

Court of Justice EU, 21 February 2013, Seven for all Mankind v Seven



## TRADE MARK LAW

### Appeal dismissed

The mere fact that there are multiple trade mark registrations within the EU including the word ‘seven’ or number ‘7’ is not sufficient to establish the weak distinctive character of those marks.

- 48. Furthermore, the mere existence, even in high numbers, of marks which have that characteristic is not sufficient to establish the weak distinctive character of those marks.

The General Court correctly held that the word ‘seven’ in the contested mark was the dominant element, and that the presence of the words ‘for all mankind’ does not affect the visual, aural and conceptual similarity between the word element “seven” and the earlier figurative mark “SEVEN”.

- 108. In that regard, the General Court, while recognising the particular character of the additional words at issue, found that the presence of the word ‘seven’ at the beginning of the signs at issue overrides the additional words. Thus they were considered by the General Court as not likely to erase the impression created by the word ‘seven’ in the mind of the relevant public.
- 113. The General Court noted, at paragraphs 42 and 45 of the judgment under appeal, that those two particular aspects are not sufficient of themselves to dispel the phonetic similarity created by the element common to both marks, or to give the trade mark for which registration is sought a conceptual content that is sufficiently different from that of the earlier marks.

Likelihood of confusion is therefore assumed, since it is not disputed that the relevant goods are identical or highly similar.

- 114. Thus the mere recognition of the ‘remarkable’ and ‘philosophical’ aspects in that mark cannot preclude the conclusion that, owing to the presence of the word ‘seven’, there is an overall similarity between the signs at issue and, as a result, a likelihood of confusion between them.
- 115. It must be noted in this respect that, like the findings relating to the visual similarity between the

signs at issue, mentioned at paragraphs 101 to 104 of this judgment, the findings relating to the phonetic and conceptual aspects of those signs are based on an analysis of all relevant factors and are consistent with the assessments which the General Court must carry out, as pointed out at paragraph 70 of this judgment.

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### Court of Justice EU, 21 February 2013

(R. Silva de Lapuerta (Rapporteur), G. Arestis, J.-C. Bonichot, A. Arabadjiev and J.L. da Cruz Vilaça)  
JUDGMENT OF THE COURT (Second Chamber)  
21 February 2013 (\*)

*(Appeal – Community trade mark – Opposition proceedings – Earlier word mark – Element ‘SEVEN’ – Similarity of the signs – Likelihood of confusion – Relative ground for refusal)*

In Case C-655/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union,  
brought on 16 December 2011,

Seven for all mankind LLC, established in Vernon, California (United States), represented by A. Gautier-Sauvagnac and B. Guimberteau, avocats, appellant,  
the other parties to the proceedings being:

Seven SpA, established in Leini (Italy), represented by L. Trevisan, avvocato, applicant at first instance,  
Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by J. Crespo Carrillo, acting as Agent, defendant at first instance,  
THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur),  
President of the Chamber, G. Arestis, J.-C. Bonichot,  
A. Arabadjiev and J.L. da Cruz Vilaça, Judges,

Advocate General: P. Mengozzi,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 6 November 2012,

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

gives the following

#### Judgment

1. By its appeal, Seven for all mankind LLC (‘SAM’ or ‘the appellant’) asks the Court to set aside the judgment of the General Court of the European Union of 6 October 2011 in Case T-176/10 Seven v OHIM – Seven for all mankind (SEVEN FOR ALL MANKIND) (‘the judgment under appeal’), by which the General Court annulled the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (‘OHIM’ or ‘the Office’) of 28 January 2010 (Case R 1514/2008-2) relating to opposition proceedings between Seven SpA (‘Seven’) and SAM (‘the contested decision’).

#### Legal context

2. Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) was repealed and replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the

Community trade mark (OJ 2009 L 78, p. 1), which entered into force on 13 April 2009. Since the decision of the Second Board of Appeal of OHIM was delivered on 28 January 2010, these proceedings are governed by Regulation (EC) No 207/2009.

3. Article 8 of Regulation No 207/2009, entitled 'Relative grounds for refusal', provides:

*'1. Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:*

*(a) if it is identical with the earlier trade mark and the goods or services for which registration is applied for are identical with the goods or services for which the earlier trade mark is protected;*

*(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, taking account, where appropriate, of the priorities claimed in respect of those trade marks:*

*(i) Community trade marks;*

*(ii) trade marks registered in a Member State, ... ;*

*(iii) trade marks registered under international arrangements which have effect in a Member State;*

*...;*

*(b) applications for the trade marks referred to in subparagraph (a), subject to their registration;*

*(c) trade marks which, on the date of application for registration of the Community trade mark, or, where appropriate, of the priority claimed in respect of the application for registration of the Community trade mark, are well known in a Member State, ... .*

*...*

5. Furthermore, upon opposition by the proprietor of an earlier trade mark within the meaning of paragraph 2, the trade mark applied for shall not be registered where it is identical with, or similar to, the earlier trade mark and is to be registered for goods or services which are not similar to those for which the earlier trade mark is registered, where, in the case of an earlier Community trade mark, the trade mark has a reputation in the Community and, in the case of an earlier national trade mark, the trade mark has a reputation in the Member State concerned and where the use without due cause of the trade mark applied for would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.'

#### **Background to the dispute**

4. On 18 May 2005, SAM filed an application with OHIM for registration of the word sign 'SEVEN FOR ALL MANKIND' as a Community trade mark.

