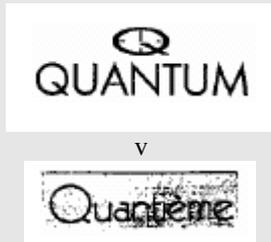


Court of Justice EU, 15 March 2007, T.I.M.E. v OHIM



## TRADE MARK LAW

Fact that earlier mark is only of weak distinctive character is not of overriding importance

- The approach of T.I.M.E. ART in that regard would have the effect of disregarding the factor of the similarity of the marks in favour of that based on the distinctive character of the earlier national mark, which would then be given undue importance. The result would be that where the earlier national mark is only of weak distinctive character a likelihood of confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the signs in question

(see, also, to that effect, order of 27 April 2006 in Case C-235/05 P L'Oréal v OHIM [2006] ECR I-57, paragraph 45). Such a result would not, however, be consistent with the very nature of the global appreciation which the competent authorities are required to undertake by virtue of Article 8(1)(b) of Regulation No 40/94.

Entitled to consider whether any of the marks has a clear and specific meaning

- In terms of that global appreciation, the Court of First Instance was entitled to consider that, in order for the conceptual difference between the QUANTUM and Quantième marks to be able to counteract to a large extent the similarities existing between them, it was necessary that at least one of the marks in question had, from the point of view of the relevant public, a clear and specific meaning, so that the public is capable of grasping it immediately

Marketing circumstances may not be taken into account since these may vary in time

- As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks.

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Court of Justice EU, 15 March 2007

(J. Klučka, A. Ó Caoimh (Rapporteur) and P. Lindh)  
JUDGMENT OF THE COURT (Seventh Chamber)

15 March 2007 (\*)

*(Appeal – Community trade mark – Regulation (EC) No 40/94 – Article 8(1)(b) – Figurative mark – Opposition by the proprietor of an earlier national trade mark – Likelihood of confusion)*

In Case C-171/06 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 31 March 2006,

T.I.M.E. ART Uluslararası Saat Ticareti ve dış Ticaret AŞ, established in Istanbul (Turkey), represented by M. Francetti and F. Jacobacci, avvocati,

applicant,

the other parties to the proceedings being:

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. Folliard-Monguiral and J. Novais Gonçalves, acting as Agents,

defendant at first instance,

Devinlec Développement Innovation Leclerc SA, established in Toulouse (France), represented by J.-P. Simon, avocat,

applicant at first instance,

THE COURT (Seventh Chamber),

composed of J. Klučka, President of the Chamber, A. Ó Caoimh (Rapporteur) and P. Lindh, Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

### Judgment

1. By its appeal, T.I.M.E. ART Uluslararası Saat Ticareti ve dış Ticaret AŞ ('T.I.M.E. ART') seeks to have set aside the judgment of the Court of First Instance of the European Communities of 12 January 2006 in Case T-147/03 Devinlec v OHIM –TIME ART (Quantum) [2006] ECR II-11 ('the judgment under appeal'), by which the Court of First Instance annulled the decision of the Third Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 30 January 2003 ('the contested decision'), rejecting the opposition brought by Devinlec Développement Innovation Leclerc SA ('Devinlec'), which relied on the earlier national trade mark Quantième, against the registration of the figurative mark QUANTUM applied for by T.I.M.E. ART.

### Legal framework

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

*'1. 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.*

2. For the purposes of paragraph 1, “earlier trade marks” means:

(a) trade marks of the following kinds with a date of application for registration which is earlier than the date of application for registration of the Community trade mark, ...:

...

(ii) trade marks registered in a Member State ...’

### **Background**

3. On 8 September 1997, T.I.M.E. ART applied to OHIM for the registration as a Community trade mark of the figurative sign QUANTUM for goods coming within Class 14 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 corresponding to the description: ‘watches, clocks, ...’.

4. On 9 November 1998, Devinlec filed a notice of opposition pursuant to Article 42 of Regulation No 40/94 against the trade mark application filed by T.I.M.E. ART, relying on the figurative mark Quantième registered in France to designate goods within Classes 14 and 18 (‘leather goods’) of the Nice Agreement.

5. Devinlec’s opposition, based on the relative ground for refusal in Article 8(1)(b) of Regulation No 40/94, was directed against all the goods covered by the application for registration.

6. That opposition was upheld by a decision of 30 November 2001 of the Opposition Division of OHIM, which held, inter alia, that the goods covered by the opposing marks were in part identical and in part similar and that the signs presented a sufficient degree of visual, phonetic and conceptual similarity, with the result that there was a likelihood of confusion on the part of the relevant public.

