

## JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

5 February 2015 (\*)

(Community trade mark — Opposition proceedings — Application for Community word mark BULLDOG — Earlier international and national word marks BULL and RED BULL — Relative grounds for refusal — Likelihood of confusion — Identical nature of the goods — Similarity of the signs — Conceptual similarity — Article 8(1)(b) of Regulation (EC) No 207/2009 — Article 8(5) of Regulation No 207/2009)

In Case T-78/13,

**Red Bull GmbH**, established in Fuschl am See (Austria), represented initially by A. Renck, T. Heitmann, lawyers, and I. Fowler, Solicitor, and subsequently by A. Renck and I. Fowler,

applicant,

v

**Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)**, represented initially by F. Mattina, then by P. Bullock and A. Schifko, acting as Agents, then by D. Walicka and finally by A. Schifko,

defendant,

the other party to the proceedings before the Board of Appeal of OHIM being

**Sun Mark Ltd**, established in Middlesex (United Kingdom),

ACTION brought against the decision of the Second Board of Appeal of OHIM of 16 November 2012 (Case R 107/2012-2), relating to opposition proceedings between Red Bull GmbH and Sun Mark Ltd,

THE GENERAL COURT (Eighth Chamber),

composed of D. Gratsias, President, M. Kancheva and C. Wetter (Rapporteur), Judges,

Registrar: J. Weychert, administrator

having regard to the application lodged at the Court Registry on 7 February 2013,

having regard to the response lodged at the Court Registry on 22 May 2013,

having regard to the change in the composition of the Chambers of the General Court,

further to the hearing on 6 November 2014,

gives the following

**Judgment**

## Background to the dispute

- 1 On 1 July 2010, Sun Mark Ltd filed an application for registration of a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) under Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).
- 2 The trade mark for which registration was sought is the word sign BULLDOG.
- 3 The goods in respect of which registration was sought come within Classes 32 and 33 for the purpose 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.
- 4 Community trade mark application No 9215567 was published in *Community Trade Marks Bulletin* No 170/2010 of 10 September 2010.
- 5 On 12 November 2010, Sun Mark Ltd requested OHIM to restrict the list of goods by removing those in Class 33.
- 6 On 15 November 2010, Sun Mark Ltd applied to OHIM to remove ‘beers’, identified as such, from the list of goods in Class 32.
- 7 By letters of 22 and 25 November 2010, OHIM took account of those requests for limitation, stating that the list of goods in Class 32 covered by the trade mark application now read as follows: ‘mineral and aerated waters; energy drinks; isotonic drinks; (non-alcoholic) aerated drinks (and beers); fruit-flavoured aerated drinks; fruit drinks and fruit juices; non-alcoholic drinks’.
- 8 On 3 December 2010, the applicant, Red Bull GmbH (‘Red Bull’), filed a notice of opposition, pursuant to Article 41 of Regulation No 207/2009, against registration of the mark applied for.
- 9 The opposition was based on, inter alia, the following earlier marks:
  - the international word mark BULL, registered on 15 July 2005 under number 867085, having effect within the territory of the European Union, for goods in Class 32, and corresponding to the following description: ‘non-alcoholic drinks, including soft drinks, energy drinks, whey beverages and isotonic (hypertonic and hypotonic) drinks (for use by sportspeople and adapted to their needs); non-alcoholic malt beverages; mineral and aerated waters; fruit drinks and fruit juices; syrups, essences and other preparations for making beverages, including effervescent tablets (sherbets) and powders for non-alcoholic drinks and cocktails’;
  - the Austrian word mark BULL, registered on 29 August 2008 under number 246682 for the same goods as those covered by the international word mark BULL described above, it being made clear that ‘powders for drinks’ must be understood as being ‘effervescent powders for drinks’;
  - the Austrian word mark RED BULL, registered on 15 January 2008 under number 242873, for, inter alia, (i) the same goods as those covered by the Austrian word mark BULL described above, and (ii) goods in Class 33 corresponding to the following description: ‘alcoholic drinks (except beer); hot and mixed alcoholic drinks, including alcoholic energy drinks, mulled wine and mixed alcoholic drinks containing milk; alcoholic malt beverages, malt liquor; wines, spirits and liqueurs; alcoholic preparations for making beverages; spirit or wine based cocktails or aperitifs; beverages containing wine’;

