

**Court of Justice EU, 24 June 2010, Barbara Becker**



**TRADEMARK LAW**

**Assesment of conceptual similarity**

- the General Court erred in law in basing its assessment of the conceptual similarity of the marks on general considerations taken from the case-law without analysing all the relevant factors specific to the case, in disregard of the requirement of an overall assessment of the likelihood of confusion, taking account of all factors relevant to the circumstances of the case, and based on the overall impression produced by the marks at issue.

In the present case, having repeated all of the rules set out in paragraphs 30 to 33 of this judgment, the General Court held essentially, in its assessment of the conceptual similarity of the marks at issue, first, that, as consumers in part of the European Union generally attribute greater distinctiveness to the surname than to the forename in word signs, the component ‘Becker’ in the mark applied for was likely to have attributed to it a stronger distinctive character than the component ‘Barbara’; second, that the fact that Ms Becker is famous in Germany had no effect on the similarity of the marks at issue since they refer to the same surname and the component ‘Barbara’ is merely a forename and, third, that the component ‘Becker’ retained an independent distinctive role in the composite mark because it would be perceived as a surname.

36 Although it is possible that, in a part of the European Union, surnames have, as a general rule, a more distinctive character than forenames, it is appropriate, however, to take account of factors specific to the case and, in particular, the fact that the surname concerned is unusual or, on the contrary, very common, which is likely to have an effect on that distinctive character. That is true of the surname ‘Becker’ which the Board of Appeal noted is common.

37 Account must also be taken of whether the person who requests that his first name and surname, taken together, be registered as a trade mark is well known, since that factor may obviously influence the perception of the mark by the relevant public.

38 Furthermore, it must be held that, in a composite mark, a surname does not retain an independent distinctive role in every case solely because it will be perceived as a surname. The finding with respect to such a role may be based only on an examination of all the relevant factors of each case.

39 Moreover, as the Advocate General pointed out in essence, in point 59 of his Opinion, the grounds relied on by the General Court in order to conclude that the marks at issue are conceptually similar, if they were held to be consistent with Article 8(1)(b) of Regulation No 40/94, would result in acknowledging that any surname which constitutes an earlier mark could be effectively relied on to oppose registration of a mark composed of a first name and that surname, even though, for example, the surname was common or the addition of the first name would have an effect, from a conceptual point of view, on the perception by the relevant public of the composite mark.

40 It follows from all the foregoing that the General Court erred in law in basing its assessment of the conceptual similarity of the marks on general considerations taken from the case-law without analysing all the relevant factors specific to the case, in disregard of the requirement of an overall assessment of the likelihood of confusion, taking account of all factors relevant to the circumstances of the case, and based on the overall impression produced by the marks at issue.

Vindplaatsen: [curia.europa.eu](http://curia.europa.eu)

**Court of Justice EU, 24 June 2010**

(J.-C. Bonichot, President of the Chamber, C. Toader, K. Schieman, P. Kūris (Rapporteur) and L. Bay Larsen)

Judgment of The Court (Fourth Chamber)

24 June 2010 (\*)

*(Appeal – Community trade mark – Regulation (EC) No 40/94 – Article 8(1)(b) – Word mark Barbara Becker – Opposition by the proprietor of the Community word marks BECKER and BECKER ONLINE PRO – Assessment of the likelihood of confusion – Assessment of the conceptual similarity of the signs)*

In Case C-51/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 3 February 2009,

Barbara Becker, residing in Miami (United States), represented by P. Baronikians, Rechtsanwalt, appellant, the other parties to the proceedings being:

Harman International Industries, Inc., established in Northridge (United States), represented by M. Vanhegan, Barrister, applicant at first instance,

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by G. Schneider, acting as Agent, defendant at first instance,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, C. Toader, K. Schieman, P. Kūris (Rapporteur) and L. Bay Larsen, Judges,

Advocate General: P. Cruz Villalón,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 11 February 2010,

after [hearing the Opinion of the Advocate General at the sitting](#) on 25 March 2010,

gives the following

### **Judgment**

1 By her appeal, Ms Becker requests the Court to set aside the judgment of the Court of First Instance of the European Communities (now ‘the General Court’) in Case T-212/07 Harman International Industries v OHIM – Becker (Barbara Becker) [2008] ECR II-3431 (‘the judgment under appeal’), by which that court annulled the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 7 March 2007 (Case R 502/2006-1) (‘the contested decision’) which had annulled the Opposition Division’s decision upholding the opposition brought by Harman International Industries Inc. (‘Harman’) against registration of the Community word mark Barbara Becker.

### **Legal background**

2 Article 8(1)(b) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) provides:

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

...

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

3 Pursuant to Article 8(2)(a) of Regulation No 40/94, ‘earlier trade marks’ means, inter alia, Community trade marks with a date of application for registration which is earlier than the date of application for registration of the Community trade mark.

### **Facts**

4 On 19 November 2002, Ms Becker filed an application at OHIM for registration of the word mark Barbara Becker as a Community trade mark.

5 The goods in respect of which registration of the mark was sought fall within Class 9 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:

‘Scientific, nautical, surveying, electric, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), lifesaving and teaching apparatus and instruments; apparatus for recording, transmission or reproduction of sound or images; magnetic data-carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers.’

6 On 24 June 2004, Harman filed a notice of opposition against registration of the trade mark Barbara Becker in respect of all the goods covered by the mark, pursuant to Article 8(1)(b) and Article 8(5) of Regulation No 40/94. The opposition was based on the Community word mark BECKER ONLINE PRO No 1823228, registered on 1 July 2002, and on the application for registration, of 2 November 2000, of

Community word mark BECKER No 1944578, registered on 17 September 2004, which also cover various goods falling within Class 9 of the Nice Agreement.

7 By decision of 15 February 2005, the Opposition Division of OHIM, accepting that there was a likelihood of confusion between the marks at issue, upheld Harman’s opposition. It held that the goods designated by those marks were identical and that the marks were similar overall, in that they had an average degree of visual and phonetic similarity, and that they were conceptually identical since they refer to the same surname.