5. The goods in respect of which registration was sought are in Classes 14 and 18 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, for each of those classes, to the following description:

– Class 14: 'Jewellery, namely, jewellery made of precious metals and stones, bracelets, earrings, rings, necklaces, cufflinks, tie tacks, tie fasteners, pins, watches, watchbands, belt buckles of precious metals';

– Class 18: 'Bags, hand bags, travel bags, travelling sets (leather goods), suitcases, rucksacks, valises, beach bags, trunks, document cases, pouches, wallets, card cases, portfolios, purses not of precious metal, cases for keys (leather goods), vanity cases, umbrella covers'.

6. On 31 March 2006, Seven filed a notice of opposition pursuant to Article 42 of Regulation No 40/94, the provisions of which are reproduced in Article 41 of Regulation No 207/2009, to registration of the mark at issue in respect of some of the goods referred to at paragraph 5 of this judgment.

7. The opposition was based on the following earlier rights:

– Community registration No 591206 of the figurative mark designating:



– goods in Class 16 and corresponding to the following description:

'Pen boxes, pencil boxes, pen cases, small cases for pens, exercise books, notebooks, folders, pastels, pencils, pens, acrylic pens, diaries, magazines, newspapers; printed matter; book binding material, photographs; stationery; adhesive (glues) for stationery or household purposes; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not [included] in other classes); playing cards; printers' type; printing blocks';

– goods in Class 18 and corresponding to the following description:

'Knapsacks and rucksacks, small knapsacks and rucksacks; school satchels; bags; multipurpose big bags; sling bags for carrying infants; pouches; camping sacks, beach bags; travelling bags; bags for climbers; school bags; leather and imitation of leather, wallets, purses, briefcases, cheque-book covers, keycases of leather or imitation of leather, paper cases; hides; trunks and suitcases; umbrellas and walking sticks; whips, harness and saddlery';

– goods in Class 25 and corresponding to the following description:

'Woven and knitted clothing and underwear, boots, shoes, slippers, [sandals, belts and] headgear';

– Community trade mark registration No 3489234 of the figurative mark designating:



– goods in Class 16 and corresponding to the following description:

‘Paper, cardboard and goods made from these materials and not included in other classes; printed matter; newspapers; magazines, books; blank diaries; photographs, stationery, notebooks, memo boxes, pen cases, pencil cases, pens, pencils, document cases, passport holders; holders for cheque books, folders with elastic bands, ring binders for notebooks, covers for books and notebooks, bags of paper or plastic, desk folders; paper staplers; clips; paper cutters; calendars; calendar holders; photo holders; photo frames; bookbinding material, adhesives (adhesives for stationery or household purposes); artists’ materials; brushes; typing machines and office accessories (excluding furniture); instructional and teaching material (except apparatus); plastic materials for packing (not included in other classes); printing types; printing blocks’;

– goods in Class 18 and corresponding to the following description:

‘Goods made from leather and imitations of leather not included in other classes; knapsacks, rucksacks, school bags, bags, baby carriers, stroller bags, shopping bags, travelling bags and holdalls, sports bags and holdalls; handbags, bags for campers; bags for climbers; school satchels, portfolio bags, billfolds, purses not of precious metal; cases for keys, fanny packs, travelling bags, umbrellas and parasols; trunks, canes; whips, harness, saddlery; briefcases of plastic’;

– goods in Class 25 and corresponding to the following description:

‘Clothing (including underwear and beachwear), shoes, boots, slippers, sandals, belts; headgear’;

– the international registration No 731954 for the figurative mark



with effect in Germany and registered to designate the goods in the following classes:

– Class 3: ‘Perfumery, essential oils, cosmetics, hair lotions; soaps’;

– Class 9: ‘Glasses and glasses accessories, [glasses] cases; barometers, thermometers and [wall] and desk hydrometers; calculating machines; dataprocessing equipment and computers; compact discs, apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers; recording discs; computer programs; magnetic data carriers; photographic and optical apparatus; telephonic apparatus; electronic organisers; helmets, mouse pads (small mat for the computer mouse)’;

– Class 12: ‘Land vehicles, in particular bicycles, scooters, motorbikes and spare parts of them’;

– Class 14: ‘Watches, small clocks, wall clocks and their cases, chronometric instruments, imitation jewellery, fancy key rings’;

– Class 15: ‘Musical instruments’;

– Class 16: ‘Paper, cardboard and goods made from these materials, not included in other classes; printed matter; magazines; books, diaries, homework notebooks; photos; stationery; exercise books, notebooks, pen holders, pencil holders, pens, pencils, folders, passport cases, folders with elastic; coverage with rings [for] exercise books, coverage for books and exercise books, briefcases, bags of paper or plastic materials, desk blotters, paperweights, clips; paper knives, calendars, calendar holders, photo holders, book-binding materials, adhesive (juts for stationery or household purposes); artists’ materials; paint brushes; typewriters and office requisites (except furniture), instructional and teaching material (except apparatus); plastic materials [for] packaging (not included in other classes); playing cards; printers’ type; printing blocks; cheques folders’;

– Class 18: ‘Goods made from leather and imitations of leather not included in other classes; knapsacks, small knapsacks, school satchels, shopping bags, sling bags for carrying infants, bags, provisions bags, bags and big travelling bags, bags and big sport bags; hand bags, bags for campers; beach bags; bags for climbers; school satchels, billfolds, portfolio bags, purses not of precious metal; cases for keys, (fine leather goods), bum bags, suitcases, umbrellas and parasols; trunks, walking sticks; whips, harness and saddlery’;

– Class 20: ‘Sleeping bags for camping; camping mattress[es]; magazine racks’;

– Class 22: ‘Camping tents, bags, envelop[e]s, packaging envelop[e]s of textile material’;

– Class 25: ‘Clothing (including underwear and beachwear), shoes, boots, slippers, sandals, belts; headgear’;

– Class 28: ‘Games and playthings; gymnastic and [sports] articles not included in other classes; decorations for Christmas trees’.