- the international word mark RED BULL, registered on 19 March 2008 under number 961854, having effect within the territory of the Member States of the European Union, with the exception of Croatia, Malta, Austria and the United Kingdom, for, inter alia, the same goods in Class 32 as those covered by the international and national word marks described above;
  - the international word mark RED BULL, registered on 19 March 2008 under number 972114, having effect within the territory of the Member States of the European Union, with the exception of Croatia, Malta, Austria and the United Kingdom, for, inter alia, the same goods in Class 33 as those covered by the Austrian word mark RED BULL described above.
- 10 The grounds relied on in support of the opposition were those referred to in Article 8(1)(b) and (5) of Regulation No 207/2009.
- 11 On 17 November 2011, the Opposition Division upheld the opposition in its entirety and ordered Sun Mark to pay the costs.
- 12 On 13 January 2012, Sun Mark filed a notice of appeal with OHIM, pursuant to Articles 58 to 64 of Regulation No 207/2009, against the decision of the Opposition Division.
- 13 By decision of 16 November 2012 ('the contested decision'), the Second Board of Appeal of OHIM upheld the appeal, annulled the decision of the Opposition Division and ordered Red Bull to pay the appeal fee of EUR 800, which had been paid by Sun Mark. In particular, the Board of Appeal found, as the Opposition Division had, that the goods covered by the trade mark application and those covered by the earlier word marks were identical, but, as regards the comparison with the earlier word marks BULL, the signs at issue had a fairly low degree of visual and phonetic similarities and were conceptually different, and as regards the comparison with the earlier word marks RED BULL, they had a low degree of visual and phonetic similarity and were conceptually different. Thus, the Board of Appeal found that the mark applied for and the earlier marks could not be regarded as similar overall because of their significant conceptual differences and that, consequently, there was no likelihood of confusion for the purposes of Article 8(1)(b) of Regulation No 207/2009. The Board of Appeal also found that, because the marks at issue were different overall, one of the conditions laid down in Article 8(5) of Regulation No 207/2009 that must be satisfied if a proprietor of an earlier trade mark is to be entitled to rely on that provision against a Community trade mark application had not been satisfied, and that that was sufficient for Red Bull's claims grounded on that provision to be rejected.

### **Forms of order sought**

- 14 Red Bull claims that the Court should:
- annul the contested decision;
  - order OHIM and Sun Mark to pay the costs.
- 15 OHIM contends that the Court should:
- dismiss the action;
  - order Red Bull to pay the costs.

### **Law**

- 16 In support of its application for annulment of the contested decision, Red Bull puts forward two pleas in law alleging, first, infringement of Article 8(1)(b) of Regulation No 207/2009 and, second, infringement of Article 8(5) of that regulation. It is necessary to examine each one of them in turn.

