

Paris, January 30, 2023  
Case C-788/22 P, notified by e-curia

**APPLICATION FOR LEAVE TO INTERVENE**  
*Articles 129 et seq. of the Rules of Procedure  
of the Court of Justice of the European Union (“CJEU”)*

**ON BEHALF OF:**

**ASSOCIATION DES PRATICIENS DU DROIT DES MARQUES ET DES MODÈLES (“APRAM”)**, a French association registered under French law dated July 1<sup>st</sup>, 1901, SIREN directory n°490 770 997, located 9, Avenue Percier, 75008 Paris, France,

*Intervener Applicant  
in support of the form of order sought by Louis Vuitton Malletier*

Represented by : Me. Edouard Fortunet – Lawyer at the Paris bar  
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*APRAM Power of Attorney: [Annex 1](#)*

*Paris Bar Certificate: [Annex 2](#)*

***Communications by e-curia: accepted***

*Date of publication in the OJEU of LVM’s appeal: not published*

**Requested measure:** APRAM is respectfully submitting its application, on the basis of the second paragraph of Article 40 of the Statute of the CJEU, for leave to intervene in Case C-788/22 P in support of the form of order sought by the Appellant (Louis Vuitton Malletier), requesting this honorable Court to grant its request. If APRAM’s application for leave to intervene in Case C-788/22 P is granted, APRAM intends, on the basis of Articles 132 and 190 of the Rules of Procedure of the CJEU, to intervene and defend the form of order sought by LVM by submitting a further statement of intervention.

**PARTIES INVOLVED:**

**LOUIS VUITTON MALLETIER (“LVM”)**, located 2, Rue du Pont Neuf, 75001, Paris, France,

*Appellant*

Represented by: Me. Pier Luigi Roncaglia, Esq.,  
Me. Noemi Parrotta, Esq.,  
Professor Pierre-Yves Gautier, Esq.

**and**

**EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE (“EUIPO”)**, located 4, Avenida de Europa, E-03008, Alicante, Spain,

*Defendant*

Represented by: J. Crespo Carrillo, acting as Agent

## Presentation of APRAM

1. **APRAM** is an international Francophile association established under French law dated July 1<sup>st</sup>, 1901. **APRAM** was founded in 1978 ([Annex 3](#)) and is registered before the French SIRENE under n°490 770 997 ([Annex 4](#)). Its creation was registered and duly published in the Official Journal of the French Republic in 1978 ([Annex 5](#)).
2. One of **APRAM**'s main characteristics is to gather, in equality, the three following families/colleges with complementary experiences, which represent the full spectrum of the professionals specialized in intellectual property, namely: (i) in-house counsels (*industrie*; trademark and design owners), (ii) European trademark and design attorneys (*conseils en propriété industrielle*; trademark and design practitioners) and (iii) lawyers (*avocats*; trademark and design practitioners) ([Annex 6](#)).
3. With more than 1.100 members, **APRAM** is amongst the most active Francophile associations specialized in intellectual property matters, specifically trademark and design issues. **APRAM**'s members in all three colleges widely cover all economic sectors, including Cosmetics and personal care, Clothing, footwear and accessories, Sports goods, Food, Chemicals, Energy, Toys and games, Jewellery and watches, Handbags and luggage, Recorded music industry, Spirits and wine, Pharmaceutical, Hotels, Smartphone and Tyres and batteries.
4. An important objective for **APRAM** is to protect, assist and promote the common interests of its members amongst all three colleges. In this regard **APRAM** strives to contribute to the development of trademark and design laws and regulations, in particular in France and within the European Union.
5. For more than a decade, **APRAM** has regularly and actively taken official positions on intellectual property issues, on its own or in cooperation with other intellectual property association and on its own initiative or at the request of national or European public institutions. Such public positions can be consulted on **APRAM**'s website ([Annex 7](#)).
6. **APRAM** is also well armed and used to provide expertise on trademark and other IP-related laws and regulations to Courts and intellectual property offices, in particular in France and within the European Union.
7. **APRAM** is notably participating in the EUIPO's Observatory Meetings, SQAP Meetings, TM5 / ID5 Meetings, User Group Meetings, Working Group Meetings, European Cooperation Projects on the Convergence of practices on trademarks and Customer Panels, to the INPI's *Jury des trophés*, regular gatherings of French Intellectual Property associations, *Comité de Suivi PI* and WIPO's meetings on the Legal Developments of the Madrid System, Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) and on the Hague System. **APRAM** is also working actively with French Judges to improve legal proceedings relating to intellectual property rights and the processing of said proceedings.

