

**Court of Justice EU, 29 November 2018, Alcohol Countermeasure Systems v EUIPO**



**TRADE MARK LAW**

The General Court did not err in law by finding that the proof of genuine use of the earlier mark consisting of the word sign 'ALCOLOCK' and registered in the UK in 1996 could be furnished by means of evidence establishing use of another mark consisting of the same word sign 'ALCOLOCK' registered in the UK in 2004:

- [it follows directly from the wording of point \(a\) of the second subparagraph of Article 15\(1\) of Regulation No 207/2009 that use of the mark in a form differing from the form in which it was registered is considered use for the purpose of the first subparagraph of that article, so long as the distinctive character of the mark in the form in which it was registered is unaltered](#)
- [CJEU has previously held that that provision also applies where that different form is itself registered as a trade mark \(IPPT20121025\)](#)

A fortiori, it must be held that the use of a sign identical to that constituting the earlier mark and itself registered as a trade mark under a different number from the earlier mark, constitutes use of that mark for the purposes of applying the first subparagraph of Article 15(1) of Regulation No 207/2009.

59 That conclusion is all the more compelling because, as was recalled by the General Court in paragraph 23 of the judgment under appeal, the fundamental condition of genuine use of a trade mark is that, as a consequence of that use, the mark may serve to identify, in the minds of the relevant class of persons, the goods to which it relates as originating from a particular undertaking (see, to that effect, [judgment of 18 April 2013, Colloseum Holding, C-12/12, EU:C:2013:253](#), paragraph 28). As the General Court, without erring in law, noted in paragraph 25 of the judgment under appeal, the fact that the word sign 'ALCOLOCK' was used under the earlier mark or under trade mark No 2 371 210 could not give rise to any difference in the minds of the relevant class of persons as regards the fact that the earlier mark designated goods originating from Lion Laboratories.

**The General Court did not err in law in not examining the two relevant periods separately when examining genuine use:**

- [it is sufficient that a trade mark has been put to genuine use during a part of the relevant period](#)

inasmuch as the appellant complains that the General Court erred in law in not examining the two relevant periods separately, it should be noted that, as is apparent from Article 15(1) of Regulation No 207/2009, which defines the concept of 'genuine use' for the purposes of applying the legislation on the EU trade mark, suspending genuine use of an EU trade mark 'during an uninterrupted period of five years' entails the application of the sanctions laid down by that regulation. Accordingly, it is sufficient that a trade mark has been put to genuine use during a part of the relevant period for it not to be subject to those sanctions.

- [in the present case the two periods overlapped so the proof relating to the period of overlap could be taken into account for each of the two relevant periods](#)

It follows that the proof of use of the earlier mark relating to the period of overlap, running from 13 August 2007 to 4 October 2009, could be taken into account for each of the two relevant periods and that the General Court could consider, in particular in view of the evidence adduced in respect of that period, that genuine use of that mark was established to the requisite legal standard.

**The General Court was not required to stay the proceedings pending Brexit in order to be able to annul the decision on the ground that an earlier UK trade mark could no longer be used to oppose the maintenance of an EU trade mark:**

- [the General Court may not annul or alter a decision on grounds which come into existence subsequent to its adoption](#)

Without it being necessary to give a ruling on the admissibility of such a ground of appeal, it should be noted that, under Article 65(2) of Regulation No 207/2009, the General Court may annul or alter a decision of a Board of Appeal of EUIPO only 'on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of [that] Regulation or of any rule of law relating to their application or misuse of power'. It follows that the General Court may annul or alter the decision at issue only if, at the date on which that decision was adopted, it was vitiated by one of those grounds for annulment or alteration. The General Court may not, however, annul or alter that decision on grounds which come into existence subsequent to its adoption (judgments of 11 May 2006, *Sunrider v OHIM*, C-416/04 P, EU:C:2006:310, paragraphs 54 and 55, and of 26 October 2016, [Westermann Lernspielverlage v EUIPO, C-482/15 P, EU:C:2016:805](#), paragraph 27).

117 It would be contrary to that case-law to hold that, in the present case, the General Court was required to stay the proceedings pending before it in order, where appropriate, to annul the decision at issue following the withdrawal of the United Kingdom from the European Union on the ground, which, moreover was purely hypothetical at that stage, that that withdrawal would

retroactively affect the outcome of invalidity proceedings based on an earlier trade mark of that Member State.

• **EU law continues in full force and effect until the time of the actual withdrawal from the EU**

Furthermore, in so far as the appellant maintains that Lion Laboratories is now a company established outside the European Union and that that company obtained the cancellation of the contested mark on the basis of the earlier mark registered outside the European Union, it should be noted that the mere communication by a Member State of its intention to leave the European Union in accordance with Article 50 TEU does not have the effect of suspending the application of EU law in that Member State and, consequently, EU law continues in full force and effect in that Member State until the time of its actual withdrawal from the European Union (see, to that effect, judgment of 19 September 2018, RO, C-327/18 PPU, EU:C:2018:733, paragraph 45).

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**Court of Justice EU, 29 November 2018**

(K. Jürimäe (Rapporteur) C. Lycourgos, C. Vajda)  
JUDGMENT OF THE COURT (Ninth Chamber)  
29 November 2018 (\*)

(Appeal — EU trade mark — Regulation (EC) No 207/2009 — Invalidity proceedings — Declaration of invalidity on the basis of an earlier United Kingdom trade mark — Genuine use — Proof — Effects of the procedure for the withdrawal of the United Kingdom from the European Union on the proceedings before the General Court and the lawfulness of the decision at issue — None)

In Case C-340/17 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 7 June 2017, Alcohol Countermeasure Systems (International) Inc., established in Toronto (Canada), represented by E. Baud and P. Marchiset, avocats, appellant,

the other parties to the proceedings being:

European Union Intellectual Property Office (EUIPO), represented by D. Botis and S. Hanne, acting as Agents,

defendant at first instance,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by C. Brodie and Z. Lavery, acting as Agents, and by N. Saunders, Barrister, intervener in the appeal,

THE COURT (Ninth Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, C. Lycourgos and C. Vajda, judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 By its appeal, Alcohol Countermeasure Systems (International) Inc. asks the Court to set aside the judgment of the General Court of the European Union of 29 March 2017, Alcohol Countermeasure Systems (International) v EUIPO — Lion Laboratories (ALCOLOCK) (T-638/15, not published, EU:T:2017:229) ('the judgment under appeal'), by which the General Court dismissed its action for annulment of the decision of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 11 August 2015 (Case R 1323/2014-1), relating to invalidity proceedings between Lion Laboratories Ltd and the appellant ('the decision at issue').

