Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

10 July 2013 *

(Community trade mark — Invalidity procedure — Community figurative trade mark MEMBER OF €e euro experts — Absolute ground for refusal — Emblems of the Union and its areas of activity — Euro symbol — Article 7(1)(i) of Regulation (EC) No 207/2009)

In Case T-3/12,

**Heinrich Kreyenberg,** residing in Ratingen (Germany), represented by J. Krenzel, lawyer,

applicant,

v

**Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM),** represented by A. Poch, acting as Agent,

defendant,

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

**European Commission,**

APPEAL brought against the decision of the Second Board of Appeal of OHIM of 5 October 2011 (Case R 1804/2010-2), concerning a procedure for invalidity between the European Commission and Mr. Heinrich Kreyenberg,

THE GENERAL COURT (Third Chamber),

composed of O. Czúcz, President, I. Labucka and D. Gratsias (Rapporteur), Judges,

Registrar: E Coulon,

having regard to the application lodged at the Registry of the General Court on 3 January 2012,

having regard to the response lodged at the Court Registry on 18 May 2012,

having regard to the reply lodged at the Court Registry on 23 August 2012,

having regard to the rejoinder lodged at the Court Registry on 12 December 2012,

* Language of the case: German.

having regard to the absence of a request by the parties to be heard within one month from notification of closure of the written procedure and having therefore decided, upon hearing the report of the Judge-Rapporteur and pursuant to Article 135a of the Rules of Procedure of the General Court, to rule on the action without an oral procedure,

gives the following

## Judgment

### Background to the dispute

1 On 9 July 2007, the applicant, Mr Heinrich Kreyenberg, 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 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by 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 in respect of which registration was sought is the figurative sign reproduced below:




3 The goods in respect of which registration was sought come within Classes 9, 16, 35, 36, 39, 41, 42, 44 and 45 of the Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks, as revised and amended ('the Nice Agreement'), and correspond to the following description for each class:

— Class 9: 'Data carriers and recording carriers with or without recorded data; data carriers with recorded computer programmes (included in Class 9)';

— Class 16: 'Printed matter';

— Class 35: 'Business management; business administration';

— Class 36: 'Insurance; financial affairs; monetary affairs; real estate affairs';

— Class 39: 'Transport; packaging and storage of goods; travel arrangement';

— Class 41: 'Publication of printed matter (also in electronic form), except for advertising; training, personal development programmes (training and continuous training); organisation and conduct of seminars';

— Class 42: 'Quality control; technical reports; scientific reports; scientific and industrial research; creation of programmes for data processing';

— Class 44: ‘Medical and veterinary services; hygienic and beauty care for human beings or animals; agriculture, horticulture and forestry services’;

— Class 45: ‘Litigation services; security services for the protection of property and individuals; personal and social services rendered by others to meet the needs of individuals; legal services’.

4 The Community trade mark application was published in *Community Trade Marks Bulletin* No 5/2008 of 4 February 2008.

5 On 25 April 2008 the Commission of the European Communities sent OHIM, pursuant to Article 41 of Regulation No 40/94 (now Article 40 of Regulation No 207/2009), written observations setting out the grounds on which, in its opinion, the trade mark in question should not be registered *ex officio*.

6 Notwithstanding those observations, the trade mark in question was registered as a Community trade mark on 4 August 2008 under No 6110423.

7 In accordance with Article 55 of Regulation No 40/94 (now Article 56 of Regulation No 207/2009), on 24 February 2009 the Commission brought an action for a declaration that the contested trade mark was invalid. According to the Commission, it had been registered in breach of Article 7(1)(h), (i) and (c) of Regulation No 40/94 (now Article 7(1)(h), (i) and (c) of Regulation No 207/2009).

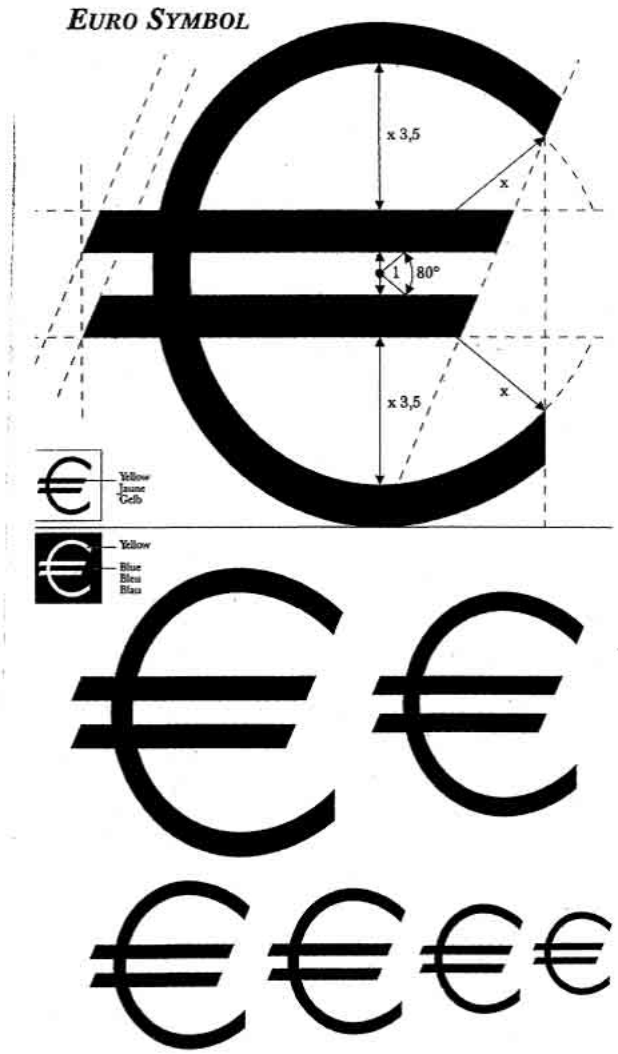
8 First of all, the Commission, in its submissions concerning Article 7(1)(h) of Regulation No 40/94, cited the emblems bearing references QO 188 and QO 189, which had been granted protection in favour of the Council of Europe on 4 October 1979. According to the Commission, both emblems were protected by virtue of Article 6ter of the Convention for the Protection of Industrial Property signed in Paris on 20 March 1883, last revised at Stockholm on 14 July 1967 and amended on 28 September 1979 (*United Nations Treaty Series*, vol. 828, No 11851, p. 305, ‘the Paris Convention’).

