

Court of Justice EU, 31 January 2019, Pandalis v EUIPO



## TRADEMARK LAW

**Appeal against General Court finding that “Cystus” has not been put to genuine use despite being used on the packaging of the goods concerned unfounded:**

- the condition of genuine is not fulfilled where the mark affixed to an item does not contribute to creating an outlet for that item or to distinguishing the item from the goods of other undertakings

As regards the first part of the second ground of appeal, it must be recalled that there is ‘genuine use’ of a trade mark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark. When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial use of the mark is real, particularly the practices regarded as warranted in the relevant economic sector as a means of maintaining or creating market shares for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark (judgments of 11 March 2003, [Ansul](#), C-40/01, EU:C:2003:145, paragraph 43, and of 17 March 2016, [Naazneen Investments v OHIM](#), C-252/15 P, not published, EU:C:2016:178, paragraph 56).

84 As regards individual marks, the essential function is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to

distinguish the goods or services from others which have another origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition which the Treaty seeks to establish and maintain, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality (judgment of 8 June 2017, W. F. [Gözze Frottierweberei and Gözze](#), C-689/15, EU:C:2017:434, paragraph 41 and the case-law cited).

85 It follows that the condition of genuine use in accordance with its essential function is not fulfilled where the mark affixed to an item does not contribute to creating an outlet for that item or to distinguishing, in the interest of the consumer, the item from the goods of other undertakings (see, to that effect, judgment of 15 January 2009, [Silberquelle](#), C-495/07, EU:C:2009:10, paragraph 21).

- the General Court stated that in view of its context the use of the term ‘cystus’ on the packaging of the products would be perceived as descriptive of the main ingredient of those goods “Cistus” and not as identifying their commercial origin, by stating this the General Court did not find that the mark at issue was descriptive

In that connection, the General Court stated, in paragraph 43 of the judgment under appeal, that ‘in view of its context’, the use of the term ‘cystus’ on the packaging of the products Pilots Friend Immunizer®, Immun44® Saft and Immun44® Kapseln would be perceived by the public as descriptive of the main ingredient of those goods and not as identifying their commercial origin.

88 In addition, in paragraph 46 of the judgment under appeal, the General Court added that the Board of Appeal did not err in finding that the relevant public would perceive the term ‘cystus’ as a descriptive indication referring to the name of the cistus plant and not as an EU trade mark.

89 Furthermore, in paragraph 47 of the judgment under appeal, the General Court stated that the element ‘cystus’ had a ‘weak distinctive character’.

90 Accordingly, as the Advocate General observes in point 59 of her [Opinion](#), the General Court did not find that the mark at issue was descriptive.

91 Indeed, the General Court distinguished between (i) the use of the mark at issue and (ii) the use of the term ‘cystus’, perceived by the public as descriptive of the main ingredient of the products Pilots Friend Immunizer®, Immun44® Saft and Immun44® Kapseln. In the light of the case-law cited in paragraphs 83 to 85 of the present judgment, the General Court could make such a distinction, since a trade mark is not always used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it has been registered.

92 The General Court therefore found, in essence, after an assessment of the facts and evidence, that in the circumstances of the present case, the Board of Appeal had rightly held that the appellant had not made use of the mark at issue in accordance with its essential

function. Rather than the mark at issue, the appellant had thus used the term ‘cystus’ as a description of the main ingredient of the goods concerned.

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### Court of Justice EU, 31 January 2019

(M. Vilaras, J. Malenovský, L. Bay Larsen, M. Safjan (Rapporteur), D. Šváby)

JUDGMENT OF THE COURT (Third Chamber)

31 January 2019 (\*)

(Appeal — EU trade mark — Regulation (EC) No 207/2009 — Article 51(1)(a) and (2) and Article 75 — EU trade mark Cystus — Food supplements not for medical purposes — Partial revocation — Lack of genuine use of the trade mark — Perception of the word ‘cystus’ as a descriptive indication of the main ingredient of the goods concerned — Obligation to state reasons)

In Case C-194/17 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 13 April 2017,

Georgios Pandalis, residing in Glandorf (Germany), represented by A. Franke, Rechtsanwältin, appellant, the other parties to the proceedings being:

European Union Intellectual Property Office (EUIPO), represented by S. Hanne and D. Walicka, acting as Agents, defendant at first instance,

LR Health & Beauty Systems GmbH, established in Ahlen (Germany), represented by N. Weber and L. Thiel, Rechtsanwältin, intervener at first instance,

THE COURT (Third Chamber),

composed of M. Vilaras, President of the Fourth Chamber, acting as President of the Third Chamber, J. Malenovský, L. Bay Larsen, M. Safjan (Rapporteur), and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 20 June 2018,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2018,

gives the following

#### Judgment

1 By his appeal, Mr Georgios Pandalis seeks to have set aside the judgment of the General Court of the European Union of 14 February 2017, Pandalis v EUIPO — LR Health & Beauty Systems (Cystus) (T-15/16, not published, ‘the judgment under appeal’, EU:T:2017:75), by which the General Court dismissed his action seeking annulment of the decision of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 30 October 2015 (Case R 2839/2014-1), relating to revocation proceedings between LR Health & Beauty Systems GmbH and Mr Pandalis (‘the decision at issue’).

#### Legal context

##### Regulation (EC) No 207/2009

2 Article 7 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the [European Union] trade mark

(OJ 2009 L 78, p. 1), which is entitled ‘Absolute grounds for refusal’, provides in paragraph 1(c):

*‘The following shall not be registered:*

...

*(c) trade marks which consist 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.’*

3 Article 51 of that regulation, entitled ‘Grounds for revocation’, provides:

*‘1. The rights of the proprietor of the [EU] trade mark shall be declared to be revoked on application to [EUIPO] or on the basis of a counterclaim in infringement proceedings:*

*(a) if, within a continuous period of five years, the trade mark has not been put to genuine use in the [European Union] in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use ...;*

...

*2. Where the grounds for revocation of rights exist in respect of only some of the goods or services for which the [EU] trade mark is registered, the rights of the proprietor shall be declared to be revoked in respect of those goods or services only.’*

4 Article 64 of that regulation, entitled ‘Decisions in respect of appeals’, provides in paragraph 1:

*‘Following the examination as to the allowability of the appeal, the Board of Appeal shall decide on the appeal. The Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.’*

5 Article 75 of that regulation, entitled ‘Statement of reasons on which decisions are based’, reads as follows:

*‘Decisions of [EUIPO] shall state the reasons on which they are based. They shall be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments.’*

##### Directive 2002/46/EC

6 Article 2(a) of Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements (OJ 2002 L 183, p. 51) provides:

*‘For the purposes of this Directive, the following definitions apply:*

*(a) “food supplements” means foodstuffs the purpose of which is to supplement the normal diet and which are concentrated sources of nutrients or other substances with a nutritional or physiological effect, alone or in combination, marketed in dose form, namely forms such as capsules, pastilles, tablets, pills and other similar forms, sachets of powder, ampoules of liquids, drop dispensing bottles, and other similar forms of liquids and powders designed to be taken in measured small unit quantities.’*

7 Article 6 of that directive provides:

‘1. For the purposes of Article 5(1) of Directive 2000/13/EC [of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (OJ 2000 L 109, p. 29)], the name under which products covered by this Directive are sold shall be “food supplement”.

2. The labelling, presentation and advertising must not attribute to food supplements the property of preventing, treating or curing a human disease, or refer to such properties.

3. Without prejudice to Directive [2000/13], the labelling shall bear the following particulars:

(a) the names of the categories of nutrients or substances that characterise the product or an indication of the nature of those nutrients or substances;

(b) the portion of the product recommended for daily consumption;

(c) a warning not to exceed the stated recommended daily dose;

(d) a statement to the effect that food supplements should not be used as a substitute for a varied diet;

(e) a statement to the effect that the products should be stored out of the reach of young children.’

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

8 On 10 August 1999, Mr Pandalis, the appellant, filed an application for registration of an EU trade mark with EUIPO. The trade mark for which registration was sought is the word sign Cystus (*‘the mark at issue’*).

9 The goods in respect of which registration was sought are, inter alia, in Class 30 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 (*‘the Nice Agreement’*), and correspond to the following description: *‘Food supplements not for medical purposes’*.

10 The mark at issue was registered on 5 January 2004 under No 1273 119.

11 On 3 September 2013, LR Health & Beauty Systems filed an application for revocation of the mark at issue in respect of all of the registered goods, on the basis of Article 51(1)(a) of Regulation No 207/2009, on the ground that that mark had not been put to genuine use within a continuous period of five years.