### Legal ground for APRAM's application for leave to intervene

8. Pursuant to article (i) 40 of the Statute of the CJEU, any person establishing an interest in the result of a case can intervene before the CJEU and (ii) 130, paragraph 2(e) of the Rules of Procedure of the CJEU, the application to intervene so submitted shall contain a statement of the circumstances establishing the right to intervene.
  
9. The CJUE grants applications for leave to intervene to associations representing a collective interest in cases raising questions of principle likely to affect the interests of their members, provided that ([Annex 8](#)):
  - the association is representative of a significant number of members active in the relevant sector;
  - the association's missions include the protection of the interests of its members;
  - the case may raise questions of principle affecting the functioning of the sector at stake;
  - the interests of the association's members may be significantly affected by the judgment to be rendered.
  
10. Intellectual property-related associations have been granted the right to intervene before the CJEU to protect the interests of their members in intellectual property-related cases raising questions of principle susceptible to affect those interests (see notably CJEU Order dated November 19th, 2019, C-818/18 P and C-6/19 P and CJEU Order dated March 25th, 2014, C-445/13 P). In particular in similar instances as the one at stake where (CJEU Order dated January 12th 2018, C-84/17 P, C-85/17 P and C-95/17 P):
  - the intellectual property-related association's "*objects include, inter alia, the protection of the interests of its members in the use made of their trademarks*"; and
  - "*the question of law raised, in essence, in Case C-84/17 P, concerns the proof of acquisition, by a sign for which registration as an EU trade mark is sought, of a distinctive character through use and, more specifically, whether such proof must be adduced for each of the Member States in which that sign is devoid of inherent distinctive character. It is therefore a question of principle liable to affect the interests of the members of [the intellectual property-related association] as proprietors of EU trade marks*"
  
11. In the case at stake:
  - **APRAM** comprises a significant number of members (more than 1.100 members), representing the full spectrum of the professionals specialized in intellectual property, namely: (i) in-house counsels (representing trademark and design owners), (ii) European trademark and design attorneys (representing trademark and design practitioners) and (iii) lawyers (representing trademark and design practitioners) ([Annex 6](#)). A significant number of **APRAM** members represent trademarks owners or have been working on matters involving EU trademarks which distinctive character has been acquired through use.

- As outlined in more details below, the position of LVM ([Annex 9](#)) relates to a “*question of principle*”. Such “*question of principle*” is affecting the functioning of trademarks owners and trademarks practitioners, *i.e.* the collective interests of **APRAM**’s members:
  - ✓ the Appealed Decision, unless it is annulled, raises the minimum level of evidence to an unreasonable, unjustified, disproportionate and illegitimate level which will require **APRAM** members (amongst which trademarks owners and trademarks practitioners) to dedicate a substantial and disproportionate amount of time and efforts in gathering fully exhaustive evidence under Article 7(3) of Regulation 2017/1001.
  - ✓ the Appealed Decision, unless it is annulled, materially and adversely affects **APRAM** members’ investments (amongst which trademarks owners mainly) and, for practical reasons, may lead to discourage them from filing EU trademarks to protect their intangible assets.
  - ✓ the declension of the Appealed Decision at the EUIPO and/or national Court level(s), unless it is annulled, may lead to uncountable number of EU cases, in line with the Appealed Decision, but in violation of the fundamental right principle of “*égalité des armes*”, which would materially and negatively affect **APRAM** members (trademarks owners and trademarks practitioners).

It is hence submitted that the Appealed Decision changes the legal situation applicable to the level of evidence required to establish the acquisition of a distinctive character of an EU trademark, that **APRAM**’s members have a direct, present and certain collective interest in the outcome of the judgment to be rendered in case C-788/22 P and that the appeal should be allowed to proceed pursuant to article 58 bis, §3 of the Statute of the CJEU.