**Legal context**

**Regulation No 207/2009**

2 Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1) was repealed and replaced with effect from 1 October 2017 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). Nevertheless, given the date on which the application for a declaration of invalidity at issue in the present case was filed, namely 13 August 2012, which is decisive for the purposes of identifying the substantive law applicable, the present dispute is governed by the substantive provisions of Regulation No 207/2009.

3 Article 8 of Regulation No 207/2009 provides:

'1. Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:

(a) if it is identical with the earlier trade mark and the goods or services for which registration is applied for are identical with the goods or services for which the earlier trade mark is protected;

(b) if because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark.

2. For the purposes of paragraph 1, "earlier trade marks" means:

(a) trade marks of the following kinds with a date of application for registration which is earlier than the date of application for registration of the [EU] trade mark, taking account, where appropriate, of the priorities claimed in respect of those trade marks:

(i) [EU] trade marks;

(ii) trade marks registered in a Member State, or, in the case of Belgium, the Netherlands or Luxembourg, at the Benelux Office for Intellectual Property;

...

4 Article 15 of that regulation states:

'1. If, within a period of five years following registration, the proprietor has not put the [EU] trade mark to genuine use in the [European Union] in connection with the goods or services in respect of

which it is registered, or if such use has been suspended during an uninterrupted period of five years, the [EU] trade mark shall be subject to the sanctions provided for in this Regulation, unless there are proper reasons for non-use.

The following shall also constitute use within the meaning of the first subparagraph:

(a) use of the [EU] trade mark in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered

...

2. Use of the [EU] trade mark with the consent of the proprietor shall be deemed to constitute use by the proprietor.'

5 Pursuant to Article 53(1)(a) of that regulation:

'[An EU] trade mark shall be declared invalid on application to the Office or on the basis of a counterclaim in infringement proceedings:

(a) where there is an earlier trade mark as referred to in Article 8(2) and the conditions set out in paragraph 1 or paragraph 5 of that Article are fulfilled.'

6 Under Article 57(2) and (3) of that regulation:

'2. If the proprietor of the [EU] trade mark so requests, the proprietor of an earlier [EU] trade mark, being a party to the invalidity proceedings, shall furnish proof that, during the period of five years preceding the date of the application for a declaration of invalidity, the earlier [EU] trade mark has been put to genuine use in the [European Union] in connection with the goods or services in respect of which it is registered and which he cites as justification for his application, or that there are proper reasons for non-use, provided the earlier [EU] trade mark has at that date been registered for not less than five years. If, at the date on which the [EU] trade mark application was published, the earlier [EU] trade mark had been registered for not less than five years, the proprietor of the earlier [EU] trade mark shall furnish proof that, in addition, the conditions contained in Article 42(2) were satisfied at that date. In the absence of proof to this effect the application for a declaration of invalidity shall be rejected. If the earlier [EU] trade mark has been used in relation to part only of the goods or services for which it is registered, it shall, for the purpose of the examination of the application for a declaration of invalidity, be deemed to be registered in respect only of that part of the goods or services.

3. Paragraph 2 shall apply to earlier national trade marks referred to in Article 8(2)(a), by substituting use in the Member State in which the earlier national trade mark is protected for use in the [European Union].'

7 Under Article 64(3) of Regulation No 207/2009:

'The decisions of the Boards of Appeal shall take effect only as from the date of expiration of the period referred to in Article 65(5) or, if an action has been brought before the Court of Justice within that period, as from the date of dismissal of such action.'

#### **Regulation No 2868/95**

8 Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995

L 303, p. 1), as amended by Commission Regulation (EC) No 355/2009 of 31 March 2009 (OJ 2009 L 109, p. 3) ('Regulation No 2868/95'), was repealed, with effect from 1 October 2017, by Commission Delegated Regulation (EU) 2017/1430 of 18 May 2017 supplementing Regulation No 207/2009 and repealing Regulations No 2868/95 and (EC) No 216/96 (OJ 2017 L 205, p. 1). Nevertheless, in view of the considerations set out in paragraph 2 above, the present dispute is governed by the substantive provisions of Regulation No 2868/95.

9 Rule 22(3) of Regulation No 2868/95 provides:

'The indications and evidence for the furnishing of proof of use shall consist of indications concerning the place, time, extent and nature of use of the opposing trade mark for the goods and services in respect of which it is registered and on which the opposition is based, and evidence in support of these indications in accordance with paragraph 4.'

10 Rule 40(6) of that regulation states:

'If the applicant has to furnish proof of use or proof that there are proper reasons for non-use under Article 56(2) or (3) of the Regulation, the Office shall invite the applicant to furnish proof of genuine use of the mark, within such period as it may specify. If the proof is not provided within the time limit set, the application for declaration of invalidity shall be rejected. Rule 22(2), (3) and (4) shall apply mutatis mutandis.'

#### **Background to the dispute and the decision at issue**

11 The background to the dispute and the essential elements of the decision at issue apparent from paragraphs 1 to 8 of the judgment under appeal may be summarised as follows for the purposes of the present case.

12 On 28 January 2010 the appellant obtained registration of the EU word mark ALCOLOCK ('the contested mark') from EUIPO. That mark was registered in respect of several goods and services in Classes 9, 37 and 42 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').

13 On 13 August 2012 Lion Laboratories filed an application for a declaration of invalidity of the contested mark pursuant to Article 53(1)(a) of Regulation No 207/2009, read in conjunction with, inter alia, Article 8(1)(a) and (b) of that regulation. That application was based on the earlier word mark ALCOLOCK, registered in the United Kingdom on 16 August 1996 under No 2 040 518 ('the earlier mark'). The earlier mark covered 'apparatus for testing, measuring, indicating, recording and/or analysing breath for alcohol; control apparatus for or responsive to the aforesaid apparatus; parts and fittings therefor' in Class 9 of the Nice Agreement.

14 On 22 November 2012 the appellant submitted a request, pursuant to Article 57(2) and (3) of Regulation No 207/2009, for Lion Laboratories to establish genuine use of the earlier mark.