12 On 12 September 2014, the Cancellation Division of EUIPO (*‘the Cancellation Division’*) revoked the appellant’s rights in respect of some of the registered goods, in particular *‘food supplements not for medical purposes’* in Class 30 of the Nice Agreement.

13 On 30 October 2015, by the decision at issue, the First Board of Appeal of EUIPO (*‘the Board of Appeal’*) dismissed the appeal brought by the appellant against the decision of the Cancellation Division. In particular, in the first place, it found that the appellant had not made use of the term ‘cystus’ as an EU trade mark, namely to indicate the commercial origin of his goods, but had used it as a description to indicate that the goods in question contained extracts from the plant variety Cistus Incanus L. as their main active

ingredient. In this respect, the partial use of the symbol ‘®’ and the spelling of the word ‘cystus’ with the letter ‘y’ were not sufficient for it to be concluded that it had been used as an EU trade mark.

14 In the second place, the Board of Appeal found that the appellant had not provided concrete and objective proof of the use of the mark at issue for *‘food supplements not for medical purposes’* in Class 30 of the Nice Agreement. First, it had not been shown that the term ‘cystus’ had been used as a trade mark for the goods Pilots Friend Immunizer®, Immun44® Saft and Immun44® Kapseln. Secondly, it had not been shown that lozenges, throat pastilles, stock, gargling solution and infection blocker tablets (*‘the other Cystus goods’*) fall within the category of goods described as *‘food supplements not for medical purposes’* in the abovementioned Class 30. The Board of Appeal therefore held, in essence, that the examples of the use of the word ‘cystus’ in relation to those goods were insufficient to show genuine use of the mark at issue for the goods in respect of which it had been registered.

15 The Board of Appeal therefore concluded that the mark at issue had not been put to genuine use in the European Union during the reference period.

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

16 By application lodged at the General Court Registry on 14 January 2016, the appellant brought an action for annulment of the decision at issue.

17 By his first plea in law, which consisted, in essence, of three limbs, the appellant submitted that the Board of Appeal had infringed Article 64(1) of Regulation No 207/2009, read in conjunction with Article 51(1)(a) of that regulation, in classifying the mark at issue as a descriptive indication within the meaning of Article 7(1)(c) of that regulation.

18 In paragraphs 17 to 20 of the judgment under appeal, the General Court rejected the first limb of that plea, concerning the extent of the examination undertaken by the Board of Appeal, as unfounded.

19 As regards the second limb of that plea, concerning the appellant’s right to a fair hearing, the General Court held, in paragraphs 23 to 25 of its judgment, that although the right to a fair hearing, as laid down in the second sentence of Article 75 of Regulation No 207/2009, extends to all the matters of fact or law and also the evidence which form the basis of the decision, that right does not apply to the final position which the authority intends to adopt. Accordingly, the Board of Appeal is not obliged to hear an appellant with regard to a factual assessment which forms part of its final decision. In the present case, it was held that the Board of Appeal did not rule on the existence of absolute grounds for refusal of registration, nor did it call into question the distinctive character of the mark at issue. In any event, the appellant had the opportunity during the proceedings to present his comments on the genuine use of that mark, including necessarily on the nature of that use, with regard to all of the goods concerned. The General Court therefore rejected the second limb of the plea as ineffective.

20 As regards the third limb of the first plea, concerning the error which the appellant claimed the Board of Appeal had committed in finding that the word ‘cystus’ was descriptive in respect of all of his goods, the General Court decided to examine that limb in conjunction with the third plea.

21 In paragraphs 31 to 35 of the judgment under appeal, the General Court dismissed the second plea, which alleged misuse of power by the Board of Appeal.

22 In support of his third plea, which was divided into two limbs, the appellant submitted that the Board of Appeal had infringed Article 51(1)(a) and (2) of Regulation No 207/2009 by ordering the revocation of the mark at issue, when he had shown genuine use of the mark which was consistent with its purpose for ‘*food supplements not for medical purposes*’ in Class 30 of the Nice Agreement.

23 The first limb of the third plea concerned the nature of the use of the mark at issue on the packaging of the products Pilots Friend Immunizer®, Immun44® Saft and Immun44® Kapseln.

24 In paragraph 42 of the judgment under appeal, the General Court observed that it was not disputed by the parties that the goods concerned contain plant extracts — the scientific name of the plant being *Cistus Incanus L.*, the Latin name being *cistus* — as their main essential active ingredient.

25 In paragraph 43 of the judgment under appeal, the General Court found that, in view of its context, the use of the term ‘cystus’ on the packaging of the goods concerned would be perceived by the public as descriptive of the main ingredient of those goods and not as an identification of the commercial origin of those goods. Thus, the Court held that it was clear, in particular, from the expression ‘extract of cystus®’ and from the inclusion of the term ‘cystus® 052’ in the product ingredient list for Immun44® Saft, that the word ‘cystus’ does not designate a ‘*food supplement not for medical purposes*’ in Class 30 of the Nice Agreement, nor a fortiori the commercial origin thereof, but only one of the ingredients of that product. Frequent references to the word ‘cystus’ on the packaging of the goods concerned, and the fact that those references are emphasised, do not establish use of that term as an EU trade mark, when, as in the present case, the relevant public will perceive those references as descriptive of the main active ingredient of the goods concerned.

26 In paragraph 46 of the judgment under appeal, the General Court added that the spelling of the word ‘cystus’ with the letter ‘y’ is insufficient to show use as a trade mark. In this respect, misspellings generally do not make a sign distinctive if its content can immediately be understood as descriptive. This was particularly so in the present case as the Board of Appeal could correctly find that the letters ‘i’ and ‘y’ are often used interchangeably in words of Latin origin and that the letter ‘y’ can be pronounced like the letter ‘i’ in German. Therefore, the Board of Appeal did not err in finding that the relevant public would perceive the term ‘cystus’ as a descriptive indication which

refers to the name of the cystus plant and not as an EU trade mark, whilst not making any statement on the existence of an absolute ground for refusal of registration under Article 7(1)(c) of Regulation No 207/2009.

27 The second limb of the third plea concerned the classification of the other Cystus goods. In that regard, the General Court held, in paragraph 54 of the judgment under appeal, that the Board of Appeal had not classed those goods as medicines, medical products in Class 5 of the Nice Agreement or any other category, but had confined itself to finding that it had not been shown to the requisite legal standard that such goods should be classed as ‘*food supplements not for medical purposes*’ in Class 30 of the Nice Agreement.

28 After recalling, in paragraphs 55 and 56 of the judgment under appeal, the rules governing the burden of proof in EU trade mark revocation proceedings, the General Court found, in paragraph 57 of that judgment, that (i) the appellant had failed to establish that he had made genuine use of the mark at issue; and (ii) the mere assertion that the goods concerned were ‘*food supplements not for medical purposes*’ in Class 30 of the Nice Agreement, was not sufficient.

29 In paragraph 58 of the judgment under appeal, the General Court held that the Board of Appeal had been fully entitled to find that failure to comply with the provisions of Directive 2002/46 — which impose a number of labelling requirements for the sale of a product whose purpose is to supplement a normal diet — amounted to an important indication against their classification as ‘*food supplements not for medical purposes*’ in Class 30 of the Nice Agreement.

30 The General Court added, in paragraph 59 of the judgment under appeal, that the Board of Appeal had likewise not erred in finding that the existence of a central pharmaceutical number for the other Cystus goods, the sale of those goods in chemists and, in particular, the fact that their ability to prevent colds and influenza and provide relief for inflammations of the mouth and throat was emphasised as part of their marketing, constituted additional cogent evidence against their classification as ‘*food supplements not for medical purposes*’ in Class 30 of the Nice Agreement.

31 Since the first to third pleas were rejected, the General Court dismissed the action in its entirety.

#### **Forms of order sought by the parties before the Court**

32 By his appeal, the appellant claims that the Court should:

- set aside the judgment under appeal;
- annul the decision at issue;
- annul the decision of the Cancellation Division of 12 September 2014 in so far as it revoked the mark at issue in respect of goods in Class 30 of the Nice Agreement, described as ‘*food supplements not for medical purposes*’;
- reject the application for a declaration of invalidity brought by LR Health & Beauty Systems against the mark at issue, in so far as that application concerns

goods in Class 30 of the Nice Agreement, described as 'food supplements not for medical purposes'; and  
– order EUIPO to pay the costs.

33 EUIPO contends that the Court should:

- dismiss the appeal; and
- order the appellant to pay the costs.