8. The opposition concerned all of the goods forming the subject-matter of the earlier registrations and was directed against all of the goods covered by the application for registration.

9. The grounds relied on in support of the opposition were those referred to in Article 8(1)(a) and (b) and Article 8(5) of Regulation No 40/94, whose provisions are reproduced in Article 8(1)(a) and (b) and Article 8(5) of Regulation No 207/2009.

10. On 19 September 2008, the Opposition Division of OHIM upheld the opposition as regards ‘rucksacks’ in Class 18, finding, inter alia, that the earlier trade marks had acquired an average distinctive character on the Italian market in relation to those goods. As regards the other elements, the Opposition Division held that, having regard to the visual, aural and conceptual comparison of the signs at issue, there was only a low degree of similarity between the trade mark in respect of which registration was sought and the earlier registrations and concluded that there was no likelihood

of confusion. The opposition was therefore rejected as regards the other goods.

11. On 20 October 2008, Seven filed an appeal with OHIM against the Opposition Division's decision.

12. By the contested decision, the Second Board of Appeal of OHIM dismissed the appeal. The Board of Appeal took the view that the signs at issue displayed significant differences and that they were not similar overall. It found that the number 'seven', written in letters, possesses a very weak inherent distinctive character and that the public is not accustomed to perceiving numbers as an exclusive sign of an undertaking. It noted that the signs at issue were sufficiently different for the degree of similarity between them not to be likely to lead the relevant public to make a connection between the two signs. Consequently, the Board of Appeal, in the absence of similarity between those signs, found that any likelihood of confusion could be excluded, even where the goods were identical or similar.

13. In those circumstances, the Board of Appeal refrained from, first, determining whether the distinctive character or reputation of the earlier marks had been proven and, second, from examining the other grounds of opposition based on Article 8(5) of Regulation No 207/2009.

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

14. By application lodged at the Registry of the General Court on 15 April 2010, Seven brought an action seeking the annulment of the contested decision.

15. Seven put forward two pleas in law in support of its action, alleging (i) infringement of Article 8(1)(b) of Regulation No 207/2009 and (ii) infringement of Article 8(5) of that regulation.

16. Before the General Court, Seven claimed, inter alia, that the signs at issue were similar and that the Board of Appeal had erred in finding that there was no likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 207/2009. It also submitted that the Board of Appeal should have taken the reputation of the earlier marks into account.

17. On the other hand, SAM and OHIM argued before the General Court that, as the signs at issue were not similar, there was no likelihood of confusion, regardless of the reputation and the distinctive character of the earlier marks.

18. The General Court, at paragraph 10 of the judgment under appeal, found, as a preliminary point, that the proceedings related solely to the (other) goods in Classes 14 and 18, with the exception of 'rucksacks' since the opposition had been upheld for 'rucksacks'.

19. The General Court, at paragraph 23 of that judgment, noted that it was apparent from the Opposition Division's decision that the goods at issue were either identical or similar, and that that finding, which was not called into question in the contested decision, was not disputed by the parties before the General Court.

20. Therefore, the General Court examined whether the Board of Appeal was right to find that the signs at issue

were not similar. That Court assessed those signs visually, phonetically and conceptually.

21. The General Court, at paragraphs 33 and 34 of the judgment under appeal, noted that the fact that the word 'seven' is present in both marks is an important point of similarity, given the not insignificant part played by that element in the perception of each of the marks at issue. It held that the figurative elements of the earlier trade marks are limited to an unoriginal typeface and, because of their essentially ornamental function, are of lesser importance when compared with the word element 'seven', which attracts the attention of the relevant public to a greater extent and is more easily remembered by that public. The same is true, according to the General Court, of the typeface of earlier trade mark No 591206 and the numeral '7' placed at the beginning of that mark. Therefore, it found that the importance of the word element 'seven' in the overall impression created by the earlier trade marks could not be overlooked.

22. The General Court observed, at paragraph 37 of the judgment under appeal, that, for the purpose of assessing the inherent distinctive character of the word 'seven', the Board of Appeal should have carried out its analysis by reference to the goods at issue, in order to assess the capacity of that word to identify those goods as coming from a particular undertaking, and thus to distinguish them from those of other undertakings. Since it did not have any particular link with the goods at issue and was not commonly used in the sector concerned, the word 'seven' must, according to the General Court, be regarded as possessing an average degree of inherent distinctive character as regards the goods at issue.

23. At paragraph 38 of the judgment under appeal, the General Court noted that the fact that the word 'seven' may have only a very weak distinctive character does not affect the finding that that word is not insignificant in the overall impression produced by the earlier trade marks, since it is clear that that word is likely to attract consumers' attention and be remembered by them.