9 The emblems referred to in the previous paragraph, as shown on the database of the World Intellectual Property Organisation (WIPO), are reproduced below:






10 Secondly, the Commission, in its submissions concerning Article 7(1)(i) of Regulation No 40/94, cited the symbol of the single currency, the euro, as shown in the Commission Communication of 23 July 1997 entitled ‘The use of the euro symbol’ [COM (97) 418] (‘Communication on the use of the euro symbol’).




11 Finally, in its submissions relating to Article 7(1)(c) of Regulation No 40/94, the Commission claimed that the use of a crown of stars in the trade mark in question was designed to deceive the public as to the origin of the goods and services designated by that mark.

12 By decision of 22 July 2010, the Cancellation Division rejected the application for a declaration of invalidity. First, it considered that the half-crown of stars comprising the trade mark in issue could not be perceived by the public as an 'imitation from the heraldic viewpoint' of the emblems cited by the Commission. The Cancellation Division therefore rejected the complaint of infringement of Article 7(1)(h) of Regulation No 207/2009. Secondly, it considered that the trade mark in question did not reproduce the euro symbol identically, so that Article 7(1)(i) of Regulation No 207/2009 had not been infringed. Third, the Cancellation Division claimed that the fact that the trade mark was likely to deceive the public as to the origin of the goods and services which it designated did not indicate an infringement of Article 7(1)(c) of Regulation No 207/2009.

13 On 17 September 2010 the Commission lodged an appeal against the Cancellation Division's decision on the basis of Articles 58 to 64 of Regulation No 207/2009. It then alleged an infringement of Article 7(1)(h), (i) and (g) of Regulation No 207/2009.

14 First of all, in its submissions concerning Article 7(1)(h) of Regulation No 207/2009, the Commission no longer cited the emblems referred to in the application for a declaration of invalidity. On the other hand, it pleaded the emblem of the European Central Bank (ECB). That emblem, which has been protected by Article 6ter of the Paris Convention since 4 August 2004, appears in the database of the International Bureau of WIPO under reference QO 867 and answers the following description:



15 Secondly, concerning Article 7(1)(h) of Regulation No 207/2009, the Commission repeated in essence its arguments at the stage of the application for a declaration of invalidity.

16 Finally, in its submissions concerning Article 7(1)(g) of Regulation No 207/2009, it repeated in essence the arguments referred to in paragraph 11 above in relation to Article 7(1)(c).

17 By decision of 5 October 2011 ('the contested decision'), the Second Board of Appeal of OHIM annulled the Cancellation Division's decision and declared the trade mark in question invalid.

18 First of all, it found that the action was inadmissible in so far as it was based on the provisions of Article 7(1)(h) of Regulation No 207/2009 because the emblem cited by the Commission before the Board of Appeal on the basis of those provisions had not been cited previously. The Board of Appeal then found that the trade mark in question contained an element that the public was likely to regard as an identical reproduction of the euro symbol, and others likewise, such as a half-crown of stars, which 'suggest the idea of the European Union'. In addition, the Board of Appeal observed that, in view of the 'variety of services and goods that fall within the scope of the activities and competences of the institutions and other bodies of the European Union', it was possible that they matched goods and services designated by the trade mark in question. In those circumstances, the Board of Appeal considered that the possibility could not be ruled out that the relevant public would believe that there was a connection between the applicant and the institutions and bodies of the European Union. That impression was strengthened by the verbal element 'member of euro experts' which, according to the Board of Appeal, refers to a circle the members of which have been officially approved. The Board of Appeal concluded that the trade mark in question should be declared invalid on the basis of Article 7(1)(i) of Regulation No 207/2009, and that it was unnecessary 'to assess the other grounds on which the application for a declaration of invalidity is founded'.

**Foms of order sought**

19 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to pay the costs.