34 LR Health & Beauty Systems contends that the Court should:

- dismiss the appeal in its entirety; and
- order the appellant to pay the costs.

### **The appeal**

35 In support of his appeal, the appellant puts forward, in essence, three grounds of appeal concerning (i) the classification of the other Cystus goods as '*food supplements not for medical purposes*' in Class 30 of the Nice Agreement; (ii) the nature of the use of the term 'cystus' for the products Pilots Friend Immunizer®, Immun44® Saft and Immun44® Kapseln; and (iii) the right to a fair hearing before the Board of Appeal.

### **The first ground of appeal**

#### **Arguments of the parties**

36 The first ground of appeal concerns the grounds of the judgment under appeal that are set out in paragraphs 54 to 59 thereof. It is divided into two parts.

37 By the first part of his first ground of appeal, the appellant submits that the General Court erred in law in the interpretation and application of Article 51(1)(a) and (2) of Regulation No 207/2009.

38 The appellant submits in this regard that it cannot be ascertained from the judgment under appeal whether the mark at issue was used for '*food supplements not for medical purposes*' or for food supplements in general. The other Cystus goods, whose main ingredient is cistus, are food supplements, within the meaning of Article 2(a) of Directive 2002/46, the directive not creating a distinction between food supplements for medical purposes and food supplements not for medical purposes.

39 The appellant further submits that the General Court distorted the fact that the advertising for the other Cystus goods had been based on their ability to prevent colds and influenza, by incorrectly finding that that fact indicates that those goods cannot be classified as '*food supplements not for medical purposes*'.

40 Furthermore, the fact that the appellant might not have complied with the labelling requirements set out in Article 6(1) to (3) of Directive 2002/46 has, it is argued, also been distorted by the General Court. The latter interpreted that as meaning that a product which does not comply with those provisions is not a food supplement not for medical purposes. However, labelling has no impact on the classification of the other Cystus goods as food supplements within the meaning of Article 2(a) of Directive 2002/46.

41 The appellant submits that the General Court also infringed Article 51(1)(a) and (2) of Regulation No 207/2009 in taking the view that the existence of a central pharmaceutical number for the other Cystus goods and the sale of those goods in chemists were cogent evidence against their classification as '*food*

*supplements not for medical purposes*'. In Germany, the existence of such a pharmaceutical number has no link with the question of whether a product is intended for medical purposes.

42 Finally, it is submitted that the General Court failed to assess lozenges marketed under the mark at issue ('the lozenges') separately in order to determine whether they were food supplements within the meaning of Article 2(a) of Directive 2002/46.

43 By the second part of his first ground of appeal, the appellant submits that the judgment under appeal fails to state sufficient reasons for finding that the mark at issue had not been put to genuine use within the meaning of Article 51(1)(a) and (2) of Regulation No 207/2009 for '*food supplements not for medical purposes*'.

44 The appellant submits that he was unable to ascertain the reasons why the facts which he put forward and the evidence which he provided failed to convince the General Court that the mark at issue had been put to genuine use for '*food supplements not for medical purposes*'. Furthermore, the examination undertaken by the General Court does not enable the appellant to ascertain which category his goods belong to.

45 Moreover, the appellant submits that the reasons stated in the judgment under appeal were insufficient, since they do not allow him to ascertain why the General Court did not make a separate assessment, with regard to the lozenges, as to whether the mark at issue had been put to genuine use for '*food supplements not for medical purposes*'.

46 More specifically, he argues that the lozenges were not marketed with the statement that they have the ability to prevent colds and influenza and provide relief for inflammations of the mouth and throat. In paragraph 59 of the judgment under appeal, the General Court considered, however, that that ability was cogent evidence that went against classifying the other Cystus goods as '*food supplements not for medical purposes*'.

47 EUIPO and LR Health & Beauty Systems contend that the first ground of appeal should be rejected.

#### **Findings of the Court**

48 In the present case, the appellant was granted registration of the mark at issue in respect of goods described as '*food supplements not for medical purposes*' in Class 30 of the Nice Agreement.

49 In paragraphs 54 to 61 of the judgment under appeal, the General Court held that the Board of Appeal had correctly found that the appellant had not shown that the other Cystus goods could be classified as 'food supplements not for medical purposes' and as a result that he had not proved that the mark at issue had been put to genuine use for those goods in the European Union, within the meaning of Article 51(1)(a) of Regulation No 207/2009.

50 In support of the first part of the first ground of appeal, concerning the classification of the other Cystus goods, the appellant claims, by his first complaint, that those goods are food supplements, within the meaning

of Article 2(a) of Directive 2002/46, and fall within Class 30 of the Nice Agreement.

51 In that regard, it must be recalled that under the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on a point of law only. The General Court thus has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts or evidence are distorted, constitute points of law subject, as such, to review by the Court of Justice on appeal (judgments of 18 December 2008, *Les Éditions Albert René v OHIM*, C-16/06 P, EU:C:2008:739, paragraph 68, and of 6 June 2018, *Apcoa Parking Holdings v EUIPO*, C-32/17 P, not published, EU:C:2018:396, paragraph 49).

52 Furthermore, such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (judgments of 18 December 2008, *Les Éditions Albert René v OHIM*, C-16/06 P, EU:C:2008:739, paragraph 69, and of 26 October 2016, *Westermann Lernspielverlage v EUIPO*, C-482/15 P, EU:C:2016:805, paragraph 36).

53 In addition, given the exceptional nature of a ground alleging distortion of the facts and evidence, Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court of Justice provide, in particular, that an appellant must indicate precisely the elements alleged to have been distorted by the General Court and show the errors of appraisal which, in his view, led to that distortion (judgment of 22 September 2016, *Pensa Pharma v EUIPO*, C-442/15 P, not published, EU:C:2016:720, paragraph 21 and the case-law cited).

54 It is clear however that, by the arguments which he puts forward in support of that complaint, the appellant merely challenges the factual assessments made by the General Court in reaching the conclusion that the other Cystus goods should not be classified as '*food supplements not for medical purposes*' in Class 30 of the Nice Agreement, and seeks, in fact, to obtain a new assessment of the facts from the Court of Justice.

55 In addition, and in so far as the appellant claims that the judgment under appeal is based on a distortion of facts and evidence, his submissions in support of that claim do not identify specific elements which the General Court distorted, nor do they show the errors of appraisal allegedly committed by the General Court. Therefore, those arguments do not satisfy the requirements of the case-law cited in paragraph 53 of the present judgment.

56 Accordingly, the first complaint must be rejected as inadmissible.

57 The appellant criticises the General Court, in his second complaint, for failing to assess the lozenges separately, in so far as, in paragraph 59 of the judgment under appeal, it held that the other Cystus goods were

advertised as having positive effects on health as part of their marketing, which constituted cogent evidence against their classification as '*food supplements not for medical purposes*'. The appellant denies however that the lozenges have been marketed with the statement that they have such positive effects.

58 Without it being necessary to determine whether the second complaint is admissible, it suffices to note, as does the Advocate General in point 39 of her [Opinion](#), that that complaint is based on a misreading of paragraph 59 of the judgment under appeal.

59 In that paragraph, the General Court did not find that the lozenges were marketed with the statement that they have positive effects on health. It merely observed, without distinguishing the lozenges from the other Cystus goods, that the Board of Appeal had not erred in its factual assessment of the additional evidence against the classification of the other Cystus goods as '*food supplements not for medical purposes*'.

60 In so doing, the General Court did not call into question the Board of Appeal's assessment, in paragraph 57 of the decision at issue, that the documents submitted by the appellant did not indicate whether the lozenges were '*medical products*' or '*food supplements not for medical purposes*'. Therefore, the lozenges were indeed the subject of a separate assessment whereby the Board of Appeal and the General Court took into account the fact that they were not marketed with a statement that they have positive effects on health.

61 The second complaint must therefore be rejected.

62 As regards the second part of the first ground of appeal, concerning infringement of the obligation to state reasons, the appellant claims, first, that the General Court did not make any finding as to which category the other Cystus goods belong to.

63 However, as the Advocate General observes in point 43 of her [Opinion](#), the dispute between LR Health & Beauty Systems and the appellant relates solely to whether the latter was able to show genuine use of the mark at issue for the other Cystus goods as '*food supplements not for medical purposes*' in Class 30 of the Nice Agreement.

64 In the examination of that dispute, the General Court held, in paragraph 57 of the judgment under appeal, that the Board of Appeal had rightly found that the appellant had not provided such proof of genuine use. It was not for the General Court to examine the question of which category, other than Class 30 of the Nice Agreement, the other Cystus goods belong to, since such a question is irrelevant to the resolution of that dispute.