24. As regards the mark for which registration is sought, the General Court pointed out, at paragraphs 39 and 40 of the judgment under appeal, that the word 'seven' is at the beginning of the sign. According to it, the consumer will generally pay greater attention to the beginning of a word sign than to the end. The General Court added that the first part of a trade mark tends normally to have a greater visual and phonetic impact than the final part and, consequently, that that word attracts the attention of the relevant public more than the additional words 'for', 'all' and 'mankind'. Moreover, although the presence of those additional words in the mark applied for is not insignificant in the overall visual impression produced by it, in particular since the result is to give that mark a different structure and length from those of the earlier trade marks, it cannot, however, according to the General Court, obscure the visual similarity between the signs at issue resulting from the fact that the word element 'seven' in

the earlier trade marks is reproduced in full in the mark for which registration is sought.

25. As regards the figurative elements of the earlier trade marks, given their essentially ornamental function, the General Court noted, at paragraphs 41 and 42 of the judgment under appeal, that the fact that those elements are not reproduced in the mark for which registration is sought is not such as to dispel all visual similarity between the signs at issue. Therefore, it found that, although the earlier trade marks include figurative elements whilst the trade mark applied for is a word mark, and even though the additional word elements of that trade mark do not appear in the earlier trade marks, the presence of the common element 'seven' at the beginning of the marks at issue meant that a certain degree of visual similarity between those marks cannot be denied.

26. As to the phonetic aspect of the signs, the General Court, at paragraphs 43 to 46 of the judgment under appeal, noted that it cannot be disputed that there is some similarity between the word elements 'seven' and 'seven for all mankind' of the signs at issue since they share the word 'seven', which is pronounced identically in both cases. According to the General Court, the difference between those signs, owing to the presence in the mark for which registration is sought of the three additional words 'for', 'all' and 'mankind', although it produces a 'remarkable' series of words, is not sufficient of itself to dispel the phonetic similarity created by the element common to both marks, namely the word element 'seven', all the more so since the word element 'seven', at the beginning of the trade mark applied for, attracts the attention of the relevant public more. The General Court added that the fact that the figurative components are left out of account when comparing the phonetic aspects of the signs makes the similarities between the signs stand out more clearly than in the visual comparison.

27. The General Court therefore found, at paragraph 47 of the judgment under appeal, that the presence of the common word element 'seven' was sufficient in the present case for a finding that there is some phonetic similarity between the signs at issue.

28. As to the conceptual aspect of the signs, the General Court, at paragraph 48 of the judgment under appeal, took the view that the marks at issue are composed of words in the English language, namely the word element 'seven', corresponding to the numeral '7', and the expression 'for all mankind'. It pointed out that the expression 'for all mankind' could easily be perceived by the English-speaking section of the relevant public as indicating the public for whom the trade mark is intended, in the present case, the general public. In that context, the expression 'for all mankind' must, according to the General Court, be regarded as not very distinctive for the goods concerned and the conceptual scope of the mark for which registration is sought will therefore be mainly determined by the word 'seven', understood as being the main word to which the words 'for all mankind' apply. Therefore, the General Court found that there is some conceptual

similarity between the marks at issue, at the very least so far as the English-speaking section of the relevant public is concerned.

29. The General Court added, at paragraph 49 of the judgment under appeal, that, although the expression 'for all mankind' evokes an alleged 'philosophical concept', it does not however give the mark for which registration is sought a conceptual content that is so different from that of the earlier trade marks that it excludes any conceptual link between the marks at issue resulting from the appearance in both of the word element 'seven'; that is so even in the case of the English-speaking section of the relevant public. According to the General Court, the expression 'for all mankind' is, as regards the sector concerned, easily perceived by the relevant public as indicating the public for whom the goods in question are intended, and not as conveying an original and unusual message. The General Court concluded that there is some conceptual similarity between the marks at issue so far as the section of the relevant public having sufficient knowledge of English is concerned.

30. The General Court therefore took the view, at paragraphs 51 and 53 of the judgment under appeal, that there is a certain overall similarity between the marks at issue, in view of the presence, in the mark for which registration is sought, of the word element 'seven', which is not insignificant in the overall impression produced by the earlier trade marks. According to the General Court, the Board of Appeal made an error of assessment in not recognising that there is a certain degree of similarity between the signs at issue, since that fact influenced its examination of the likelihood of confusion.

31. The General Court, at paragraph 56 of the judgment under appeal, thus upheld the first plea of the action, alleging infringement of Article 8(1)(b) of Regulation No 207/2009, and the second plea, alleging infringement of Article 8(5) of that regulation. Accordingly, it annulled the Board of Appeal's decision.

#### **Procedure before the Court of Justice and the forms of order sought by the parties**

32. SAM claims that the Court should:

- set aside the judgment under appeal;
- confirm the contested decision, and
- order Seven to bear its own costs and to pay those incurred by the appellant in the present proceedings and in the proceedings before OHIM.

33. Seven contends that the Court should:

- dismiss the appeal and uphold the judgment under appeal, and
- in any event, order SAM to pay the costs incurred by Seven in the course of the present proceedings.

34. OHIM, by its cross-appeal, contends that the Court should:

- set aside the judgment under appeal in its entirety, and
- order Seven to pay the costs incurred by it.

#### **The appeal**

35. SAM raises two grounds of appeal in support of its appeal.

36. First, the appellant claims that the General Court committed a breach of procedure affecting its interests when assessing the distinctive character of the word 'seven'. Secondly, SAM submits that the General Court, in assessing the notion of similarity between the trade marks at issue, infringed Article 8(1)(b) of Regulation No 207/2009. The latter ground of appeal is divided into three parts.