*Infringement of Article 8(1)(b) of Regulation No 207/2009*

- 17 By its first plea, Red Bull alleges infringement of Article 8(1)(b) of Regulation No 207/2009. In Red Bull's view, the Board of Appeal was wrong to conclude that there was no likelihood of confusion between the mark applied for and the earlier word marks BULL. It states that the same applies to the likelihood of confusion between the mark applied for and the earlier word marks RED BULL, but 'for reasons of procedural economy', it intends to limit the scope of the first plea to the Board of Appeal's assessment of the likelihood of confusion between the mark applied for and the earlier word marks BULL. When questioned on this point at the hearing, Red Bull confirmed that limitation, which was duly noted in the minutes of the hearing.
- 18 It is therefore in the light of that restriction that the Court will examine whether, by making that assessment, the Board of Appeal infringed Article 8(1)(b) of Regulation No 207/2009. At the outset, it must be inferred from this that the decision of the Swiss Federal Administrative Court of 28 April 2014 (B-2766/2013), placed on the file and relating to the likelihood of confusion between the word mark BULLDOG and the earlier word mark RED BULL, although constituting an admissible piece of evidence as it is purely illustrative in nature, can have no bearing on the present case, for the likelihood of confusion must be assessed only between the mark applied for and the earlier word marks BULL.
- 19 The first plea is divided into two parts, Red Bull contending, first, that the Board of Appeal incorrectly assessed the visual, phonetic, conceptual and overall similarities of the signs at issue, by granting, in particular, too much importance to the alleged conceptual differences between those signs and, second, that the Board of Appeal also erred in assessing the likelihood of confusion between the marks at issue.
- 20 According to Article 8(1)(b) of Regulation No 207/2009, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for may not be registered if, because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected. The likelihood of confusion includes the likelihood of association with the earlier trade mark.
- 21 According to settled case-law, the risk that the public may believe that the goods or services in question come from the same undertaking or from economically-linked undertakings constitutes a likelihood of confusion. According to that same line of case-law, the likelihood of confusion must be assessed globally, according to the relevant public's perception of the signs and the goods or services in question, and taking into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs and that of the goods or services designated (see judgment of 9 July 2003 in *Laboratorios RTB v OHIM — Giorgio Beverley Hills (GIORGIO BEVERLEY HILLS)*, T-162/01, EU:T:2003:199, paragraphs 30 to 33 and the case-law cited).
- 22 For the purposes of applying Article 8(1)(b) of Regulation No 207/2009, a likelihood of confusion presupposes both that the marks at issue are identical or similar and that the goods or services which they cover are identical or similar. Those conditions are cumulative (see judgment of 22 January 2009 in *Commercy v OHIM — easyGroup IP Licensing (easyHotel)*, T-316/07, EU:T:2009:14, paragraph 42 and the case-law cited).

### The relevant public

- 23 According to the case-law, in the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of goods concerned, who is reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see judgment of 13 February 2007 in *Mundipharma v OHIM — Altana Pharma (RESPICUR)*, T-256/04, EU:T:2007:46, paragraph 42 and the case-law cited).
- 24 In paragraph 23 of the contested decision, the Board of Appeal correctly pointed out, first, that some of the earlier word marks were protected in Austria and others in some of the Member States of the European Union or across the entire European Union. Given the limitation of the first plea indicated in paragraph 17 above, the relevant public is, on the one hand, that to be found in Austria (Austrian word mark BULL) and, on the other, that to be found in the European Union (international word mark BULL). Next, for the goods covered by the marks at issue, which are everyday consumer goods, the Board of Appeal was also correct in finding that the relevant public was the general public, which is deemed to be reasonably well informed, reasonably observant and circumspect (judgment of 22 June 1999 in *Lloyd Schuhfabrik Meyer*, C-342/97, EU:C:1999:323, paragraph 26). Finally, concerning the perception of the marks at issue by consumers, the Board of Appeal was entitled to distinguish, within the relevant public, between the English-speaking public and the non-English-speaking public (see, to that effect, judgment of 30 April 2014 in *Beyond Retro v OHIM — S&K Garments (BEYOND VINTAGE)*, T-170/12, EU:T:2014:238, paragraph 25).

### The comparison of the goods

- 25 As the Board of Appeal rightly pointed out in paragraph 27 of the contested decision, the goods covered by the marks at issue are identical, a conclusion which has not, after all, been contested by the parties to the dispute.