65 Accordingly, the first complaint must be rejected as unfounded.

66 Secondly, the appellant claims that the judgment under appeal does not make it possible to ascertain the reasons why the General Court did not conduct a separate assessment to determine whether the mark at issue — specifically in the case of lozenges — had been put to genuine use for '*food supplements not for medical purposes*'.

67 In this regard, it should be recalled that, according to settled case-law, the Court of Justice does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case, and that the General Court's reasoning may therefore be implicit, on condition that it enables the persons concerned to know why it has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (judgment of 30 May 2018, [Tsujimoto v EUIPO](#), C-85/16 P and C-86/16 P, EU:C:2018:349, paragraph 82 and the case-law cited).

68 Admittedly, the General Court did not distinguish the lozenges from the other Cystus goods. However, it should be noted that, in paragraphs 57 to 64 of the decision at issue, the Board of Appeal examined the question whether the lozenges, among the other Cystus goods, corresponded to the description of '*food supplements not for medical purposes*'.

69 Therefore, it must be held that the General Court, in holding that the Board of Appeal had not erred as regards the classification of the other Cystus goods, endorsed the findings of the Board of Appeal. In so doing, as the Advocate General observes in point 45 of her [Opinion](#), the General Court implicitly rejected the objections put forward by the appellant regarding the lozenges.

70 Therefore, the second complaint and, accordingly, the second part of the first ground of appeal must be rejected as unfounded.

71 In the light of the foregoing, the first ground of appeal must be rejected as being, in part, inadmissible and, in part, unfounded.

### **The second ground of appeal**

#### **Arguments of the parties**

72 The second ground of appeal concerns the grounds of the judgment under appeal that are set out in paragraphs 43 and 46 thereof. It comprises two parts.

73 By the first part of the second ground of appeal, the appellant submits that the General Court infringed Article 51(1)(a) and (2) of Regulation No 207/2009 by classifying the mark at issue as a descriptive indication which refers to the name of the cistus plant, without considering the specific nature of its use as a trade mark.

74 According to the appellant, the General Court erred in stating, in paragraph 46 of the judgment under appeal, that the Board of Appeal was entitled to find that the relevant public would perceive the term 'cystus' as a descriptive indication referring to the name of the cistus plant, whilst it did not make any statement on the existence of an absolute ground for refusal within the meaning of Article 7(1)(c) of Regulation No 207/2009. It is submitted that that summary classification by the General Court would deprive the appellant of any possibility of using his mark in accordance with its essential function, for the purposes of Article 51(1)(a) and (2) of Regulation No 207/2009.

75 In that regard, first, it is argued that the General Court ought to have verified whether the appellant had

used the mark at issue for '*food supplements not for medical purposes*' in the form in which it had been registered or in a form which might differ by reason of factors which do not alter its distinctive character.

76 Secondly, the appellant submits that the General Court should have examined whether the mark at issue had been used in accordance with its essential function, which was to indicate commercial origin. He argues that that mark was used in accordance with that function, since the consumer is accustomed to goods bearing, in addition to the principal mark, secondary marks which are also understood as indicative of the origin of the goods.

77 Thirdly, the appellant submits that the relevant public will consider the sign Cystus as a trade mark for the food supplements marketed, since that mark is also used for the cistus plant, which is sold as a finished product. Consequently, designating the goods concerned with the sign Cystus amounts to use of the mark in the sense that it indicates that the manufacturer of one of the essential elements of the product is also responsible for the food supplements concerned as a whole.

78 As regards '*food supplements not for medical purposes*' which contain cistus plant extracts as their main active ingredient, it is argued that the appellant would be, de facto, deprived of the possibility of using his mark in accordance with its function.

79 By the second part of his second ground of appeal, the appellant submits that the General Court infringed the obligation to state reasons in the context of its finding that the mark at issue had not been put to genuine use, within the meaning of Article 51(1)(a) and (2) of Regulation No 207/2009, for '*food supplements not for medical purposes*'.

80 The appellant submits in this regard that the assessment made by the General Court in paragraphs 43 and 46 of the judgment under appeal is contradictory, since, on the one hand, it summarily stated that the spelling of the word 'cystus' with the letter 'y' is not sufficient to show use as a trade mark. However, on the other hand, the General Court maintained that the Board of Appeal, on the basis of that argument, did not err in holding that the relevant public would perceive the term 'cystus' as a descriptive indication referring to the name of the cistus plant and not as an EU trade mark.

81 The appellant argues that the reasoning adopted by the General Court is, moreover, insufficient, since it does not state the reasons why the specific nature of the use of the mark at issue does not meet the requirements set out in Article 51(1)(a) and (2) of Regulation No 207/2009. Given that that mark was registered, in particular, for '*food supplements not for medical purposes*' in Class 30 of the Nice Agreement, it should be assumed that it is distinctive and non-descriptive for those goods.

82 EUIPO and LR Health & Beauty Systems contend that the second ground of appeal must be rejected.

#### **Findings of the Court**

83 As regards the first part of the second ground of appeal, it must be recalled that there is ‘genuine use’ of a trade mark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark. When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial use of the mark is real, particularly the practices regarded as warranted in the relevant economic sector as a means of maintaining or creating market shares for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark (judgments of 11 March 2003, [Ansul](#), C-40/01, EU:C:2003:145, paragraph 43, and of 17 March 2016, [Naazneen Investments v OHIM](#), C-252/15 P, not published, EU:C:2016:178, paragraph 56).

84 As regards individual marks, the essential function is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition which the Treaty seeks to establish and maintain, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality (judgment of 8 June 2017, W. F. [Gözze Frottierweberei and Gözze](#), C-689/15, EU:C:2017:434, paragraph 41 and the case-law cited).

85 It follows that the condition of genuine use in accordance with its essential function is not fulfilled where the mark affixed to an item does not contribute to creating an outlet for that item or to distinguishing, in the interest of the consumer, the item from the goods of other undertakings (see, to that effect, judgment of 15 January 2009, [Silberquelle](#), C-495/07, EU:C:2009:10, paragraph 21).

86 In the present case, it must be held that the appellant’s arguments are based on a misreading of the judgment under appeal.

87 In that connection, the General Court stated, in paragraph 43 of the judgment under appeal, that ‘in view of its context’, the use of the term ‘cystus’ on the packaging of the products Pilots Friend Immunizer®, Immun44® Saft and Immun44® Kapseln would be perceived by the public as descriptive of the main ingredient of those goods and not as identifying their commercial origin.

88 In addition, in paragraph 46 of the judgment under appeal, the General Court added that the Board of Appeal did not err in finding that the relevant public would perceive the term ‘cystus’ as a descriptive indication referring to the name of the cystus plant and not as an EU trade mark.

89 Furthermore, in paragraph 47 of the judgment under appeal, the General Court stated that the element ‘cystus’ had a ‘weak distinctive character’.

90 Accordingly, as the Advocate General observes in point 59 of her [Opinion](#), the General Court did not find that the mark at issue was descriptive.

91 Indeed, the General Court distinguished between (i) the use of the mark at issue and (ii) the use of the term ‘cystus’, perceived by the public as descriptive of the main ingredient of the products Pilots Friend Immunizer®, Immun44® Saft and Immun44® Kapseln. In the light of the case-law cited in paragraphs 83 to 85 of the present judgment, the General Court could make such a distinction, since a trade mark is not always used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it has been registered.

92 The General Court therefore found, in essence, after an assessment of the facts and evidence, that in the circumstances of the present case, the Board of Appeal had rightly held that the appellant had not made use of the mark at issue in accordance with its essential function. Rather than the mark at issue, the appellant had thus used the term ‘cystus’ as a description of the main ingredient of the goods concerned.

93 Moreover, the question whether the appellant used the mark at issue in accordance with the function of indicating origin or whether he used the term ‘cystus’ on the packaging of the goods concerned is a factual assessment and can be the subject of an appeal only where there has been a distortion of those facts, in accordance with the case-law cited in paragraph 51 of the present judgment. However, in the context of the first part of his second ground of appeal, the appellant does not claim that the General Court distorted the facts and the evidence submitted to it for assessment.

94 Accordingly, the first part of the second ground of appeal must be dismissed as unfounded.

95 As regards the second part of the second ground of appeal, concerning the obligation to state reasons, it is based on the premiss that the General Court considered that the mark at issue was descriptive as regards the goods concerned. However, as is apparent from the examination of the first part of that ground of appeal, that premiss is incorrect.

