

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

25 October 2018 (*)

(EU trade mark — Cancellation proceeding — European Union word mark DEVIN — Absolute ground for refusal — Descriptive character — Geographical name — Article 7(1)(c) of Regulation (EC) No 207/2009 (now Article 7(1)(c) and (3) of Regulation (EU) 2017/1001))

In Case T-122/17,

Devin AD, established in Devin (Bulgaria), represented by B. Van Asbroeck, lawyer,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by S. Di Natale and D. Gája, acting as Agents,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO, and intervener before the General Court, being

Haskovo Chamber of Commerce and Industry, established in Haskovo (Bulgaria), represented by D. Dimitrova, lawyer,

concerning an action brought against the decision of the Second Board of Appeal of EUIPO of 2 December 2016 (Case R 579/2016-2) relating to invalidity proceedings between Devin AD and Haskovo Chamber of Commerce and Industry,

THE GENERAL COURT (Eighth Chamber),

composed of A.M. Collins, President, M. Kancheva (Rapporteur) and J. Passer, Judges,

Registrar: I. Dragan, Administrator,

having regard to the application lodged at the Court Registry on 22 February 2017,

having regard to the response of EUIPO lodged at the Court Registry on 8 May 2017,

having regard to the response of the intervener lodged at the Court Registry on 9 May 2017,

further to the hearing on 14 March 2018, in which the intervener did not participate,

gives the following

Judgment

I. Background to the dispute

- 1 On 21 January 2011, the applicant, Devin AD, obtained from the European Union Intellectual Property Office (EUIPO) registration under number 9408865 of the European Union word mark DEVIN ('the contested mark') pursuant to Regulation (EC) No 207/2009 of the Council of 26 February 2009 on the European Union trademark (OJ 2009 L 78, p. 1), as amended (replaced by Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017, on the European Union trademark (OJ 2017 L 154, p. 1)).
- 2 The goods in respect of which the mark was registered fall within Class 32 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, corresponding to the following description: 'Non-alcoholic drinks; mineral water; seltzer waters; fruit-flavoured beverages; juices; syrups and other preparations for making beverages; aperitifs, non-alcoholic; spring water; flavoured water; non-alcoholic fruit extracts; non-alcoholic fruit juices beverages; table water; waters (beverages); seltzer mineral water; vegetable juices (beverages); isotonic drinks; cocktails, non-alcoholic; fruit nectars, non-alcoholic; soda water.'
- 3 On 11 July 2014, the intervener, Haskovo Chamber of Commerce and Industry (HCCI, Bulgaria), filed a request for a declaration of invalidity of the contested mark on the grounds of Article 52(1)(a) of Council Regulation (EC) No 207/2009 (replaced by Article 59(1)(a) of Regulation 2017/1001) in conjunction with Article 7(1)(c), (f) and (g) of that regulation (now Article 7(1)(c), (f) and (g) of Regulation 2017/1001).
- 4 By a decision of 29 January 2016, the Cancellation Division of EUIPO rejected the invalidity requests based on Article 7(1)(f) and (g) of Regulation No 207/2009. However, it accepted the request for a declaration of invalidity based on Article 7(1)(c) of that regulation and declared the mark invalid in its entirety. Specifically, it considered that the geographical name Devin fell within the scope of that provision inasmuch as, nowadays, it was understood by the general public in Bulgaria and a part of the public in neighbouring countries as a description of the geographical origin of the goods concerned and, in future, would potentially be understood by a wider European public in view of the marketing efforts being made and the growth of the Bulgarian tourism sector. It further observed that the applicant had provided no evidence of the distinctive character acquired by the contested mark in markets other than the Bulgarian market.
- 5 On 23 March 2016, the applicant filed an appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009 (now Articles 66 to 71 of Regulation 2017/1001), against the decision of the Opposition Division.
- 6 By decision of 2 December 2016 ('the contested decision'), the Second Board of Appeal of EUIPO dismissed the appeal. In essence, it considered that the Bulgarian town of Devin was known to the general public in Bulgaria and a significant part of consumers in neighbouring countries such as Greece and Romania, especially as a spa town, and that the name of that town was linked by the relevant public with the designated goods in Class 32 covered by the contested mark, especially mineral waters. It therefore 'confirmed the decision [of the Cancellation Division] that, for a significant part of the relevant public outside of Bulgaria, the town of Devin is associated with the goods designated by the contested mark, ... and can, in the eyes of that public, serve to designate the geographical origin of the goods'. It concluded that, for a significant part of the relevant Bulgarian and non-Bulgarian public, in particular the public of those neighbouring countries, the contested mark was descriptive of the geographical origin of the goods covered.

II. Forms of order sought

- 7 The applicant claims that the Court should:
 - annul the contested decision;

- annul the decision of the Cancellation Division of 29 January 2016;
- entirely, or at least partially, reject the request for cancellation of the contested mark;
- order EUIPO to pay the costs of the applicant and to bear its own costs.

8 EUIPO and the intervener contend that the Court should:

- dismiss the application;
- order the applicant to pay the costs.

III. Law

9 In support of the action, the applicant advances two pleas. In the first place, it alleges that the Board of Appeal infringed Article 52(1)(a) of Regulation No 207/2009 in conjunction with Article 7(1)(c) of that regulation by ruling that, in the eyes of the relevant public, the contested mark is descriptive of the geographical origin of the goods in Class 32 covered by the mark. In the second place, it alleges that to the extent that the Board of Appeal did not infringe Article 7(1)(c) of the regulation, it did infringe Article 7(3) of that regulation (now Article 7(3) of Regulation 2017/1001) by ruling that the contested mark has not acquired distinctiveness through use in those parts of the European Union where it has been found descriptive.

10 It must be pointed out at the outset that the applicant's second and third heads of claim, requesting the Court to annul the decision of the Cancellation Division and to entirely, or at least partially, reject the request for cancellation of the contested mark, in reality ask the Court to take the decision which, in the applicant's submission, the Board of Appeal should have taken when it was seised of the case. At the hearing, the applicant confirmed that those heads of claim should be construed as an application for alteration.

11 In that regard, it is apparent from the second sentence of Article 64(1) of Regulation No 207/2009 (now the second sentence of Article 71(1) of Regulation 2017/1001) that the Board of Appeal may annul the decision of the EUIPO department which was responsible for the decision appealed and exercise any power within the competence of that department, in the present case ruling on the application for invalidity and rejecting it. Consequently, that measure is one of those which may be taken by the General Court in the exercise of its power to alter decisions under Article 65(3) of Regulation No 207/2009 (now Article 72(3) of Regulation 2017/1001) (see, to that effect, judgments of 14 December 2011, *Völkl v OHIM — Marker Völkl (VÖLKL)*, T-504/09, EU:T:2011:739, paragraph 40; of 13 May 2015, *easyGroup IP Licensing v OHIM — Tui (easyAir-tours)*, T-608/13, not published, EU:T:2015:282, paragraph 20; and of 4 May 2017, *Kasztantowicz v EUIPO — Gbb Group (GEOTEK)*, T-97/16, not published, EU:T:2017:298, paragraph 17).

12 It is necessary to examine, at the outset, the application for annulment of the contested decision resulting from the applicant's first plea in law.