8 On 11 April 2006, Ms Becker filed an appeal against that decision, which led to its annulment by the contested decision. In the latter decision, the First Board of Appeal of OHIM (‘the Board of Appeal’) held that the goods designated by the marks at issue were partly identical and partly similar. It distinguished between the goods directed at the general public, those directed at professionals, and those which, directed at both of those groups, fell within an intermediate category.

9 As regards the signs at issue, the Board of Appeal compared only the earlier word mark BECKER and the mark Barbara Becker for which registration is sought. It found that visually and phonetically there was only some degree of similarity between those signs but that conceptually, however, the signs were clearly distinct in Germany and in other countries of the European Union by reason of the fact that the relevant public would perceive the mark Barbara Becker in its entirety, rather than as a combination of ‘Barbara’ and ‘Becker’. It also noted that Ms Becker was famous in Germany, while ‘Becker’ was a very common surname. Therefore, it concluded that the differences between the signs at issue were significant enough to rule out a likelihood of confusion.

10 Furthermore, the Board of Appeal held that the condition that, for the application of Article 8(5) of Regulation No 40/94, there must be a degree of similarity between the marks at issue such that the relevant public establishes a link between them, had not been satisfied.

### **The action before the General Court and the judgment under appeal**

11 By application lodged at the Registry of the General Court on 15 June 2007 Harman brought an action against the contested decision. In support of its action it put forward two pleas alleging infringement of Article 8(1)(b) and Article 8(5) of Regulation No 40/94 respectively.

12 Upholding the first of those pleas the General Court, by the judgment under appeal, annulled the contested decision, considering that the Board of Appeal had wrongly concluded that the marks at issue were clearly distinct. After noting, in paragraph 33 of the judgment under appeal, that visually and phonetically they had a certain similarity, as the Board of Appeal had found, it held, in paragraph 34 of the judgment, that the Board of Appeal had incorrectly assessed the relative importance of the component ‘Becker’ as compared with the component ‘Barbara’.

13 First, the General Court, referring to Case T-185/03 *Fusco v OHIM – Fusco International (ENZO FUSCO)* [2005] ECR II-715, paragraph 54, observed, in paragraph 35 of the judgment under appeal, that the case-law had stated that, at least in Italy, consumers generally attributed greater distinctiveness to the surname than to the forename making up a trade mark, so that the surname 'Becker' was likely to have attributed to it a stronger distinctive character than the first name 'Barbara' in the composite mark.

14 Second, the General Court stated, in paragraph 36 of the judgment under appeal, that the fact that Ms Becker is famous in Germany as the former wife of Boris Becker did not mean that, conceptually, the marks at issue were not similar. It observed that those two marks referred to the same surname and were therefore similar, especially since in a part of the European Union the component 'Becker' in the mark Barbara Becker was, as a surname, likely to have attributed to it a stronger distinctive character than the component 'Barbara', which is simply a first name.

15 Third, referring to Case C-120/04 *Medion* [2005] ECR I-8551, paragraphs 30 and 37, the General Court held, in paragraph 37 of the judgment under appeal, that the component 'Becker', even if it was not the dominant component of the composite mark, would be perceived as a surname, which is commonly used to describe a person, and would retain an independent distinctive role in that mark.

16 Therefore, noting that the identical or similar nature of the goods designated by the marks at issue was not contested and that those marks were visually, phonetically and conceptually similar, the General Court, in paragraph 40 of the judgment under appeal, held that there was a likelihood of confusion between them even if the relevant goods were intended for a public with a relatively high level of attention.

17 Lastly, in paragraphs 41 and 42 of the judgment under appeal, the General Court held that that finding was not invalidated by OHIM's argument that a composite mark and another mark can be considered to be similar only if the common component constitutes the dominant component in the overall impression created by the composite mark. It also dismissed Ms Becker's argument that the case-law on composite marks was not applicable in the present case because the mark Barbara Becker consisted of a first name and a surname.

#### **Forms of order sought**

18 By her appeal, the appellant claims that the Court should set aside the judgment under appeal in so far as it annulled the contested decision and ordered her to pay the costs. She also seeks an order for the respondent to pay the costs.

19 Harman contends essentially that the Court should dismiss the appeal and order the appellant to pay the costs.

20 OHIM contends that the Court should set aside the judgment under appeal and order Harman to pay the costs incurred by it.

#### **The appeal**

##### **Arguments of the parties**

21 In support of her appeal, Ms Becker puts forward a single plea alleging infringement of Article 8(1)(b) of Regulation No 40/94. She submits that the General Court erred in considering that there was a similarity between the marks at issue and therefore misapplied that provision in concluding that there was a likelihood of confusion.

22 First, Ms Becker criticises the General Court for having based its assessment on the judgment in *Fusco v OHIM – Fusco International (ENZO FUSCO)*, according to which Italian consumers attribute greater distinctiveness to the surname than the forename in a trade mark. She observes in that respect that in a more recent judgment, of 12 July 2006, in Case T-97/05 *Rossi v OHIM – Marcorossi (MARCOROSS)*, paragraphs 46 and 47, the General Court stated that such a general rule did not automatically apply in every situation, as each case should be examined individually, and that the surname common to the two marks in that case was not sufficiently dominant in those marks to lead to a likelihood of confusion.

23 Second, the appellant submits that the General Court erroneously concluded from *Medion* that the component 'Becker' had an independent distinctive role in the composite mark so that the two marks at issue had to be regarded as similar. That judgment merely stated that it is not sufficient for a third party to add its company name to a registered trade mark in order to claim protection for its composite trade mark. It can by no means be construed as establishing a general rule that any element shared by two trade marks is to be regarded as distinctive even though it is not dominant.

24 Moreover, that judgment concerned trade marks which cannot be compared with those at issue in the present case. The present case concerns not the imitation of an earlier trade mark to which a company name has been added, but an amendment of the earlier mark by the addition of a first name in front of the surname. The relevant public will perceive the sign 'Barbara Becker' as the name of a woman, while the name 'Becker', which is very common, is not sufficiently individualised for there to be a conceptual similarity between the marks at issue. The General Court therefore misapplied Article 8(1)(b) of Regulation No 40/94 in stating that the component 'Barbara' is simply a first name, when the overall impression given by the trade mark applied for is decisively affected by the addition of that first name, in so far as it conveys a whole new conceptual meaning to the surname Becker.