96 In addition, the General Court explained, in paragraphs 39 to 49 of the judgment under appeal, the reasons why it considered that the mark at issue had not been put to genuine use in the European Union, within the meaning of Article 51(1)(a) and (2) of Regulation No 207/2009, for the products Pilots Friend Immunizer®, Immun44® Saft and Immun44® Kapseln.

97 Accordingly, the second part of the second ground of appeal must be rejected as unfounded and, consequently, the second ground of appeal must be rejected in its entirety.

### **The third ground of appeal Arguments of the parties**

98 The appellant refers to paragraphs 23 to 25 of the judgment under appeal and submits that the General

Court erred in law in the interpretation of the second sentence of Article 75 of Regulation No 207/2009, in that the Board of Appeal ruled on the existence of an absolute ground for refusal of registration by finding the mark at issue to be descriptive, as can be seen from paragraphs 32 and 34 of the decision at issue. Contrary to what is stated by the General Court, the Board of Appeal made that assessment in the opening statement of the decision at issue and not during its assessment of the specific nature of the use of the mark at issue.

99 The appellant submits that he did not have the opportunity to present his comments on the finding of the descriptive character of the mark at issue during the proceedings before the Board of Appeal. The General Court ought therefore to have annulled the decision at issue on the ground of an infringement of the right to a fair hearing.

100 EUIPO and LR Health & Beauty Systems contend that the arguments put forward by the appellant are unfounded.

#### Findings of the Court

101 In paragraphs 23 to 25 of the judgment under appeal, the General Court examined and rejected the second limb of the appellant's first plea in law in the action at first instance, which alleged infringement of his right to a fair hearing, as laid down in the second sentence of Article 75 of Regulation No 207/2009. In that regard, the General Court held that, contrary to the appellant's contention, the Board of Appeal did not make any statement on the existence of absolute grounds for refusal of registration, nor did it call into question the distinctive character of the mark at issue and that, in any event, the appellant had had the opportunity during the proceedings to present his comments on the genuine use of that mark, including necessarily the nature of that use, in respect of all of the goods concerned.

102 The appellant criticises the General Court, in essence, for an erroneous reading of the decision at issue. He submits that the Board of Appeal did rule on an absolute ground for refusal of registration within the meaning of Article 7(1)(c) of Regulation No 207/2009, which is a point on which he did not have an opportunity to present his comments. In that regard, the appellant refers to paragraphs 32 and 34 of the decision at issue.

103 In paragraph 32 of that decision, the Board of Appeal stated that the *'the scientific generic name of a plant does not just constitute the name of the plant genus, (and is therefore in the broader sense a product name or descriptive indication within the meaning of Article 7(1)(c) of Regulation No 207/2009), but also describes goods whose essential ingredient is produced from plants of this genus'* and that that finding was not affected by the switching of 'i' and 'y', as those letters are often used interchangeably in words of Latin origin.

104 Admittedly, those statements could lead to confusion if read in isolation. Nevertheless, it is apparent from paragraph 29 of the decision at issue that the Board of Appeal noted that the dispute between LR Health & Beauty Systems and the appellant concerned

the question of whether the latter had actually used the mark at issue in accordance with the function of indicating origin or if he had rather used the term 'cystus' as a descriptive indication of the main ingredient of the goods concerned.

105 Consequently, the Board of Appeal did not consider that generally the appellant could not make use of the mark at issue. It concluded, after an assessment of the facts and evidence, that, in the present case, the term 'cystus' was used by the appellant as a descriptive indication which refers to the name of the cistus plant.

106 It follows that, contrary to what is claimed by the appellant, paragraph 32 of the decision at issue cannot be understood as an assertion by the Board of Appeal whereby it ruled on the existence of an absolute ground for refusal of registration.

107 Furthermore, in paragraphs 33 and 34 of the decision at issue, the Board of Appeal stated that adding the symbol '®' would probably be understood as meaning that the appellant's advertising ultimately communicates the fact that he had acquired a trademark right in a descriptive indication.

108 In that regard, as the Advocate General observes in point 85 of her [Opinion](#), those statements do not amount to a finding by the Board of Appeal itself that the term 'cystus' constitutes, generally, a descriptive indication, but an interpretation of what the appellant communicated by the use of the symbol '®'.

109 Accordingly, it must be held that, in considering that the Board of Appeal did not make any statement on the existence of an absolute ground for refusal of registration under Article 7(1)(c) of Regulation No 207/2009, the General Court has not erred in its reading of the decision at issue.

110 Consequently, the third ground of appeal cannot succeed.

111 It follows from all of the foregoing considerations that the appeal must be dismissed in its entirety.

#### Costs

112 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, which is applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

113 Since EUIPO and LR Health & Beauty Systems have applied for costs and the appellant has been unsuccessful, he must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. Dismisses the appeal;
2. Orders Mr Georgios Pandalis to pay the costs.

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#### OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 13 September 2018 (1)

Case C-194/17 P

Georgios Pandalis

v

European Union Intellectual Property Office (EUIPO)

(Appeal — EU trade mark — Regulation No 207/2009 — Revocation proceedings — EU word mark CYSTUS — Genuine use — Descriptive character of the trade mark — Food supplements not for medical purposes — Directive 2002/46/EC)

### I. Introduction

1. The EU Trade Mark Regulation (2) provides for a situation where a registered trade mark is devoid of any distinctive character but is merely perceived as a description. In that case, the trade mark may be declared invalid on application under Article 52, although in principle it should not have been registered in the first place. In addition, a trade mark may be declared to be revoked under Article 51 if, within a period of five years, it has not been put to genuine use. The point at issue in the present case is the consequences of a mark's descriptive nature for proof of genuine use.

2. The Board of Appeal of EUIPO and the General Court each focused on the point that, because of its descriptive nature, the mark was not used as a trade mark and inferred from that that it should be revoked. The proprietor of the mark essentially submits that the invalidity proceedings were thus circumvented.

3. The question also arises whether the contested trade mark was used for the correct products, namely food supplements not for medical purposes. Directive 2002/46/EC, (3) which relates to such products, is relevant in this connection.

### II. Legal framework

#### A. EU Trade Mark Regulation

4. Article 7(1) of the EU Trade Mark Regulation lays down absolute grounds for refusal:

*'1. The following shall not be registered:*

...

*(c) trade marks which consist 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.'*

5. Article 51 of the EU Trade Mark Regulation regulates the revocation of the trade mark:

*'1. The rights of the proprietor of the EU trade mark shall be declared to be revoked on application to the Office or on the basis of a counterclaim in infringement proceedings:*

*(a) if, within a continuous period of five years, the trade mark has not been put to genuine use in the Community in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use; however, no person may claim that the proprietor's rights in a Community trade mark should be revoked where, during the interval between expiry of the five-year period and filing of the application or counterclaim, genuine use of the trade mark has been started or resumed; the commencement or resumption of use within a period of three months preceding the filing of the application or counterclaim which began at the earliest on expiry of the continuous period of five years of non-use shall, however, be*

*disregarded where preparations for the commencement or resumption occur only after the proprietor becomes aware that the application or counterclaim may be filed;*

...

*2. Where the grounds for revocation of rights exist in respect of only some of the goods or services for which the Community trade mark is registered, the rights of the proprietor shall be declared to be revoked in respect of those goods or services only.'*

6. Article 75 of the EU Trade Mark Regulation recalls the duty to state reasons and the right to a fair hearing:

*'Decisions of the Office shall state the reasons on which they are based. They shall be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments.'*

#### B. Directive 2002/46

7. Food supplements are the subject of Directive 2002/46. They are defined in Article 2(a) thereof as *'foodstuffs the purpose of which is to supplement the normal diet and which are concentrated sources of nutrients or other substances with a nutritional or physiological effect, alone or in combination, marketed in dose form, namely forms such as capsules, pastilles, tablets, pills and other similar forms, sachets of powder, ampoules of liquids, drop dispensing bottles, and other similar forms of liquids and powders designed to be taken in measured small unit quantities'*.