20 The OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

**Law**

21 In support of his action, the applicant puts forward three pleas in law.

22 First, he claims that the representation of the euro symbol in the trade mark in issue is not one of those prohibited by Article 7(1)(i) of Regulation No 207/2009.

23 Secondly, the applicant submits that, even if the representation of the euro symbol were prohibited, there is no connection between, on the one hand, the proprietor of the mark in question and, on the other, the authorities of the economic and monetary union, or, more generally, those of the European Union.

24 Third, while admitting that the contested decision of the Board of Appeal declared that the trade mark in issue was invalid on the basis of Article 7(1)(i) of Regulation No 207/2009 alone, the applicant points out 'in the alternative' that the trade mark cannot be declared invalid on the basis of Article 7(1)(g).

*Preliminary observations*

25 Article 7(1) of Regulation No 207/2009 reads as follows:

'The following shall not be registered:

…

(h) trade marks which have not been authorized by the competent authorities and are to be refused pursuant to Article 6ter of the Paris Convention …;

(i) trade marks which include badges, emblems or escutcheons other than those covered by Article 6ter of the Paris Convention and which are of particular public interest, unless the consent of the appropriate authorities to their registration has been given;

…'

26 Article 7(2) of Regulation No 207/2009 provides as follows:

'Paragraph 1 shall apply notwithstanding that the grounds of non-registrability obtain in only part of the [Union].'

27 Under Article 6ter of the Paris Convention:

'1.

(a) The [parties to this Convention] agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorisation by the competent authorities, either as trademarks or as elements of trade marks, of armorial bearings, flags, and other State emblems, of the [parties to this Convention], official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.

(b) The provisions of subparagraph (a), above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organisations of which one or more [parties to this Convention] are members, with the exception of armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection.

(c) … The [parties to this Convention] shall not be required to apply the provisions [under (b) above] when the use or registration referred to under … (a), above, is not of such a nature as to suggest to the public that a connection exists between the organisation concerned and the armorial bearings, flags, emblems, abbreviations, and names, or if such use or registration is probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organisation.

…

3. …

(b) The provisions of [subparagraph (b) of paragraph (1)] of this Article shall apply only to such armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organisations as the latter have communicated to the countries of the Union through the intermediary of the International Bureau.

…'

28 It follows that Article 7(1)(h) of Regulation No 207/2009, read in conjunction with Article 6ter of the Paris Convention to which it refers, protects two categories of emblems.

29 In the first place, that provision prohibits the registration of State emblems, not only as trade marks, but also as elements of trade marks, regardless of whether the emblems are reproduced identically or are merely the object of an imitation from the heraldic point of view (judgments of 5 May 2011 in Case T-41/10 *SIMS — École de ski international* v *OHIM — SNMSF* (*esf école du ski français*), not published in the ECR, paragraph 21, and of 15 January 2013 in Case T-413/11 *Welte-Wenu* v *OHIM — Commission* (*EUROPEAN DRIVESHAFT SERVICES*), not published in ECR, paragraph 36).

30 To determine whether a trade mark comprises an imitation of an emblem from the heraldic point of view, it is necessary to consider the heraldic description of the emblem. However, any difference between the trade mark and the emblem detected by a specialist in heraldic art will not necessarily be perceived by the average consumer who, in spite of differences in certain heraldic details, may see in the mark an imitation of the emblem in question (*EUROPEAN DRIVESHAFT SERVICES*, paragraph 29 above, paragraph 37).

31 In the second place, Article 7(1)(h) of Regulation No 207/2009 prohibits the registration of a trade mark comprising a reproduction or imitation from the heraldic point of view of an emblem of an international intergovernmental organisation when it has been communicated to the States which are parties to the Paris Convention through the intermediary of the International Bureau of the WIPO. However, that prohibition applies only in the case referred to in Article 6ter (1)(c) of the Paris Convention, that is to say, when, taken as a whole, the trade mark concerned suggests, in the public mind, a connection between, on the one hand, its proprietor or user and, on the other, the international intergovernmental organisation in question, or misleads the public as to the existence of such a connection (see, to that effect, *EUROPEAN DRIVESHAFT SERVICES*, paragraph 29 above, paragraph 59).

32 With regard to Article 7(1)(i) of Regulation No 207/2009, it prohibits the registration of trade marks which include emblems other than those referred to by Article 7(1)(h) of the same regulation, this to say, other than those of States or international intergovernmental organisations duly communicated to the States which are parties to the Paris Convention when, first, those emblems are of particular interest to the public and, secondly, the appropriate authority has not authorised registration.

33 It is necessary to determine whether the protection conferred by the last mentioned provision is subject to the same conditions as the protection given to the emblems covered by Article 7(1)(h) of Regulation No 207/2009.

34 On that point it must be observed that Article 7(1)(i) of Regulation No 207/2009 does not expressly restrict the scope of the prohibition to trade marks reproducing an emblem identically. The wording of the provision allows it to be interpreted as prohibiting not only identical reproduction but also the imitation of an emblem by a trade mark. If that interpretation were not accepted, the practical effect of Article 7(1)(i) of Regulation No 207/2009 would be much diminished: it would be sufficient for an emblem to have been slightly modified, even in an imperceptible way for a person not a specialist in heraldic art, for it to be registered as a trade mark or element of a mark.