A. *The application for annulment*

1. *The first plea in law, alleging infringement of Article 52(1)(a) of Regulation No 207/2009, in conjunction with Article 7(1)(c) of that regulation*

13 By the first plea, the applicant alleges that the Board of Appeal erred in law in finding that the mark is descriptive in relation to the goods in Class 32 covered by it. That plea consists of two parts, the first relating to the degree of recognition by the relevant public of the word 'devin' as a geographical name, and the second relating to the link between the contested mark and all the goods concerned.

- 14 By the first part of the first plea in law, which should be examined first, the applicant essentially claims that the Board of Appeal erred in finding, on the basis of mere presumptions, that a large part of the relevant public was likely to link the word ‘Devin’ with the geographical origin of the goods covered by the contested mark. In this respect, it distinguishes between three geographical categories of average consumers, namely, first, those from Bulgaria, secondly, those from Greece and Romania and, thirdly, those from the other Member States of the European Union. The applicant concludes from this that the Board of Appeal did not establish that there was a sufficient degree of familiarity with the town of Devin among average consumers of European Union countries and erred in law in applying Article 7(1)(c) of Regulation No 207/2009, at least with respect to average consumers of the neighbouring countries Greece and Romania, and all other countries of the European Union, with the sole exception of Bulgaria.
- 15 EUIPO disputes the applicant’s arguments. It is of the view that the core of the dispute is whether the contested mark was, at the time of its filing, descriptive in territories situated outside Bulgaria, in particular in the neighbouring countries of Greece and Romania. It states that the contested decision is not vitiated by any error in finding that the evidence on the file suffices to establish that at the date of application for registration of the contested mark it was likely that a considerable, or at least, a non-negligible portion of the relevant public in Greece and Romania, would make an association between the sign DEVIN, understood as the name of a spa town in Bulgaria, and the geographical origin of the designated goods, in particular waters included in Class 32. It contends that the Board of Appeal is not precluded by precedent from drawing inferences to find that a significant part of the Greek or Romanian public associated the word ‘devin’ with the geographical origin of the goods concerned. It asserts that, on the basis of the evidence produced, the Board of Appeal was justified in taking the view that the ‘undoubted reputation’ of Devin as a spa town with natural healing waters did not stop at the Bulgarian boarder, but extended to neighbouring countries and that it was reasonable to assume that awareness of Devin by consumers outside Bulgaria is considerable. According to EUIPO, the applicant is wrong to believe that ‘the town of Devin is protected somehow by natural fortification, without information, and that all this would make it almost inaccessible’. For its part, it is of the view that the low numbers of the registered visits of Greek and Romanian tourists in hotels in the town of Devin, its small size and its geographical location cannot invalidate the contested decision. It concludes that the Board of Appeal rightly protected the general interest in preserving the availability of a geographical name such as that of the spa town of Devin.
- 16 The intervener disputes the applicant’s arguments. It contends that the conclusion of the Board of Appeal that the relevant public in the European Union perceives the word ‘devin’ as a geographical term is based on objective facts and data, such as the number of foreign tourists who visited Bulgaria, the considerable tourist infrastructure of the town of Devin, or the information available online, especially the promotion of Devin’s famous mineral springs on the official tourism portal of Bulgaria. It also stresses the marketing efforts made locally and nationally to promote Devin as an international tourist destination throughout the year and a place famous for its mineral water, evidenced in particular by a letter from the regional tourism association Rhodopes. According to the intervener, in view of the ‘National Strategy for Sustainable Development of Tourism in the Republic of Bulgaria till 2030’, adopted by the Bulgarian Government in 2014, as well as ‘geopolitical factors’ including ‘the increased threat of terrorism in Turkey, Egypt and Tunisia and the unstable political situation in these countries’, which it is claimed ‘redirected part of the tourist flow to Bulgaria’ thanks, above all, to ‘the safety of the country’, it would be reasonable to assume that Bulgaria will become a more desirable tourist destination with European tourists throughout the year and that, as a result, the number of tourists searching for information on certain tourist destinations in the country, including Devin, will increase.
- 17 According to a combined reading of Article 52(1)(a) and Article 7(1)(c) of Regulation No 207/2009, the registered EU trade mark is declared invalid when it consists exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service. Pursuant to Article 7(2) of that regulation (now Article 7(2) of Regulation 2017/1001), paragraph 1 thereof is to apply notwithstanding that the ground for refusal to register or the ground for invalidity obtain in only part of the European Union.

- 18 According to settled case-law, the signs and indications covered by Article 7(1)(c) of Regulation No 207/2009 are those which may serve in normal usage from the point of view of the relevant public to designate, either directly or by reference to one of their characteristics, the goods or services in respect of which registration is sought or contested (see, to that effect, judgments of 20 September 2001, *Procter & Gamble v OHIM*, C-383/99 P, EU:C:2001:461, paragraph 39, and of 10 September 2015, *Laverana v OHIM (BIO organic)*, T-610/14, not published, EU:T:2015:613, paragraph 14). It follows that, for a sign to be caught by the prohibition set out in that provision, there must be a sufficiently direct and specific link between the sign and the goods or services in question to enable the relevant public immediately to perceive, without further thought, a description of the goods or services in question or of one of their characteristics (judgments of 22 June 2005, *Metso Paper Automation v OHIM (PAPERLAB)*, T-19/04, EU:T:2005:247, paragraph 25, and of 7 December 2017, *Colgate-Palmolive v EUIPO (360°)*, T-332/16, not published, EU:T:2017:876, paragraph 15). It is sufficient that a ground of refusal or a ground of invalidity exists in relation to a non-negligible part of the target public and it is unnecessary to examine whether other consumers belonging to the relevant public were also aware of that sign (see judgment of 6 October 2017, *Karelia v EUIPO (KARELIA)*, T-878/16, not published, EU:T:2017:702, paragraph 27 and the case-law cited).
- 19 The public interest underlying Article 7(1)(c) of Regulation No 207/2009 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services (judgment of 10 March 2011, *Agencja Wydawnicza Technopol v OHIM*, C-51/10 P, EU:C:2011:139, paragraph 37). That provision prevents such signs or indications from being reserved to one undertaking alone because they have been registered as trade marks (judgment of 23 October 2003, *OHIM v Wrigley*, C-191/01 P, EU:C:2003:579, paragraph 31) and prevents an undertaking from monopolising the use of a descriptive term to the detriment of other undertakings, including its competitors, whose range of available vocabulary for describing their own goods would thereby be limited (see judgment of 7 December 2017, *360°*, T-332/16, not published, EU:T:2017:876, paragraph 17 and the case-law cited). However, the application of that provision does not depend on the existence of a real, current or serious need to leave a sign free (see, to that effect, judgment of 7 October 2015, *Cyprus v OHIM (ΧΑΛΛΟΥΜΙ and HALLOUMI)*, T-292/14 and T-293/14, EU:T:2015:752, paragraph 55 and the case-law cited).
- 20 As regards, more particularly, signs or indications that may serve to designate the geographical origin or destination of the categories of goods, or the place of performance of the categories of services, in respect of which a European Union trade mark has been applied for, it is in the public interest that geographical names remain available, not least because they may be an indication of the quality and other characteristics of the categories of goods or services concerned, and may also, in various ways, influence consumer preferences by, for instance, associating the goods or services with a place that may evoke positive feelings (judgments of 25 October 2005, *Peek & Cloppenburg v OHIM (Cloppenburg)*, T-379/03, EU:T:2005:373, paragraph 33; of 15 January 2015, *MEM v OHIM (MONACO)*, T-197/13, EU:T:2015:16, paragraph 47; and of 27 April 2016, *Niagara Bottling v EUIPO (NIAGARA)*, T-89/15, not published, EU:T:2016:244, paragraph 15).
- 21 Furthermore, it may be noted, first, that the registration of geographical names as trade marks where they designate specified geographical locations which are already famous, or are known for the category of goods or services concerned, and which are therefore associated with that category in the mind of the relevant class of persons, is excluded as, secondly, is the registration of geographical names which are liable to be used by undertakings and must remain available to such undertakings as indications of the geographical origin of the category of goods or services concerned (judgments of 25 October 2005, *Cloppenburg*, T-379/03, EU:T:2005:373, paragraph 34; of 15 January 2015, *MONACO*, T-197/13, EU:T:2015:16, paragraph 48; and of 27 April 2016, *NIAGARA*, T-89/15, not published, EU:T:2016:244, paragraph 16).
- 22 However, it must be noted that, in principle, Article 7(1)(c) of Regulation No 207/2009 does not preclude the registration of geographical names which are unknown to the relevant class of persons — or at least