8. Article 6 of Directive 2002/46 contains labelling requirements:

*'1. For the purposes of Article 5(1) of Directive 2000/13/EC, the name under which products covered by this Directive are sold shall be "food supplement".*

*2. The labelling, presentation and advertising must not attribute to food supplements the property of preventing, treating or curing a human disease, or refer to such properties.*

*3. Without prejudice to Directive 2000/13/EC, the labelling shall bear the following particulars:*

*(a) the names of the categories of nutrients or substances that characterise the product or an indication of the nature of those nutrients or substances;*

*(b) the portion of the product recommended for daily consumption;*

*(c) a warning not to exceed the stated recommended daily dose;*

*(d) a statement to the effect that food supplements should not be used as a substitute for a varied diet;*

*(e) a statement to the effect that the products should be stored out of the reach of young children.'*

#### III. Background to the dispute and procedure before EUIPO and the General Court

9. Mr Pandalis is the proprietor of an EU trade mark consisting of the word sign CYSTUS. It was registered by EUIPO on 5 January 2004. The application for registration was, inter alia, for *'food supplements not for medical purposes'* in Class 30 of the Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for

the Purposes of the Registration of Marks, as revised and amended.

#### **A. Procedure before EUIPO and the decision of the Board of Appeal**

10. On 3 September 2013, LR Health & Beauty Systems GmbH filed an application pursuant to Article 51(1)(a) of the EU Trade Mark Regulation (now Article 58(1)(a) of Regulation (EU) 2017/1001) for a declaration of revocation of the CYSTUS trade mark. It based its application on the ground that the trade mark had not been put to genuine use within a continuous period of five years.

11. At the hearing, Mr Pandalis and LR Health & Beauty Systems explained, when questioned by the Court, that invalidity proceedings have also been brought against the CYSTUS trade mark, claiming that the mark is descriptive. EUIPO has stayed those proceedings pending the conclusion of the present case.

12. By decision of 12 September 2014, the Cancellation Division of EUIPO ruled on the application for a declaration of revocation. It declared the trade mark to be revoked in respect of some of the registered goods, including *'food supplements not for medical purposes'* in Class 30 of the Nice Classification.

13. By decision of 30 October 2015, the First Board of Appeal dismissed the appeal filed by Mr Pandalis against the decision of the Cancellation Division.

14. The Board of Appeal based its decision on two main arguments.

15. First of all, Mr Pandalis did not use the term 'Cystus' as an EU trade mark but as a description of his products to indicate that they contained extracts from the plant variety *Cistus Incanus L.* as their main active ingredient. It was insufficient that the products featured CYSTUS rather than 'Cistus' and that in some cases the '®' symbol was used to be able to infer use as an EU trade mark. For that reason alone, the trade mark had to be declared to be revoked.

16. Second, the Board of Appeal took the view that Mr Pandalis had failed to prove genuine use of the mark in respect of *'food supplements not for medical purposes'* in Class 30 because their appearance did not meet the requirements of Directive 2002/46.

#### **B. Judgment of the General Court**

17. On 14 January 2016, Mr Pandalis brought an action at the General Court against the contested decision of the Board of Appeal. By the judgment under appeal of 14 February 2017, the General Court dismissed the action.

#### **IV. Appeal proceedings and forms of order sought**

18. By a document lodged on 14 April 2017, Mr Pandalis lodged an appeal against the judgment of the General Court.

19. He claims that the Court should:

1. set aside the decision of the General Court of 14 February 2017 in Case T-15/16 relating to revocation proceedings brought against EU trade mark No 001273119 CYSTUS;

2. annul the decision of the First Board of Appeal of EUIPO of 30 October 2015 (Case R 2839/2014-1)

relating to revocation proceedings brought against EU trade mark No 001273119 CYSTUS;

3. annul the decision of the Cancellation Division (4) in cancellation proceedings 8374 C of 12 September 2014 in so far as it revoked EU trade mark No 001273119 CYSTUS in respect of 'food supplements not for medical purposes' in Class 30;

4. reject the application for a declaration of invalidity brought by LR Health & Beauty Systems in the proceedings before the Cancellation Division and the First Board of Appeal of EUIPO against EU trade mark No 001273119 CYSTUS in so far as it relates to the goods *'food supplements not for medical purposes'* in Class 30;

5. order the European Union Intellectual Property Office to pay the costs of the proceedings.

20. EUIPO and LR Health & Beauty Systems each contend that the Court should:

1. dismiss the appeal and

2. order the appellant to pay the costs.

21. Written observations were submitted by the parties, which also presented oral argument at the hearing on 20 June 2018.

#### **V. Legal assessment**

22. Mr Pandalis bases the challenge against the judgment of the General Court on three grounds of appeal. The first concerns the classification of goods identified by the CYSTUS trade mark in the category of 'food supplements not for medical purposes' (see under B), the second the question whether Mr Pandalis used the CYSTUS trade mark as a trade mark in labelling products (see under C) and the third the right to a fair hearing in the proceedings before EUIPO (see under D). First of all, however, it is necessary to make a preliminary remark regarding the first two grounds of appeal.

#### **A. Preliminary remark**

23. In order to be able to specify the importance of the first two grounds of appeal, it should be borne in mind that EUIPO revoked the mark at issue on the ground that it had not been put to genuine use in respect of the category of goods for which it was registered.

24. The Board of Appeal held in this regard that, first, the word 'Cystus' had not been used as a trade mark but merely in a descriptive manner and, second, none of the products mentioned by Mr Pandalis could be regarded as *'food supplements not for medical purposes'*. The contested decision thus had a twin basis, that is, each of the two lines of reasoning is aimed at substantiating the decision in full.

25. However, in the judgment under appeal, the General Court did not examine comprehensively whether the pleas in law raised by Mr Pandalis call into question both lines of reasoning.

26. Instead, it simply found, for some of the products mentioned, namely *'Pilots Friend Immunizer®'*, *'Immun44® Saft'*, *'Immun44® Kapseln'* and *'the other products for which the term "Cystus" was used exclusively in the expressions "Cystus 52" or "Cystus 052", with or without the "®" symbol'*, that the term 'Cystus' was not used as a trade mark but in a

descriptive manner. These findings are contested by Mr Pandalis in his second ground of appeal.

27. For use in respect of some other products, namely lozenges, throat pastilles, stock, gargling solution and infection blocker tablets, on the other hand, the General Court ruled that it could not be regarded as use for *'food supplements not for medical purposes'*. That ruling is the subject of the first ground of appeal.

28. In order for his appeal to be upheld, Mr Pandalis must therefore be successful with only one of these grounds of appeal in respect of only one of the abovementioned products. It would then have to be examined whether use of the CYSTUS trade mark for that product is sufficient for genuine use.

### **B. First ground of appeal — no 'food supplements not for medical purposes'**

29. By the first ground of appeal, Mr Pandalis challenges paragraphs 54 to 59 of the judgment under appeal. In that passage, the General Court ruled that the Board of Appeal of EUIPO was right to hold that Mr Pandalis had failed to prove that the products lozenges, throat pastilles, stock, gargling solution and infection blocker tablets, which he had identified by the CYSTUS trade mark, were *'food supplements not for medical purposes'*.

30. Mr Pandalis, first, objects that the General Court misapplied the rules of Directive 2002/46 on food supplements and, second, claims a defective statement of reasons.

#### **1. The first part of the first ground of appeal — notion of food supplement**

31. Mr Pandalis bases the first part of the first ground of appeal on an alleged infringement of Article 51(1)(a) of the EU Trade Mark Regulation. He objects that in assessing whether certain products are food supplements not for medical purposes in accordance with the category of goods in trade mark law, the General Court was permitted to use only the definition of food supplements under Article 2(a) of Directive 2002/46, but not the requirements laid down in Article 6 of that directive for the labelling of food supplements.

32. However, this argument misconstrues the function of the definition in Directive 2002/46. It is not intended to delimit the category of goods in trade mark law but only makes the directive, including the rules on labelling, applicable.

33. On the other hand, the appearance of food supplements, which is influenced by the rules on labelling, is very important to the category of goods in trade mark law. This is because appearance is crucial in determining the category of goods in which consumers classify the product.

34. The fact that the products in question did not comply with the EU legislation on labelling for food supplements is thus an important indication that the products are not regarded as food supplements.

35. The question whether the deviation from the rules on labelling is sufficiently serious to find that the products are not *'food supplements not for medical purposes'* is a matter of appraisal of the facts.

36. The same holds for the importance which the General Court attached to the facts that there is a 'central pharmacological number' for the products in question, they are sold in chemists and they are marketed with a statement that they offer protection against colds and flu and help with inflammations in the mouth and throat.

37. It should be recalled in this regard that, under Article 256(1) TFEU and Article 58(1) of the Statute of the Court of Justice of the European Union, an appeal lies on a point of law only. The General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus does not, save where they distort the evidence, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal. (5)

38. However, Mr Pandalis complains that in paragraph 59 of the judgment under appeal the General Court distorted facts with regard to *'Cystus'* lozenges, as those lozenges did not bear the abovementioned sales statement concerning health benefits. Such a complaint is admissible in appeal proceedings.