- Article 4 of **APRAM**’s Bylaws set forth that **APRAM**’s missions include the “*protect[ion], assist[ance] and promot[ion]*” of the interests of its members ([Annex 3](#));
- **APRAM**’s position was prepared in cooperation with **APRAM**’s Board of Directors, under the direct supervision of **APRAM**’s Executive Committee, following a strictly independent procedure; and
- On January 27, 2023, **APRAM**’s Board of Directors approved “*APRAM’s intervention in support of LVM’s position in the proceedings pending before the CJEU C-788/22*” ([Annex 10](#)).

**12. APRAM**’s intervention in support of LVM’s position is admissible and **APRAM** respectfully requests that this honorable Court grants its application for leave to intervene.

**13. APRAM** is aware that its application for leave to intervene should be lodged once the CJUE decided to allow the appeal to proceed (which is not yet the case in C-788/22 P). Nevertheless, **APRAM** wishes to emphasize the importance of this case for its members: as explained in more details below, the outcome of the decision in case C-788/22 P raises a crucial question for the unity, consistency and development of European Union law, which requires the appeal to be allowed to proceed pursuant to article 58 bis, §3 of the Statute of the CJEU.

## Reasons why APRAM is submitting its application for leave to intervene

14. In case T-275/21, the General Court ruled, on October 19, 2022 (the “**Appealed Decision**”), that LVM failed to demonstrate the acquisition of a distinctive character through use of LVM’s figurative international registration n°986207 designating the EU, obtained on November 4, 2008.
15. As regards the geographical scope of the proof of distinctive character acquired through use, according to the General Court, LVM bore the burden to prove that its figurative international registration n°986207 designating the EU acquired a “*distinctive character in the part of the European Union in which it did not, ab initio, have such character*” and that “*with regard to [the figurative international registration n°986207 designating the EU] that is, ab initio, devoid of distinctive character in all Member States*”, LVM had to establish that it “*has acquired distinctive character through use throughout the territory of the European Union*” (case T-275/21, §24).
16. **APRAM** considers that the implementation of the “each Member State” doctrine to Article 7(3) of Regulation 2017/1001 in the Appealed Decision is not (or no longer) legitimate from a legal standpoint, for mainly two reasons.
17. **First**, as pertinently pointed out by the Appellant in its appeal ([Annex 9](#)), the unreflective implementation of the “each Member State” doctrine to Article 7(3) of Regulation 2017/1001 in the Appealed Decision creates an unreasonable, unjustified, disproportionate and illegitimate burden of proof on trademarks owners, which constitutes a violation of the rules of fair trial and the principle of “*égalité des armes*”.
18. Appellant rightly stated that, based on Article 47 of the Charter of the European Union, which constitutes the “primary law” of the Union, “*every person whose rights and freedoms guaranteed by the law of the Union have been violated is entitled to an effective remedy before a court of law... Each person is entitled to a fair hearing*”. Such right to a “*fair hearing*” includes the “*right of evidence*” and imposes to consider, consistent with the rules on the burden of proof and in line with the principle of presumption of validity, that once registered, an EU trademark should be presumed inherently distinctive throughout the entire European Union. Accordingly, a Judge or an Office should not be imposing on a party (the owner of an EU trademark) the demonstration of a fact (the acquisition of the distinctive character of the EU trademark) so difficult and excessive that it is impossible, in practice, to administer it (the demonstration, on a country-by-country basis and for each of the 27 Member States of the European Union that the EU trademark acquired a distinctive character) ([Annex 9](#)).
19. **APRAM** respectfully requests the CJUE to consider that, in addition to the arguments raised by the Appellant, the Appealed Decision’s first and most significant impact is to set an unreasonable, unjustified, disproportionate and illegitimate burden of proof on trademark owners, despite the General Court’s statement in §25 and §31 of the Appealed Decision that “*the burden of proof imposed on the proprietor of the contested mark of*

*demonstrating distinctive character acquired through the use of that mark must not be unreasonable*".