### The comparison of the signs

- 26 The signs at issue are word marks, the earlier word marks being composed of the single word 'bull', while the mark applied for is composed of the word 'bulldog'.
- 27 According to the case-law, two marks are similar where, from the point of view of the relevant public, they are at least partially identical as regards one or more relevant aspects (judgments of 26 January 2006 in *Volkswagen v OHIM — Nacional Motor (Variant)*, T-317/03, EU:T:2006:27, paragraph 46, and of 9 September 2011 in *Ergo Versicherungsgruppe v OHIM — DeguDent (ERGO)*, T-382/09, EU:T:2011:454, paragraph 42).
- 28 The global assessment of the likelihood of confusion, in relation to the visual, phonetic or conceptual similarity of the signs at issue, must be based on the overall impression given by the signs, 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 overall assessment of that likelihood of confusion. In that regard, the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (see judgment of 12 June 2007 in *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 35 and the case-law cited).

#### – Regarding the visual comparison

- 29 Red Bull disputes the Board of Appeal's finding that there is only a fairly low degree of visual

similarity between the two signs. It considers that the Board of Appeal's assessment of the visual similarity of the signs at issue is not in line with the case-law, because it did not take account of the fact that the consumer in general paid more attention to the first part of a mark. Those first parts are identical, the mark applied for BULLDOG containing the earlier word marks BULL in full. The Board of Appeal ought therefore to have found that there was an average, rather than a low degree of similarity, the fact that the mark applied for was also written as one word being immaterial in that regard.

30 OHIM disputes Red Bull's arguments, stating, regarding the visual comparison of the signs at issue, that even though both contain the word 'bull', the mark applied for contains seven letters, while the earlier word marks contain four. OHIM contends that Red Bull's premiss that consumers concentrate more on the beginning of a mark does not always hold true, in particular where, as in the present case, the signs at issue are relatively short, and disputes the relevance of the case-law cited by Red Bull in that regard.

31 In the present case, it should be noted that the beginning of the two signs at issue contains four identical letters, namely 'b', 'u', 'l' and 'l'. The consumer will generally pay greater attention to the beginning of a word sign than to the end. The first part of a trade mark tends normally to have a greater visual and phonetic impact than the final part (see, to that effect, judgments of 7 September 2006 in *Meric v OHIM — Arbora & Ausonia (PAM-PIM'S BABY-PROP)*, T-133/05, EU:T:2006:247, paragraph 51, and of 3 September 2010 in *Companhia Muller de Bebidas v OHIM — Missiato Industria e Comercio (61 A NOSSA ALEGRIA)*, T-472/08, EU:T:2010:347, paragraph 62), even if that argument does not hold in all cases (see judgment of 27 February 2014, *Advance Magazine Publishers v OHIM — López Cabré (TEEN VOGUE)*, T-37/12, EU:T:2014:96, paragraph 70 and the case-law cited).

32 In this instance, in the case of relatively short word signs, it must be held that the fact that the first four letters, constituting all the letters making up the earlier word marks and the majority of those forming the mark applied for (four out of seven), is sufficient for the Board of Appeal's characterisation of the signs as 'similar to a rather low degree' to be dismissed. Red Bull is therefore correct in claiming that OHIM erred in its assessment in that regard.

33 On the other hand, given that, according to case-law, a difference consisting in a single consonant can sometimes prevent the finding of a high degree of visual similarity between two relatively short word signs (see, to that effect, judgments of 22 June 2004 in *Ruiz-Picasso and Others v OHIM — DaimlerChrysler (PICARO)*, T-185/02, EU:T:2004:189, paragraph 54, and of 16 January 2008 in *Inter-Ikea v OHIM–Waibel (idea)*, T-112/06, EU:T:2008:10, paragraph 54), it must be pointed out that the presence of the three additional letters in the mark applied for ('d', 'o' and 'g') prevents the signs at issue being considered to have a high degree of similarity.