15 By decision of 24 March 2014, the Cancellation Division granted the application for a declaration of invalidity on the basis of Article 53(1)(a) of Regulation No 207/2009, read in conjunction with Article 8(1)(a) and (b) of that regulation. In particular, it considered that the earlier mark had been put to genuine use, that the goods and services in question were identical or similar, and that the signs at issue were identical.

16 By the decision at issue, the First Board of Appeal of EUIPO, ruling on the appeal lodged by the appellant, dismissed that appeal. It noted, inter alia, that Lion Laboratories had established to the requisite legal standard that the earlier mark had been put to genuine use in the United Kingdom, that some of the goods in question were identical, as were the signs at issue, and that there was a likelihood of confusion between those signs within the meaning of Article 8(1) of Regulation No 207/2009.

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

17 By application lodged at the Registry of the General Court on 12 November 2015, the appellant brought before that Court an action seeking the annulment of the decision at issue.

18 In support of its action, the appellant relied on three pleas in law whereby it contested, in essence, the Board of Appeal's assessment of the genuine use of the earlier mark. By its first plea, it argued, inter alia, that genuine use of that mark could not be demonstrated by evidence establishing the use of another mark owned by Lion Laboratories and registered, in the United Kingdom, under another number. By its second plea, it mainly complained that the Board of Appeal had not distinguished to the requisite legal standard the periods during which genuine use of the earlier mark had to be demonstrated. By its third plea, it maintained that the Board of Appeal had incorrectly concluded that the use of the earlier mark was genuine and had disregarded its duty to state reasons.

19 By the judgment under appeal, the General Court rejected all those pleas.

20 In particular, in paragraphs 22 to 25 of that judgment, the General Court held that proof of genuine use of the earlier mark, registered in the United Kingdom in 1996 under No 2 040 518, could be furnished by means of evidence relating to the use of another word mark, consisting of the same sign 'ALCOLOCK' and registered in the United Kingdom in 2004 under No 2 371 210 ('trade mark No 2 371 210').

21 In paragraphs 54 and 55 of that judgment, the General Court found that, under Article 57(2) of Regulation No 207/2009, proof of genuine use of the earlier mark had to be furnished, in the case at hand, in relation to two periods. The first period comprised the five years preceding the date of the application for a declaration of invalidity and ran from 5 October 2004 to 4 October 2009 ('the First Period'). The second period covered the five years preceding the date of the publication of the application for registration of the

contested mark and ran from 13 August 2007 to 12 August 2012 ('the Second Period').

22 The General Court therefore dismissed the action in its entirety.

#### **Forms of order sought by the parties to the appeal**

23 By its appeal, the appellant claims that the Court should:

- order that operation of the judgment under appeal be suspended;
- set aside the judgment under appeal;
- annul the decision at issue;
- in the alternative, set aside the judgment under appeal and order that the proceedings be stayed pending the outcome of the process for the withdrawal of the United Kingdom from the European Union pursuant to Article 50 TEU or, at the very least, until 31 May 2019;
- order EUIPO to pay the costs of the proceedings at first instance and on appeal.

24 EUIPO contends that the Court should:

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

25 The United Kingdom has been granted leave to intervene in support of the form of order sought by EUIPO.

#### **The request that the judgment under appeal be suspended**

26 By its application, the appellant claims that the Court should order that operation of the judgment under appeal be suspended.

27 In that regard, it should be borne in mind that, under Article 160(4) of the Rules of Procedure of the Court of Justice, applicable to appeal proceedings by virtue of Article 190(1) thereof, an application to suspend the operation of any measure adopted by an institution, made pursuant to Article 278 TFEU, must be made by a separate document and in accordance with the provisions of Articles 120 to 122 of those rules.

28 In the present case, the application to suspend the operation of the judgment under appeal was not made by a separate document and is, therefore, inadmissible.

#### **The appeal**

##### **First ground of appeal**

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

29 By its first ground of appeal, the appellant submits, in the first place, that the General Court distorted its application at first instance by summarising, in paragraph 86 of the judgment under appeal, its arguments in support of the third plea for annulment to the effect that 'it [was] apparent from the evidence adduced by Lion Laboratories before EUIPO that only 64 devices had been sold during the relevant periods [for furnishing proof of genuine use of the earlier mark]' even though it was very clear from its application at first instance that the count of 64 devices exclusively concerned the First Period.

30 The appellant adds that it was all the more inconsistent to consider that that count concerned both periods given that the second plea raised by it before the General Court was based on the need to examine each of those periods separately, with a lack of proof of use in respect of either one of those periods necessarily

entailing, in its view, the dismissal of the application for a declaration of invalidity. Thus, before the General Court, its arguments were generally focused on the First Period.

31 In the second place, the General Court erred in citing, in paragraph 87 of the judgment under appeal, an overall number of 350 devices which had been sold by Lion Laboratories during the two periods, when only the First Period was relevant and that number had not been confirmed by either of the parties. In so doing, the General Court clearly distorted the count of 64 devices for the First Period, which had not been disputed by EUIPO.

32 EUIPO considers that the first ground of appeal is manifestly unfounded.

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

33 The first ground of appeal comprises two lines of argument alleging a distortion of the appellant's written pleadings in paragraph 86 of the judgment under appeal, and a manifest error of assessment vitiating paragraph 87 of that judgment, respectively.

34 In the first place, it should be borne in mind that, so as not to neglect its role, the EU judiciary must examine the various claims and pleas submitted by an applicant, as formulated in his pleadings, without modifying their nature or substance (judgment of 7 June 2018, *Ori Martin v Court of Justice of the European Union*, C-463/17 P, EU:C:2018:411, paragraph 18 and the case-law cited).

35 In paragraph 86 of the judgment under appeal, the General Court summarised the arguments developed by the appellant in support of the third plea for annulment, whereby that party argued that 'it [was] apparent from the evidence adduced by Lion Laboratories before EUIPO that only 64 devices had been sold during the relevant periods' for furnishing proof of genuine use of the earlier mark.

36 The appellant argues, in essence, that that summary is the result of a distortion of its application at first instance, given that it was very clear from that application that the count of 64 devices exclusively concerned the First Period.

37 However, it is not apparent, either from the arguments from the application at first instance identified by the appellant in its written pleadings before the Court of Justice, or from that application viewed in its entirety, that the General Court distorted the scope of the line of argument relating to the sale of 64 devices, inasmuch as it concerned only the First Period.