unknown as the designation of a geographical location — or of names in respect of which, because of the type of place they designate, such persons are unlikely to believe that the category of goods or services concerned originates there (judgments of 25 October 2005, *Cloppenburg*, T-379/03, EU:T:2005:373, paragraph 36; of 15 January 2015, *MONACO*, T-197/13, EU:T:2015:16, paragraph 49; and of 27 April 2016, *NIAGARA*, T-89/15, not published, EU:T:2016:244, paragraph 17).

23 In the light of all the above, the descriptive character of a sign can be assessed only by reference to the goods or services concerned and to the way in which it is understood by the relevant public (judgments of 25 October 2005, *Cloppenburg*, T-379/03, EU:T:2005:373, paragraph 37; of 15 January 2015, *MONACO*, T-197/13, EU:T:2015:16, paragraph 50; and of 27 April 2016, *NIAGARA*, T-89/15, not published, EU:T:2016:244, paragraph 18).

24 In making that assessment, EUIPO is bound to establish that the geographical name is known to the relevant class of persons as the designation of a place. Furthermore, the name in question must suggest a current association, in the mind of the relevant class of persons, with the category of goods or services concerned, or else it must be reasonable to assume that such a name may, in the view of those persons, designate the geographical origin of that category of goods or services. In making that assessment, particular consideration should be given to the relevant class of persons' degree of familiarity with the geographical name in question, with the characteristics of the place designated by that name, and with the category of goods or services concerned (judgments of 25 October 2005, *Cloppenburg*, T-379/03, EU:T:2005:373, paragraph 38; of 15 January 2015, *MONACO*, T-197/13, EU:T:2015:16, paragraph 51; and of 27 April 2016, *NIAGARA*, T-89/15, not published, EU:T:2016:244, paragraph 19).

25 Moreover, it is settled case-law that the only relevant date for the purpose of assessing an application for a declaration of invalidity based on Article 52(1)(a) of Regulation No 207/2009 is that of the filing of the application for registration of the contested mark. The fact that the case-law allows material subsequent to that date to be taken into account, far from weakening that interpretation of that article, reinforces it, since it is only possible to take such material into account if it relates to the situation on the date of filing of the trade mark application (see, to that effect, orders of 23 April 2010, *OHIM v Frosch Touristik*, C-332/09 P, not published, EU:C:2010:225, paragraphs 52 and 53, and of 4 October 2018, *Safe Skies v EUIPO*, C-326/18 P, not published, EU:C:2018:800, paragraph 5; judgments of 3 June 2009, *Frosch Touristik v OHIM — DSR touristik (FLUGBÖRSE)*, T-189/07, EU:T:2009:172, paragraphs 18 and 19, and of 26 February 2016, *provima Warenhandels v OHIM — Renfro (HOT SOX)*, T-543/14, not published, EU:T:2016:102, paragraph 44). In the present case, the relevant date for assessing whether the contested mark complies with Article 7 of Regulation No 207/2009 was that on which the application for registration was filed, namely 21 January 2011.

26 It is in the light of those considerations that the first part of the applicant's first plea in law must be examined.

27 In the present case, it is common ground that Devin (Latinised form of Девин) is a town in southern Bulgaria, located in the Rhodopes mountain range. In paragraphs 30 to 33 of the contested decision, the Board of Appeal provided further details, which were not contested by the parties. Accordingly, the town of Devin 'possesses an abundance of hot springs and spa resorts' as well as water reserves, including a V-5 (or B-5) bore-hole currently operated by the applicant under an authorisation granted by the Bulgarian State. Bulgaria's official tourism portal, which has a section devoted to Devin, refers to 'the development of its "spa tourism" and "famous" mineral springs' and to the 'healing properties' known since antiquity. For its part, the applicant states, without being challenged, that Devin has a population of approximately 7 000 inhabitants and, as such, ranks approximately 109th among Bulgarian towns in terms of population.

28 The Board of Appeal also stated that Devin water, associated with the source 'Devin sondazh 5', is included in the official list of natural mineral waters recognised by Bulgaria and the other Member States, published in the Official Journal of the European Union (OJ 2010 C 65, p. 1) pursuant to Article 1 of Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation

and marketing of natural mineral waters (OJ 2009 L 164, p. 45). The Board of Appeal also referred to a geographical indication 'Devin Natural Mineral Water', registered in Bulgaria under number 190-01/1995, and an identical appellation of origin, registered under number 883/2006 in certain Member States of the European Union, including Greece and Romania, which are parties to the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, of 31 October 1958, as revised and amended.

29 In this respect, it should be noted that the present dispute does not concern a possible ground for refusal (or ground for invalidity) based on the new Article 7(1)(j) of Regulation 2017/1001, according to which 'the following shall not be registered ... trade marks which are excluded from registration, pursuant to Union legislation or national law or to international agreements to which the Union or the Member State concerned is party, providing for protection of designations of origin and geographical indications', nor on Regulation (EU) No 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs (OJ 2012 L 343, p. 1).

30 Moreover, in paragraph 27 of the contested decision, the Board of Appeal found that, since the goods concerned are daily consumer goods, the relevant public is the average consumer of the European Union, who is reasonably well informed and reasonably observant and circumspect. Since the average consumer of such everyday consumer products is the general public, there is no reason to question this finding, which is, moreover, approved by the applicant.

31 It is necessary to examine, in turn, the perception of the word 'devin' by the average consumer in the European Union and the availability of the geographical name Devin.

(a) On the perception of the word 'devin' by the average EU consumer

32 The Board of Appeal considered that the perception of the word 'devin' by the general public outside Bulgaria was the 'central point of the dispute' between the parties. The Court, like the applicant, considers that, in its assessment of the descriptive character of the contested trade mark, the Board of Appeal has, in essence, made a distinction between three geographical categories of average consumers, consisting of (i) average Bulgarian consumers, (ii) average consumers of the neighbouring countries Greece and Romania and (iii) average consumers of the remaining Member States of the European Union.