**First ground of appeal: Breach of procedure  
Arguments of the parties**

37. SAM claims that the General Court came to the conclusion in paragraph 37 of the judgment under appeal without taking account of the arguments before it concerning the weak distinctive character of the word 'seven' for the goods at issue. Those arguments referred to the existence of numerous trade marks including the word 'seven' filed throughout the European Union

38. The appellant claims that the General Court did not, however, examine that aspect. It neither accepted nor rejected the arguments relating to it. Consequently, the General Court's assessment of the distinctive character of the word 'seven' is vitiated by a breach of procedure.

39. Seven submits that the alleged existence of numerous trade marks including the word 'seven' filed throughout the European Union is not relevant unless it is demonstrated that the word is descriptive of the goods at issue in Classes 16 and 18 or is a general word used to distinguish those goods. However, that is not the case here. It submits that the trade mark Seven is a mark with a reputation which, of itself, overcomes the alleged lack-of-distinctive character argument.

40. Seven states that even if the General Court did not sufficiently state reasons for its conclusion regarding the 'average degree of inherent' distinctive character of the word 'seven' – which is not the case – that did not affect its reasoning as to the visual similarity of the contested signs.

41. OHIM observes that the appellant had argued, before the General Court, that the word 'seven' had weak distinctive character for the goods at issue, pointing to the existence of a large number of marks filed throughout the European Union containing the word 'seven' or the numeral '7'. OHIM agrees with that assertion and concludes that, by not analysing that fact, the General Court committed a breach of procedure which affected the appellant's interests.

42. OHIM claims that the distinctive character of trade marks consisting only of a numeral is extremely weak and the addition of further elements, even if they are of a weak distinctive character in themselves, may be capable of dispelling any likelihood of confusion.

43. According to OHIM, the finding of the General Court at paragraph 37 of the judgment under appeal that the word 'seven' is not 'commonly used' in the sector concerned amounts to a distortion of the evidence, given that the evidence shows that the word

'seven' appears in more than 80 Community and national trade marks.

**Findings of the Court**

44. In order to respond to this ground of appeal, the Court notes that SAM, at paragraph 45 of its response lodged with the General Court, submitted that it is clear from a 'search' in the trade mark registers that there are numerous marks in the European Union containing the word 'seven' or the numeral '7'. Furthermore, in an earlier decision, a Board of Appeal of OHIM indicated that the Community trade mark database showed some 80 trade marks consisting of or beginning with the word 'seven'. 'More generally', OHIM had already indicated that 'it is common experience that numbers are frequently used', in particular on clothing items and accessories.

45. SAM thus alleges that the General Court did not take that argument into account and, therefore, committed a breach of procedure.

46. In that respect, it should be noted that the General Court found, at paragraph 38 of the judgment under appeal, that the fact that the word 'seven' may have only a very weak distinctive character does not affect the finding that that word is not insignificant in the overall impression produced by the earlier trade marks, since it is clear that that word is likely to attract consumers' attention and be remembered by them.

47. In those circumstances, even if, as the appellant claims, the General Court had committed a breach of procedure by not examining the arguments presented by SAM as to the existence of numerous marks registered in the European Union containing the word 'seven' or the numeral '7', that would not have had any bearing on the General Court's finding.

48. Furthermore, the mere existence, even in high numbers, of marks which have that characteristic is not sufficient to establish the weak distinctive character of those marks.

49. For that claim to be relevant to such a finding, it must be shown that there are significant similarities as regards not only the presence of the word 'seven' or the numeral '7' in the earlier marks but also the position, type-face, ornamental presentation, any special font of a particular letter of that word, and the shape of the numeral '7', as well as, if that be the case, the presence of verbal or figurative additional elements before or after that word or number. Furthermore, the marks at issue must refer to the same goods and services.

50. Consequently, even if the General Court had mentioned and examined the arguments set out at paragraph 43 of this judgment, it would not have been able to come to a different conclusion.

51. Therefore, the procedural irregularity alleged by SAM cannot lead to the setting aside of the judgment under appeal, as it is not established that, in the absence of that alleged irregularity, that judgment might have reached a different conclusion (see, to that effect, Joined Cases 209/78 to 215/78 and 218/78 Van Landewyck and Others v Commission [1980] ECR 3125, paragraph 47; Case C-142/87 Belgium v Commission [1990] ECR I-959, paragraph 48, and

**Case C-447/02 P KWS Saat v OHIM [2004] ECR I-10107, paragraphs 47 to 50).**

52. It follows that the first ground of appeal, alleging breach of procedure, must be rejected.

**Second ground of appeal: Infringement of Article 8(1)(b) of Regulation No 207/2009**

53. This ground of appeal being divided into three parts, the Court considers it appropriate to start by examining the first and third parts and then to examine the second part of that ground of appeal.

**The first and third parts of the second ground of appeal**

**– Arguments of the parties**

54. The first part of the second ground of appeal alleges that the General Court accorded excessive importance to the position of the common element ‘seven’ in the marks at issue.

55. SAM submits that the mere fact that the contested sign contains the word element ‘seven’, even if this word is at the beginning of the mark in respect of which registration is sought, does not necessarily create a similarity with the earlier trade marks. Even if it is true that the consumer pays more attention to the initial part of a trade mark, that argument – which is not true in all cases – is, in this case in particular, irrelevant.