38 Indeed, although the appellant indicated, in paragraph 61 of its application at first instance, that, in the context of the second plea for annulment, '[it had to] mainly focus its argumentation on the First Period', and also referred to that period in various paragraphs of that application relating to its third plea for annulment, it is nonetheless not unequivocally apparent from that application that the appellant's line of argument relating to the sale of 64 devices concerned only that period. Thus, in the context of the third plea for annulment, the appellant explained, in paragraph 96 of

that application, that, first, 'the commercial volume of the use of the Earlier Mark, [namely] 64 devices, ... as well as of the length of each relevant period during which the mark was used ... were scarce and insufficient for the ... request for invalidity to succeed' and, second, the invoices relating to the 64 devices in question were 'quasi exclusively ... after November 2007'. The First and Second Periods partially overlap in respect of the period between 13 August 2007 and 4 October 2009.

39 In those circumstances, the line of argument alleging a distortion of the appellant's written pleadings is unfounded.

40 In the second place, it must be borne in mind that, under 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 points 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 they distort the facts or evidence, constitute a point of law which is subject as such to review by the Court of Justice on appeal ([judgment of 11 October 2017, EUIPO v Cactus, C-501/15 P, EU:C:2017:750](#), paragraph 60 and the case-law cited).

41 In paragraph 87 of the judgment under appeal, the General Court noted that 'the invoices and purchase orders annexed to the application [at first instance] [indicated] that almost 350 devices for testing, measuring, indicating, recording or analysing breath for alcohol, as well as repair kits and spare parts for those devices, were sold during the relevant periods'.

42 The appellant is attempting to obtain a new appraisal of the facts previously submitted to the General Court for appraisal, inasmuch as that Court referred to a number of 350 devices for the two relevant periods, whereas, according to the appellant, only the First Period was relevant and that number had not been confirmed by the parties. However, it does not establish a distortion of those factual elements. Therefore, in accordance with the case-law cited in paragraph 40 above, that line of argument is inadmissible.

43 In so far as, by its first ground of appeal, the appellant seeks to argue that the General Court erred in law in failing to distinguish the First Period from the Second Period, it is necessary to refer to the examination of the third ground of appeal which covers, inter alia, that issue.

44 Accordingly, the first ground of appeal must be rejected as being in part inadmissible and in part unfounded.

#### **Second ground of appeal**

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

45 By its second ground of appeal, the appellant complains of a distortion by the General Court of Lion Laboratories' statement, set out in a letter from the latter party's lawyer and dated 21 March 2013 ('the letter of 21 March 2013'), and of an infringement of Article 57(2) of Regulation No 207/2009 and Rule 22(3) and Rule 40(6) of Regulation No 2868/95.

46 In the first place, the General Court distorted Lion Laboratories' statement as set out in the letter of 21 March 2013 and, more specifically, in the conclusion drawn in that letter.

47 In that regard, the appellant notes that the letter of 21 March 2013 states, by way of conclusion, that 'from the evidence provided it [was] clear that [trade mark No 2 371 210] was in use'. That letter contained no reference to the registration number of the earlier mark. By contrast, it contained two references to trade mark No 2 371 210, the first of which was in order to describe the content of a licence agreement concluded by Lion Laboratories and Alcolock GB.

48 In those circumstances, the General Court should have considered that the evidence referred to in the letter of 21 March 2013 concerned only trade mark No 2 371 210 and not the earlier mark.

49 However, the General Court, like the Board of Appeal, confined itself to verifying whether the licence agreement referred to in paragraph 47 above covered the earlier mark. The case-law cited in paragraph 22 of the judgment under appeal, pursuant to which the use of a mark in a form different from that in which it was registered may constitute genuine use of the earlier mark, is irrelevant in that context.

50 In the second place, the appellant infers from the wording of Article 57(2) of Regulation No 207/2009 and, in essence, from Rule 22(3) and Rule 40(6) of Regulation No 2868/95 that the proprietor of the earlier mark must furnish proof of genuine use of the mark on which the application for a declaration of invalidity is based.

51 However, having regard to the content of the letter of 21 March 2013, it appears that Lion Laboratories has not proved use of the earlier mark, but has furnished evidence showing use of a different mark, namely trade mark No 2 371 210.

52 Moreover, the General Court erred in law in paragraph 25 of the judgment under appeal, given that the question whether the public could have been aware of the possible differences between the two national marks in question was irrelevant.

53 EUIPO contends that that ground of appeal should be rejected as manifestly unfounded.

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

54 In paragraphs 22 to 27 and 29 to 32 of the judgment under appeal, the General Court found, in essence, that the proof of genuine use of the earlier mark, consisting of the word sign 'ALCOLOCK' and registered in the United Kingdom in 1996 under No 2 040 518, could be furnished by means of evidence establishing use of another mark, namely trade mark No 2 371 210, consisting of the same word sign 'ALCOLOCK' but registered in the United Kingdom in 2004.

55 By its second ground of appeal, the appellant complains that those considerations were vitiated by a distortion of an item of evidence and an error of law on the part of the General Court.

56 In the first place, regarding the alleged error of law, it should be observed that, in so far as the appellant bases its argument on the wording of Article 57(2) of

Regulation No 207/2009 and Rule 22(3) and Rule 40(6) of Regulation No 2868/95, those provisions, inasmuch as they refer to the use of the earlier mark, must be read in the light of Article 15 of Regulation No 207/2009, which defines the concept of 'genuine use' for the purposes of applying the legislation on the EU trade mark.

57 It follows directly from the wording of point (a) of the second subparagraph of Article 15(1) of Regulation No 207/2009 that use of the mark in a form differing from the form in which it was registered is considered use for the purpose of the first subparagraph of that article, so long as the distinctive character of the mark in the form in which it was registered is unaltered. The Court of Justice has previously held that, as was recalled, in essence, by the General Court in paragraph 22 of the judgment under appeal, that provision also applies where that different form is itself registered as a trade mark (see, by analogy, [judgment of 25 October 2012, Rintisch, C-553/11, EU:C:2012:671](#), paragraphs 20 and 30).

58 A fortiori, it must be held that the use of a sign identical to that constituting the earlier mark and itself registered as a trade mark under a different number from the earlier mark, constitutes use of that mark for the purposes of applying the first subparagraph of Article 15(1) of Regulation No 207/2009.