34 It must therefore be concluded that there is only an average visual similarity between the signs at issue.

– With regard to the phonetic comparison

35 Red Bull strongly reiterates, in the context of the phonetic comparison of the signs, the argument that the first part of the mark is predominant, because that part is pronounced by the consumer and not merely observed. It disputes the argument that the word 'dog' gives a different rhyme and rhythm to the mark applied for, the products covered by the marks in question generally being consumed in noisy places, where the ends of words may not be heard. In its view, as regards the phonetic comparison, there is, therefore, a strong degree of similarity or, at least, an average degree of similarity, and not, as the Board of Appeal wrongly found, a rather low degree of similarity.

- 36 With regard to the phonetic comparison of the signs at issue, OHIM claims that Red Bull fails to take account of their pronunciation as a whole, such pronunciation highlighting the fact that the last syllable ‘dog’, which has a hard sound, differentiates those signs sufficiently for it to be concluded that there is a fairly low degree of similarity.
- 37 As was stated in paragraph 31 above, it must be held, in the circumstances of the present case, that the relevant public will place greater importance on the common first part of the signs at issue, namely, the syllable ‘bull’, which constitutes the entirety of the earlier word marks and phonetic half of the mark applied for, the latter consisting of two syllables.
- 38 For the same reasons as those set out when reviewing the legality of the contested decision with regard to the visual comparison of the signs at issue, the Court therefore rules that the Board of Appeal was wrong to hold that those signs had a fairly low degree of similarity.
- 39 Red Bull’s argument is not, however, to be accepted, that the second syllable of the mark applied for, ‘dog’, would be more weakly perceived by the relevant public as a result of its pronunciation made in noisy places where the products at issue would usually be consumed. While it is true that they are served in bars, nightclubs and other particularly noisy places, it should be noted that they are also available in many other places, such as retail stores and large commercial centres, Red Bull having admitted, when questioned on that point at the hearing, that half of its sales were made in bars and clubs and half in supermarkets and retail stores.
- 40 It follows that the syllable ‘dog’, the pronunciation of which is clear and produces a hard sound, as the Board of Appeal rightly pointed out, constitutes a feature so distinguishing the signs at issue that they cannot be regarded as having a high degree of similarity, but rather an average degree of similarity once more.
- As regards the conceptual comparison
- 41 Red Bull rejects the reasoning of the Board of Appeal regarding the conceptual comparison of the signs at issue. It submits that it is not possible merely to accept the assertion that the animals are different, the case-law stating that conceptual similarity exists where the marks in question contain an identical word, in the present case ‘bull’; thus, the signs at issue both refer to the term ‘bull’ or, at least, an aggressive animal. Moreover, since the bulldog was originally a dog trained to fight bulls, there exists a conceptual link between the two animals.
- 42 As regards the conceptual comparison of the signs at issue, OHIM distinguishes, in relation to the understanding of the word ‘bull’, the English-speaking section of the relevant public, which, through the use of that term, will identify a male bovine animal, from its non-English-speaking component, for which it may have no meaning. It considers, as regards the understanding of the word ‘bulldog’, that the Board of Appeal was right to find that that term is understood throughout the European Union, either because it is found as such in a number of languages spoken in the territory of the European Union, starting of course with English, or because there are similar equivalents to it in other languages. OHIM states that Red Bull did not challenge that analysis of the Board of Appeal, and it cannot be accepted that there is a certain conceptual similarity between the signs at issue due to the aggressiveness that is common to both animals described by the marks at issue.
- 43 It should be noted, at the outset, that, in view of the definition of the relevant public correctly adopted by the Board of Appeal and recalled in paragraph 24 above, the vast majority of that public is not English-speaking. It is therefore necessary to determine whether the signs at issue are nevertheless likely to be understood by the general, non-English-speaking public, failing which,

according to the case-law, the Court must conclude that the conceptual comparison can have no influence on the assessment of the similarity of the signs at issue (see, to that effect, judgments of 16 September 2013 in *Gitana v OHIM — Teddy (GITANA)*, T-569/11, EU:T:2013:462, paragraph 67 and the case-law cited, and of 27 February 2014 in *Advance Magazine Publishers v OHIM — Nanso Group (TEEN VOGUE)*, T-509/12, EU:T:2014:89, paragraph 45).