25 OHIM concurs essentially with the grounds relied on by the appellant. It submits that the General Court failed to take into account all the factors relevant to the circumstances of the case in assessing the existence of a likelihood of confusion, wrongly considering the factual assessment made in *Fusco v OHIM – Fusco International (ENZO FUSCO)* to be a rule of law and automatically applying the case-law resulting from *Medion*.

26 The General Court thus failed, inter alia, to take into consideration the fact that the surname in the mark applied for is a very common German surname. It omitted, in paragraph 36 of the judgment under appeal,

to ascertain whether the fact that Ms Becker is a celebrity was capable of counteracting the aural and visual similarities between the signs at issue. Likewise, it erroneously held that the component ‘Becker’ played an independent distinctive role without analysing the impact of Ms Becker’s celebrity status on the perception of consumers.

27 At the hearing, OHIM added that the General Court had erred in law in inferring from its finding, that the second part of the sign had a dominant distinctive character as compared with the first, that it also played an independent distinctive role.

28 By contrast, Harman objects to the plea put forward by the appellant. It submits, first, that, contrary to the appellant’s assertion, it is apparent from the judgment under appeal that the General Court referred to Fusco v OHIM – Fusco International (ENZO FUSCO) as a guideline and not as a rule of law which applies to all situations. It further observes that that reference is not decisive in the reasoning followed by the General Court for the purposes of concluding that there was a likelihood of confusion.

29 Secondly, it agrees with the analysis carried out by the General Court as regards the independent distinctive role of the component ‘Becker’, which is consistent, in its view, with Medion.

#### **Findings of the Court**

30 Since the appellant has criticised the General Court for incorrectly applying Article 8(1)(b) of Regulation No 40/94, it should be recalled that, according to that provision, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered if, because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected.

31 In that regard, it is settled case-law that the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 (see Case C-334/05 P OHIM v Shaker [2007] ECR I-4529, paragraph 33, and judgment of 20 September 2007 in Case C-193/06 P Nestlé v OHIM, paragraph 32; and, to that effect, with respect to First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), [Case C-39/97 Canon](#) [1998] ECR I-5507, paragraph 29, [Case C-342/97 Lloyd Schuhfabrik Meyer](#) [1999] ECR I-3819, paragraph 17, and [Medion](#), paragraph 26).

32 The existence of a likelihood of confusion on the part of the public must be appreciated globally, taking into account all factors relevant to the circumstances of the case (see, to that effect, [Case C-251/95 SABEL](#) [1997] ECR I-6191, paragraph 22; [Lloyd Schuhfabrik Meyer](#), paragraph 18; [Medion](#), paragraph 27; [OHIM v Shaker](#), paragraph 34; and Nestlé v OHIM, paragraph 33).

33 It is also settled case-law that the global appreciation of the likelihood of confusion, in relation to the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the global appreciation of that likelihood of confusion. In this regard, the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (see, to that effect, [SABEL](#), paragraph 23; [Lloyd Schuhfabrik Meyer](#), paragraph 25; [Medion](#), paragraph 28; [OHIM v Shaker](#), paragraph 35; and Nestlé v OHIM, paragraph 34).

34 However, in paragraphs 30 and 31 of [Medion](#), the Court held that, beyond the usual case where the average consumer perceives a mark as a whole, it is quite possible that in a particular case an earlier mark used by a third party in a composite sign including the name of the company of the third party still has an independent distinctive role in the composite sign, without necessarily constituting the dominant element. In such a case, the overall impression produced by the composite sign may lead the public to believe that the goods or services at issue come, at the very least, from companies which are linked economically, in which case the likelihood of confusion must be held to be established.

35 In the present case, having repeated all of the rules set out in paragraphs 30 to 33 of this judgment, the General Court held essentially, in its assessment of the conceptual similarity of the marks at issue, first, that, as consumers in part of the European Union generally attribute greater distinctiveness to the surname than to the forename in word signs, the component ‘Becker’ in the mark applied for was likely to have attributed to it a stronger distinctive character than the component ‘Barbara’; second, that the fact that Ms Becker is famous in Germany had no effect on the similarity of the marks at issue since they refer to the same surname and the component ‘Barbara’ is merely a forename and, third, that the component ‘Becker’ retained an independent distinctive role in the composite mark because it would be perceived as a surname.

36 Although it is possible that, in a part of the European Union, surnames have, as a general rule, a more distinctive character than forenames, it is appropriate, however, to take account of factors specific to the case and, in particular, the fact that the surname concerned is unusual or, on the contrary, very common, which is likely to have an effect on that distinctive character. That is true of the surname ‘Becker’ which the Board of Appeal noted is common.

37 Account must also be taken of whether the person who requests that his first name and surname, taken together, be registered as a trade mark is well known, since that factor may obviously influence the perception of the mark by the relevant public.

38 Furthermore, it must be held that, in a composite mark, a surname does not retain an independent distinctive role in every case solely because it will be

perceived as a surname. The finding with respect to such a role may be based only on an examination of all the relevant factors of each case.

39 Moreover, as the Advocate General pointed out in essence, in point 59 of his Opinion, the grounds relied on by the General Court in order to conclude that the marks at issue are conceptually similar, if they were held to be consistent with Article 8(1)(b) of Regulation No 40/94, would result in acknowledging that any surname which constitutes an earlier mark could be effectively relied on to oppose registration of a mark composed of a first name and that surname, even though, for example, the surname was common or the addition of the first name would have an effect, from a conceptual point of view, on the perception by the relevant public of the composite mark.

40 It follows from all the foregoing that the General Court erred in law in basing its assessment of the conceptual similarity of the marks on general considerations taken from the case-law without analysing all the relevant factors specific to the case, in disregard of the requirement of an overall assessment of the likelihood of confusion, taking account of all factors relevant to the circumstances of the case, and based on the overall impression produced by the marks at issue.