59 That conclusion is all the more compelling because, as was recalled by the General Court in paragraph 23 of the judgment under appeal, the fundamental condition of genuine use of a trade mark is that, as a consequence of that use, the mark may serve to identify, in the minds of the relevant class of persons, the goods to which it relates as originating from a particular undertaking (see, to that effect, [judgment of 18 April 2013, Colloseum Holding, C-12/12, EU:C:2013:253](#), paragraph 28). As the General Court, without erring in law, noted in paragraph 25 of the judgment under appeal, the fact that the word sign 'ALCOLOCK' was used under the earlier mark or under trade mark No 2 371 210 could not give rise to any difference in the minds of the relevant class of persons as regards the fact that the earlier mark designated goods originating from Lion Laboratories.

60 Accordingly, the argument alleging an error of law is unfounded.

61 In the second place, regarding the argument alleging a distortion of the letter of 21 March 2013, it should be specified from the outset that that argument is based on the premiss that only acts of use of the earlier mark under its own registration number may be such as to establish genuine use of that mark. However, as is apparent from the considerations set out in paragraphs 56 to 59 above, such a premiss is incorrect.

62 Furthermore, it should be borne in mind that, according to the case-law of the Court, a distortion of the facts or the evidence 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 13 September 2018, [Birkenstock Sales v EUIPO, C-26/17 P, EU:C:2018:714](#), paragraph 80).

63 In the present case, the appellant has not shown any distortion, by the General Court, of the conclusion set out in the letter of 21 March 2013, according to which '[trade mark No 2 371 210] was in use'. Indeed, it is unequivocally apparent from paragraphs 27 and 30 of the judgment under appeal that the General Court in no way considered that the acts of use referred to concerned the earlier mark under its own registration number. Instead, it held that the acts of use relating to trade mark No 2 371 210 could, in the circumstances of the case at hand, be taken into account in order to establish genuine use of the earlier mark.

64 Having regard to the foregoing, the second argument raised in support of the second ground of appeal must be rejected as unfounded, and accordingly, that ground of appeal must be rejected in its entirety.

### **Third ground of appeal**

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

65 By its third ground of appeal, the appellant submits that, in the context of its assessment of the third plea in law raised before it, the General Court misinterpreted the concept of 'genuine use' within the meaning of Regulation No 207/2009 and the judgment of 11 March 2003, [Ansul \(C-40/01, EU:C:2003:145\)](#), and that it applied an incorrect methodology when assessing genuine use.

66 At the outset, the appellant specifies the method which it considers appropriate for assessing use of the earlier mark.

67 In that regard, it is of the view that, in a situation where a licence agreement is relied on before EUIPO as evidence of genuine use and that agreement indicates expected sales figures or minimum requirements for the licensee, those indications constitute a quantitative threshold relevant for assessing whether the alleged use is genuine. The fact that those minimum requirements are not met permits the conclusion that the use in question is not genuine and that the mark has not been used in accordance with its essential function, which is to create or preserve an outlet for the goods it covers.

68 In addition, the appellant emphasises that, in order to assess genuine use of the earlier mark, attention must be paid to the designation of the goods as set out in the application for registration of that mark and not to the condition of the goods as marketed by the proprietor of that mark or by a licensee at the time that assessment is carried out. In the present case, Lion Laboratories could have used the earlier mark for standard breathalysers or for chemical breathalysers, as allowed by virtue of the designation of the goods covered by the earlier mark.

69 In the present case, the appellant argues that the General Court misinterpreted the concept of 'genuine use' and disregarded that methodology for five reasons.

70 First, the General Court should have analysed the First and Second Periods separately and focused on the first of those periods, rather than carrying out an overall analysis concerning a combination of both periods. The appellant's arguments chiefly concerned the First

Period. An analysis of the use during that period would have enabled it to be established that there was a lack of genuine use of the earlier mark. In particular, the finding, in paragraph 87 of the judgment under appeal, of the sale of nearly 350 devices during the two periods is irrelevant, especially since that number was not put forward by EUIPO or by Lion Laboratories. In addition, of the 18 invoices referred to in paragraph 75 of the judgment under appeal, only 10 were issued between 2007 and 2008.

71 Secondly, the General Court failed to take into consideration the time, extent and place of use of the earlier mark during the First Period. In particular, it failed to note that that mark was not used at all during 2004 and 2005 and its use in 2006 was practically non-existent, that Alcolock GB had less than 10 customers in the United Kingdom during that period, that only two products were sold in the United Kingdom in 2009, and that Alcolock GB achieved only 2.4% of the expected sales figures set in the licence agreement which that undertaking had concluded with Lion Laboratories. If the General Court had used the methodology recommended by the appellant, based, *inter alia*, on taking into account the objectives set in that agreement, it would necessarily have concluded that the use of the earlier mark during the First Period was of a purely symbolic nature.

72 Thirdly, the General Court incorrectly took into account the use of the earlier mark in connection with services, even though it was for Lion Laboratories to furnish proof of use in connection with the goods in respect of which that mark was registered. Moreover, contrary to what was noted by the General Court in paragraph 74 of the judgment under appeal, the appellant had contested before it the fact that the promotional material and corresponding invoices made reference to both the earlier mark and the goods in respect of which it was registered.

73 Fourthly, the General Court relied on abstract considerations, without carrying out a specific analysis of the characteristics of the market concerned (comprising 30 million customers in the United Kingdom, road safety being a subject of concern since the 1960s) and the goods (standard breathalysers which are widely sold), in view of which the genuine nature of the use of the earlier mark implied a certain quantitative threshold. In that regard, the General Court should have taken account, on the one hand, of the fact that the earlier mark could and should have been used for standard breathalysers, as allowed by virtue of the designation of the goods covered by the earlier mark, and not solely for a part of the goods covered by that mark, and, on the other, the reasonable quantitative threshold set by the licence agreement. At the same time, the General Court ascribed too much importance to other items of evidence.

74 Fifthly, the General Court did not, contrary to what was stated in paragraph 34 of the judgment under appeal, examine whether trade mark No 2 371 210 had been filed with the sole purpose of enabling Lion Laboratories artificially to preserve its rights in the

earlier mark. According to a widespread strategy, trade mark proprietors submit new applications for the same sign and for similar goods shortly before the renewal date, in order to circumvent the requirement of genuine use laid down in respect of that renewal.

