state reasons must be dismissed.

The infringement of the right to be heard

- 69 The applicant claims that it was unable to submit observations relating to the requirement of availability referred to by the Board of Appeal in paragraph 23 of the contested decision, so that its right to be heard was infringed.

- 70 EUIPO contests the applicant's arguments.
- 71 It should be noted that, in accordance with the second sentence of Article 94(1) of Regulation 2017/1001, EUIPO may base its decision only on matters of fact or of law on which the parties have had an opportunity to present their comments. The general principle of protection of the rights of the defence is thereby enshrined in the law of European Union trade marks. In accordance with that principle, a person whose interests are appreciably affected by a decision taken by a public authority must be given the opportunity to make his point of view known (see judgment of 6 September 2013, *Eurocool Logistik v OHIM – Lenger (EUROCOOL)*, T-599/10, not published, EU:T:2013:399, paragraph 50 and the case-law cited).
- 72 The right to be heard extends to all the factual and legal material which forms the basis for the decision, but not to the final position which the authority intends to adopt (see judgment of 12 May 2009, *Jurado Hermanos v OHIM (JURADO)*, T-410/07, EU:T:2009:153, paragraph 31 and the case-law cited).
- 73 In the present case, it is apparent from the documents in EUIPO's file, in particular the applicant's statement setting out the grounds of its appeal against the examiner's decision, that the clarification given by the Board of Appeal, that sounds which make up the trade mark applied for must be available, is subsequently part of the exchanges between the parties during the administrative procedure before the Board of Appeal. As EUIPO rightly maintains, the Board of Appeal raises no new matters and merely replies to the applicant's notice of appeal and, more particularly, to the argument alleging, in essence, that the other economic operators would not be prevented, by the registration of the trade mark applied for, from using their signs in order to market various liquids with ring-pulls.
- 74 That clarification by the Board of Appeal did not, therefore, in itself, require it to give the applicant the opportunity to make known its views in that regard.
- 75 It follows that the plea alleging infringement of the right to be heard must be dismissed and, consequently, the application in its entirety.

Costs

- 76 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. However, in accordance with Article 135(1) of the Rules of Procedure, the General Court may decide, if equity so requires, that an unsuccessful party is to pay only a proportion of the costs of the other party in addition to barring its own, or even that it is not to be ordered to pay any.
- 77 Furthermore, under Article 190(2) of the Rules of Procedure, costs necessarily incurred by the parties for the purposes of the proceedings before the Board of Appeal shall be regarded as recoverable costs.
- 78 In the present case, in view of the numerous errors in the contested decision, and although it is not annulled, each party is to pay its own costs incurred before the General Court. The applicant shall also pay the costs necessarily incurred for the purposes of the proceedings before the Board of Appeal.

On those grounds,

THE GENERAL COURT (Fifth Chamber, Extended Composition)

hereby declares:

- 1. The application is dismissed;**
- 2. The European Union Intellectual Property Office (EUIPO) is to bear its own costs incurred before the General Court;**
- 3. Ardagh Metal Beverage Holdings GmbH & Co. KG is to bear its own costs incurred before the General Court and the costs necessarily incurred for the purposes of the proceedings before the Board of Appeal of EUIPO.**

Papasavvas

Spielmann

Öberg

Spineanu-Matei

Norkus

Delivered in open court in Luxembourg on 7 July 2021.

[Signatures]