7. By the contested decision, the Third Board of Appeal of OHIM annulled that decision and rejected Devinlec’s opposition. It essentially considered that, notwithstanding the identity and the similarity of the goods covered by the opposing marks, it was necessary to take account of the circumstances in which the goods covered by the earlier mark were marketed and the fact that watches and watch straps bearing that mark were sold to the end consumer only in E. Leclerc shopping centres. In those circumstances, the Board of Appeal took the view that the visual and phonetic similarities between the opposing marks and their possible common allusion to the notion of quantity would not lead the average consumer, were he to see the mark applied for on ‘watches, clocks, watch straps, watch chains/bracelets, watch bands, cases for watches and for clocks’ in outlets other than E. Leclerc stores, to consider that the goods covered by the opposing marks originated from the same undertaking or from connected undertakings.

### **The proceedings before the Court of First Instance and the judgment under appeal**

8. By application lodged at the Registry of the Court of First Instance on 30 April 2003, Devinlec brought an action for the annulment of the contested decision. To that end, it raised two pleas in law, based on infringement of Rule 50 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1) and of Article 8(1)(b) o (b) of Regulation No 40/94 respectively.

9. With respect to the second plea, the Court of First Instance first of all considered the likelihood of confusion on the part of the average French consumer, which it held to be the relevant public. As regards goods such as those covered by the opposing marks, it stated, in paragraph 63 of the judgment under appeal, that these are not purchased regularly and are generally bought through a salesperson, and accordingly that the average consumer’s level of attention must be taken to be higher than usual, and, therefore, fairly high.

10. As regards a comparison of the goods in question, the Court of First Instance found, in paragraph 64 of the judgment under appeal, that these are in part identical and in part similar.

11. With respect to a comparison of the opposing marks, it held, in paragraphs 68 to 92 of the judgment, that the marks are visually and phonetically similar, but present conceptual differences. In the latter regard, it stated as follows in paragraphs 88 and 89 of the judgment under appeal:

*‘88 ... the meaning of the verbal elements of the signs will not be understood immediately by the average French consumer, in particular on account of the technical and specialised fields in which those terms are used. ...*

*89 ... it is also appropriate, in that respect, to attach some importance to the objective circumstances in which the marks may be present on the market ..., in particular the circumstances in which watches and clocks are marketed. Those goods are generally sold through a salesperson who, in particular, will lavish advice on the buyer and will probably explain the technical details and design of the goods in question. In those circumstances, it is possible for the average consumer to be aware of the meaning of the verbal element “quantième” in the earlier mark, which is particularly used in the watch and clock trade.’*

12. In those circumstances, the Court of First Instance held in paragraph 91 of the judgment that ‘whilst as a general rule the public concerned will not immediately attribute a precise meaning to the verbal elements of the marks, it may be able to ascribe a meaning to the verbal element of the earlier mark, having regard to the objective circumstances in which the goods protected by the marks are marketed. There is therefore some conceptual difference between the signs.’

13. The Court of First Instance next held, in paragraphs 96 to 112 of the judgment under appeal, that there is a likelihood of confusion between the earlier mark and

the mark for which registration was sought. It stated in that regard:

‘96 ... assessment of the likelihood of confusion implies some interdependence between the relevant factors, and in particular a similarity between the trade marks and between the goods or services covered. Accordingly, a lesser degree of similarity between these goods or services may be offset by a greater degree of similarity between the signs (see, by analogy, Case C-39/97 Canon [1998] ECR I-5507, paragraph 17 ...).

97 In this case, it is not disputed that the goods covered by the marks are in part identical and in part similar. It follows that, in order to remove the likelihood of confusion, that identity and similarity must be offset by a high degree of difference between the signs. As was noted above, the signs are visually and phonetically similar, whereas they present a certain conceptual difference.

98 It is true that, according to case-law, a conceptual difference between the marks at issue may be such as to counteract to a large extent the visual and aural similarities between those signs ([Case T-292/01 Phillips-Van Heusen v OHIM – Pash Textilvertrieb und Einzelhandel (BASS) [2003] ECR II-4335], paragraph 54). However, for there to be such a counteraction, at least one of the marks at issue must have, from the point of view of the relevant public, a clear and specific meaning so that the public is capable of grasping it immediately.

99 However, in this case, as the Court has observed, the relevant public cannot have an immediate grasp of the specific meaning either of the verbal element “quantième” of the earlier mark or of the verbal element “quantum” of the mark applied for.