56. According to SAM, the General Court was wrong, at paragraphs 39 and 45 of the judgment under appeal, to make a general finding which gave priority to an analysis of the signs at issue based on the elements with which they began.

57. Seven contends that the General Court did not state that, on account of the position of the word ‘seven’ at the beginning of the sign ‘seven for all mankind’, the public would disregard the elements ‘for all mankind’. Thus, the General Court ruled correctly in holding that the word ‘seven’ attracts the attention of the public more than the words ‘for all mankind’.

58. Seven takes the view that the General Court did not state that the word ‘seven’ had to be considered as dominant. The Court only stated that its role was not insignificant in the perception of each of the marks at issue.

59. OHIM takes the view that the General Court gave excessive importance to the position of the common element ‘seven’ situated at the beginning of the marks at issue.

60. It states that such an isolated examination is not in accordance with the law since that element should be considered in relation to the rest of the mark for which registration is sought.

61. The third part of the second ground of appeal alleges erroneous overall assessment of the mark for which registration is sought.

62. In that regard, SAM claims that the General Court erred in ruling that the similarity between the signs at issue was assessed taking into consideration only one of the elements of a composite mark and comparing it with another mark. SAM states that such a comparison must be made by examining the marks at issue, each considered as a whole.

63. SAM submits that the existence of a similarity between two marks does not presuppose that their common component is the dominant element within the overall impression created by the mark for which registration is sought. In order to assess the similarity of two trade marks it is necessary to consider each of the marks as a whole, which does not rule out the possibility that the overall impression created in the mind of the relevant public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components. However, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element.

64. Seven points out that the General Court made an overall comparison of the marks at issue and held that the (visual, phonetic and conceptual) similarities conferred by the presence of the word ‘seven’ in both of the signs at issue outweighed the differences deriving from the figurative elements of the earlier Seven marks and the words ‘for all mankind’.

65. Seven observes that the similarity between the two marks does not presuppose that their common element is the dominant element within the overall impression created by the mark for which registration is sought. It cannot, however, according to Seven, be denied that the word ‘seven’ dominates the additional elements ‘for all mankind’.

66. OHIM contends that the General Court erred in its assessment of the sign as a whole. It erred in law when concluding that the expression ‘for all mankind’ is not very distinctive for the goods concerned. That follows in particular from the fact that that expression is a ‘remarkable’ series of words that evokes a philosophical concept, conveying an original and unusual message.

67. OHIM submits that the conceptual scope of the mark for which registration is sought will not be dominated by the word ‘seven’, but by the expression ‘for all mankind’, which dispels the conceptual similarity and excludes any conceptual link between the marks at issue resulting from the appearance in both of the word element ‘seven’.

**– Findings of the Court**

68. In order to reply to the first and third parts of the second ground of appeal, the Court notes that those parts relate, on the one hand, to the importance attached by the General Court to the element ‘seven’ in the signs at issue and, on the other, to the General Court’s assessments as regards the overall impression produced by the mark for which registration is sought and which has a complex character.

69. Article 8(1)(b) of Regulation No 207/2009 provides that, upon opposition by the proprietor of an earlier trade mark, the trade mark for which registration is sought 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. Such a

likelihood of confusion includes the likelihood of association with an earlier trade mark.

70. It is apparent from settled case-law that the existence of a likelihood of confusion on the part of the public must be assessed globally, taking into account all factors relevant to the circumstances of the case (see [Case C-334/05 P OHIM v Shaker \[2007\] ECR I-4529, paragraph 34](#); [Case C-498/07 P Aceites del Sur-Coosur v Koipe \[2009\] ECR I-7371, paragraph 46](#), and [Case C-317/10 P Union Investment Privatfonds v UniCredito Italiano \[2011\] ECR I-0000, paragraph 45](#)).

71. The Court has also held that the global assessment of the likelihood of confusion, in relation to the visual, phonetic 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. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (see [Case C-120/04 Medion \[2005\] ECR I-8551, paragraph 28](#); [Case C-206/04 P Mülhens v OHIM \[2006\] ECR I-2717, paragraph 19](#), and [OHIM v Shaker, paragraph 35](#)).

72. In the context of consideration of the likelihood of confusion, assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components (see [Medion, paragraph 29](#), and [OHIM v Shaker, paragraph 41](#)). Nevertheless, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element (see [OHIM v Shaker, paragraph 42](#)).

73. As regards the first part of the second ground of appeal, which relates to the importance that the General Court attached to the element ‘seven’ in its examination of the signs at issue, it must be noted that the General Court, at paragraph 33 of the judgment under appeal, stated that the presence of that element in both marks is an important point of similarity.

74. The General Court also underlined, at paragraph 34 of that judgment, the relevant public’s increased attention to the word element at the beginning of a mark, given that it is more easily remembered by that public.

75. Furthermore, it stated, at paragraph 39 of the judgment under appeal, that that similarity is increased by the fact that the word ‘seven’ is at the beginning of each of the signs at issue and that the first part of a trade mark tends to have a greater impact on the consumer than the final part.

76. Finally, the General Court specified, in particular at paragraphs 40, 42, 45 and 48 to 50 of the judgment under appeal, the considerations which led it to the conclusion that the presence of the expression ‘for all mankind’ in the mark for which registration is sought is not sufficient of itself to dispel the phonetic similarity created by the element common to the two marks at issue.