35 Secondly, the Union legislature has in no way specified that the registration of only a trade mark consisting exclusively of an emblem could be prohibited under Article 7(1)(i) of Regulation No 207/2009. By using the verb 'include' in that provision, the legislature indicated that, in the conditions laid down by that provision, the use of emblems other than those referred to in that provision was prohibited, not only as a trade mark, but also as an element of a mark. That is consistent with the practical effect of that provision, which aims to provide the most complete protection for the emblems to which it refers.

36 It follows from paragraphs 34 and 35 above that Article 7(1)(i) of Regulation No 207/2009 must be interpreted as prohibiting the registration, as trade marks or as elements of trade marks, of emblems other than those referred to in Article 7(1)(h), whether those emblems are reproduced identically or only the subject of an imitation.

37 However, that prohibition is not unconditional.

38 As already stated at paragraph 31 above, the emblems of international intergovernmental organisations that have been duly communicated to the States which are parties to the Paris Convention are protected by Article 7(1)(h) of Regulation No 207/2009, when, taken as a whole, the trade mark concerned suggests, in the public mind, a connection between, on the one hand, its proprietor or user and, on the other, the international intergovernmental organisation in question. If the protection conferred by Article 7(1)(i) of Regulation No 207/2009 could take effect even where the latter condition is not fulfilled, the protection would be superior to that conferred by Article 7(1)(h) on the emblems of international intergovernmental organisations that have been duly communicated to the States which are parties to the Paris Convention.

39 There is nothing to indicate that the Union legislature wished to confer upon emblems covered by Article 7(1)(i) of Regulation No 207/2009 greater protection than that for the emblems referred to by Article 7(1)(h), so that the extent of the protection conferred by Article 7(1)(i) cannot be greater than that of the protection conferred by Article 7(1)(h) (see, to that effect, Joined Cases C-202/08 P and C-208/08 P *American Clothing Associates* v *OHIM* and *OHIM* v *American Clothing Associates* [2009] ECR I-6933. paragraph 80).

40 Therefore it must be concluded that the protection conferred upon the emblems referred to in Article 7(1)(i) of Regulation No 207/2009 is intended to apply only where the condition set out at paragraph 38 is fulfilled, that is to say, where, taken as a whole, the trade mark containing the emblem is likely to mislead the public as to the connection between, on the one hand, its proprietor or user and, on the other, the authority to which the emblem in question relates.

41 It is in the light of those preliminary considerations that the Court must examine the three pleas put forward by the applicant.

*First plea in law: misinterpretation of the scope of Article 7(1)(i) of Regulation No 207/2009*

42 The applicant's first and principal plea is that the representation of the euro symbol in the trade mark in issue is not one of those prohibited by Article 7(1)(i) of Regulation No 207/2009. The plea is in three parts.

The first part

43 The applicant claims that '[Article 7(1)(i) of Regulation No 207/2009] covers only symbols protected on the basis of a convention/treaty to which all the contracting parties are parties'. In the present case, as the Member States of the European Union 'are not [all] members of the European monetary union', the euro symbol 'is not covered by' Article 7(1)(i) of Regulation No 207/2009.

44 On that point, it is noted that Article 7(1)(i) of Regulation No 207/2009 protects emblems other than those referred to in Article 7(1)(h), that is to say, emblems other than those of States and those of international intergovernmental organisations duly communicated to the States which are parties to the Paris Convention, provided that the emblems are of particular public interest. In view of the broad wording of that provision, it must be borne in mind that it protects not only the emblems of international intergovernmental organisations which have not been duly communicated to the States which are parties to the Paris Convention, but also emblems which, while not designating all the activities of an international intergovernmental organisation, nevertheless have a special connection with one of those activities. The fact that an emblem is connected with one of the activities of an international intergovernmental organisation is sufficient to show that a public interest attaches to its protection.

45 In view of what is said in the previous paragraph, it must be found that Article 7(1)(i) of Regulation No 207/2009 protects, in particular, not only emblems of the European Union as such, subject to compliance with the other conditions laid down by that provision, but also emblems that merely relate to one of the Union's areas of activity.

46 Furthermore, Article 7(2) of Regulation No 207/2009 states that paragraph 1 of that article is applicable notwithstanding that the grounds of non-registrability obtain in only part of the European Union. Therefore it is to be understood that the public interest referred to in Article 7(1)(i) need not necessarily exist throughout the Union. It is sufficient if it exists in part of it. It must therefore be concluded that Article 7(1)(i) protects any emblem which, without designating the Union as whole, relates to an activity of the Union, even if that activity concerns only certain Member States of the European Union.

47 On that point Article 3(4) TFEU provides that 'the Union shall establish an economic and monetary union whose currency is the euro'. The euro symbol is therefore undoubtedly the symbol of an activity of the European Union. Consequently the mere fact that certain Member States of the European Union do not have the euro as their currency does not justify the conclusion that the euro

symbol, which is not shown by any document in the file to have been duly communicated to the States which are parties to the Paris Convention, is excluded from the scope of the protection conferred by Article 7(1)(i) of Regulation No 207/2009.