- 44 Sun Mark argued before the Board of Appeal that the word ‘bull’ could be understood by the relevant public, first, because it was an intelligible word for ‘a considerable number’ of non-English-speaking consumers and, second, because the translation of the English term into several official languages of the Union is very similar, namely, ‘Bulle’ in German, the language of the country in which the earlier national word mark was protected, ‘bullis’ in Latvian and ‘bul’ in Dutch.
- 45 That argument is not convincing, since the relevant public is that of the European Union as a whole. The word ‘bull’ is not one of the words that could be considered as forming part of basic English vocabulary, which will therefore be understood by a large part of that general non-English-speaking public who would have sufficient knowledge of English, who would understand, for example, the word ‘water’ (see judgment of 28 November 2013, *Vitaminaqua v OHIM — Energy Brands (vitaminaqua)*, T-410/12, EU:T:2013:615, paragraph 58 and the case-law cited).
- 46 The fact that, in the three official languages of the European Union cited by the Board of Appeal in support of its reasoning, the translation of the word ‘bull’ is similar to the English word is not sufficient to permit that reasoning to be extrapolated to the relevant public in its entirety. Indeed, in Spanish and Italian, the word ‘bull’ is rendered as ‘toro’. It is rendered as ‘tavros’ in Greek, ‘touro’ in Portuguese and ‘tjur’ in Swedish. In French it is ‘taureau’; the word which is pronounced like the word ‘bull’ is ‘boule’, one of the meanings of which corresponds, in English, to ‘ball’.
- 47 Consequently, the fact that that term cannot have a specific meaning for a large part of the relevant public renders nugatory any comparison with the other word sign ‘bulldog’, notwithstanding the fact that the English word ‘bulldog’, as the Board of Appeal pointed out, correctly this time, has passed into nearly all official EU languages almost unchanged (see paragraph 35 of the contested decision).
- 48 The parties are therefore wrong to rely on the judgment in *PICARO*, paragraph 33 above (EU:T:2008:10), to reach the conclusion that, according to Red Bull, the signs at issue are conceptually similar or, according to OHIM, that they are conceptually dissimilar. It is clear from the case-law cited in paragraph 43 above, as it is, moreover, from a simple logical analysis, that a comparison is possible only if the two elements of that comparison are known to the person who is to make it. As has been noted, the non-English-speaking public will have knowledge of only one of those two terms, which rules out the conceptual comparison having any bearing on the majority of the relevant public.
- 49 By contrast, the English-speaking part of the relevant public, not only in the UK but also in Ireland and Malta, where English is an official language, and in several other Member States of the European Union as well where people use English daily, will recognise that the signs at issue refer to two separate animals.
- 50 However, as Red Bull rightly argues, in the present case, contrary to what the Board of Appeal stated, those signs are not devoid of a certain conceptual similarity (see, to that effect, judgment of 16 May 2013 in *Nath Kalsi v OHIM — American Clothing Associates (RIDGE WOOD)*, T-80/11, EU:T:2013:251, paragraphs 52, 53 and 56). Admittedly, the Court cannot accept Red Bull’s argument that the English-speaking part of the relevant public will associate the bulldog and the bull



due to the fact that, originally, the first was trained to fight the second, the practice of bull-baiting being little known beyond England. However, both the bull, depicted by the earlier word marks, and the bulldog, described by the mark applied for, convey the image of animals from which a concentrated force emanates, a great muscular force often expressing itself aggressively towards their fellow creatures or human beings, especially when that power is on display in combat or at bullfights.

51 Overall, therefore, the Board of Appeal erred in finding that the signs at issue would be perceived as being conceptually dissimilar in a substantial part of the European Union, those signs, for the English-speaking public, having a low degree of similarity and not being comparable conceptually for the majority of the relevant public.