77. Consequently, first, it must be held that the General Court did not, contrary to what SAM claims, merely make a general finding attributing a dominant character to the elements at the beginning of a word mark, but examined the sign for which registration is sought as a whole. Consequently, it did not commit the error in law alleged by the applicant.

78. Second, even if the findings noted at paragraphs 73 to 75 of this judgment relate to the impression created by a particular element of a mark on the relevant public, and that impression is subjective, they are findings of a factual nature.

79. However, it follows from the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, second, to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them (see [Case C-551/03 P General Motors v Commission \[2006\] ECR I-3173, paragraph 51](#), and [Case C-352/09 P ThyssenKrupp Nirosta v Commission \[2011\] ECR I-0000, paragraph 179](#)).

80. The Court has also stated that the appraisal of the facts by the General Court does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (see [Case C-397/03 P Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission \[2006\] ECR I-4429, paragraph 85](#), and [ThyssenKrupp Nirosta v Commission, paragraph 180](#)).

81. No distortion of the facts or of the evidence relating to the assessments carried out by the General Court as to the importance of the word ‘seven’ in the marks at issue has been alleged by the applicant.

82. Consequently, those assessments cannot be reviewed by the Court of Justice in the context of the present appeal.

83. It follows that the first part of the second ground of appeal must be rejected.

84. As regards the third part of the second ground of appeal, it must be noted that it relates, as the appellant states, to an alleged lack of assessment by the General Court of the consumer’s overall perception of the mark for which registration is sought.

85. In order to respond to that argument, the Court notes that the determination of distinctive character, or



lack of distinctive character, of the various elements of a sign, their importance in the overall impression given by the sign as well as the finding of conceptual similarity in relation to another sign involves a weighing up of those criteria which entails an analysis of a factual nature (see, to that effect, Case C-327/11 P United States Polo Association v OHIM [2012] ECR I-0000, paragraphs 59 and 61).

86. The Court has also held that the global assessment of that impression implies some interdependence between the factors taken into account (see, to that effect, judgment of 17 April 2008 in Case C-108/07 P Ferrero Deutschland v OHIM (not published in the ECR), paragraph 45).

87. As regards this case and the conceptual aspect of the mark for which registration is sought, the General Court found, at paragraph 48 of the judgment under appeal, that the expression ‘for all mankind’ must be regarded as having a low degree of distinctiveness for the goods concerned and that the conceptual scope of the trade mark applied for will therefore be mainly determined by the word ‘seven’, understood as being the main word to which the other words apply. The General Court concluded, at paragraph 48, that there is some conceptual similarity between the marks at issue, at the very least so far as the Englishspeaking section of the relevant public is concerned.

88. It is on the basis of those considerations that the General Court found, at paragraph 49 of the judgment under appeal, that the additional words ‘for all mankind’ are not sufficient to exclude the conceptual similarity between the signs at issue and, thus, the overall perception that the word ‘seven’ overrides the other elements of the mark for which registration is sought.

89. It is necessary to add that the General Court completed its assessments of the overall perception of the marks at issue by analysing the linguistic dimension of the mark for which registration is sought, that is to say the understanding which the consumer of the goods at issue has of English vocabulary (see paragraphs 49 and 50 of the judgment under appeal).

90. In those circumstances, the General Court found, at paragraph 51 of the judgment under appeal, that there is a certain overall similarity between the marks at issue, in view of the presence, in the mark in respect of which registration is sought, of the element ‘seven’, reiterating the finding made at paragraph 33 of that judgment that the role of that element is not insignificant in the overall impression produced by the earlier trade marks.

91. In so doing, the General Court assessed the signs at issue as a whole, taking into account all relevant factors in accordance with the case-law mentioned at paragraph 70 of this judgment.

92. In the light of that thorough and comprehensive examination by the General Court, the third part of the second ground of appeal, alleging lack of assessment by the General Court of the consumer’s overall perception of the mark for which registration is sought, must be rejected.

## **The second part of the second ground of appeal**

### **– Arguments of the parties**

93. SAM claims that the conclusion of the General Court, at paragraph 42 of the judgment under appeal, that the presence of the common element ‘seven’ at the beginning of the marks at issue created a certain similarity between the earlier trade marks and the mark for which registration is sought is in contradiction with the statement of the General Court at paragraphs 39 and 40 of that judgment as regards the impression given by the additional words in the signs at issue.

94. SAM also maintains that it follows from the findings of the General Court at paragraphs 45 and 49 of the judgment under appeal that the elements ‘for all mankind’ are, phonetically, a ‘remarkable’ series of words and, conceptually, evoke a ‘philosophical’ concept. By finding that the marks at issue are similar, despite the recognised importance of the words ‘for all mankind’, the General Court contradicts itself and does not draw the appropriate conclusions from its own arguments.

95. Seven takes the view that the General Court was correct to find that the words ‘for all mankind’ – albeit not insignificant in the overall visual impression given by the mark for which registration is sought – cannot obscure the visual similarity or dispel the phonetic similarity created by the common word ‘seven’. The General Court assessed and compared the visual impression given by the marks at issue, correctly deciding that the common element ‘seven’ prevailed over the differences between the marks.

96. According to Seven, the General Court, without contradicting itself, assessed whether the expression ‘seven for all mankind’ could have a conceptual meaning capable of distinguishing that mark from the earlier marks containing the word ‘seven’ and came to the conclusion that this was not the case.