41 It follows that the ground of appeal alleging infringement of Article 8(1)(b) of Regulation No 40/94 must be upheld and that, therefore, the judgment under appeal must be set aside and the case referred back to the General Court.

#### Costs

42 As the case is being referred back to the General Court, it is appropriate to reserve the costs relating to the present appeal proceedings.

On those grounds, the Court (Fourth Chamber) hereby:

1. Sets aside the judgment of the Court of First Instance of the European Communities of 2 December 2008 in Case T-212/07 *Harman International Industries v OHIM – Becker (Barbara Becker)*;
2. Refers the case back to the General Court of the European Union;
3. Reserves the costs.

---

#### Opinion of advocate general Cruz Villalón

delivered on 25 March 2010 (1)

Case C-51/09 P

Barbara Becker

(Appeals – Community trade mark – Word mark ‘Barbara Becker’ – Opposition by the proprietor of the Community word marks ‘BECKER’ and ‘BECKER ONLINE PRO’)

#### I – Introduction

1. Ms Barbara Becker has brought an appeal against the judgment of the Court of First Instance (First Chamber) of 2 December 2008 in *Harman International Industries v OHIM* (2) which annulled the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (‘OHIM’) (3) in which the appellant sought permission to register the Community mark ‘Barbara Becker’.

2. This appeal arises from the opposition proceedings successfully brought by Harman International Industries Inc. (‘Harman Int. Industries’) before the Opposition Division of OHIM, claiming that there was a likelihood of confusion between the mark Barbara Becker and the rights existing prior to that mark, namely, those derived from the Community mark ‘BECKER ONLINE PRO’ and the Community mark applied for ‘BECKER’, the application for which was filed prior to that of the mark at issue.

3. Although in their pleadings the appellant and OHIM based their arguments on the defective reasoning in the judgment under appeal, at the hearing the arguments focused on an error of law resulting specifically from an incorrect interpretation of the case-law.

#### II – Relevant law on trade marks

4. Since 13 April 2009 Community trade marks have been governed essentially by Regulation (EC) No 207/2009, (4) however, for the purposes of the resolution of this appeal the provisions of Regulation (EC) No 40/94 are applicable *ratione temporis*. (5)

5. Article 8(1)(b) of Regulation No 40/94 (the wording of which is, furthermore, reproduced in Article 8(1)(b) of Regulation No 207/2009) provides as follows:

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

...

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

6. In accordance with Article 8(2) ‘earlier trade marks’ means, *inter alia*, trade marks with a date of application for registration which is earlier than the date of application for registration of the Community trade mark.

#### III – Facts before the Court of First Instance and judgment under appeal

##### A – Facts and proceedings before OHIM

7. On 19 November 2002, the appellant, Barbara Becker, applied to OHIM for registration of the sign consisting of her own first name and surname as a Community word mark, pursuant to Article 25(1)(a) of Regulation No 40/94. (6)

8. The goods in respect of which registration of the mark was sought are covered by Class 9 of the Nice Agreement, (7) and correspond to the following description ‘Scientific, nautical, surveying, electric, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus for recording, transmission or reproduction of sound or images; magnetic and electronic data carriers, recording discs; recorded computer programs and software; automatic vending machines and mechanisms for coin operated apparatus; cash registers, calculating machines, data processing equipment and computers’.

9. On 24 June 2004 Harman Int. Industries filed an opposition before the Opposition Division against registration of that mark with respect to all the goods referred to in Class 9 of the Nice Agreement, pursuant to Article 8(1)(b) and (5) of Regulation No 40/94. The opposition was based on the Community word mark BECKER ONLINE PRO, (8) and on the application for a Community word mark BECKER. (9) The goods covered by the earlier marks also fell within Class 9 of the Nice Agreement, the fact that the goods concerned are identical or similar not being disputed by the parties. (10)

10. The Opposition Division, taking the view that there was a likelihood of confusion between the signs at issue, upheld Harman Int. Industry's opposition. (11) The Opposition Division held that the goods designated by the marks at issue were partially identical and partially similar and that the marks were similar overall, in so far as they were very similar visually and phonetically, and were conceptually identical, both referring to the same surname.

11. Barbara Becker brought an appeal before the First Board of Appeal of OHIM, which upheld the appeal and annulled the Opposition Division's decision. (12) The Board of Appeal held that the goods designated by the marks at issue were partially identical and partially similar, distinguishing, according to the nature and subject-matters of the goods, between those directed at the general public, those directed at professionals and those constituting an intermediate category of goods intended for both groups of persons. (13)

12. As regards the signs at issue, it should be noted that for reasons of procedural economy, the Board of Appeal considered only the earlier word mark BECKER and the mark Barbara Becker for which registration was sought. The Board of Appeal merely found that visually and phonetically there was some degree of similarity between the signs at issue, given that another component, the first name Barbara, was placed at the start of the trade mark applied for. (14)

13. However, the Board of Appeal held that conceptually the signs at issue were clearly distinct in Germany and the other countries of the European Union. The Board of Appeal considered that the surname Becker was not the dominant and distinctive element of the trade mark applied for, on account of the fact that the relevant public would perceive the mark in its entirety, that is to say Barbara Becker, rather than as a combination of the first name and surname. It also noted that Barbara Becker had 'acquired celebrity status' (15) in Germany, while the name Becker was generally recognised as an ordinary and widespread surname. Therefore, the Board of Appeal concluded that the conceptual differences between the signs at issue were substantial enough to rule out a likelihood of confusion. (16)

14. Furthermore, the Board of Appeal held that the condition laid down by the case-law for the application of Article 8(5) of Regulation No 40/94, which requires such a degree of similarity between the marks at issue that the relevant public establishes a link between them, had not been satisfied. (17)

## **B – Summary of the judgment under appeal**

15. On 15 June 2007, Harman Int. Industries brought an action before the Court of First Instance seeking annulment of the Board of Appeal's decision. In support of its action it relied on two pleas, based on an infringement of Article 8(1)(b) and Article 8(5) respectively of Regulation No 40/94. Given that the appeal does not deal with the second of those pleas, the arguments concerning the application of Article 8(5) of the regulation are not reproduced.