– As regards the overall comparison

52 OHIM contends that the Board of Appeal was correct in stating that the signs at issue were dissimilar overall, which Red Bull disputes, given that all the considerations set out lead to the conclusion that those signs are similar overall.

53 It follows from the considerations set out by the Court regarding the comparison of the signs at issue that those signs have, contrary to what the Board of Appeal held, an average visual and phonetic similarity, and for the English-speaking part of the relevant public, a low degree of conceptual similarity, since such a conceptual comparison is not possible for the majority of the relevant non-English-speaking public.

54 It must therefore be concluded that those signs resemble one another overall.

55 However, in order to determine whether the Board of Appeal's errors must lead to the annulment of the contested decision, it is necessary to assess the actual likelihood of confusion.

The likelihood of confusion

56 The global assessment of the likelihood of confusion implies some interdependence between the factors taken into account, and in particular between the similarity of the marks and the similarity of the goods or services concerned. Accordingly, a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa (judgments of 29 September 1998 in *Canon*, C-39/97, EU:C:1998:442, paragraph 17, and of 14 December 2006 in *Mast-Jägermeister v OHIM — Licorera Zacapaneca (VENADO with frame and Others)*, T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 74).

57 The Board of Appeal considered that the mere fact that the marks at issue begin in the same way, as a result of the presence of the letters 'b', 'u', 'l' and 'l', could not lead to the conclusion that the relevant public would confuse those marks, because Red Bull had not adduced evidence of the increased distinctive character or the reputation of the earlier word marks BULL.

58 Red Bull argues that the Board of Appeal was wrong to apply the case-law to establish that there was no likelihood of confusion where the conceptual differences counteracted the visual and phonetic similarities, provided that one of the signs at issue has a clear and definite meaning. Red Bull argues that not only is this conceptual difference not justified, but even if it were established, it is not enough to counteract those similarities, given, in particular, that the first part of the signs at issue is identical. It further argues that, in assessing the likelihood of confusion, the Board of Appeal failed to take into account the principle of interdependence and the reputation of the earlier word marks BULL.

- 59 OHIM contends, concerning the assessment of the likelihood of confusion, that the Board of Appeal did not contradict itself in finding that, the signs at issue being dissimilar overall, one of the essential conditions for the application of Article 8(1)(b) of Regulation No 207/2009 had not been satisfied and that there was therefore no likelihood of confusion.
- 60 It should first be noted that the Board of Appeal failed to take into account, in the assessment of the likelihood of confusion, the fact that the products at issue were completely identical. Given, first, how important the fact is that they are identical and, second, the conclusion, reached in paragraph 54 above of the overall resemblance of the signs at issue, it must be held that the likelihood of confusion between the marks at issue has been proved.
- 61 It follows that the Opposition Division had correctly allowed the opposition and that the contested decision must be annulled in so far as the Board of Appeal infringed Article 8(1)(b) of Regulation No 207/2009, without there being any need to rule on the plea alleging infringement of Article 8(5) of Regulation No 207/2009.

### Costs

- 62 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 63 Since OHIM has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by Red Bull.
- 64 Since Sun Mark is not a party to this dispute, Red Bull's form of order requesting that Sun Mark be ordered to pay the costs is inadmissible.

On those grounds,

### THE GENERAL COURT (Eighth Chamber)

hereby:

- 1. Annuls the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 16 November 2012 (Case R 107/2012-2), relating to opposition proceedings between Red Bull GmbH and Sun Mark Ltd.**
- 2. Declares inadmissible Red Bull's form of order requesting that Sun Mark be ordered to pay the costs.**
- 3. Orders the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) to pay the costs.**

Gratsias

Kancheva

Wetter

Delivered in open court in Luxembourg on 5 February 2015.

[Signatures]

\* Language of the case: English.