48 The applicant puts forward three arguments in attempting to challenge that conclusion.

49 First, the applicant claims that in the *Manual of Trade Mark Practice* ('the OHIM Manual'), published in English only (part B entitled 'Examination', point 7.8.3.3.a), the OHIM expressly admitted that only the emblems referred to at paragraph 43 above were protected by Article 7(1)(i) of Regulation No 207/2009. However, it must be observed, first, that the provisions of the OHIM Manual were in any case no longer applicable at the date of adoption of the contested decision. Secondly, and above all, reference to them is irrelevant. The OHIM Manual is only a set of consolidated rules setting out the line of conduct which OHIM proposes to adopt. Its provisions cannot be deemed to be of a higher order than the provisions of Regulation No 207/2009 or to influence the interpretation of those regulations by the courts of the European Union. On the contrary, they are designed to be read in accordance with the provisions of Regulation No 207/2009 (Case T-523/10 *Interkobo* v *OHIM — XXXLutz Marken (my baby)*) [2012] ECR, paragraph 29).

50 Secondly, the applicant claims that to date there is only one OHIM decision stating that the euro symbol is protected by Article 7(1)(i) of Regulation No 207/2009. However, that is a factual situation which obviously has no influence whatever on the interpretation that must be given to those provisions.

51 Third, the applicant alleges that the protection conferred by Article 7(1)(i) was refused by OHIM to 'other important symbols such as the international symbol identifying a recyclable product'. However, the legality of the decisions of the Boards of Appeal must be assessed solely on the basis of Regulation No 207/2009 and the other provisions applicable to the case as interpreted by the Community judicature and not on the basis of a previous decision-making practice (Case C-412/05 P *Alcon* v *OHIM* [2007] ECR I-3569, paragraph 65, and Case T-435/11 *Universal Display* v *OHIM (UniversalPHOLED)* [2012] ECR, paragraph 37), particularly as the applicant does not indicate how the OHIM decision relating to the 'international symbol identifying a recyclable product' can be applied to the particular case.

52 The first part of the plea must accordingly be dismissed.

The second part

53 The applicant observes that the euro symbol is 'perceived by the public every day as an ordinary currency sign'. Therefore, even if the first part of the plea were dismissed, the euro symbol, as a currency sign, could not, according to the applicant, be protected by Article 7(1)(i) of Regulation No 207/2009.

54 In addition, the applicant submits that the Commission, in the Communication on the use of the euro, 'expressly authorised the use of the [euro] symbol to indicate the currency'.

55 However, first, there is nothing that permits the exclusion of the euro symbol, that is to say, an emblem which is connected with an area of activity of the European Union, from the scope of Article 7(1)(i) of Regulation No 207/2009 merely because it is a 'currency sign'. Secondly, the Communication on the use of the euro does not authorise the reproduction or imitation of the euro symbol as a trade mark or element of a trade mark. In the Communication, the Commission merely 'invites all currency users to use the [euro] symbol whenever a distinctive symbol is needed for the description of monetary amounts in euros, e.g. in price lists and invoices, on cheques and in any other legal instruments'.

56 It is thus necessary to dismiss the second part of the plea.

The third part

57 The applicant claims that the Board of Appeal erred in law in finding that Article 7(1)(i) of Regulation No 207/2009 protected emblems not only against identical reproductions, but also against imitations.

58 In that connection he puts forward three arguments.

59 First, he submits that the Board of Appeal did not follow the interpretation of Article 7(1)(i) of Regulation No 207/2009 given in the OHIM Manual (part B entitled 'Examination', point 7.8.3.3.b).

60 Secondly, he states that it is clear from the findings at paragraph 80 of the judgment in *American Clothing Associates* v *OHIM* and *OHIM* v *American Clothing Associates* (paragraph 39 above) that Article 7(1)(i) of Regulation No 207/2009 has a narrower scope than Article 7(1)(h) of the same regulation.

61 Third, he alleges that the Board of Appeal misconstrued Article 7(1)(i) of Regulation No 207/2009 because the use of the verb 'include' in that provision clearly indicates that only identical reproductions of emblems are referred to. That wording differs from Article 7(1)(h), which refers to Article 6ter of the Paris Convention.

62 However, the applicant is mistaken as to the scope of the protection conferred by Article 7(1)(i): as stated at paragraph 34 above, that provision prohibits the registration of trade marks including emblems other than those referred to by Article 7(1)(h), including when they are not reproduced faithfully but are only imitated.

63 In addition, first, the applicant cannot rely on the OHIM Manual in order to modify the meaning to be attached to the abovementioned provision (see paragraph 49 above). Secondly, the applicant has misinterpreted paragraph 80 of *American Clothing Associates* v *OHIM* and *OHIM* v *American Clothing Associates* (paragraph 39 above): that judgment does not state that the protection conferred by the provisions set out under Article 7(1)(h) of Regulation No 207/2009 is necessarily broader than that conferred by the provisions under Article 7(1)(i), but only that the protection given under (h) is at least as broad as that under (i).

64 It must therefore be concluded that the Board of Appeal did not err in law in stating, in paragraph 28 of the contested decision, that the identical reproduction of the emblems referred in Article 7(1)(i) of Regulation No 207/2009 was 'not expressly required by the wording of that Article'.