75 EUIPO contends that that ground of appeal is inadmissible and, in any event, manifestly unfounded.

Findings of the Court

76 As a preliminary point, it should be noted that it is apparent from the case-law of the Court that, as the appellant observes in its appeal, the determination of the criteria to be employed for the assessment of genuine use of the earlier mark is a question of law and thus falls within the Court's jurisdiction (see, by analogy, judgment of 11 October 2017, [EUIPO v Cactus, C-501/15 P, EU:C:2017:750](#), paragraph 64).

77 However, first, according to the settled case-law of the Court of Justice, an appellant may not rely for the first time before the Court of Justice on grounds of appeal and arguments it did not raise before the General Court. Indeed, to allow a party to put forward for the first time before the Court of Justice such grounds and arguments would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas and arguments debated before the General Court (judgment of 8 November 2016, [BSH v EUIPO, C-43/15 P, EU:C:2016:837](#), paragraph 43 and the case-law cited).

78 In the present case, it is apparent from the application at first instance that, before the General Court, the appellant argued only that the expected figures set out in the licence agreement concluded between Lion Laboratories and Alcolock GB were to be used as a criterion for assessing whether the use of the earlier mark was genuine. In those circumstances, it may not, under the guise of alleged methodological errors, complain that the General Court failed to take account of the forward-looking elements contained in that licence agreement. It follows that, in so far as it is based on such a failure by the General Court, the third ground of appeal is new and, therefore, inadmissible.

79 Second, the appellant may not contest, under the guise of alleging errors of law in the determination of the relevant criteria for the assessment of genuine use of the earlier mark, the appraisals of the facts made by the General Court. Indeed, according to the case-law of the Court of Justice cited in paragraph 40 above, the appraisal of the facts and the assessment of the evidence is not subject, save where the facts or evidence are distorted, to review by the Court of Justice on appeal.

80 In those circumstances it must be held that the arguments directed against paragraphs 75 and 87 of the judgment under appeal, the arguments alleging that there was no use of the earlier mark, or that such use was practically non-existent, during the period from 2004 to 2006, and the arguments complaining that the General Court took account of certain items of

evidence relating to the use of the earlier mark in connection with the provision of services are inadmissible, inasmuch as, by such arguments, the appellant seeks to call in question the appraisals of the facts and the examination of the evidence carried out by the General Court or requests the Court of Justice to carry out new appraisals of the facts.

81 With regard to the substance, first, in so far as the appellant complains, in essence, that the General Court confined itself to examining the use made of the earlier mark in connection with the goods actually marketed by the proprietor of that mark or by a licensee without assessing that use having regard to the other goods in respect of which that mark had been registered, even though, in the present case, Lion Laboratories could also have used that mark in connection with those other goods, it should be noted that that argument largely overlaps with the argument alleging that the General Court did not carry out a specific analysis of the characteristics of the market. It will therefore be analysed at the same time as that argument in paragraphs 87 to 91 below.

82 Secondly, inasmuch as the appellant complains that the General Court erred in law in not examining the two relevant periods separately, it should be noted that, as is apparent from Article 15(1) of Regulation No 207/2009, which defines the concept of 'genuine use' for the purposes of applying the legislation on the EU trade mark, suspending genuine use of an EU trade mark 'during an uninterrupted period of five years' entails the application of the sanctions laid down by that regulation. Accordingly, it is sufficient that a trade mark has been put to genuine use during a part of the relevant period for it not to be subject to those sanctions.

83 In the present case, it is common ground that, as the General Court noted in paragraphs 54, 55 and 57 of the judgment under appeal, pursuant to Article 57(2) of Regulation No 207/2009, genuine use of the earlier mark had to be established for the First and Second Periods running from 5 October 2004 to 4 October 2009 and from 13 August 2007 to 12 August 2012 respectively, and that those two periods overlapped.

84 It follows that the proof of use of the earlier mark relating to the period of overlap, running from 13 August 2007 to 4 October 2009, could be taken into account for each of the two relevant periods and that the General Court could consider, in particular in view of the evidence adduced in respect of that period, that genuine use of that mark was established to the requisite legal standard.

85 Thirdly, it is necessary to reject the argument that the General Court was wrong to take into account the use of the earlier mark in connection with services when it should have assessed the use made of that mark in connection with goods in Class 9 of the Nice Agreement. Indeed, it is apparent from, inter alia, paragraphs 73 and 74 of the judgment under appeal that the General Court focused on establishing the use of that mark in connection with the goods in respect of which it was registered. Furthermore, it should be noted



that the General Court did not misconstrue the scope of the application at first instance in noting, in paragraph 74 of the judgment under appeal, that the appellant did not dispute the fact that the publicity materials and corresponding invoices referred to in that paragraph referred to both the earlier mark and the goods. Indeed, in that application, the appellant confined itself to making a general assertion that ‘some of the invoices [provided by Lion Laboratories as evidence] referred to services and not goods’, an assertion which in no way implied that the appellant was seeking to argue that none of the publicity materials or corresponding invoices provided by Lion Laboratories concerned goods.

86 In that regard, it should be added that the appellant made reference, in its application at first instance, to a document appended to that application. However, according to the case-law of the Court, it is necessary, for an argument relied on in support of a plea in law to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. A general reference to other documents, even those appended to the application, cannot make up for the absence of the essential arguments in law which must appear in the application (see, to that effect, judgment of 13 June 2013, *Versalis v Commission*, C-511/11 P, EU:C:2013:386, paragraph 115). Therefore, it must be held that the General Court was not required to look in the annexes to the application at first instance for possible objections.

87 Fourthly, regarding the alleged failure to take account of the specific circumstances of the market for the goods in question, it should be observed that, in paragraphs 86 to 90 of the judgment under appeal, the General Court examined and rejected the appellant’s argument, as summarised in paragraph 86 of that judgment, that, in view of the characteristics of the market, the sales volumes of the goods in question were insufficient for a finding of genuine use of the earlier mark. In that regard, in the context of an appraisal of the facts, which is not, except where the facts are distorted, subject to review by the Court of Justice on appeal, the General Court considered, in paragraph 89 of that judgment that, ‘notwithstanding the relatively low number of the goods in question sold during the relevant period, ... the sales made constitute use which objectively is such as to create or preserve an outlet for the goods concerned’.