16. The Court of First Instance upheld the first plea for annulment, holding that the Board of Appeal had wrongly stated that the marks at issue were clearly distinct. Regardless of the greater or lesser differences between the two marks visually and phonetically, (18) the Court rejected the Board of Appeal's assessment of the relative importance of the component 'Becker' compared to the component 'Barbara' in the mark Barbara Becker based on the following reasoning. (19)

17. First, the Court referred to one of its own judgments in which it had ruled that, even if the perception of marks consisting of personal names can vary in the different countries in the Community, at least in Italy, consumers generally attribute greater distinctiveness to the surname than to the forename contained in trade marks. (20) It follows that the surname Becker is likely to have attributed to it a stronger distinctive character than the first name Barbara in the mark Barbara Becker.

18. Second, the Court rejected the argument that the fact that Barbara Becker enjoys celebrity status in Germany as the former wife of Boris Becker does not mean that, conceptually, the marks at issue are not similar, as both marks refer to the same surname Becker. In the Court's view, such similarity is reinforced by the fact that, in part of the Community, the component 'becker' is likely to be attributed a stronger distinctive character than the component 'barbara', which is simply a first name.

19. Third, the Court cited the judgment in Medion, (21) according to which a composite mark, created by the juxtaposition of a component and the sign of another earlier registered mark, may be regarded as similar to that other mark where the latter has an independent distinctive role in the composite mark, although it is not the dominant component. Applying that criterion to the present case, the Court of First Instance considered the component 'becker' to be a surname which is commonly used to describe a person, retaining an independent distinctive role in the mark Barbara Becker, which is sufficient for a finding of a likelihood of confusion.

20. Finally, given that the parties did not deny that the goods designated by both of the marks at issue are identical or similar, and also taking account of the visual and phonetic similarities of the marks Barbara Becker and BECKER, the Court of First Instance found that there was a likelihood of confusion between the marks, even though the goods were directed at a public with a relatively high level of attention. In that connection, the Court rejected OHIM's argument that a composite mark and another mark can be considered to be similar only if the common component constitutes

the dominant component in the overall impression created by the composite mark. It also rejected Barbara Becker's argument that the case-law on composite marks relating to the likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 is inapplicable.

#### **IV – Procedure before the Court of Justice and the forms of order sought**

21. The appeal brought by Barbara Becker was lodged at the Registry of the Court of Justice on 3 February 2009. In her appeal the appellant claims that the Court should:

- set aside paragraph 1 of the operative part of the judgment under appeal, by which it annulled the decision of the First Board of Appeal of 7 March 2007;
- set aside paragraph 3 of the operative part of the judgment under appeal, ordering OHIM to bear its own costs and to pay the costs incurred by Harman Int. Industries;
- order Harman Int. Industries to pay the costs.

22. The response of Harman Int. International was lodged at the Court Registry on 27 March 2009. It contends that the Court should:

- uphold the judgment under appeal in its entirety
- order the appellant to pay the costs incurred by Harman Int. Industries in all the proceedings before OHIM and the Community Courts.

23. OHIM lodged its response on 8 May 2009; (22) it contended that the Court should:

- set aside the judgment under appeal in its entirety;
- order Harman Int. Industries to pay the legal costs incurred by OHIM.

24. At the hearing on 11 February 2010, the representatives of Barbara Becker, Harman Int. Industries and OHIM presented their oral submissions and answered questions put by the members of the Chamber and the Advocate General.

#### **V – Analysis of the appeal**

##### **A – Definition of positions**

25. Barbara Becker relies on a single ground of appeal based on the infringement of Article 8(1)(b) of Regulation No 40/94. In particular, she claims that the judgment incorrectly applied to the present case a finding of the Court of First Instance in *Fusco* and also incorrectly applied to this case the judgment in *Medion*.

26. As regards the first submission, the appellant criticises the Court of First Instance for applying to this case a finding in the judgment in *Fusco*, to the effect that, at least in Italy, consumers generally attribute greater distinctiveness to the surname than to the forename contained in trade marks, disregarding a later ruling in which the Court of First Instance held that that rule cannot be applied automatically without taking account of the particularities of each case. (23) In the *Marcorossi* judgment, in spite of the fact that the two marks in that case contained the same Italian surname 'Rossi', it was not considered to be sufficiently dominant to give rise to a likelihood of confusion. (24)

27. By her second submission, Barbara Becker criticises the judgment under appeal for holding, by applying the judgment in *Medion*, that the component 'Becker' has an independent distinctive role, which led to the

finding that the marks at issue are similar. In that connection, Barbara Becker takes the view that the judgment in *Medion* merely intended to avoid a situation in which a third party could add the name of its undertaking, probably having a weak distinctive character, to a mark already registered and claim protection for that mark as a whole, to the detriment of the registered mark. In any event, the appellant submits that the judgment in *Medion* does not lay down a general rule according to which any component shared by two marks, even if it is not dominant in the composite mark, must be held to be distinctive for the purposes of that judgment, giving rise to a likelihood of confusion.

28. Lastly, the appellant mentions the differences in circumstances in which that judgment was delivered, since that case concerned the addition of the name of a company to a pre-existing mark, whereas the present case concerns a whole name, in which the surname happens to coincide with another registered mark. The appellant emphasises that the public will perceive the sign 'Barbara Becker' as a female person, and that they will not confuse it, without more, with the surname Becker, which is very common and therefore hardly appropriate for a finding that there is a conceptual similarity between the two marks at issue. In the appellant's view, the Court of First Instance has erred in calling the name 'Barbara' 'simply a first name', (25) since that name, added to the surname in question, has a decisive effect on the overall impression made by her mark, since it confers a completely new conceptual meaning on the surname 'Becker'

29. OHIM essentially supports the appellant's assertions, in particular the fact that the Court of First Instance failed to take account of all the specific characteristics of the case, such as the celebrity status of the ex-wife of a well-known tennis player, and regarding the errors in the application of the judgment in *Medion*. In short, like Barbara Becker, OHIM criticises the reasoning in the judgment under appeal, which it considers, for the reasons set out, contradictory and inadequate. However, at the hearing it concentrated its criticisms on an automatic application of the findings in the judgment in *Medion*.