65 The third part of the plea must therefore be dismissed.

The fourth part

66 At paragraphs 29 to 31 of the contested decision the Board of Appeal found that the trade mark in issue included a representation of the euro symbol which, while not exactly matching it, could be confused by the public with an 'identical representation' of the symbol.

67 The applicant alleges that the Board of Appeal was mistaken in that finding. According to the applicant, the trade mark in issue includes, not an 'identical' reproduction of the euro symbol, but an 'altered' representation of it. The representation does not have the same colouring as the euro symbol described in the Communication on the use of the euro symbol. Unlike that symbol, it contains a gradation of colours. In addition, it is said to be 'merged' with the letter 'e'. Finally, its lower curve is longer than that of the said symbol.

68 Accordingly the applicant uses the arguments reproduced in the preceding paragraph to claim that the Board of Appeal was mistaken in finding that the trade mark in issue included an 'identical' reproduction of the euro symbol.

69 However, those arguments are based on an incorrect premise. It appears from the first sentence of paragraph 29 and from the general scheme of the contested decision that the Board of Appeal did not find that the trade mark in issue included an identical reproduction of the euro symbol, but observed that it included an imitation of the symbol, which was however so faithful that uninformed persons could confuse it with an identical reproduction of the symbol. If the Board of Appeal had intended to find that the trade mark in question included an identical reproduction of the euro symbol, it would not have taken the trouble at paragraph 28 of the contested decision to observe that Article 7(1)(i) of Regulation No 207/2009 prohibited not only the identical reproduction of emblems other than those referred to in Article 7(1)(h), but also prohibited their imitation. Nor would the Board of Appeal have demonstrated, at paragraph 29 of the contested decision, a 'difference' allegedly existing between the euro symbol and its representation in the trade mark in question.

70 In any case, even if the applicant had intended to argue that the Board of Appeal had erred in finding that the trade mark in question included an imitation of the euro symbol, that argument could only have been dismissed.

71 The differences existing between, on the one hand, the representation of the euro symbol in the trade mark in issue and, on the other, the symbol, are not so considerable that the representation can be described as an imitation.

72 First, the symbol represented in the trade mark does not have exactly the proportions laid down in the Communication on the use of the euro symbol. In particular, it has a lower curve longer than that of the euro symbol, as described in the Communication. Nevertheless, that difference, which can be detected by a specialist in heraldic art, will not necessarily be perceived by the average consumer.

73 Secondly, although the colour varies gradually towards orange shades and, according to the applicant, even 'brownish' ones, it remains predominantly yellow. In addition, the background against which it is placed is blue, as laid down by the Communication on the use of the euro symbol.

74 Third, the symbol represented in the trade mark in question is certainly attached to the letter 'e', but it is not, as the applicant claims, 'merged' with it to the extent that it cannot be distinguished from it.

75 Consequently the first plea should be dismissed in its entirety.

*The second plea: incorrect application of the condition laid down by Article 6ter (1)(c) of the Paris Convention*

76 As stated at paragraph 39 above, the condition laid down by Article 6ter (1)(c) of the Paris Convention is applicable, *mutatis mutandis*, to the case of the emblems referred to in Article 7(1)(i) of Regulation No 207/2009.

77 The protection given to those emblems takes effect only in the situation where, taken as a whole, the trade mark including that emblem may mislead the public as to the connection existing between, on the one hand, its proprietor or user and, on the other, the authority to which the emblem refers.

78 Therefore such protection applies where the trade mark in question misleads consumers as to the origin of the goods or services which it designates, leading them to believe that the goods or services originate from the authority to which the emblem, a reproduction or imitation of which they contain, refers. But the protection must also apply where the public may believe that, because of the presence in

the trade mark of such reproduction or imitation, the goods or services have the approval or warranty of the authority to which the emblem refers or that they are connected in some other way with that authority (see, by analogy, *EUROPEAN DRIVESHAFT SERVICES*, paragraph 29 above, paragraph 61).

79 With the second plea the applicant submits, in the alternative, that if the Board of Appeal was right to apply by analogy Article 6ter (1)(c) of the Paris Convention, it nevertheless applied it incorrectly to the facts of the present case.

The first part

80 According to points 40 to 44 of the contested decision, the Board of Appeal found that the euro symbol referred to the European Union.

81 In the first part of the present plea, the applicant disputes that assessment. In that connection he puts forward two arguments.

82 First, he claims that the euro symbol does not refer to an organisation. According to him, it is perceived by the public merely as indicating a currency.

83 That is said to be confirmed by the 'daily experience of every consumer', who is likely to 'recognise the [euro] symbol in trade "at every street corner" without thinking at all about the European monetary union'. The euro symbol is therefore an entirely neutral currency sign, just like the symbol for the American dollar or the pound sterling. Furthermore, the public is accustomed to logos representing the euro symbol in an 'altered' way, as in the present case, and does not associate them immediately with the institutions and other agencies of the European Union.

84 Secondly, the applicant submits that, even if the Court were to find that the euro symbol is associated with an 'organisation which is "behind" it', it would have to be found that that organisation is not the European Union taken as a whole, but merely the 'European monetary union'.