(1) Average Bulgarian consumers

33 As far as the average Bulgarian consumer is concerned, the applicant does not dispute that he or she might perceive the word 'devin' as the name of a town in Bulgaria. However, the applicant submits that that word is also known and clearly recognised as a water brand by a significant portion of Bulgarian consumers. According to the applicant, the only consumers likely to understand the word 'devin' as an indication of geographical origin, namely Bulgarian consumers, are also familiar with the mark because of its distinctive character acquired through use within the meaning of Article 7(3) of Regulation No 207/2009. Thus, the contested mark does not, it is claimed, simply indicate the geographical origin, but is a clear indication of the commercial origin of the goods concerned. The applicant infers from this that the contested mark is valid in Bulgaria, even if it may be perceived as a reference to the name of a town, because there it is better known as a trade mark. It adds that not only did the word 'devin' acquire distinctive character through use, but it also acquired a highly distinctive character in Bulgaria, where it was considered to be a well-known trade mark for water. To that end, the applicant refers to Decision No OM-22 of the Патентно ведомство на Република България (Patent Office of the Republic of Bulgaria) of 19 March 2010, valid for five years and declaring that the Bulgarian word mark Девин (Devin), registered under number 24137 and held by the applicant, has been well known in the territory of Bulgaria since 1 December 2005 for goods in Class 32, namely 'mineral water'. At the hearing, the applicant stated that, even if this decision could not be renewed in 2015 because of a legislative repeal, the factual finding underlying it remained valid.

34 In that regard, it suffices to note that the absence of any challenge by the applicant to the recognition by the average Bulgarian consumer of the word 'devin' as the geographical name of a Bulgarian town is by no

means decisive in the present case, since the applicant hastens to add that the contested mark has acquired an increased distinctive character, and even a reputation, for mineral waters in the mind of the average Bulgarian consumer.

35 Moreover, it should be noted that, since the Bulgarian word mark Devin has been recognised as having a reputation by the Patent Office of the Republic of Bulgaria, it appears, *prima facie*, extremely implausible that the contested mark, namely the European Union word mark DEVIN, has not acquired there, at the very least, normal distinctive character, without there being any need to rule on its increased distinctive character or its reputation.

(2) *Average Greek or Romanian consumers*

36 As far as average consumers in neighbouring countries (Greece and Romania) are concerned, the applicant claims that the intervener has not submitted any evidence allowing the Board of Appeal to establish that the word 'devin' would be perceived by those consumers as a geographical location. It claims that the Board of Appeal, in reaching such a conclusion, relied on unsubstantiated deductions or assumptions based essentially on the number of tourists visiting Bulgaria. In addition, the applicant submits that, although it does not bear the burden of proof, it produced reliable and concrete evidence in support of the reverse argument that an average consumer in Greece or Romania would not make a direct link between the contested mark and a geographical origin.

37 It is necessary to examine the evidence retained by the Board of Appeal in order to conclude that the contested mark was descriptive for the average consumer in Greece and Romania.

38 First, the Board of Appeal, following the Cancellation Division, relied on several sources of data relating to tourism, in particular the Official Tourism Portal of Bulgaria and other websites. Relying on the fact that more than 5.4 million foreign tourists visited Bulgaria in 2014, an 'impressive' figure bearing in mind the country's 7.3 million inhabitants, the Board of Appeal estimated that, 'even if it were true that most of these tourists finally elected to spend their vacations in sea-side or winter ski resorts, as argued by the [applicant], this does not rule out knowledge of other areas or other locations'. It considered that 'when a person chooses a vacation, he or she will generally consider beforehand a variety of destinations before settling on one in particular' and concluded from that 'a person wishing to visit Bulgaria, and after considering the range of destinations on offer, will almost certainly come across lesser known or less accessible destinations even if, in the end, the potential tourist decides on a different destination'. On the basis of those mere hypotheses, the Board of Appeal speculated that it was 'very unlikely ... that Devin, and its association with spa waters, would not appear on internet searches for holiday destinations in Bulgaria'.

39 However, it must be acknowledged, as the applicant has, that the mere fact that the town of Devin has a detectable presence on the internet cannot suffice to establish, in line with the required legal and case-law standards, that it would be known by a significant part of the relevant public of Greece and Romania. As the applicant points out, reasoning such as that of the Board of Appeal, taken to its extreme, would lead to the conclusion that foreign consumers could, by simply browsing on the internet, know every town in the world, of any size, even small ones.

40 The Board of Appeal also mentioned that 'Devin has a detectable presence on internet websites providing reviews of travel-related content and interactive travel forums (e.g. Trip Advisor, Booking.com)'. In passing, it rejected the applicant's remark that Devin occupied only the 68th (or now 59th according to the intervener) place out of the 70 most popular destinations in Bulgaria in the ranking of the website 'TripAdvisor.com', on the ground that this demonstrated the existence of at least a non-negligible tourist profile on the internet, unlike the hundreds of towns and villages in Bulgaria which were not included.

41 However, the existence of a 'non-negligible tourist profile on the internet', in itself, does not suffice to establish the knowledge of a small town by the relevant public abroad. In that regard, the fact that Devin is not one of Bulgaria's most popular destinations on the 'TripAdvisor.com' website is at the very least

relevant, since it is reasonable to consider that the relevant foreign public only knows the main attractions of a third country such as Bulgaria.

42 Secondly, the Board of Appeal relied on the ‘considerable’ or ‘substantial’ tourism infrastructure of the municipality of Devin, comprising, according to it, ‘nearly two dozen hotels in the area’, including many spa hotels and five-star luxury hotels.

43 However, that simple fact, in itself, does not does not warrant the conclusion that an average Greek or Romanian consumer could have knowledge of the town of Devin beyond its borders or establish a direct link with it. It cannot be ruled out that that tourism infrastructure could be used mainly by the average Bulgarian consumer, whose knowledge of the town of Devin is not in dispute, and incidentally by a small proportion of average foreign consumers who visit Bulgaria as tourists.

44 Furthermore, the Board of Appeal, in paragraph 41 of the contested decision, speculated that the fact that the hotel registers in Devin report low numbers of foreigners ‘may not accurately reflect visits to the town’ since ‘a high proportion of visitors who are attracted by nature will not necessarily stay in luxury hotels, but will opt for camping or bed-and-breakfast accommodation in nearby towns or villages’, going on to state that ‘the popular resort of Pamporovo is only a little over half an hour away by car’. It also made the assumption that ‘it would be extremely surprising ... if tourists staying in Pamporovo (16th most popular resort in Bulgaria, according to [TripAdvisor.com]) did not venture out to visit an area of allegedly stunning natural beauty only a stone’s throw away’.

45 However, it must be noted that none of the evidence provided by the intervener supports any of those hypotheses and that the probative value of those hypotheses is less than that of each statement to the contrary.

46 Above all, with regard to all the above evidence, it should be stressed that the legal criterion to be applied is not to count bit by bit the number of foreign tourists visiting the town of Devin, but to establish the perception of the word ‘devin’ by the whole relevant public of the European Union, including those who do not necessarily visit Devin or Bulgaria, and who constitute the majority of that public. The Board of Appeal’s argument does not concern that great majority of average consumers in the European Union, in particular Greeks and Romanians, who do not visit Bulgaria, but focuses on the minimal fraction of those who plan to visit that country, and above all the very small fraction of those who visit Devin or do research about it.

47 In that respect, it is important to note that the average consumer of mineral water and beverages in the European Union does not have a high degree of specialisation in geography or tourism. Accordingly, by analogy, in the case giving rise to the judgment of 15 October 2008, *Powerserv Personalservice v OHIM – Manpower (MANPOWER)* (T-405/05, EU:T:2008:442, paragraphs 85, 89 and 93), the General Court dismissed as ‘far too vague’ allegations that ‘tourism by English and German citizens generates linguistic exchange’ in other countries of the European Union, and found that the Board of Appeal had not taken into account the entire relevant public, consisting of the entire population of working age, by wrongly focusing on employers who were looking for staff.