30. Harman Int. Industries on the other hand, seeks to have the appeal dismissed on the ground that the analysis of the Court of First Instance is correct and asks the Court to uphold the judgment under appeal.

##### **B – Examination of the single ground of appeal**

###### **1. Admissibility of the appeal**

31. First of all, it must be recalled that, in the absence of a request by one of the parties to the proceedings, it is for the Court of Justice to examine of its own motion any question relating to the admissibility of an appeal or one of its grounds. (26) The Court has consistently held that, under the second subparagraph of Article 225(1) EC (now Article 256 TFEU) and Article 58 of the Statute of the Court of Justice, an appeal is to be limited to points of law and is to lie on grounds, in particular, of infringement of Community law by the Court of First Instance. (27)

32. In those circumstances, and in the light of the submissions of Harman Int. Industries at the hearing on the

alleged inadmissibility of its opponent's arguments, it is appropriate to address the admissibility of the single ground of this appeal on my own initiative.

33. That issue arises in particular from the criticisms of the appellant and OHIM with respect to the failure, in the judgment under appeal, to examine the mark applied for Barbara Becker with respect to the overall impression resulting from the combination of the first name and the surname, and the references to the fact that that surname is 'ordinary' or common. Such criticisms may have given rise to a certain suspicion of inadmissibility, since they are merely intended to obtain a re-evaluation of the facts, which the Court of Justice is not authorised to do when adjudicating in these proceedings. (28)

34. I do not believe that to be the case.

35. In the first place, as OHIM states, the appellant and OHIM do not challenge the result of that factual assessment but the reasoning in extenso of the judgment under appeal. Support for their submissions is to be found in settled case-law, according to which whether the statement of reasons is lacking or inadequate are questions of law relating to infringement of essential procedural requirements, within the meaning of Article 230 EC (now Article 263 TFEU) which may be relied on in an appeal, (29) or raised by the Court of its own motion as a matter of public policy. (30)

36. In the second place, as I pointed out earlier, at the hearing the criticisms on which the ground of appeal is based were more clearly defined. In any event as regards OHIM, it moves from criticism based on the defective reasoning to another more precisely defined argument concerning the error of law in the application of the judgment in *Medion*.

37. In conclusion, I take the view that it is appropriate to envisage the criticisms of the judgment under appeal as falling within the category of an error of law.

## **2. Substance of the appeal**

38. The criticisms expressed by the appellant in her statement in intervention, read together with OHIM's observations, principally raise questions as to the adequacy and the interpretation of the judgments (principally *Fusco* and *Medion*) relied on in the judgment under appeal in order to resolve the dispute, in essence from the context of the case. Given the background to the appeal, that is to say the likelihood of confusion and the basis of the reasoning, namely, the incorrect interpretation and application of Article 8(1)(b) of Regulation No 40/94, I will describe the legal and jurisprudential parameters for the resolution of this type of dispute.

39. In accordance with that precept, 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.

40. According to recital 7 in the preamble to Regulation No 40/94, the assessment of the likelihood of confusion depends on numerous elements and, in particular, on the recognition of the trade mark on the market, the association which can be made with the used or registered sign, the degree of similarity between the trade mark and the sign and between the goods or services identified.

41. As regards in particular the definition of the likelihood of confusion, the Court of Justice has consistently held that the risk that the public might believe that the goods or services in question come from the same undertaking or from economically-linked undertakings constitutes a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94. (31)

42. As regards how to determine the existence of a likelihood of confusion between two signs on the part of the public, the Court of Justice has declared that it must be assessed globally, taking into account all factors relevant to the circumstances of the case. (32)

43. Likewise, the Court has consistently held that the global assessment must include the visual, aural or conceptual similarity of the marks in question, adding that the global assessment must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. The Court of Justice has also stated that the perception of marks in the mind of the average consumer of the type of goods or services in question plays a decisive role in the global appreciation of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. (33)

44. In the present case neither the similarity of the goods nor the degree of similarity between the marks at issue from a visual or aural point of view is challenged. The dispute in this case involves conceptual similarity, which, in the present case, essentially requires an examination of the significance of the surname 'Becker' and the full name 'Barbara Becker', while endeavouring, in particular, to determine the influence exercised by the first name on the surname.

45. In order to proceed in that way it is essential, as stated in the case-law cited in point 43 of this Opinion, 'to take into account all factors relevant to the circumstances of the case'. In that context, the fact that the decision of the Board of Appeal of OHIM, which was the subject-matter of the dispute before the Court of First Instance, had upheld the conceptual difference between the marks at issue, basing its decision to a large extent on the weakness of the mark *BECKER*, because it is such a common surname, and on the popularity of Barbara Becker in Germany, is of particular relevance. (34)

46. However, the judgment under appeal, as will be seen later, takes a schematic approach, made up of previous rulings of the Court of First Instance (*Fusco*) and the Court of Justice (*Medion*) which are relatively isolated, in that the specific circumstances of the cases concerned had a particular if not decisive influence.

47. In paragraphs 34 to 43 the judgment under appeal considers and answers the question on conceptual simi-

larity. The finding of the existence of a likelihood of confusion is constructed essentially from paragraphs 35 and 36, based on Fusco, and 37 to 41, based on Medion.

48. First, the judgment under appeal concludes that the surname 'Becker' has 'a stronger distinctive character' than the component 'barbara' by relying on the judgment in Fusco, in which the Court of First Instance had assessed the likelihood of confusion between the marks 'Enzo Fusco' and 'Antonio Fusco' based on the finding, repeated here that, at least in Italy, consumers generally attribute greater distinctiveness to the surname than to the forename contained in trade marks. The extent of the appellant's popularity in Germany is irrelevant from a conceptual point of view (paragraphs 34 and 35).

49. However, it is difficult to accept such an automatic application of the judgment in Fusco to the present case, given the relevance attributed in that case to the circumstances of the case, with expressions such as 'in those circumstances', and 'in this case' or 'in the marks in question', in paragraph 54 thereof.