85 According to the applicant, the euro symbol is 'at the most associated with the activities of the monetary union in the area of economic policy and not with the — possible — activities of the European Union in the broad sense which nevertheless, a priori, fall only within the legislative/political area'.

86 However, as stated at paragraph 47 above, Article 3(4) TFEU provides that 'the Union shall establish an economic and monetary union whose currency is the euro'. It follows from the wording of that article that, although the euro symbol is a currency sign, it refers to a particular legal person, namely the European Union.

87 The fact that the euro symbol refers more specifically to the economic and monetary union is not inconsistent with the conclusion reached in the preceding paragraph. The economic and monetary union referred to in Title VIII of Part 3 of the FEU Treaty, to which the applicant appears to allude in using the phrase 'European monetary union', is an area of action of the European Union. Furthermore, the economic and monetary union does not possess a legal personality separate from that of the European Union.

88 The first part must therefore be dismissed.

89 In attempting to cast doubt on that conclusion, the applicant claims that 'the Union … as a whole cannot be considered from the angle of the flag of the European Union …, which was referred to in Article 7(1)(h) of [Regulation No 207/2009] and was not considered relevant by [the Board of

Appeal]'. According to the applicant, 'to say that the trade mark [in issue] does not give rise to an association in the public mind with the Union … or with its flag and then to conclude that such an association exists through the [euro] symbol would be … an irrational evasion of that provision'.

90 However, the fact, assuming it were true, that the trade mark in question does not contain an identical reproduction or imitation of an emblem protected by Article 7(1)(h) of Regulation No 207/2009 does not mean that it does not contain an emblem protected by Article 7(1)(i). Consequently the fact that, in the contested decision, the Board of Appeal censured an infringement of Article 7(1)(i) of Regulation No 207/2009 cannot in any case constitute, in itself, an evasion of the provisions set out in Article 7(1)(h).

The second part

91 At point 42 of the contested decision the Board of Appeal found that, 'given the great diversity of the services and goods that fall within the scope of the activities and competences of the institutions and other agencies of the European Union, it may be seen that there is overlapping between them and those covered by the registration of the trade mark [in question]'.

92 The applicant submits, in essence, that, even if the first part of the present plea is dismissed, the Court is bound to observe that the findings set out in the preceding paragraph are incorrect. According to the applicant, the areas of activity of the 'European monetary union' and of the European Union have 'no objective connection with the goods and services [designated by the trade mark in question]'. Therefore, according to the applicant, it is impossible for the public to associate the proprietor of the trade mark with the 'European monetary union' or with the European Union.

93 To illustrate his comments, the applicant claims that it is obvious that the 'data carriers and recording carriers' of Class 9 and the 'printed matter' of Class 16, like the 'medical and veterinary services' and the 'hygienic and beauty care for human beings or animals' of Class 44, the 'personal development programmes (training and continuous training)' of Class 41 and the 'creation of data-processing programmes', referred to in Class 42, do not fall within the area of activity of the 'European monetary union'.

94 The applicant adds that the public cannot associate the services in Classes 35 and 36, such as 'business management', 'financial affairs' and 'monetary affairs' with the 'European monetary union', 'whose members cannot … be private undertakings', or with the European Union, 'the activity of which [is not] that of a private business and financial consultant'. The public would be particularly careful with regard to those services because of its interest in the 'investment of its financial assets and their yield'.

95 That argument must, in any event, be rejected.

96 First of all, contrary to what the applicant implies, the euro symbol refers to the European Union as a whole and not only to the 'economic and monetary union', which is only one of its areas of action (see paragraph 87 above). Therefore the Board of Appeal quite rightly compared the goods and services designated by the trade mark in issue with the areas of action of the European Union as a whole.

97 Secondly, as shown at paragraph 78 above, the protection conferred by Article 7(1)(i) of Regulation No 207/2009 is applicable even where a trade mark, without misleading consumers as to the origin of the goods or services which it designates, induces the public to believe that the goods or services which it designates are approved or warranted by the authority referred to by the emblem contained in the trade mark or that the goods or services are connected with that authority in some other way.

98 Consequently the Board of Appeal rightly found that, in essence, because of the great diversity of the areas in which the Union has a competence, the possibility cannot be ruled out that the public may consider that the goods and services designated by the trade mark in issue fall within an area in which the Union is active.

99 In addition, first, the 'data carriers and recording carriers' in Class 9 and the 'creation of programmes for data processing' in Class 42 are concerned with 'technological development', an area of Union action referred to in Title XIX of Part Three TFEU, and with Union action in the area of the protection of personal data, mentioned in Article 16(1) TFEU. Secondly, the 'printed matter' designated in Class 16 falls within an area in which the Union acts, even if only through the activities of the Publications Office of the European Union. Third, the 'medical and veterinary services' and 'hygienic and beauty care for human beings or animals' of Class 44 are concerned with 'public health', which is dealt with in Title XIV of Part Three TFEU, in the framework of which 'measures may be adopted in the veterinary and phyiosanitary fields which have as their direct objective the protection of public health' pursuant to Article 168(4)(b) TFEU. Fourth, the 'personal development programmes (training and continuous training)' of Class 41 may fall within the areas of 'education' or 'vocational training' referred to under Title XII of Part Three. Fifth, the services included in Classes 35 and 36, such as 'business management', 'financial affairs' and 'monetary affairs', necessarily bring to mind the 'economic and monetary policy' to which Title VIII of Part Three TFEU relates, regardless of which section of the public is concerned.