100 In those circumstances, the conceptual difference between the signs is not such as to counteract to a large extent the visual and phonetic similarities found between those same signs.’

14. As regards the particular circumstances in which the goods covered by the earlier mark are marketed, the Court of First Instance held that, as a matter of principle, that criterion should not be considered when examining the likelihood of confusion.

15. In that respect, the Court of First Instance stated as follows:

‘103 According to case-law, in the global assessment of the likelihood of confusion the respective weight to be given to the visual, phonetic or conceptual aspects may vary on the basis of the objective circumstances in which the marks may be present on the market ... . It should be noted in that respect that the “usual” circumstances in which the goods covered by the marks are marketed must be taken as a benchmark, that is, those which it is usual to expect for the category of goods covered by the marks. In this case, for watches and watch bands or straps, those conditions generally include purchase through a salesperson, without the consumer having direct self-service access to those goods.

104 Consideration of the objective circumstances in which the goods covered by the marks are marketed is

fully justified. The examination of the likelihood of confusion which the OHIM authorities are called on to carry out is a prospective examination. Since the particular circumstances in which the goods covered by the marks are marketed may vary in time and depending on the wishes of the proprietors of the trade marks, the prospective analysis of the likelihood of confusion between two marks, which pursues an aim in the general interest, that is, the aim that the relevant public may not be exposed to the risk of being misled as to the commercial origin of the goods in question, cannot be dependent on the commercial intentions, whether carried out or not, and naturally subjective, of the trade mark proprietors.

105 On the other hand, the OHIM authorities are permitted to take into account the objective conditions under which the goods are marketed, in particular in order to determine the respective weight to be given to the visual, phonetic and conceptual aspects of the marks. ...’

16. In paragraph 108 of the judgment under appeal, the Court of First Instance accordingly held that, for all of those reasons, the Board of Appeal should not have discounted the existence of a likelihood of confusion between the opposing marks on the part of the average French consumer, while adding in paragraphs 109 and 110:

‘109 That assessment is not undermined by the argument put forward by OHIM and the intervener that the earlier mark can enjoy only limited protection because its distinctiveness is weak.

110 Although it is true that the more distinctive the earlier mark, the greater will be the likelihood of confusion (Case C-251/95 SABEL [1997] ECR I-6191, paragraph 24), in this case the identity and similarity of the goods covered by the respective marks, combined with the visual and phonetic similarity of the signs they consist of, without those similarities being offset to a large extent by the conceptual difference between those signs, suffice to create a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 on the part of the average French consumer. Since likelihood of confusion is the specific prerequisite for protection of the earlier mark, that protection applies irrespective of whether the earlier mark has only weak distinctiveness.’

17. In those circumstances, the Court of First Instance annulled the contested decision.

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

18. T.I.M.E. ART claims that the Court should, first, reverse the judgment under appeal and, secondly, declare the claims put forward by it in the proceedings at first instance to be well founded.

19. OHIM contends that the Court should dismiss the appeal as being in part inadmissible and in part unfounded and order T.I.M.E. ART to pay the costs.

20. Devinlec contends that the Court should dismiss the appeal, confirm the judgment under appeal and order T.I.M.E. ART to pay the costs.

#### **The appeal**

21. In support of its appeal, T.I.M.E. ART puts forward two pleas in law, alleging infringement of Article 7(1)(b) and Article 8(1)(b) of Regulation No 40/94.

22. However, since T.I.M.E. ART has provided no information to support its plea based on infringement of Article 7(1)(b) of that regulation and since that plea constitutes, in any event, a plea which was not put by one of the parties before the Court of First Instance, it must be rejected as inadmissible.

23. To allow a party to put forward for the first time before the Court of Justice, in an appeal, a plea in law which it has not raised before the Court of First Instance would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance.

24. In an appeal, the jurisdiction of the Court of Justice is confined to review of the findings of law on the pleas argued before the Court of First Instance (Case C-136/92 P Commission v Brazzelli Lualdi and Others [1994] ECR I-1981, paragraphs 57 to 59).

25. The second plea, alleging infringement of Article 8(1)(b) of Regulation No 40/94, is divided into three parts, based on failure by the Court of First Instance to take account of the weak distinctive character of the earlier mark in assessing the likelihood of confusion, on the importance to be given, when making that assessment, to the conceptual difference between the two opposing marks, and on contradictory reasoning in the judgment under appeal as regards the public targeted by the goods covered by the opposing marks and the manner in which they are marketed.