88 It follows from the foregoing that the General Court, implicitly but indisputably, took account of the characteristics of the market for the goods in question.

89 According to the settled case-law of the Court of Justice, the duty to state reasons does not require the General Court to provide an account that follows exhaustively and one by one all the arguments put forward by the parties to the dispute, and the reasoning may therefore be implicit, on condition that it enables the persons concerned to know the reasons why the General Court has not upheld their arguments and that it provides the Court of Justice with sufficient material

for it to exercise its powers of review (see, to that effect, judgments of 19 March 2015, *MEGA Brands International v OHIM*, C-182/14 P, EU:C:2015:187, paragraph 54 and the case-law cited, and of 7 June 2018, *Ori Martin v Court of Justice of the European Union*, C-463/17 P, EU:C:2018:411, paragraph 26 and the case-law cited).

90 Furthermore, it should be added, first, that, in so far as the appellant emphasises, in that context, the fact that the sales volumes in question were very low, the requirement of genuine use does not seek to assess commercial success or to review the economic strategy of an undertaking; nor is it intended to restrict trade mark protection to cases where large-scale commercial use has been made of the marks (see, to that effect, judgment of 26 September 2013, *Centrotherm Systemtechnik v centrotherm Clean Solutions*, C-609/11 P, EU:C:2013:592, paragraphs 72 and 74).

91 Second, in so far as the appellant complains that the General Court ascribed too much importance to other items of evidence, its line of argument is based on general statements and does not specifically identify the ways in which — according to the appellant — the General Court erred in law. Accordingly, that line of argument is inadmissible.

92 Fifthly, regarding the alleged failure by the General Court to assess the argument, put forward by the appellant in the first complaint of its first plea for annulment, that trade mark No 2 371 210 was filed solely in order to enable Lion Laboratories artificially to preserve its rights in the earlier mark, it should be observed that the General Court considered, in paragraph 34 of the judgment under appeal, that that argument was intended, in essence, to dispute that the mark had been put to genuine use, with the result that it fell to be examined in the context of the third plea relating to proof of such use.

93 While it is true that, as is asserted by the appellant, the General Court did not specifically address that argument in its assessment, in paragraphs 59 to 96 of the judgment under appeal, of that third plea in law, the fact remains that it implicitly rejected that argument, without it being possible to criticise it for doing so, as is apparent from the case-law of the Court of Justice recalled in paragraph 89 above. Indeed, that argument was clearly based on the premiss, contradicted by the appraisals of the facts carried out by the General Court, that the earlier mark had not been put to genuine use.

94 Having regard to the foregoing, the third ground of appeal must be rejected as being in part inadmissible and in part unfounded.

#### **Fourth ground of appeal Arguments of the parties**

95 By its fourth ground of appeal, the appellant argues that, assuming that use was made of the earlier mark, the General Court erred in considering that that mark, inasmuch as it was not affixed to the goods, had been used ‘as a trademark’.

96 Specifically, the General Court made two errors in applying the case-law stemming from the judgment of

11 September 2007, [Céline \(C-17/06, EU:C:2007:497\)](#).

97 First, it is apparent from paragraphs 20 and 21 of that judgment that, where a mark is not affixed to the goods, it must be held that the use of that mark in connection with the goods it covers cannot be established unless the sign corresponding to that mark is used in such a way that it establishes a link between the sign constituting the company name, trade name or shop name of the proprietor of the mark and the goods marketed and the sign enables those goods to be distinguished. However, in the present case, the General Court confined itself, in paragraphs 83 and 84 of the judgment under appeal, to examining whether the few items of evidence provided enabled the goods in question to be identified or described, without verifying whether they enabled those goods to be distinguished.

98 Secondly, unlike the circumstances giving rise to the judgment of 11 September 2007, [Céline \(C-17/06, EU:C:2007:497\)](#), in the present case, another mark, namely the figurative mark Lion, appears on the goods, while the earlier mark is likely to be perceived as a common name by customers. In those circumstances, it is highly unlikely that a customer will establish a link between the company name designating the undertaking ('Alcolock GB' or 'Alcolock') or the common name reflected in the use of the terms 'the Alcolock', 'alcolocks' or 'Alcolock Kit', on the one hand, and the earlier mark, on the other. In that regard, the appellant makes reference to various items of evidence of use of the earlier mark produced before both EUIPO and the General Court in order to illustrate use, not of the earlier mark, but of common names or company names, and contests the considerations set out in paragraphs 76, 80, 81 and 84 of the judgment under appeal. It argues that the General Court distorted those items of evidence and failed to assess the fact that the term 'alcolock' was used as a common name by United Kingdom customers.

99 EUIPO contends that the fourth ground of appeal is in part inadmissible and in part manifestly unfounded.

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

100 The fourth ground of appeal is directed against paragraphs 80 to 85 of the judgment under appeal, whereby the General Court rejected the appellant's argument, raised in the context of its third plea for annulment, that the earlier mark had never been affixed to the goods in question and had only ever been used descriptively, as the company name of Alcolock GB or in order to designate goods sold under another mark.

101 In the first place, in so far as the appellant alleges misinterpretation of the lessons to be drawn, in its view, from paragraphs 20 and 21 of the judgment of 11 September 2007, [Céline \(C-17/06, EU:C:2007:497\)](#), it should be pointed out, as EUIPO did, that the appellant at no time claimed before the General Court that, where what is affixed to the goods in question is not the earlier mark but a common name, a company name, or another mark, it is necessary to determine whether the evidence provided enables the goods in question to be

distinguished. Therefore, it is not entitled to complain that the General Court did not address that issue.

102 In the second place, in so far as the appellant disputes the considerations relating to the existence of a link between the sign used and the earlier mark, it should be noted from the outset that, in paragraphs 80 and 81 of the judgment under appeal, the General Court found that several publicity materials produced as evidence of genuine use of the earlier mark showed a device to which that mark was affixed and that the fact that some publicity materials referred to that mark as the company name of Alcolock GB and showed similar devices bearing a different mark did not preclude the use of that mark from being classified as 'genuine'. In paragraphs 82 and 83 of the judgment under appeal, the General Court, in essence, based that conclusion on the consideration that reference was made to the earlier mark in order to identify and describe the goods in question in a number of publicity materials, invoices and purchase orders and in a press article, such that the link, for the purpose of the case-law stemming from the judgment of 11 September 2007, [Céline \(C-17/06, EU:C:2007:497\)](#), between that mark and the marketing of the goods in respect of which it had been registered was, in any event, established.