50. The importance of the circumstances of the case in Fusco is made plain in a judgment delivered shortly after by the same Chamber of the Court of First Instance in Marcorossi, which also concerned Italian surnames. After stating that the perception of signs composed of a name and surname may vary among the different countries of the European Community and that it could not be excluded that in certain countries consumers remember the surname better than the first name, the Court, expressly referring to the judgment in Fusco, held that 'however, that general rule ... should not be applied automatically, without taking account of the specific features of each case'.

51. Second, and here most of my reservations lie, the judgment under appeal relies on the judgment delivered by the Court of Justice in its answer to the question referred for a preliminary ruling in Medion.

52. It must be recalled that the likelihood of confusion raised in that preliminary question referred to the mark LIFE, registered by the German company Medion for leisure electronic devices, and with the name THOMSON LIFE used by the company Thomson to market some of its goods. In that case the goods designated by the two marks were identical at least in part, which is why Medion sought an order from the national court to prohibit Thomson from using that name to designate the identical goods. (35)

53. In those circumstances, the true meaning of the doctrine laid down in Medion is shown by the contrast between the wording of the question referred by the national court and the answer given by the Court of Justice. While the national court asks whether there 'is' a likelihood of confusion in the circumstances of the case, as just stated, the Court of Justice replies that 'there may be' such a likelihood of confusion in circumstances such as those described. The meaning of that form of expression used by the Court in its answer can be clearly seen in paragraph 30 of that judgment. In paragraph 30, after repeating the formula of the 'global appreciation' or the 'overall impression', bearing in

mind, in particular, their distinctive and dominant components (paragraph 28) in the examination of the likelihood of confusion, the Court of Justice allowed for the possibility which must be regarded as exceptional that an earlier mark used by a third party in a composite sign may retain an independent distinctive role in that composite sign, without necessarily constituting the dominant element.

54. By examining, in this case, the requirements for a possible likelihood of confusion, the Court of Justice, in paragraph 30 of the judgment, held that '[h]owever, beyond the usual case in which the average consumer perceives a mark as a whole, and notwithstanding that the overall impression may be dominated by one or more components of a composite mark, it is quite possible that in a particular case an earlier mark used by a third party in a composite sign still has an independent distinctive role in the composite sign, without necessarily constituting the dominant element'. (36)

55. In that way, the Court of Justice answered the national court with respect to the examination of the likelihood of confusion between the two signs, in cases in which a composite mark contains an earlier registered mark as one of its elements and obliged it to reject the so-called 'Prägetheorie' (theory of the impression conveyed). (37)

56. It is abundantly clear from all of the foregoing that, if the Court in the judgment under appeal wished to base its reasoning definitively on the doctrine in Medion in order to assess the likelihood of confusion between the marks at issue, it had to reason in terms of an exception, (38) that is to say, it had to explain why exceptionally in that case it was necessary to dispense with the general requirement with respect to an application for a composite trade mark to examine the overall impression, bearing in mind, in particular, its distinctive and dominant components. In other words, it should have dealt with, in that context, the possible conceptual similarity between 'barbara becker' and 'becker', because in this case it is not necessary for the component 'becker' to have a dominant position in the mark as a whole.

57. However, none of that is to be found in the reasoning in the judgment under appeal. Instead, there is scarcely any consideration to be found other than that (paragraph 37) that 'becker' is a surname, which is not in dispute, and which would be hard to refute. It is on that basis that the Court directly concludes that 'becker' and 'barbara becker' are similar (paragraph 38) and, therefore that the Board of Appeal had erred in law (paragraph 39).

58. It should be repeated that the judgment now under appeal makes no observations or assessment of the surname Becker in order to determine whether it retains an independent distinctive role, without necessarily constituting the dominant element in the mark as a whole, to which the judgment in Medion refers, whereas, in the circumstances of the case, it was essential to carry out an assessment of the distinctive character of the earlier mark BECKER. (39) Since the latter had enjoyed a high level of notoriety with the public, any other mark

which sought to designate identical goods would have more difficulties in appropriating that surname.

59. To sum up, based on a generalised understanding, in part incorrect, of the combined effects of the judgments in *Fusco* and *Medion*, the judgment under appeal may give rise to the belief, wrong in itself, that, in principle, any surname which coincides with an earlier mark may effectively prevent registration of a composite mark including a first name and the surname in question on the basis of a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94.

60. In other words, the result of adding a purported rule of principle derived from a previous judgment of the Court of First Instance to another from a judgment of the Court of Justice, appears to lead to a result which is almost inevitable, which is that the issue of conceptual similarity is practically superseded in as much as the Court failed to take account of all the facts of the case, as it was required to do in accordance with the case-law. Most particularly, it failed to examine the influence of the first name from a conceptual point of view of the mark *Barbara Becker* and the greater or lesser degree of distinctiveness of a mark composed of a single surname.

61. In the light of the foregoing, I consider that the judgment under appeal is vitiated by an error of law, and that the single ground of appeal should be upheld and the judgment set aside.

62. As the error detected may be remedied only by undertaking the assessments of fact referred to in the preceding paragraph, and leaving aside the fact that the judgment under appeal, given the circumstances, did not have to answer the second plea in law relied on by the appellant, the state of the proceedings does not, in my view, permit the Court of Justice to give final judgment in accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, and therefore I propose that the case should be referred back to the General Court in order for the latter to undertake those assessments and to give another ruling consistent with them.

#### **VI – Costs**

63. Since I propose that the case should be referred back to the General Court, the costs relating to the present appeal should be reserved.

#### **VII – Conclusion**

64. In view of the foregoing considerations, I propose that the Court should:

- (1) set aside in its entirety the judgment of the Court of First Instance of the European Communities (First Chamber) of 2 December 2008 in Case T-212/07 *Harman International Industries v OHIM*;
- (2) refer the case back to the General Court of the European Union;
- (3) reserve the costs.

4 – Council Regulation of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1) in force from that date.