**The first part of the second plea, based on failure by the Court of First Instance to take account of the weak distinctive character of the earlier mark**

**Arguments of the parties**

26. T.I.M.E. ART claims that the distinctiveness of the earlier national mark, which formed the basis of the opposition, constitutes an essential element of the assessment of the likelihood of confusion. According to T.I.M.E. ART, the Court of First Instance failed to consider that aspect of the dispute and merely compared the two opposing marks from a visual, phonetic and conceptual perspective, as if the earlier national mark was a mark which enjoyed an average degree of distinctiveness.

27. However, T.I.M.E. ART considers that where that mark has, as in the present case, a low degree of distinctiveness, since the mark *Quantième* is merely descriptive of a particular function of watches, small differences in a subsequent mark are sufficient to prevent a likelihood of confusion. Contrary to well-established case-law, according to which 'the more distinctive the earlier mark, the greater will be the likelihood of confusion' (see *SABEL*, paragraph 24), the Court of First Instance did not, when assessing that likelihood, draw the appropriate conclusion from its finding that the mark *Quantième* is distinctive.

28. Devinlec submits that the Court did no more in *SABEL* than accept that a mark having a strong distinctive character is more exposed to a likelihood of

confusion and that examination of that likelihood should take account of that factor. However, where the similarities are considered to be sufficient to establish the existence of such a likelihood, that likelihood cannot be ruled out on the ground that a mark has a weaker distinctive character.

29. OHIM argues, like T.I.M.E. ART, that if, as is apparent from the Court's case-law, the more distinctive the earlier mark, the greater will be the likelihood of confusion, the opposite must also be accepted, that is to say, that the less distinctive the earlier mark, the lower the likelihood of confusion will be. Under reference to the judgment in *Canon*, and in particular to paragraph 24, OHIM contends that the distinctive character of the earlier mark must be assessed, not only where the similarity between the goods or services is debatable, but also where, it being established that the goods are identical or similar, it is necessary to determine the degree of similarity between the signs concerned in order to establish whether or not a likelihood of confusion exists. The degree of distinctiveness of the earlier mark is irrelevant only when the signs as well as the goods or services are identical.

30. OHIM submits that, in confirming, in paragraphs 109 and 110 of the judgment under appeal, that a likelihood of confusion existed notwithstanding the argument of OHIM and T.I.M.E. ART that the earlier mark can enjoy only limited protection because its distinctiveness is weak, the Court of First Instance implicitly, but clearly, acknowledged that that argument is well founded and, accordingly, that the distinctiveness of the earlier mark is weak.

**Findings of the Court**

31. It should be noted at the outset that, according to the seventh recital in the preamble to Regulation No 40/94, the appreciation 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, and the degree of similarity between the trade mark and the sign and between the goods or services identified.

32. Article 8(1)(b) of Regulation No 40/94 provides that, 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. The likelihood of confusion includes the likelihood of association with the earlier trade mark.

33. The existence of a likelihood of confusion on the part of the public must therefore be appreciated globally, taking into account all factors relevant to the circumstances of the case (see, to that effect, in respect of 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](#)), *SABEL*, paragraph 22, and [Case C-342/97 Lloyd Schuhfabrik](#)

[Meyer \[1999\]](#) ECR I-3819, paragraph 18, and, with respect to Article 8(1)(b) of Regulation No 40/94, order in [Case C-3/03 P Matratzen Concord v OHIM \[2004\] ECR I-3657](#), paragraph 29).

34. That 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 ([order in Matratzen Concord v OHIM](#), paragraph 29).

35. It also implies some interdependence between the relevant factors, and in particular a similarity between the trade marks and between the goods or services covered. Accordingly, a lesser degree of similarity between those goods or services may be offset by a greater degree of similarity between the marks, and vice versa. Accordingly, it is necessary to give an interpretation of the concept of similarity in relation to the likelihood of confusion, the appreciation of which depends, in particular, on the recognition of the trade mark on the market and the degree of similarity between the mark and the sign and between the goods or services identified (see [Canon](#), paragraph 17, and [Lloyd Schuhfabrik Meyer](#), paragraph 19).

36. In the present case, since the goods covered by the opposing marks are in part identical and in part similar, the Court of First Instance undertook, in paragraphs 65 to 92 of the judgment under appeal, a comparative analysis of the two marks from a visual, phonetic and conceptual perspective. It reached the conclusion, set out in paragraphs 92 and 97 of that judgment, that those marks are visually and phonetically similar, but present a certain conceptual difference.