39. As EUIPO has nevertheless rightly explained, this complaint stems from a misinterpretation of the judgment under appeal as the General Court does not find in paragraph 59 that *'Cystus'* lozenges were marketed with that statement but it confirms the assessment of evidence by the Board of Appeal. The Board of Appeal found that the product was marketed without the statement and took this into consideration in its assessment. (6)

40. The first part of the first ground of appeal must therefore be rejected in part as inadmissible and for the remainder as unfounded.

#### **2. The second part of the first ground of appeal — defective statement of reasons**

41. By the second part of the first ground of appeal, Mr Pandalis alleges a defective statement of reasons.

42. A first deficiency is claimed on the ground that the General Court did not make a finding on the category in which his products are to be classified.

43. Mr Pandalis misunderstands the subject matter of the dispute, however. The only point at issue is whether he was able to prove genuine use of the CYSTUS trade mark in respect of *'food supplements not for medical purposes'*. It is irrelevant to this point in which other category his products can be classified.

44. Furthermore, Mr Pandalis complains that it is not clear from the judgment under appeal why in its examination under Article 51(1)(a) and (2) of the EU Trade Mark Regulation the General Court did not assess separately whether the EU trade mark at issue was used for 'food supplements not for medical purposes' in respect of *'Cystus'* lozenges.

45. The crucial factor here, too, is that the General Court adopts — in relatively general terms — the Board of Appeal's assessment of this point because, at the same time, it is thereby rejecting, at least implicitly, Mr Pandalis' objections with regard to this product.

46. The second part of the first ground of appeal must therefore be rejected as unfounded.

### **C. The second ground of appeal — use as trade mark**

47. By his second ground of appeal, Mr Pandalis alleges that, in paragraphs 43 and 46, the General Court classified the EU trade mark at issue CYSTUS in general terms as a descriptive indication with reference to the designation of the plant ‘Cistus’, without considering the specific nature of the use of the mark. This constitutes a further error in law in the application of Article 51(1)(a) of the EU Trade Mark Regulation as, according to Mr Pandalis, the use of the trade mark should have been recognised as genuine. In addition, the reasoning on these aspects is contradictory.

48. It is necessary in this regard to examine, first, the General Court’s statements in paragraph 46 of the judgment under appeal, which do in fact appear *prima facie* to err in law and, second, its other remarks regarding this plea in law.

#### **1. Paragraph 46 of the judgment under appeal — descriptive nature of the CYSTUS trade mark**

49. In paragraph 46 of the judgment under appeal, the General Court found that the Board of Appeal was entitled to assume, without erring in law, that the relevant public would perceive the term ‘Cystus’ as a descriptive indication with reference to the designation of the plant ‘Cistus’ and not as an EU trade mark, without thereby deciding on the existence of an absolute ground for refusal within the meaning of Article 7(1)(c) of the EU Trade Mark Regulation.

50. Mr Pandalis rightly contends in relation to this finding that these statements — taken in isolation — are contradictory. If the relevant public perceives the trade mark only as descriptive, use as a trade mark is precluded and at the same time — irrespective of the assertion to the contrary by the General Court — the absolute ground for refusal would thus exist under Article 7(1)(c) of the EU Trade Mark Regulation.

51. That finding would also be doubtful because it anticipates the outcome of invalidity proceedings within the framework of revocation proceedings. This would be contrary *prima facie* to the judgment in *Formula One Licensing v OHIM*, according to which, in opposition proceedings against an EU trade mark for which registration has been sought, it is not possible to find, with regard to a sign identical to a trade mark protected in a Member State, an absolute ground for refusal, such as the lack of distinctive character. The characterisation of a sign as descriptive or generic is equivalent to denying its distinctive character. (7)

52. The objection could be raised against applying this case-law to the present case that the Court relies on the fact that neither EUIPO nor the General Court has the power to review a national trade mark. (8) On the other hand, the institutional powers would exist in respect of the EU trade mark at issue and would simply have to be exercised in other proceedings.

53. However, the Court also considers that the EU Trade Mark Regulation acknowledges a certain degree of distinctiveness of the earlier trade mark in opposition

proceedings. (9) This idea can be easily transposed to the assessment of genuine use of a registered EU trade mark.

54. Ultimately, there is no need to answer this question in this case.

55. The General Court clarifies in paragraph 47 of the judgment under appeal what it actually intends to say in the unfortunate wording in paragraph 46. The General Court does not deny any distinctive character for the term ‘Cystus’, as it would for a merely descriptive term, (10) but recognises it as having at least weak distinctive character. This satisfies the requirements of the abovementioned case-law. (11)

56. In addition, this interpretation also permits the General Court’s finding that the Board of Appeal did not make any statements regarding Article 7(1)(c) of the EU Trade Mark Regulation.

57. Mr Pandalis’ objections to paragraph 46 of the judgment under appeal thus stem from a misinterpretation of the statements made by the General Court, which are admittedly ambiguous.

#### **2. The other remarks — assessment of genuine use of the CYSTUS trade mark**

58. In other respects too, Mr Pandalis’ submissions regarding the second ground of appeal are based substantially on a selective and thus erroneous reading of the General Court’s assessment of the relevant plea in law, including the paragraphs at issue.

59. First, as has already been stated, the General Court did not find in general terms that the CYSTUS trade mark could be used exclusively in a descriptive manner. Rather, the weak distinctive character recognised by the General Court means that the trade mark may in principle also be used as such; that is to say, according to the General Court, it is possible to use the trade mark in such a way that consumers perceive it as an indication of origin for a product and not merely as a description of its ingredients.

60. Second, as LR Health & Beauty Systems points out, it is evident from paragraph 37 and the introductory sentences of paragraph 43 of the judgment under appeal that in paragraphs 39 to 48 the General Court assessed the specific use of the word ‘Cystus’ on the packaging of the products ‘Pilots Friend Immunizer®’, ‘Immun44® Saft’ and ‘Immun44® Kapseln’.

61. The General Court thus confirmed, third, the Board of Appeal’s conclusion that that use was descriptive and did not therefore meet the requirements for use as a trade mark.

62. This argument supports the finding that Mr Pandalis did not put the CYSTUS trade mark to genuine use in respect of the three abovementioned products.

63. This is because regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real when assessing whether there has been genuine use of the trade mark, in particular whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark. (12)

64. Use can be regarded as genuine only if it is consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin. (13)

65. Accordingly, not all use of a trade mark must be in accordance with the function of indicating origin. (14) In addition, not all proven commercial exploitation can therefore automatically be deemed genuine use of the mark in question. (15) A mark may also be used to fulfil other functions, such as that of guaranteeing the quality of that product or service or that of communication, investment or advertising. (16)

66. The manner in which a trade mark has been used in a specific case can thus be determined only on the basis of an appraisal of the facts. However, as has been stated, this falls outside the scope of the review in appeal proceedings.

### 3. The inclusion of other products

67. With regard to the preceding remarks it could be objected that the General Court holds in paragraph 50 of the judgment under appeal that use of the CYSTUS trade mark cannot be recognised in respect of ‘the other products for which the term “Cystus” was used exclusively in the expressions “Cystus 52” or “Cystus 052”, with or without the “®” symbol’. The General Court thus extends its assessment beyond the three abovementioned products.

68. The General Court nevertheless states reasons for this finding in paragraph 47 of the judgment under appeal.

69. In that paragraph it discusses whether the use of the term ‘Cystus’ in the terms ‘Cystus 052’ and ‘Cystus 52’ is to be recognised as use of the CYSTUS trade mark. In this regard, according to point (a) of the second subparagraph of Article 15(1) of the EU Trade Mark Regulation, proof that the trade mark was used in a form differing in elements which did not alter the distinctive character of the mark in the form in which it was registered also constitutes proof of genuine use of a trade mark.

70. This is rejected by the General Court for the abovementioned use, however, because of the weak distinctive character of the term ‘Cystus’. That form of use is likely to strengthen the distinctive character of the mark considerably. The distinctive character would therefore be altered in contravention of point (a) of the second subparagraph of Article 15(1) of the EU Trade Mark Regulation. This statement of reasons is consistent, moreover, with the Court’s case-law on the use of marks as an element of other marks. (17)

71. Accordingly, the General Court’s statements in paragraphs 47 and 50 of the judgment under appeal — which are not challenged by Mr Pandalis — have a different subject matter from paragraphs 43 and 46, which are contested by him. The former statements do not therefore call into question the assessment of the second ground of appeal.