The third part

100 The applicant submits that the trade mark in issue does not induce the public to believe that there is a connection between the proprietor and 'the European monetary union, of which [the latter] cannot form part by reason of its status as a private enterprise' or, more generally, the European Union.

101 According to the applicant, even if the euro symbol were associated with the European Union, the representation of that symbol in the trade mark in question is not of a dominant nature. Therefore the trade mark should be considered generally to determine whether a connection exists between the proprietor and the European Union.

102 On examination, it appears that no such connection can be shown to exist.

103 First, the blue background of the trade mark is 'broken by the white rectangle containing the words "member of" and, by the words "euro experts" also in white'.

104 Secondly, the representation of the euro symbol is said to be 'merged' with the letter 'e', 'in a gradation of gold tones (turning into brownish) which contrasts clearly with the plain light yellow of the official [euro] sign'. Moreover, 'because of the more and more dark gradation, the "e" attracts more attention than [the representation of the euro symbol]'.

105 Third, the 'stars arranged in a half-moon [do not constitute] an indicator of the monetary union — nor of the European Union as a whole'. The stars cannot bring to mind 'the European flag … as the general context keeps away from the idea of the European Union and the semicircle precisely does not convey the central message of unity'.

106 This argument does not hold.

107 It is true that, as the applicant observes, the application of Article 7(1)(i) of Regulation No 207/2009 requires a general examination of the trade mark in question since the other elements of the mark may cause it, taken as a whole, not to suggest in the public mind a connection between the proprietor

or user and the authority which possesses or uses the emblem forming part of the trade mark, and not to mislead the public in that respect (see, by analogy, *EUROPEAN DRIVESHAFT SERVICES*, paragraph 29 above, paragraph 59).

108 However, as the Board of Appeal observed at points 40 to 44 of the contested decision, it is clear precisely from a general examination of the trade mark in issue that it suggests, in the public mind, a connection between the proprietor and the European Union.

109 First, as stated at paragraph 71 above, the trade mark in question includes an imitation euro symbol, placed in a central position. As noted at paragraph 86 above, that symbol can be associated only with the European Union.

110 Second, the other three elements forming the trade mark are not such as to neutralise the impression given to the public by the presence of the imitation euro symbol.

111 First, 12 predominately yellow stars are arranged in a semi-circle against a blue background, around the imitation euro symbol. Even accepting that the stars are not an imitation of the European flag reproduced at paragraph 9 above, it must be said that, in any case, they cannot counterbalance the effect produced in the public mind by the presence of the imitation euro symbol in the trade mark.

112 Secondly, as stated at paragraph 74 above, the euro symbol represented in the trade mark is attached to the letter 'e' and not, as the applicant claims, 'merged' with it. However, the letter 'e' conveys no meaning by itself and therefore does not prohibit association of the proprietor of the trade mark with the European Union.

113 Third, the words 'member of' appear on a white background above the imitation of the euro symbol. The words 'euro experts' appear, also on a white background, below the euro symbol. As the Board of Appeal quite correctly pointed out, at point 43 of the contested decision, those two expressions, when read together, convey the idea of a limited circle of euro experts who have been officially approved. They therefore produce a feeling that the European Union, to which the euro symbol relates, as just mentioned, has consented to the trade mark in issue.

114 It follows that the third part of this plea must be dismissed. The second plea must therefore be dismissed in its entirety.

*Third plea: Article 7(1)(g) of Regulation No 207/2009*

115 In the further alternative, the applicant submits that the Cancellation Division's decision refusing the application for a declaration of invalidity on the basis of Article 7(1)(c) of Regulation No 207/2009 was correct. In addition, he claims that, as the Commission pleaded Article 7(1)(g) of Regulation No 207/2009 only before the Board of Appeal, that plea must be found out of time and therefore inadmissible. He adds that, in any case, the trade mark in question could not be found invalid on the basis of the latter provision.

116 However, as appears from points 44 and 45 of the contested decision, the Board of Appeal took the view that the trade mark in question should be declared invalid on the basis of Article 7(1)(i) of Regulation No 207/2009 and that there was no need 'to assess the other grounds on which the application for a declaration of invalidity is founded'.

117 Consequently the Board of Appeal did not annul the Cancellation Division's decision and declare that the trade mark in issue was invalid on the ground that the mark infringed the provisions of Article 7(1)(g) of Regulation No 207/2009.

118 Accordingly, the third plea in law must be dismissed as unfounded.

119 It follows that the action must be dismissed.

**Costs**

120 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. Since the applicant has been unsuccessful, he must be ordered to pay the costs in accordance with the form of order sought by OHIM.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Mr Heinrich Kreyenberg to pay his own costs and those incurred by the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM).**

Czúcz Labucka Gratsias

Delivered in open court in Luxembourg on 10 July 2013.

[Signatures]