37. The Court of First Instance held, in paragraph 110 of the judgment under appeal, that the identity and similarity of the goods covered by the respective marks, combined with the visual and phonetic similarity of the signs they consist of, without those similarities being offset to a large extent by the conceptual difference between those signs, suffice to create a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 on the part of the average French consumer.

38. Although T.I.M.E. ART complains that the Court of First Instance failed to take account of the distinctive character of the earlier national mark in its global appreciation of the likelihood of confusion, it must be held that it follows implicitly, but clearly, from paragraphs 109 and 110 of the judgment under appeal, and from the examination undertaken, in particular in paragraphs 75 and 89 of the judgment, of the components of that mark, that the Court of First Instance did in fact take account of the arguments of T.I.M.E. ART and of OHIM with regard to the relatively weak distinctive character of the mark.

39. Although T.I.M.E. ART also complains that the Court of First Instance held that a likelihood of confusion existed notwithstanding the relatively weak distinctive character of that mark, it must be pointed out, as is mentioned in paragraph 33 of this judgment,

that the existence of such a likelihood on the part of the public must be appreciated globally, taking into account all factors relevant to the circumstances of the case.

40. In the present case, the analysis by the Court of First Instance forms an integral part of the process designed to determine the overall impression given by the opposing marks and to make a global appreciation of the likelihood of confusion between them. Likewise, the Court of First Instance provided reasons for its findings in that regard to the requisite legal standard.

41. It is necessary, in any event, to reject T.I.M.E. ART's argument that the Court of First Instance infringed Article 8(1)(b) of Regulation No 40/94 in the present case by failing to treat the fact that the earlier national mark is only of weak distinctive character as being of overriding importance. The approach of T.I.M.E. ART in that regard would have the effect of disregarding the factor of the similarity of the marks in favour of that based on the distinctive character of the earlier national mark, which would then be given undue importance. The result would be that where the earlier national mark is only of weak distinctive character a likelihood of confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the signs in question (see, also, to that effect, order of 27 April 2006 in [Case C-235/05 P L'Oréal v OHIM \[2006\] ECR I-57](#), paragraph 45). Such a result would not, however, be consistent with the very nature of the global appreciation which the competent authorities are required to undertake by virtue of Article 8(1)(b) of Regulation No 40/94.

42. In those circumstances, the first part of the second plea must be rejected as being unfounded.

**The second part of the second plea, based on the importance to be given, when assessing the likelihood of confusion, to the conceptual difference between the opposing marks**

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

43. T.I.M.E. ART claims that the Court of First Instance erred in law in failing to treat the conceptual difference between the opposing marks as being of primary importance. Taking the case-law of the Court of First Instance as a basis (see, inter alia, [Case T-355/02 Mühlens v OHIM – Zirh International \(ZIRH\) \[2004\] ECR II-791](#)), it claims that that difference was sufficient to counteract the likelihood of confusion in question.

44. Devinlec argues that the Court of First Instance assessed the weight to be given to various factors – the identity or the similarity of the goods covered by the opposing marks, the visual and phonetic similarities between the marks and the conceptual difference between them – taking their interdependence into account, and finally concluded that there was a likelihood of confusion between the two marks, considering that the conceptual difference did not counteract the existing similarities. It did not make any error of law in that respect.

45. Devinlec contends that T.I.M.E. ART challenges the appraisal of the facts by the Court of First Instance and requests the Court of Justice to substitute its own assessment, although it is not open to T.I.M.E. ART to put forward arguments of that kind in an appeal.

46. OHIM contends that the Court of First Instance was fully entitled to hold that the conceptual difference between the opposing marks is not such as to counteract to a large extent the visual and phonetic similarities found between those marks. According to OHIM, the Court of First Instance did not disregard the impact of the relevant public's indirect understanding of the earlier mark, but merely held that this impact was not sufficient to outweigh to a large extent the elements of those marks which are similar.

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

47. T.I.M.E. ART's argument that the Court of First Instance wrongly failed to treat the conceptual difference between the two opposing marks as being of predominant importance cannot be accepted.

48. As is clear from paragraphs 36 and 37 of this judgment, in the process designed to make a global appreciation of the likelihood of confusion between the opposing marks, the Court of First Instance evaluated, as case-law requires, the various relevant factors, taking their interdependence into account, and found that there was a likelihood of confusion since the conceptual difference did not counteract the existing similarities.