### 4. Interim conclusion

72. The second ground of appeal is thus partially inadmissible — in so far as it seeks a fresh assessment of the facts — and for the remainder unfounded.

### D. Third ground of appeal — right to a fair hearing

73. By the third ground of appeal, Mr Pandalis objects that in paragraphs 23 to 25 of the judgment under appeal the General Court misapplied the second sentence of Article 75 of the EU Trade Mark Regulation.

74. Mr Pandalis argues that the Board of Appeal actually found that the CYSTUS trade mark is descriptive within the meaning of Article 7(1)(c) of the EU Trade Mark Regulation. He did not have an opportunity to present his comments on that point.

75. On the other hand, the General Court found in paragraph 24 of the judgment under appeal that the Board of Appeal did not make a statement on the existence of absolute grounds for refusal, that is, on Article 7(1)(c) of the EU Trade Mark Regulation.

76. If the finding made by the General Court is correct, there was therefore no reason for EUIPO to hear Mr Pandalis on whether the CYSTUS trade mark is descriptive within the meaning of Article 7(1)(c) of the EU Trade Mark Regulation.

77. This ground of appeal thus contains the implicit objection that the General Court wrongly reproduced the reasoning of the Board of Appeal, which would constitute an error in law because the EU Courts cannot in any event substitute their own reasoning for that of the author of the contested act. (18)

78. As I have already explained elsewhere, this reflects the cassatory nature of the action for annulment. Outside the scope of their unlimited jurisdiction (Article 261 TFEU), the European Union Courts may not amend the act concerned, but must declare it to be void if and in so far as the action for annulment is well founded (first paragraph of Article 264 TFEU). The European Union institutions, bodies, offices and agencies are then required to take the necessary measures to comply with the judgment annulling their decision (first paragraph of Article 266 TFEU). (19)

79. The General Court has, it is true, jurisdiction under Article 65(3) of the EU Trade Mark Regulation not only to annul the contested decision, but also to alter it. However, its power to alter decisions does not have the effect of conferring on it the power to substitute its own assessment for that of a Board of Appeal of EUIPO, or of carrying out an assessment on which that Board of Appeal has not yet adopted a position. (20)

80. The Board of Appeal stated in paragraph 32 of the contested decision ‘*that the scientific generic name of a plant does not just constitute the name of the plant genus (and is therefore in the broader sense a product name or descriptive indication within the meaning of Article 7(1)(c) [of the EU Trade Mark Regulation] ...), but also describes the goods whose essential ingredient is produced from plants of this genus*’.

81. Furthermore, according to paragraph 34 of the contested decision, the addition of the ‘®’ symbol ‘is ... to be understood as meaning that his [Mr Pandalis] advertising ultimately communicates the fact that he

acquired a trade mark right in a descriptive indication ... .

82. Indeed, it seems reasonable to understand these statements to mean that the Board of Appeal finds the CYSTUS trade mark to be descriptive within the meaning of Article 7(1)(c) of the EU Trade Mark Regulation.

83. However, this interpretation is not compelling.

84. For one thing, the Board of Appeal qualifies its statement in paragraph 32 of the contested decision to the effect that a generic name is in the 'broader sense' a descriptive indication within the meaning of Article 7(1)(c) of the EU Trade Mark Regulation. This implies, however, that only a term that is descriptive in the strict sense also necessarily meets the requirements of that provision and that a corresponding trade mark would have to be declared invalid.

85. Furthermore, the statements in paragraph 34 of the contested decision contain not so much a finding by the Board of Appeal on the importance of the use of the '®' symbol as an interpretation of the communication by the trade mark proprietor.

86. The General Court's interpretation of the contested decision is thus still defensible and it cannot be found that the General Court unlawfully substituted its own reasoning for that of the Board of Appeal.

87. Therefore, Mr Pandalis' main submissions regarding the third ground of appeal must also be rejected. Since, according to the defensible findings of the General Court, the Board of Appeal did not make any statements regarding the existence of the absolute ground for refusal under Article 7(1)(c) of the EU Trade Mark Regulation, Mr Pandalis also did not need to be heard on that point.

88. The third ground of appeal is therefore unfounded.

#### VI. Costs

89. Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1), which applies to the procedure on appeal in accordance with Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

90. Since Mr Pandalis has been unsuccessful in his appeal and EUIPO and LR Health & Beauty Systems have applied for costs, Mr Pandalis must be ordered to pay the costs. (21)

#### VII. Conclusion

91. I therefore propose that the Court should:

1. Dismiss the appeal.
2. Order Georgios Pandalis to pay the costs of the proceedings.

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1 Original language: German.

2 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), as amended by the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (OJ 2012 L 112, p. 21). Now replaced by

Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1.)

3 Directive of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements (OJ 2002 L 183, p. 51).

4 Footnote not relevant to the English version.

5 Judgments of 7 October 2004, [Mag Instrument v OHIM](#) (C-136/02 P, EU:C:2004:592, paragraph 39); of 17 July 2014, [Reber v OHIM](#) (C-141/13 P, EU:C:2014:2089, paragraph 35); and of 26 July 2017, [Staatliche Porzellan-Manufaktur Meissen v EUIPO](#) (C-471/16 P, EU:C:2017:602, paragraph 34).

6 Paragraph 57 of the contested decision.

7 Judgment of 24 May 2012, [Formula One Licensing v OHIM](#) (C-196/11 P, EU:C:2012:314, paragraph 41).

8 Judgments of 24 May 2012, [Formula One Licensing v OHIM](#) (C-196/11 P, EU:C:2012:314, paragraphs 40, 44 and 45), and of 8 November 2016, [BSH v EUIPO](#) (C-43/15 P, EU:C:2016:837, paragraph 66); and orders of 30 May 2013, [Wohlfahrt v OHIM](#) (C-357/12 P, EU:C:2013:356, paragraph 46), and of 16 October 2013, [medi v OHIM](#) (C-410/12 P, EU:C:2013:702, paragraph 34).

9 Judgment of 24 May 2012, [Formula One Licensing v OHIM](#) (C-196/11 P, EU:C:2012:314, paragraphs 46 and 47).

10 Judgment of 24 May 2012, [Formula One Licensing v OHIM](#) (C-196/11 P, EU:C:2012:314, paragraph 41).

11 Judgments of 24 May 2012, [Formula One Licensing v OHIM](#) (C-196/11 P, EU:C:2012:314, paragraph 47), and of 8 November 2016, [BSH v EUIPO](#) (C-43/15 P, EU:C:2016:837, paragraph 67).

12 Judgment of 11 March 2003, [Ansul](#) (C-40/01, EU:C:2003:145, paragraph 38).

13 Judgments of 11 March 2003, [Ansul](#) (C-40/01, EU:C:2003:145, paragraph 36), and of 9 December 2008, [Verein Radetzky-Orden](#) (C-442/07, EU:C:2008:696, paragraph 13).

14 Order of 20 May 2014, [Reber Holding v OHIM](#) (C-414/13 P, EU:C:2014:812, paragraph 54).

15 Judgment of 17 July 2014, [Reber v OHIM](#) (C-141/13 P, EU:C:2014:2089, paragraph 32).

16 Judgment of 8 June 2017, [W. F. Gözze Frottierweberei and Gözze](#) (C-689/15, EU:C:2017:434, paragraphs 42 and 45).

17 Judgment of 1 December 2016, [Klement v EUIPO](#) (C-642/15 P, EU:C:2016:918, paragraph 29).

18 Judgments of 27 January 2000, [DIR International Film and Others v Commission](#) (C-164/98 P, EU:C:2000:48, paragraphs 38 and 48), and of 21 January 2016, [Galp Energía España and Others v Commission](#) (C-603/13 P, EU:C:2016:38, paragraph 73).

19 My Opinion in [Frucona Košice v Commission](#) (C-73/11 P, EU:C:2012:535, points 92 and 93).

20 Judgments of 5 July 2011, [Edwin v OHIM](#) (C-263/09 P, EU:C:2011:452, paragraph 72), and of 21 July 2016, [Apple and Pear Australia and Star Fruits Diffusion v EUIPO](#) (C-226/15 P, EU:C:2016:582, paragraph 67).

21 See judgments of 26 July 2017, [Staatliche Porzellan-Manufaktur Meissen v EUIPO](#) (C-471/16 P, EU:C:2017:602, paragraph 65), and of 19 April 2018, [Fiesta Hotels & Resorts v EUIPO](#) (C-75/17 P, EU:C:2018:269, paragraph 71).