48 In the present case, it must be noted that the Board of Appeal, by wrongly focusing on foreign tourists, in particular Greeks or Romanians, who visit Bulgaria or Devin, did not take into consideration the entire relevant public, consisting of the average consumer of the European Union, in particular from Greece and Romania, but wrongly limited itself to a very small or minimal fraction of the relevant public, which, in any event, is negligible and cannot be considered sufficiently representative of it in the light of the case-law cited in paragraph 18 above. It is such a limitation to a very small or minimal fraction of the relevant public, namely foreign tourists visiting Bulgaria or Devin, which explains why the evidence relied on by the Board of Appeal is of very little probative value, to the point of being almost irrelevant. In short, the Board of Appeal applied a wrong test, which inevitably led it to an incorrect factual assessment of the perception of the word ‘devin’ by the relevant public.

49 Finally, in paragraph 55 of the contested decision, the Board of Appeal stated that it was ‘convince[d] ... that the undoubted reputation of Devin as a spa town with natural water does not arbitrarily stop at the Bulgarian border, but extends beyond to neighbouring countries’ and concluded by declaring that ‘[it] would be strange ... if the considerable fame that Devin enjoys in Bulgaria for its waters should mysteriously vanish on crossing the Bulgarian-Greek border’.

50 However, it must be noted, as the applicant did, that such a declaration cannot serve as valid evidence to establish knowledge of the town of Devin ‘by a “considerable proportion” of consumers in neighbouring countries such as Greece and Romania’, as the Board of Appeal found in line with the Cancellation Division on that point. Furthermore, it should be noted that the town of Devin, which is not easily accessible and is separated from the Greek border by a mountain range, has particular geographic circumstances that render that declaration even more unlikely.

51 By analogy, it should be recalled that, in the case leading to the judgment of 25 October 2005, *Cloppenburg* (T-379/03, EU:T:2005:373, paragraphs 39 and 46), concerning the town of Cloppenburg, located in Lower Saxony (Germany) and having a population of approximately 30 000, more than four times the population of Devin, the General Court was able to leave open the question of whether the public concerned, namely the average German consumer, knew the city of Cloppenburg as a geographical place and, in any event, considered that, given the ‘small size’ of that town, even if German consumers did know it, that knowledge must be regarded as slight or, at the most, as moderate. In that case, the General Court did not even contemplate that that German town of such a small size could be known by the average consumer in the other Member States of the European Union.

52 It follows that the reasons set out in the contested decision to demonstrate that the average consumer in Greece and Romania knows Devin as a geographical place are neither convincing nor conclusive.

53 In addition, the applicant provided further evidence in support of its argument that an average consumer in Greece and Romania would not make a direct link between the contested mark and any geographical origin.

54 Accordingly, the applicant produced an official summary issued by the municipality of Devin itself, stating, on the basis of statements by hotel owners, the number of foreign tourists who visited the town of Devin in 2014, which was allegedly a ‘record year’. That document shows that, during that year, less than 3 500 foreign tourists of all nationalities visited the town of Devin and that, among them, there were only 400 Greek tourists and 50 Romanian tourists. Compared with the figure of 5.4 million foreign tourists who visited Bulgaria in 2014 (see paragraph 38 above) and the populations of the Member States of the European Union, in particular Greece and Romania — 10.7 million and 19.6 million inhabitants respectively on 1 January 2017 according to the Statistical Office of the European Union (Eurostat) — that data suggests that the town of Devin does not represent a major attraction for foreign tourists, particularly Greek and Romanian, and, a fortiori, is not known to the average consumer abroad.

55 The applicant also produced data resulting from an ‘omnibus’ market survey carried out in several Member States, including Greece (mainland and Crete), Romania, Germany and the United Kingdom (‘the omnibus survey’). With regard to the survey conducted in Greece and covering a sample of 1 007 people from the Greek public, the results seemed to show that less than 1% of that sample associated the word ‘devin’ with a place in Bulgaria, and less than 3% with any place at all.

56 The Board of Appeal considered this omnibus survey to be ‘flawed on several points’ listed in paragraphs 44 to 47 of the contested decision. According to it, first, the investigation was trying to prove a negative fact, namely that the public did not know the town of Devin, and because of that questionable premiss, most of the data collected was ambiguous. The interviewees should have been ‘prompted to be more precise’, but it did not specify how. Secondly, there was no indication as to whether or to what extent people living in border regions of Bulgaria had taken part in the Greek survey. Thirdly, the results of the Greek survey were vitiated by errors and the data suffered from occasional unreliability (in the order of an erroneous total of 71 instead of 72). Fourthly, even if the data were interpreted in its most favourable sense

from the applicant's point of view, it should be taken into account that, in the Greek survey, 30 respondents replied that Devin was either a 'town', a 'location' or a 'region in Bulgaria'. It inferred that those 30 respondents, out of sample of 1 007, correspond to more than 270 000 inhabitants out of a total Greek population of 11 million, which was not an insignificant number. Of all these, the Board of Appeal concluded that the survey data was 'clearly ... not convincing' and 'not conclusive'.

57 Even if that omnibus survey were to suffer from the shortcomings identified by the Board of Appeal, it must be held that its conclusions can at least be taken into account, with a sufficient margin of error and without being decisive. Accordingly, even if the actual percentage of the Greek public recognising Devin as a geographical place (in Bulgaria or elsewhere) is 3%, or even two or three times higher, that is still a small percentage, which cannot be considered as representing the average Greek consumer.

58 Above all, even if the number of 270 000 inhabitants is not insignificant in absolute terms, the relevant question is the perception by the entire public concerned, with regard to which a relative percentage of 3% is very unrepresentative. The same result can also be read as meaning that 97% (or an approaching percentage) of the Greek population does not recognise the word 'devin' as a 'town', 'place' or 'region of Bulgaria', which is much more convincing and conclusive.

59 Moreover, as regards the absence of any indication in the Greek survey of persons bordering Bulgaria, it suffices to recall that, in any case, a very large majority of average Greek consumers does not live close to the Bulgarian border.

60 Finally, EUIPO's allegation in the response, that the fact that Greece and Romania are parties to the Lisbon Agreement implies that the citizens of those Member States know Devin as a geographical indication of Bulgarian mineral water must be rejected. Such an allegation is clearly lacking in fact, in that it presumes on the part of the average Greek or Romanian consumer an extremely high degree of knowledge that they clearly do not possess, including international treaties and the list of protected geographical indications in their country. Moreover, the legal protection by a Member State of a geographical indication cannot suffice to automatically establish the recognition, by the average consumer in that Member State, of the word corresponding to that indication as descriptive of a geographical origin.

61 Consequently, it must be concluded, as the applicant claims, that the Board of Appeal did not comply with the requirements established by the settled case-law cited in paragraph 24 above, namely that it should 'establish' that the word 'devin' is known as the designation of a geographical origin by the average consumer in Greece and Romania.

(3) The average consumer in other EU Member States

62 The Board of Appeal, having found that the contested trade mark was descriptive for the average Greek or Romanian consumer, hardly examined that issue from the point of view of the average consumer in the other Member States of the European Union. In paragraph 47 of the contested decision, it merely considered that it could be deduced by extrapolation from the omnibus survey, which it had however dismissed as 'not convincing', that around 455 000 German consumers would perceive the word 'devin' as the name of a town or a town in Bulgaria. In paragraph 55 of that decision, it added that 'it would be unrealistic to claim that none of these members of the general public from other Member States [who visit Bulgaria] would fail to familiarise themselves with Bulgarian culture, history and natural attractions, which would include the town of Devin, when considering their travel arrangements'.