20. In §24 of the Appealed Decision, the Judges ruled that *"As regards the geographical scope of the proof of distinctive character acquired through use, it should be recalled that a sign may be registered as an EU trade mark under Article 7(3) of Regulation No 40/94 only if evidence is provided that it has acquired, in consequence of the use that has been made of it, distinctive character in the part of the European Union in which it did not, ab initio, have such character for the purposes of Article 7(1)(b)"* (case T-275/21, §24). Such statement seems to imply that the burden of proof falling on trademark owners would be limited, suggesting that a trademark owner may *"only"* have to demonstrate that its trademark has acquired a distinctive character in a limited part of the European Union (namely, *"only"* the Member States where the EU trademark did not, ab initio, have such distinctive character).
21. **APRAM** supports that such statement is totally wrong as far as it applies to EU figurative trademarks, for the mere reason that an EU figurative trademark devoid, ab initio, of distinctive character in one Member State, will necessarily be devoid of distinctive character in the remaining 26 Member States.
22. As a consequence, the Appealed Decision sets a general and abstract standard for EU figurative trademarks owners: they must necessarily demonstrate, on a country-by-country basis and for each of the 27 Member States of the European Union, that their trademark acquired a distinctive character. The Appealed Decision, unless it is annulled, raises the minimum level of evidence to an unreasonable, unjustified, disproportionate and illegitimate level.
23. Such unreasonable, unjustified, disproportionate and illegitimate level of evidence set by the Appealed Decision has a direct impact on trademarks owners and trademarks practitioners (including **APRAM**'s members): to abide by the outcome of the Appealed Decision, if it is not annulled, they will be required to dedicate a substantial and disproportionate amount of time and efforts in gathering fully exhaustive evidence under Article 7(3) of Regulation 2017/1001. All the more given that the Appealed Decision opens two gaps in their portfolios: if the trademark owner is not in a position to invest a substantial amount of time and efforts in gathering fully exhaustive evidence under Article 7(3) of Regulation 2017/1001:
  - a sign, be it a reputed sign, may be refused for registration; and
  - a registered trademark, be it a reputed sign, may be cancelled (including by way of counterclaim in infringement proceedings).
24. Trademarks owners and trademarks practitioners members of **APRAM** also express that their concern is further compounded by the management and processing of evidence, not only at the General Court's level, but also as implemented at lower (such as before the Board of Appeal and ultimately the EUIPO) or parallel (such as before national courts) instances. In §33 of the Appealed Decision, the General Court explains that *"In the contested decision, the Board of Appeal decided to examine first whether the contested*

*mark had acquired distinctive character through the use that had been made of it in Bulgaria, Estonia, Latvia, Lithuania, Slovakia and Slovenia (together, ‘the Member States concerned’), stating that it would proceed to such an examination in respect of the other EU Member States only if distinctive character acquired through use had been demonstrated for the Member States concerned. The Member States concerned were, together with Malta, the Member States in which the applicant did not have any stores”.*

25. Based on an unreflective implementation of the Appealed Decision, the legal situation for trademarks owners and trademarks practitioners members of **APRAM** will change since:
- upon application for registration of a sign devoid of distinctive character ab initio, be it a reputed sign, the EUIPO (supported by the Board of Appeal and the General Court) will conduct a “*cherry picking*” analysis of the submitted evidence, focusing on the Member State(s) in which the applicant does not have any store, irrespective of the actual reputation and acquired distinctive character of the sign at a global EU level;
  - upon enforcement of a registered trademark devoid of distinctive character ab initio before any competent national Court, the infringer will systematically counterclaim cancellation of the registered trademark (before the competent national Court) or initiate a cancellation action (before the EUIPO), alleging that the lack of acquisition of a distinctive character in a single Member State suffices to cancel such trademark under Article 7(3) of Regulation 2017/1001; bargaining on the substantial time and efforts that the trademarks owners will have to consecrate to effectively and successfully respond to such claim.
26. It is clear that the Appealed Decision materially and adversely affects trademarks owners’ investments and, for practical reasons, will lead to discourage them from filing EU trademarks to protect their intangible assets (in view of the (i) lack of unitary character of EU trademarks (ii) disadvantages of EU trademarks compared to the filing of national registrations and/or (iii) the disproportionate efforts and investments that the registration and/or defense of signs devoid of distinctive character ab initio (be they reputed signs) will require in the future). It creates a strong legal uncertainty (*insécurité juridique*) that is detrimental to **APRAM**’s members.
27. The unknown remains, for **APRAM** and its members, the extent to which the Appealed Decision, if it is not annulled, will materially and adversely affect trademarks owners’ portfolios and the protection of their products.
28. Indeed, the declension of the Appealed Decision at the EUIPO and/or national Court level(s) may lead to uncountable number of EU cases, in line with the Appealed Decision, but in violation of the fundamental right principle of “*égalité des armes*”.
29. Hence, Case C-788/22 P raises a question of principle, namely the possible contradiction to the fundamental right principle of “*égalité des armes*” of numerous future EUIPO, General Court and/or national Courts decisions, in which the Judges will be led to unreflectively apply the Appealed Decision’s reasoning, if it is not annulled.