49. In terms of that global appreciation, the Court of First Instance was entitled to consider that, in order for the conceptual difference between the QUANTUM and Quantième marks to be able to counteract to a large extent the similarities existing between them, it was necessary that at least one of the marks in question had, from the point of view of the relevant public, a clear and specific meaning, so that the public is capable of grasping it immediately (see, also, to that effect, [Case C-206/04 P Mühlers v OHIM \[2006\] ECR I-2717, paragraph 35](#)).

50. By holding in this case that, as a general rule, the relevant public would not immediately attribute a precise meaning to the verbal elements of the opposing marks, the Court of First Instance was carrying out an appraisal of a factual nature.

51. In accordance with Article 225(1) EC and the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal lies on a point of law only. The appraisal of the relevant facts and the assessment of the evidence relied on thus do not, save where the facts or evidence are distorted, which is not suggested to have arisen in the present case, constitute points of law subject, as such, to review by the Court of Justice on appeal (see, inter alia, order of 1 June 2006 in Case C-324/05 P Warenhandelsgesellschaft v OHIM [2006] ECR I-73, paragraph 28).

52. In those circumstances, the second part of the second plea must be rejected as being in part unfounded and in part inadmissible.

**The third part of the second plea, based on contradictory reasoning in the judgment under**

**appeal as regards the public targeted by the goods covered by the opposing marks and the manner in which they are marketed**

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

53. According to T.I.M.E. ART, the judgment under appeal is vitiated by contradictory reasoning. It argues that, first, the Court of First Instance recognised the professional nature of the sector of the public towards which the goods covered by the opposing marks are targeted, that is to say, professional retailers, and, as regards consumers in general, the high level of awareness amongst them when they buy the goods, thanks to the assistance of a salesperson. Secondly, the Court of First Instance acknowledged that the goods in question are marketed in an unusual way. By holding, despite those findings, that there was a likelihood of confusion on the part of consumers, the Court of First Instance erred in law, according to T.I.M.E. ART.

54. Devinlec contends that, contrary to what T.I.M.E. ART claims, the Court of First Instance took into account the objective conditions under which the goods were marketed, but did not accept the professional nature of the sector of the public targeted by the goods. The Court of First Instance held that those who buy a watch are final consumers, and not professionals, whose level of attention is fairly high, sometimes thanks to the assistance of a salesperson.

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

55. In so far as it complains that the Court of First Instance held that there was a likelihood of confusion between the opposing marks on the basis of contradictory reasoning as regards the manner in which the goods covered by the marks are marketed and the level of attention of the public targeted by those goods, T.I.M.E. ART relies on an incorrect reading of the judgment under appeal.

56. While it is true that the Court of First Instance acknowledged in paragraph 89 of the judgment under appeal that the goods in question are generally sold through a salesperson who lavishes certain advice on the buyer and that the level of attention of the relevant public is high, having regard to the objective circumstances in which the goods protected by the opposing marks are marketed, the fact remains that it also held that the meaning of the verbal elements of the marks will not be understood immediately by the average French consumer, in particular on account of the technical and specialised fields in which the terms 'quantum' and 'quantième' are used. In addition, it expressly ruled out, in paragraphs 102 to 107 of the judgment under appeal, the taking into account, when assessing the likelihood of confusion, of the particular circumstances in which the goods in question were marketed.

57. For the reasons already set out in paragraph 51 of this judgment, the finding by the Court of First Instance that the relevant public is not capable of grasping directly the meaning of the earlier national mark cannot, save where the facts and evidence put before the Court of First Instance have been distorted, be subject to review by the Court of Justice on appeal.

58. In addition, as OHIM rightly argued, contrary to what T.I.M.E ART claims, the Court of First Instance did not disregard the impact of the relevant public's indirect understanding of the earlier mark, but merely held that this impact was not sufficient to outweigh to a large extent the elements of the opposing marks which are visually and phonetically similar.

59. As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks.

60. Accordingly, the third part of the second plea must be rejected as being in part inadmissible and in part unfounded and the appeal must therefore be dismissed in its entirety.

**Costs**

61. Under Article 69(2) of the Rules of Procedure of the Court, applicable to appeal proceedings by virtue of Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since OHIM and Devinlec have applied for costs against T.I.M.E. ART and the latter has been unsuccessful, it must be ordered to pay the costs.

**On those grounds, the Court (Seventh Chamber) hereby:**

1. Dismisses the appeal;
  2. Orders T.I.M.E. ART Uluslararası Saat Ticareti ve dış Ticaret AŞ to pay the costs.
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