63 It must be noted, as did the applicant, that 455 000 consumers would correspond to less than 0.6% of the total German population, which hardly qualifies as a considerable proportion or an average German consumer of mineral water and drinks. Further, the mere fact that consumers answered 'town' to a question in the survey is inconclusive, as it cannot be equated with the knowledge of a particular town or particular direct link with the goods at issue.

64 As for the characterisation of the average EU consumer as a tourist preparing a trip to Bulgaria and familiarising himself with a relatively minor attraction of the country, this seems much more ‘unrealistic’ than the contrary finding. In that respect, it should be noted again that the average consumer of mineral water and beverages in the European Union does not have a high degree of specialisation in geography or tourism (see paragraph 47 above).

65 Moreover, the intervener did not present any specific evidence to establish that the average consumer of the European Union perceives the word ‘devin’ as a geographical place in Bulgaria.

66 As regards the Cancellation Division’s assertion that the geographical name Devin, in the future, would potentially be understood by the public in the European Union as a description of the geographical origin of the relevant goods, taking into account the marketing efforts made and the growth of the Bulgarian tourism sector (see paragraph 4 above), it should be noted that such an assertion is not supported by the facts of the case and is a mere hypothesis, in particular because the town of Devin is not one of Bulgaria’s 50 main destinations and benefits only very marginally from the growth of foreign tourism in that country. It is therefore not ‘reasonable’, within the meaning of the case law cited in paragraph 24 above, to consider that the name Devin could, in the eyes of the public of the European Union, designate the geographical origin of the goods concerned. Moreover, the burden of proof cannot be reversed by requiring the applicant to demonstrate a negative fact, namely that the town of Devin could not be visited or known in the future.

67 It must be concluded that it does not appear from the file that the word ‘devin’ is recognised as the designation of a geographical origin by the average consumer in the Member States of the European Union other than Bulgaria.

68 In view of the general interest in preserving the availability of geographical names (see paragraph 20 above), it is necessary to consider the consequences of the above conclusion on the availability of the geographical name Devin.

(b) *The availability of the geographical name Devin*

69 The Board of Appeal, in paragraph 8 of the contested decision, recalled that the Cancellation Division had stressed the general interest in preserving the availability of geographical names. According to the Cancellation Division, the case of Devin illustrated the underlying logic of Article 7(1)(c) of Regulation No 207/2009, namely the need for certain geographical descriptions to remain available for other operators to use them, and that the existence of a European Union trademark should not hinder current and future economic efforts to develop the reputation of a traditional spa town beyond the country’s borders. The Cancellation Division had rejected the applicant’s argument that the water concession was granted to one company only, on the ground that it did not take into account the settled case-law that the general or public interest in leaving descriptive or potentially descriptive marks free for third parties to use was pre-established and presumed.

70 The Board of Appeal itself, in paragraphs 49 to 52 of the contested decision, rejected an ‘essential argument’ of the applicant described by the Board of Appeal as relating to ‘the alleged “exclusivity” of its contract allowing it to exploit Devin’s water reserves’, a provision of Bulgarian law according to which ‘an extraction concession ... is granted to a single concessionaire’ (Article 47(11) of the Water Act) as well as a ‘factual monopoly over the [geographical indication] “Devin Natural Mineral Water”’ (see paragraph 28 above) precluding, according to that Board, that it ‘be left free for other traders’.

71 To this end, the Board of Appeal first considered that the applicant’s potential monopoly is limited in time and can be terminated for various commercial or legal reasons. Furthermore, it considered that the ‘exploitation’ of a natural source and its subsequent bottling may involve different undertakings, each of which must have the right to include the word ‘devin’ on its labels. Finally, it observed that ‘regardless of the current legal constraints in Bulgaria ... Directive [2009/54] does not restrict the exploitation of mineral water sources to one undertaking’, that ‘Article 8(2), of [the directive] only imposes the restriction that water from one spring should be marketed always under one and the same “trade description”, but does not

limit the marketing to one undertaking’ and that ‘[that provision] does not seek to regulate the number of “concessionaires”[as the applicant seemed to argue]’.

72 The Board of Appeal, in paragraph 54 of the contested decision, addressed another argument of the applicant, pointing out that EUIPO had registered the European Union word marks VITTEL (under number 958322) and EVIAN (under number 1422716) for, inter alia, ‘mineral waters’ included in Class 32. The Board of Appeal countered that it was not necessarily EUIPO’s ‘practice’ to accept the registration of such marks unchallenged, as an examination of the history of the latter mark revealed that an objection had been raised against it during the examination of the absolute grounds for refusal, although it was later waived after the submission of evidence.

73 EUIPO, both in the response and at the hearing, considers that the Board of Appeal rightly protected the general interest in preserving the availability of a geographical name such as that of the spa town of Devin. It specifies that the applicant may of course continue exploiting its well-known trade mark in Bulgaria. However, it adds, the fact that it has a well-known trade mark in Bulgaria does not give it a right to have an EU-wide monopoly on the descriptive word ‘devin’, which would hinder economic efforts to develop the reputation of a traditional spa town beyond Bulgaria’s borders. Nor does it rule out that other competitors might, in the future, have a legitimate interest to use the descriptive indication ‘devin’ in other Member States of the European Union, where Devin is known and associated with its waters, but where it had not acquired any distinctiveness by virtue of use.

74 The applicant claims that Article 7(1)(c) of Regulation No 207/2009 is not an absolute block on the registration of descriptive signs as trade marks. It states that, when a descriptive sign has acquired a secondary meaning as a trade mark by use, it can be registered, which does not prevent other parties from making descriptive use of the sign.

75 In that regard, in the first place, it should be recalled that, under Article 12(1)(b) of Regulation No 207/2009 (now, in slightly amended form, Article 14(1)(b) of Regulation 2017/1001), ‘[an EU] trade mark shall not entitle the proprietor to prohibit a third party from using in the course of trade indications concerning the ... geographical origin ... of the goods or of rendering of the service, or other characteristics of the goods or service’.

76 The Court of Justice considered that, by thus limiting the effects of the exclusive rights of a trade mark proprietor, Article 12 of Regulation No 207/2009 seeks to reconcile the fundamental interests of trade mark protection with those of free movement of goods and freedom to provide services in the internal market in such a way that trade mark rights are able to fulfil their essential role in the system of undistorted competition which the TFEU seeks to establish and maintain (see, to that effect and by analogy, judgment of 10 April 2008, *Adidas and Adidas Benelux*, C-102/07, EU:C:2008:217, paragraph 45 and the case-law cited).

77 Specifically, Article 12(1)(b) of Regulation No 207/2009 seeks to ensure that all economic operators have the opportunity to use descriptive indications. That provision therefore gives expression to the requirement of availability. However, the requirement of availability cannot in any circumstances constitute an independent restriction of the effects of the trade mark in addition to those expressly provided for in that article (see, to that effect and by analogy, judgment of 10 April 2008, *Adidas and Adidas Benelux*, C-102/07, EU:C:2008:217, paragraphs 46 and 47 and the case-law cited).