103 It follows that the General Court made its ruling on the basis of an overall assessment of different items of evidence testifying to a genuine use of the earlier mark.

104 The appellant in no way disputes the use of such an overall assessment and confines itself to criticising only the assessment of certain documents in particular. To that extent, the fourth ground of appeal is, therefore, ineffective.

105 In any case, it should be added that, in so far as the real aim of that line of argument is to obtain a new assessment, by the Court of Justice, of the facts and evidence already submitted to the General Court for assessment, it is also inadmissible pursuant to the case-law recalled in paragraph 40 above. Although the appellant alludes to a distortion of that evidence by the General Court, it has, however, failed to establish that such distortion exists.

106 Having regard to the foregoing, the fourth ground of appeal must be rejected as being inadmissible and, in any event, as being in part unfounded and in part ineffective.

#### **Fifth ground of appeal**

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

107 By its fifth ground of appeal, the appellant complains that the General Court infringed the principle of territoriality governing trade mark law under Article 6 of the Convention for the Protection of Industrial Property signed in Paris on 20 March 1883, as last revised at Stockholm on 14 July 1967 and amended on 28 September 1979 (United Nations Treaties Series, No 11851, Vol. 828, p. 305), and its fundamental right to exercise its intellectual property rights and to benefit from the unitary character of the EU trade mark. It relies, in that regard, on Article 17 of the Charter of Fundamental Rights of the European Union.

108 In essence, it considers that, from 23 June 2016, the date of the referendum in which the people of the United Kingdom expressed their wish to withdraw from the European Union, the General Court should have, for reasons of public policy, taken account of the future withdrawal of the United Kingdom from the European Union or ordered a stay of the proceedings pending the actual withdrawal of that Member State, with a view to subsequently annulling the decision at issue. It observes that the General Court delivered the judgment under appeal on the day the United Kingdom communicated its intention to leave the European Union in accordance with Article 50 TEU.

109 In so doing, the Government of the United Kingdom acknowledged that United Kingdom trade marks cannot serve as a basis for the cancellation of EU trade marks.

110 The appellant adds, first, that the fact that the decision at issue was adopted before that communication and that EU law continues to apply to the United Kingdom throughout the procedure set out in Article 50 TEU cannot be used to call in question the admissibility of the present ground of appeal or whether it is well founded. Indeed, that ground of appeal raises issues of public policy. Moreover, the appellant could not have raised that plea before the General Court, given that the referendum was held after the written part of the procedure before the General Court was closed on 11 February 2016.

111 Second, the appellant maintains that it would not be sufficient for it to file a new EU trade mark concerning the sign ‘alcolock’ at the end of the procedure set out in Article 50 TEU. Indeed, at that time it would no longer be in a position to claim the full benefits of its seniority rights. Moreover, the transformation of the contested mark into national trade marks pending the withdrawal of the United Kingdom from the European Union would expose the appellant to unnecessary and excessive costs.

112 The appellant also observes that, in view of Article 64(3) of Regulation No 207/2009, it is the date on which the Court’s ruling on the appeal will be delivered that is important.

113 EUIPO contends that that ground of appeal is entirely unfounded.

114 The United Kingdom contends that the present ground of appeal is inadmissible and, in any event, unfounded.

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

115 By its fifth ground of appeal, the appellant argues, in essence, that the General Court should have stayed the proceedings pending the date of the withdrawal of the United Kingdom from the European Union, in order to be able to annul the decision at issue on the ground that an earlier United Kingdom trade mark could no longer be used to oppose the maintenance of an EU trade mark.

116 Without it being necessary to give a ruling on the admissibility of such a ground of appeal, it should be noted that, under Article 65(2) of Regulation No 207/2009, the General Court may annul or alter a

decision of a Board of Appeal of EUIPO only ‘on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of [that] Regulation or of any rule of law relating to their application or misuse of power’. It follows that the General Court may annul or alter the decision at issue only if, at the date on which that decision was adopted, it was vitiated by one of those grounds for annulment or alteration. The General Court may not, however, annul or alter that decision on grounds which come into existence subsequent to its adoption (judgments of 11 May 2006, *Sunrider v OHIM*, C-416/04 P, EU:C:2006:310, paragraphs 54 and 55, and of 26 October 2016, *Westermann Lernspielverlage v EUIPO*, C-482/15 P, EU:C:2016:805, paragraph 27).

117 It would be contrary to that case-law to hold that, in the present case, the General Court was required to stay the proceedings pending before it in order, where appropriate, to annul the decision at issue following the withdrawal of the United Kingdom from the European Union on the ground, which, moreover was purely hypothetical at that stage, that that withdrawal would retroactively affect the outcome of invalidity proceedings based on an earlier trade mark of that Member State.

118 Furthermore, in so far as the appellant maintains that Lion Laboratories is now a company established outside the European Union and that that company obtained the cancellation of the contested mark on the basis of the earlier mark registered outside the European Union, it should be noted that the mere communication by a Member State of its intention to leave the European Union in accordance with Article 50 TEU does not have the effect of suspending the application of EU law in that Member State and, consequently, EU law continues in full force and effect in that Member State until the time of its actual withdrawal from the European Union (see, to that effect, judgment of 19 September 2018, *RO*, C-327/18 PPU, EU:C:2018:733, paragraph 45).

119 It follows that the fifth ground of appeal and, consequently, the appellant’s fourth head of claim, must be rejected.

120 Since none of the grounds relied on by the appellant in support of its appeal has been upheld, that appeal must be dismissed in its entirety.

#### **Costs**

121 In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs.

122 Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings.

123 Since EUIPO has applied for costs and the appellant has been unsuccessful, the appellant must be ordered to bear its own costs and to pay those incurred by EUIPO.

124 Article 140(1) of the Rules of Procedure, which is also applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that the Member States and institutions which have intervened in the proceedings are to bear their own costs.

125 Accordingly, the United Kingdom must bear its own costs.

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

1. Dismisses the appeal;
2. Orders Alcohol Countermeasure Systems (International) Inc. to bear its own costs and to pay those incurred by the European Union Intellectual Property Office (EUIPO);
3. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

Delivered in open court in Luxembourg on 29 November 2018.

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