97. OHIM claims that the General Court, at paragraphs 45 and 49 of the judgment under appeal, admitted the ‘remarkable’ and ‘philosophical’ character of the expression ‘for all mankind’. However, the General Court concluded, at paragraph 48 of that judgment, that the expression ‘for all mankind’ must be regarded as not very distinctive for the goods concerned since it will easily be perceived by the relevant public as indicating the public for whom the goods in question are intended and not as conveying an ‘original and unusual’ message.

98. OHIM concludes that the General Court contradicted itself in the abovementioned statements.

### **– Findings of the Court**

99. It is apparent from the arguments in support of the second part of the second ground of appeal that SAM alleges that inconsistencies of the General Court vitiate the grounds of the judgment under appeal on two points.

100. The appellant thus refers to the General Court’s assessments concerning, on the one hand, the visual similarity between the signs at issue and, on the other, the phonetic and conceptual similarities between them.

101. As regards the appellant's first argument, it should be noted that the General Court, at paragraph 42 of the judgment under appeal, noted that despite the presence of additional word elements in the mark for which registration is sought the presence of the common element 'seven' at the beginning of the marks at issue means that it cannot be denied that there is a certain degree of visual similarity between those marks.

102. The General Court, at paragraph 39 of the judgment under appeal, underlined the fact that the visual perception of a mark and the consumer's attention will generally focus on the beginning of a word sign more than on the end of it. The General Court also stated, at paragraph 39, that the first part of a trade mark tends to have a greater impact than the final part and that, therefore, the word at the beginning of the mark attracts the attention of the relevant public more than the additional words.

103. The General Court continued this reasoning at paragraph 40 of the judgment under appeal, admitting that the presence of additional words in the mark for which registration is sought is not insignificant in the overall visual impression produced by that mark and that the mark has a different structure and length from those of the earlier trade marks.

104. Having made that observation and taking into account the specifics of this case, the General Court none the less found, at paragraph 40, that the additional words cannot obscure the visual similarity between the signs at issue.

105. However, it should be noted that those findings are not vitiated by any contradiction.

106. Indeed, the General Court weighed the various relevant factors, as it was required to do under the case-law referred to at paragraph 70 of this judgment.

107. In so doing, the General Court is called upon in particular to identify all of the characteristics of the marks at issue and to weigh them in order to establish whether or not there is a certain degree of similarity between the signs at issue.

108. In that regard, the General Court, while recognising the particular character of the additional words at issue, found that the presence of the word 'seven' at the beginning of the signs at issue overrides the additional words. Thus they were considered by the General Court as not likely to erase the impression created by the word 'seven' in the mind of the relevant public.

109. In those circumstances, the General Court cannot be criticised for having found visual similarity between the signs at issue, but acknowledging the presence of an original and unusual element in the mark for which registration is sought.

110. The first argument alleging contradiction in the grounds of the judgment is therefore unfounded.

111. As regards the appellant's second argument, which relates to the General Court's assessment of the phonetic and conceptual aspects of the mark for which registration is sought, it must be noted that the General Court, at paragraphs 45 and 49 of the judgment under

appeal, found that there is some phonetic and conceptual similarity between the marks at issue.

112. While it is true that, in the course of the consideration of those two aspects, the General Court indicated that the words 'for all mankind' constitute a 'remarkable' series of words and that those words assume a 'philosophical' concept, the fact remains that those considerations were regarded by the General Court as relating to secondary aspects.

113. The General Court noted, at paragraphs 42 and 45 of the judgment under appeal, that those two particular aspects are not sufficient of themselves to dispel the phonetic similarity created by the element common to both marks, or to give the trade mark for which registration is sought a conceptual content that is sufficiently different from that of the earlier marks.

114. Thus the mere recognition of the 'remarkable' and 'philosophical' aspects in that mark cannot preclude the conclusion that, owing to the presence of the word 'seven', there is an overall similarity between the signs at issue and, as a result, a likelihood of confusion between them.

115. It must be noted in this respect that, like the findings relating to the visual similarity between the signs at issue, mentioned at paragraphs 101 to 104 of this judgment, the findings relating to the phonetic and conceptual aspects of those signs are based on an analysis of all relevant factors and are consistent with the assessments which the General Court must carry out, as pointed out at paragraph 70 of this judgment.

116. The identification of all those factors, including those which are not in accordance with the final assessment adopted, is indeed a part of that analysis. It follows that the fact of stating particular factors that are not in line with that assessment, in the course of an overall balancing, does not indicate a contradiction in the statement of reasons.

117. Accordingly, the reasoning followed by the General Court as regards the conceptual and phonetic similarities between the marks at issue is not vitiated by a contradiction.

118. In the light of the foregoing, no inconsistency can be found in the General Court's statement of reasons as regards its assessment of the two elements mentioned at paragraph 100 of this judgment.

119. The second part of the second ground of appeal must, therefore, be rejected as unfounded.

120. It follows that the second ground of appeal must be rejected in its entirety.

121. In the light of all of the foregoing, the appeal must be dismissed.

#### **Costs**

122. In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, which applies to the procedure on appeal by virtue of the first paragraph of Article 184 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Seven has applied for costs to be awarded against SAM only, and as the latter has been

unsuccessful, SAM must be ordered to bear its own costs and to pay those incurred by Seven. Accordingly, OHIM must bear its own costs.

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

1. Dismisses the appeal;
2. Orders Seven for all mankind LLC to bear its own costs and to pay those incurred by Seven SpA;
3. Orders the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) to bear its own costs. [Signatures]

\* Language of the case: English.

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