78 Admittedly, it should be noted that, in circumstances that are different from the present case, it has been held that the case-law principle, referred to in paragraphs 19 and 20 above, concerning the general interest underlying Article 7(1)(c) of Regulation No 207/2009, is not contradicted by Article 12(1)(b) of that regulation, which also does not have a decisive influence on the interpretation of the first provision. Indeed, Article 12(1)(b) of Regulation No 207/2009, which aims, inter alia, to resolve the problems posed by registration of a mark consisting wholly or partly of a geographical name, does not confer on third parties the right to use the name as a trade mark, but merely guarantees their right to use it descriptively, that is to say, as an indication of geographical origin, provided that it is used in accordance with honest practices in

industrial or commercial matters (see, to that effect judgments of 15 October 2003, *Nordmilch v OHIM (OLDENBURGER)*, T-295/01, EU:T:2003:267, paragraph 55, and of 20 July 2016, *Internet Consulting v EUIPO — Provincia Autonoma di Bolzano-Alto Adige (SUEDTIROL)*, T-11/15, EU:T:2016:422, paragraph 55; see also, to that effect and by analogy, judgment of 4 May 1999, *Windsurfing Chiemsee*, C-108/97 and C-109/97, EU:C:1999:230, paragraphs 26 to 28).

79 In particular, a descriptive use of the name ‘Devin’ is thus permitted in order to promote the town as a tourist destination. Contrary to what the intervener fears, the contested mark cannot therefore constitute an impediment to the economic efforts to develop, beyond the borders of Bulgaria, the reputation of the town of Devin for its spa waters.

80 For the sake of clarity, it should be pointed out that this legislative and jurisprudential reminder does not amount to advocating a minimum control of the grounds for refusal in Article 7 of Regulation No 207/2009 at the time when the application for registration is considered, on the pretext that the risk that operators might appropriate certain signs which ought to remain available would be neutralised by the limits which Article 12 of that regulation imposes at the stage when advantage is taken of the effects of the registered mark. The assessment of the grounds for refusal set out in Article 7 of that regulation must be carried out by the competent authority for the registration procedure or invalidity proceedings of the trademark, and cannot be withdrawn from it in order to transfer it to the courts with responsibility for ensuring that the rights conferred by the trade mark can actually be exercised (see, to that effect and by analogy, judgment of 6 May 2003, *Libertel*, C-104/01, EU:C:2003:244, paragraph 58).

81 With regard to the citation by the Board of Appeal of the judgment of 23 October 2003, *OHIM v Wrigley* (C-191/01 P, EU:C:2003:579, paragraph 32), according to which ‘a word sign must be refused registration ... if at least one of its possible meanings designates a characteristic of the goods or services concerned’, it suffices to recall that that case-law answers, in the negative, the question of whether it is ‘necessary that the signs and indications composing the mark ... be in use at the time of the application for registration in a way that is descriptive’. However, in the present case, the relevant issue is not this one — since the word ‘devin’ is descriptive in Bulgaria, subject to distinctiveness acquired through the use of the contested mark for the goods concerned — but instead concerns the perception of that word by the relevant public outside Bulgaria.

82 In that regard, while the likelihood of a geographical indication of origin influencing competitive relationships is strong in the case of a large region with a reputation for the quality of a wide range of goods or services, it is, however, weak in the case of a well-defined place the reputation of which is limited to a restricted number of goods or services (see, to that effect, judgments of 15 December 2011, *Mövenpick v OHIM (PASSIONATELY SWISS)*, T-377/09, not published, EU:T:2011:753, paragraph 41, and of 20 July 2016, *SUEDTIROL*, T-11/15, EU:T:2016:422, paragraph 44). However, in the present case, Devin is a well-defined place, known to the average consumer only in Bulgaria and largely unknown to the average consumer in the rest of the European Union, the reputation of which is limited to its waters.

83 In the second place, it is important to note that, assuming that the contested trade mark has acquired a secondary meaning and distinctive character in Bulgaria, the only Member State where the word ‘devin’ is descriptive, and therefore valid as a trade mark of the European Union, the fact remains that Regulation No 207/2009 provides, in the very definition of the exclusive right conferred by such a mark, safeguards to protect the interests of third parties.

84 Accordingly, the Court recalled that the purpose of Regulation No 207/2009 is generally to strike a balance between the interest which the proprietor of a trade mark has in safeguarding its essential function, on the one hand, and the interests of other economic operators in having signs capable of denoting their products and services, on the other. It follows that the protection of rights that the proprietor of a trade mark derives under that regulation is not unconditional (see, to that effect and by analogy, judgments of 27 April 2006, *Levi Strauss*, C-145/05, EU:C:2006:264, paragraphs 29 and 30 and the case-law cited; of 22 September 2011, *Budějovický Budvar*, C-482/09, EU:C:2011:605, paragraphs 34 and 48; of 6 February

2014, *Leidseplein Beheer and de Vries*, C-65/12, EU:C:2014:49, paragraphs 41 to 43; and of 30 May 2018, *Tsujimoto v EUIPO*, C-85/16 P and C-86/16 P, EU:C:2018:349, paragraph 90).

85 First, the protection of the function of indicating the origin of the trade mark, provided for in Article 9(2) (a) and (b) of Regulation No 207/2009 (now Article 9(2)(a) and (b) of Regulation 2017/1001), covers its use for identical or similar goods (or services) only and requires a risk of confusion on the part of the relevant public, which is assumed in the case of double identity of signs and goods.

86 Secondly, the protection of the advertising function of a reputed trademark, provided for in Article 9(2)(c) of Regulation No 207/2009 (now Article 9(2)(c) of Regulation 2017/1001), also covers dissimilar products, but requires a risk of dilution, tarnishing or free-riding and, in addition, does not cover uses with a 'due cause'.

87 According to the case-law of the Court, the concept of 'due cause' should not be interpreted as being limited to objectively overriding reasons, but may also relate to the subjective interests of a third party using a sign which is identical or similar to the mark with a reputation. That concept is intended, not to resolve a conflict between a mark with a reputation and a similar sign which was being used before that trade mark was filed or to restrict the rights which the proprietor of that mark is recognised as having, but to strike a balance between the interests in question by taking account, in the specific context of Article 9(2)(c) of Regulation No 207/2009 and in the light of the enhanced protection enjoyed by that mark, of the interests of the third party using that sign (see, to that effect and by analogy, judgment of 6 February 2014, *Leidseplein Beheer and de Vries*, C-65/12, EU:C:2014:49, paragraphs 45 to 48).

88 It follows from Article 9(2)(c) of Regulation No 207/2009 that the proprietor of a trade mark with a reputation may be obliged, pursuant to the concept of 'due cause', to tolerate the use by a third party of a sign similar to that mark in relation to a product which is identical to that for which that mark was registered, if it is demonstrated that that sign was being used before that mark was filed and that the use of that sign in relation to the identical product is in good faith. Similarly, pursuant to Article 8(5) of that regulation (now Article 8(5) of Regulation 2017/1001), that proprietor may not oppose the registration of such a sign (judgment of 5 July 2016, *Future Enterprises v EUIPO – McDonald's International Property (MACCOFFEE)*, T-518/13, EU:T:2016:389, paragraph 113; see also, to that effect and by analogy, judgment of 6 February 2014, *Leidseplein Beheer and de Vries*, C-65/12, EU:C:2014:49, paragraph 60).