5 – Council Regulation of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), amended by Council Regulation (EC) No 3288/94 of 22 December 1994 for the implementation of the agreements concluded in the framework of the Uruguay Round (OJ 1994 L 349, p. 83), and finally, by Council Regulation (EC) No 422/2004 of 19 February 2004 (OJ 2004 L 70, p. 1) ('Regulation No 40/94').

6 – The trade mark application was published in Community Trade Marks Bulletin No 13/2004 of 29 March 2004.

7 – 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.

8 – Registered under No 1. 823.228, of 1 July 2002.

9 – Registration of 2 November 2000, No 1.944.578, subsequently registered as a trade mark on 17 September 2004.

10 – See paragraphs 22 and 27 of the judgment under appeal.

11 – By decision of 15 February 2005.

12 – Decision cited in footnote No 3.

13 – Paragraph 29 of the decision.

14 – Paragraphs 34 and 35 of the decision.

15 – Paragraph 36 of the decision.

16 – Paragraphs 36 to 42 of the decision.

17 – Case C-408/01 *Adidas-Saloman and Adidas Benelux* [2003] ECR I-12537, paragraph 41.

18 – Paragraph 33 of the judgment under appeal.

19 – See paragraphs 34 to 38 of the judgment under appeal.

20 – Case T-185/03 *Fusco v OHIM– Fusco International (ENZO FUSCO)* [2005] ECR II-715, paragraph 54.

21 – Case C-120/04 [2005] ECR I-8551, paragraphs 30 and 37.

22 – Fax of 4 May.

23 – Judgment of 12 July 2006 in Case T-97/05 *Rossi v OHIM(Marcorossi)*, ('*Marcorossi*'), paragraph 45.

24 – *Marcorossi*, paragraphs 46 and 47.

25 – Paragraph 36 of the judgment under appeal.

26 – Case C-23/00 P *Council v Boehringer* [2002] ECR I-1873, paragraph 46, and judgment of 28 February 2008 in Case C-17/07 P *Neirinck v Commission*, paragraph 38.

27 – Case C-346/90 P *F. v Commission* [1992] ECR I-2691, paragraphs 6 and 7; Case C-53/92 P *Hilti v Commission* [1994] ECR I-667, paragraph 10; Case C-136/92 P *Commission v Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 47; and Case C-494/06 P *Commission v Italy and Wam* [2009] ECR I-0000, paragraph 29.

28 – Case C-104/00 P *DKV v OHIM(Companyline)* [2002] ECR I-7561, paragraphs 21 and 22, and the Opinion of Advocate General Ruiz-Jarabo Colomer, points 59 and 60; also the orders of 5 February 2004 in Case C-326/01 P *Telefon & Buch v OHIM* [2004] ECR

---

1 – Original language: Spanish

2 – Case T-212/07 [2008] ECR II-3431.

3 – Decision of 7 March 2007 (Case R 502/2006-1).

I-1371, paragraph 35, and Case C-150/02 P Stream-service v OHIM [2004] ECR I-1461, paragraph 30.

29 – Case C-283/90 Vidrányi v Commission [1991] ECR I-4339, paragraph 29; Case C-401/96 Somaco v Commission [1998] ECR I-2587, paragraph 53; Case C-446/00 P Cubero Vermurie v Commission [2001] ECR I-10315, paragraph 20; and Case C-3/06 P Groupe Danone v Commission [2007] ECR I-1331, paragraph 45.

30 – Case C-166/95 P Commission v Daffix [1997] ECR I-983, paragraph 24; Case C-367/95 P Commission v Sytraval and Brink's France [1998] ECR I-1719, paragraph 67; Case C-265/97 P VBA v Florimex and Others [2000] ECR I-2061, paragraph 114; Case C-413/06 P Bertelsmann and Sony Corporation of America v Impala [2008] ECR I-4951, paragraph 174; and Case C-89/08 Commission v Ireland and Others [2009] ECR I-0000, paragraph 34.

31 – See, to that effect, in relation to First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), Case C-342/97 Lloyd Schuhfabrik Meyer [1999] ECR I-3819, paragraph 17; Medion, paragraph 26; and, in relation to the Regulation on the Community trade mark, Case C-334/05 P OHIM v Shaker [2007] ECR I-4529, paragraph 33, and judgment of 20 September 2007 in Case C-193/06 P Nestlé v OHIM, paragraph 32.

32 – See, to that effect, Case C-251/95 SABEL [1997] ECR I-6191, paragraph 22; Lloyd Schuhfabrik Meyer, paragraph 18; Case C-425/98 Marca Mode [2000] ECR I-4861, paragraph 40; Medion, paragraph 27; Case C-206/04 P Mühlens v OHIM [2006] ECR I-2717, paragraph 18; OHIM v Shaker, paragraph 34; and Nestlé v OHIM, paragraph 33; see also the order of 28 April 2004 in Case C-3/03 Matratzen Concord v OHIM [2004] ECR I-3657, paragraph 28.

33 – See, to that effect, the judgments cited above in SABEL, paragraph 23; Lloyd Schuhfabrik Meyer, paragraph 25; Medion, paragraph 28; Mühlens v OHIM, paragraph 19 and OHIM v Shaker, paragraph 35; and the order in Matratzen Concord v OHIM, paragraph 29.

34 – Paragraphs 36 to 41 of the contested decision.

35 – See paragraphs 6 to 10 of the judgment.

36 – Emphasis added.

37 – According to that theory, in order to appreciate the similarity of the signs at issue, it is necessary to consider the overall impression conveyed by each of the two signs and to ascertain whether the common component characterises the composite mark to the extent that the other components are largely secondary to the overall impression (Medion, paragraph 12).

38 – F. Hacker, '§ 9 – Relative Eintragungshindernisse – Ähnlichkeit mehrgliedriger Marken', in Ströbele/Hacker, Markengesetz Kommentar, 9th Ed., Carl Heymanns, Colonia, 2009, p. 598.

39 – E. Keller/A. Glinke, 'Die "MEDION"-Entscheidung des EuGH: Neujustierung der verwechslungsrelevanten Markenähnlichkeit bei Kombinationsmarken', in Wettbewerb in Recht und Praxis, No 1/2006, pp. 21 et seq., p. 27.