30. Accordingly, Case C-788/22 P has a direct impact on the interests of **APRAM**'s members composing the in-house counsels (*industrie*; trademarks owners) college and, equally directly, on **APRAM**'s members composing the European trademark and design attorneys (*conseils en propriété industrielle*, for the filing and prosecution of trademarks) and lawyers (*avocats*, for the filing, enforcement and defense of trademarks) colleges.
31. **Second**, as pertinently pointed out by the Appellant in its appeal ([Annex 9](#)), the “each Member State” doctrine is not (or is no longer) legitimate and is affecting the unity, consistency and development of European Union law.
32. Since Case C-788/22 P raises an important question for the unity, consistency and development of European Union law, the appeal should be allowed to proceed pursuant to article 58 bis, §3 of the Statute of the CJEU: “*An appeal shall be allowed to proceed, wholly or in part, in accordance with the detailed rules set out in the Rules of Procedure, where it raises an issue that is significant with respect to the unity, consistency or development of Union law*”.
33. Appellant rightly stated in that respect that the “each Member State” doctrine, requiring that the acquisition of distinctive character be established in relation to each Member State, does not find support in statutory language. Appellant further explains that the “each Member State” doctrine derives from case-law and, specifically, from a distorted application of the principles relevant to shape marks, which is in blatant contrast with the unitary character of EU trademarks, and, more generally, with a single market and a common economic union. Appellant’s position is supported by an analysis of EU case-law which reveals that the most recent CJUE case law relating to the acquisition of distinctive character has left many doubts on how evidence addressing the European Union as a whole may be relevant to carry out an independent assessment of acquired distinctiveness in each Member State (in a context where the EU must be taken as a whole and not as the sum of the territories of its Member States, irrespective of their national boundaries) ([Annex 9](#)).
34. **APRAM** respectfully requests the CJUE to consider that, in addition to the arguments raised by the Appellant, the Appealed Decision creates an illegitimate and unjustified distortion between the interpretation of Article 9(2)(c) and Article 7(3) of Regulation 2017/1001, affecting the unity, consistency and development of European Union law.
35. Both Article 9(2)(c) and Article 7(3) of Regulation 2017/1001 are silent as to the geographical scope to be taken into consideration to assess, respectively, the reputation of an EU trademark and the acquisition of distinctive character of an EU trademark.
36. Under Article 9(2)(c) of Regulation 2017/1001, the CJUE considered that the relevant geographical scope to establish the reputation of an EU trademark is “*a substantial part of the territory of the [European Union]*”, which can be a single Member State of the European Union (CJEU, October 6, 2009, C-301/07 P, *Pago*, §27: “*Territorially, the condition as to reputation must be considered to be fulfilled when the Community trade mark has a reputation in a substantial part of the territory of the Community (see, by way of analogy, General Motors, paragraph 28)*”).