89 In the present case, it follows from the above that the name of the town of Devin remains available to third parties not only for descriptive use, such as the promotion of tourism in that town, but also as a distinctive sign in cases of 'due cause' and where there is no likelihood of confusion excluding the application of Articles 8 and 9 of Regulation No 207/2009.

90 The general interest in preserving the availability of a geographical name such as that of the spa town of Devin can thus be protected by allowing descriptive uses of such names and by means of safeguards limiting the exclusive right of the proprietor of the contested mark, without requiring cancellation of that mark and the total suppression of the exclusive right that it confers for the goods in Class 32 covered by the registration.

91 Moreover, it is this necessary balance between the rights of the proprietors and the interests of third parties which allows the registration of trade marks originating from an eponymous geographical name, such as the European Union word marks VITTEL and EVIAN mentioned by the applicant, under certain conditions relating in particular to the acquisition of a secondary meaning and distinctive character by use in territories where the sign is intrinsically descriptive of a geographical origin and where that sign is not deceptive as regards that origin.

2. Conclusion on the first plea in law and on the request for annulment

92 In view of the above considerations, in particular paragraphs 32 to 67 above, it must be concluded, as the applicant submits, that the Board of Appeal has not established the existence of a sufficient degree of

recognition of the town of Devin by the average European Union consumer, in particular Greek or Romanian consumers, and that the intervener has not supported its request for a declaration of invalidity with any evidence that the average European Union consumer would associate the word 'devin' with a town in Bulgaria. While it must be held that a proportion of European Union consumers know the town of Devin, that proportion must, in any event, be considered to be very small. That conclusion in no way calls into question the natural beauty of Devin and the healing properties of its spa waters, nor the economic efforts made to promote tourism in Bulgaria.

93 According to the case-law cited in paragraph 22 above, in principle, Article 7(1)(c) of Regulation No 207/2009 does not preclude the registration of geographical names which are unknown in the circles concerned or, at the very least, unknown as a designation of a geographical place. In the present case, however, while the geographical name Devin is known to the relevant class of persons in Bulgaria, in which country the applicant claims that the contested mark has acquired distinctive character, it must be noted that, as regards the relevant class of persons in the other Member States of the European Union, in particular Greece and Romania, the geographical name Devin is largely unknown to them or, at the very least, unknown as a designation of a geographical place.

94 Similarly, according to the case-law cited in paragraph 24 above, in making its assessment, EUIPO was bound to establish that the geographical name is known to the relevant class of persons as the designation of a place. In the present case, however, it must be noted that, with respect to the relevant class of persons, which is made up of average consumers, the geographical name Devin is, for a large majority of the public, unknown. The part of the relevant public that knows that name as a geographical place represents only a very small and negligible minority of one or a few percent at most. Moreover, that percentage seems, *prima facie*, to be lower than that representing the part of the relevant public who know Devin as a brand of mineral water.

95 It follows from the foregoing that the Board of Appeal erred in its assessment by concluding that the contested trade mark was descriptive of a geographical origin as regards the average consumer in the neighbouring countries of Bulgaria, namely Greece and Romania, and in all the other Member States of the Union, with the sole exception of Bulgaria. In doing so, it infringed Article 52(1)(a) of Regulation No 207/2009 in conjunction with Article 7(1)(c) of that regulation.

96 Consequently, the first part of the first plea should be upheld and, consequently, the contested decision should be annulled, in accordance with the applicant's first head of claim, without the need to examine the second part of the first plea or the second plea, including the pleas of inadmissibility raised against them respectively by the intervener or by EUIPO, nor to rule on the admissibility of certain annexes that, according to the applicant, were submitted by the intervener for the first time before the General Court.

B. The claim for alteration

97 As regards the applicant's second and third heads of claim, seeking the rejection of the intervener's application for a declaration of invalidity in its entirety and, in essence, requesting the alteration of the contested decision (see paragraph 10 above), it must be borne in mind that the power of the General Court to alter decisions pursuant to Article 65(3) of Regulation No 207/2009 does not have the effect of conferring on that court the power to carry out an assessment on which the Board of Appeal has not yet adopted a position. Exercise of the power to alter decisions must therefore, in principle, be limited to situations in which the General Court, after reviewing the assessment made by the Board of Appeal, is in a position to determine, on the basis of the matters of fact and of law as established, what decision the Board of Appeal was required to take (judgments of 5 July 2011, *Edwin v OHIM*, C-263/09 P, EU:C:2011:452, paragraph 72, and of 13 May 2015, *easyAir-tours*, T-608/13, not published, EU:T:2015:282, paragraph 68).

98 In the present case, the conditions for the exercise of the General Court's power to alter decisions, as set out in the judgment of 5 July 2011, *Edwin v OHIM* (C-263/09 P, EU:C:2011:452), are not satisfied. While it is true that it follows from the considerations set out in paragraph 95 above that the Board of Appeal was

required to declare that the contested trade mark was not descriptive in respect of the non-Bulgarian part of the relevant public, in particular for the average Greek or Romanian consumer, the fact remains that the Board of Appeal — in so far as it considered, wrongly, that the alleged descriptive character of the contested mark for the Greek or Romanian part of the relevant public was sufficient to establish the existence of a ground of invalidity justifying the dismissal of the appeal against the decision of the Cancellation Division — did not clearly rule on the acquisition of distinctive character by the use of the contested mark as regards the Bulgarian part of the relevant public, the only part for which the contested mark is descriptive of a geographical origin. Since the issue of whether distinctive character had been acquired by the use of the contested trade mark in Bulgaria was not clearly examined by the Board of Appeal, it is not for the General Court to examine it, for the first time, in its review of the legality of the contested decision (see, to that effect, judgments of 5 July 2011, *Edwin v OHIM*, C-263/09 P, EU:C:2011:452, paragraphs 72 and 73, and of 13 May 2015, *easyAir-tours*, T-608/13, not published, EU:T:2015:282, paragraphs 69 and 70 and the case-law cited).

99 It follows that, as the case currently stands, the General Court cannot exercise its power to review the contested decision in order to annul the decision of the Cancellation Division of 29 January 2016 — which had, moreover, considered, on that point, that, ‘in view of the materials submitted by the [applicant] ... there can be no doubt that the trade mark “Devin” has acquired distinctive character in Bulgaria’ — and to reject the request for a declaration of invalidity of the contested mark.

100 The applicant’s second and third heads of claim must therefore be rejected.

IV. Costs

101 Under Article 134(1) 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.

102 Since EUIPO and the intervener have been unsuccessful for the most part, first, EUIPO must be ordered to bear its own costs and to pay those incurred by the applicant, in accordance with the form of order sought by the latter, and, secondly, the intervener must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

- 1. Annuls the decision of the Second Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 2 December 2016 (Case R 579/2016-2);**
- 2. Dismisses the action as to the remainder;**
- 3. Orders EUIPO to bear its own costs and to pay those incurred by Devin AD;**
- 4. Orders Haskovo Chamber of Commerce and Industry to bear its own costs.**

Collins

Kancheva

Passer

Delivered in open court in Luxembourg on 25 October 2018.

E. Coulon

M. Kancheva

Registrar

President

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(a) On the perception of the word 'devin' by the average EU consumer

(1) Average Bulgarian consumers

(2) Average Greek or Romanian consumers

(3) The average consumer in other EU Member States

(b) The availability of the geographical name Devin

2. Conclusion on the first plea in law and on the request for annulment

B. The claim for alteration

IV. Costs

* Language of the case: English.