37. As a consequence, under Article 9(2)(c) of Regulation 2017/1001, the unity and consistency of European Union law :

- requires to have a global assessment of the evidence, which is a matter of “proportions” (Annex 11: “*In so far as it is accepted that reputation may be established in only one State, irrespective of its size, as Advocate General Wahl pointed out, it is a question of proportions rather than absolute figures*”); and
- precludes any situation in which the evidence in one single Member State may impact an EU trademark as a whole (Annex 11: “*The proprietor of that trademark cannot be required to prove that reputation in the territory of the Member State in which the application for registration of the later national mark, which is the subject of an opposition, was filed. This solution is based on the principle of uniformity of protection of the Union trademark*”); and
- protects trademarks owners in situations where a large part of the population is not a consumer (Annex 11: “*The EUIPO thus accepted the evidence provided by Pfizer regarding the Viagra trademark, referring to a 2012 judgment, advertising campaigns, sales figures in most EU countries and a survey in Austria showing that 90% of the population over the age of 18 knew the trademark. The Court held that the mere fact that a large part of the population has knowledge of the trademark only by hearsay, as they are not consumers, is irrelevant for the purpose of assessing the reputation of the trademark*”).

38. By contrast, the Appealed Decision, if it is not annulled, creates a distortion under Article 7(3) of Regulation 2017/1001:

- no space is left for a global and proportionate assessment of the evidence that a trademark acquired a distinctive character (trademarks owners must necessarily demonstrate, on a country-by-country basis and for each of the 27 Member States of the European Union, that their trademark acquired a distinctive character);
- the lack of evidence in one single Member State has a direct negative impact on an EU trademark as a whole (namely: it results in the cancellation of the EU trademark as a whole); and
- trademarks owners are not protected in situations where part of the population is not a consumer.

39. The strict implementation of the Appealed Decision to facts such as the ones in the case at stake reveals, again, a strong legal uncertainty (*insécurité juridique*), since:

- the use of a registered figurative trademark (which is presumed valid and inherently distinctive) in one single Member State only, such as France, is sufficient to establish its famous character;
- the lack of use of the very same registered figurative trademark (which is presumed valid and inherently distinctive) in one single Member State only, such as Latvia, is sufficient to lead to its cancellation as a whole, several years later and with arguably no ability to convert it into national trademarks.

40. From a business perspective, the Appealed Decision’s immediate impact is to create a fertile ground for the development of a pro-counterfeiting and pro-counterfeiters case law, which directly affects **APRAM**’s members. It is in full contradiction with the European Union’s objective to create a common market which, as far as regulated intangible assets are concerned, led to the creation of European Union-wide intellectual property rights with a unitary character.
41. The Appealed Decision applies to the handbag and luggage sector. According to the Observatory study “*The economic cost of IPR infringement in handbags and luggage*”: “*It is estimated that the legitimate industry loses approximately €1.6 billion of revenue annually [Nota: excluding wholesale and retail trade] due to the presence of counterfeit handbags and luggage in the EU marketplace, corresponding to 12.7% of the sector’s sales*” ([Annex 12](#)).
42. Based on a strict implementation of the Appealed Decision, it can be predicted that the presence of counterfeit handbags and luggage in the EU market will increase, especially in the luxury field, where the “*legitimate industry*” is currently protecting iconic items with figurative signs (which distinctive character is, *de facto*, hard to demonstrate ab initio in all EU Member States). Indeed, the “*legitimate industry*” may be constrained to cease protecting or defending their reputed intangible assets given the costs associated with the investments required to implement the Appealed Decision. **APRAM** hence has an interest in defending its members of the three colleges active in the handbag and luggage sector.
43. The Appealed Decision applies more broadly to all economic sectors, including all of those covered by the Observatory studies (in particular, Cosmetics and personal care, Clothing, footwear and accessories, Sports goods, Toys and games, Jewellery and watches, Recorded music industry, Spirits and wine, Pharmaceutical, Smartphone and Tyres and batteries). **APRAM** also has an interest in defending its members of the three colleges active in such sectors.

### ON THESE GROUNDS

#### MAY IT PLEASE THE HONORABLE COURT TO:

1. grant leave to **APRAM** to intervene in Case C-788/22 P in support of the form of order sought by LVM, Appellant in that case;
2. grant leave to **APRAM** to submit a further written statement of intervention as intervener in Case C-788/22 P;
3. order that the costs be reserved.

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Edouard Fortunet  
*Avocat au Barreau de Paris*

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