iv. failed to acknowledge that the requested documents are intrinsically linked to the decision to pursue or not to pursue legislative policy initiatives;

Ground 2: Error in law in not recognizing the existence of an overriding public interest.

The General Court committed an error in law, since it:

i. failed to consider the specific public interests raised by ClientEarth;

ii. found that the disclosure of requested documents at a later point in time precludes the existence of an overriding public interest in disclosure of the requested documents;

iii. found that the disclosure of documents other than the requested documents precludes the existence of an overriding public interest in disclosure of the requested documents;

iv. did not recognise the nature of the public interest represented by ClientEarth;

v. failed to interpret the grounds for refusal in a restrictive way, taking into account the public interest served by disclosure, as provided by the second sentence of Article 6(1) of Regulation 1367/2006 ([2]);

vi. did not recognise the public interest in the improvement of access to justice in environmental matters.

([1]) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJ L 145, p. 43

([2]) Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies OJ L 264, p. 13

Appeal brought on 9 February 2016 by Comercializadora Eloro, S.A. against the judgment of the General Court (Fourth Chamber) delivered on 9 December 2015 in Case T-354/14 *Comercializadora Eloro* v *OHIM — Zumex Group (Zumex)*

(Case C-71/16 P)

(2016/C 191/09)

Language of the case: Spanish

Parties

Appellant: Comercializadora Eloro, S.A. (represented by: J.L. de Castro Hermida, lawyer)

Other parties to the proceedings: European Union Intellectual Property Office (EUIPO) and Zumex Group, S.A.

Form of order sought

The appellant claims that the Court should:

— as regards the submission of evidence, deem adduced and admitted the documentary evidence submitted at the end of the appeal procedure which was resubmitted with the application initiating the action and is numbered from Document No 1 to Document No 7, as specified in the list of annexes appended to that application.

— hold, on the basis of the documents filed in the administrative procedure, that the applicant (Comercializadora Eloro, S. A.) has provided sufficient proof of real and genuine use in the relevant period and territory of its mark JUMEX for fruit juices in Class 32.

— on account of the opponent — who is the appellant in the present proceedings — having proved use of the earlier mark, refuse registration of the mark applied for, ZUMEX, for all goods in Class 32 because of the likelihood of confusion on the part of consumers arising from the coexistence in the market of both marks, the similarity of the words and their identity in application.

Grounds of appeal and main arguments

First ground: infringement of Article 42(2) of the Community Trade Mark Regulation ([1]) **and Rules 22(2) and 22(3) of the Community Trade Mark Implementing Regulation** ([2])

The EUIPO Opposition Division found that the proof of use submitted by the opponent reached the minimum level required to declare that there had been genuine use of the mark during the relevant period and in the relevant territory.

The doubts expressed in the contested decision as to whether the goods sold to the Dutch firm 'Nidera General Merchandise, B.V.' actually entered EU territory are solely based on one piece of documentary evidence, namely: that firm's website (available at www.ngm-int.com), in which it is stated that it is West African countries that are the destination for its commercial transactions

In that regard, the evidentiary value of the print-outs from that website must be rejected, since these date from the time when that evidence was first submitted and reviewed, that is, on or around 5 August 2011, which is eight years after the beginning of the relevant period for proof of use and three years following the end of that period. During that interval the trading activity and geographical ambit of the company in question could have varied significantly. Legal logic requires evidence adduced to refute the use of the mark to relate to the relevant period and not to several years after the end of that period.

The invoices submitted as evidence show that the Dutch firm 'Nidera General Marchandise, B.V.', established in Rotterdam, is not only the purchaser of the goods but also the consignee of the goods sold, which suggests that those goods entered EU territory.

The opponent has provided evidence that that firm belongs to the 'Nidera' corporate group that operates in several European countries, including Spain, through its subsidiary 'Nidera Agro Comercial, S.A.', which is a strong indication that the goods it purchased were destined for the European market.

The opponent having borne the burden of proof of use of its mark, and that use having been established by the provision of invoices of the sale of goods bearing the mark, the burden of proof must be reversed when the virtuality of that proof is argued. Thus the burden of proving, beyond mere conjectures and assumptions, that the proof adduced is insufficient must be borne by the trade mark applicant.

Second ground: infringement of Article 15(1)(b) of the Community Trade Mark Regulation

The fact that the Dutch firm 'Nidera General Merchandise, B.V.' appears in invoices as the consignee of the goods means that the goods cannot have been dispatched from the customs territory of the European Union under the external transit procedure, and implies that the goods actually entered the relevant territory, even though they were subsequently re-exported to Africa.

The judgment under appeal rejects the argument that import for the sole purpose of re-export constitutes genuine use of the mark, on the grounds that such an activity does not enable market share to be created and maintained. Nevertheless, this is analogous to the situation provided for in Article 15(1)(b) of the Community Trade Mark Regulation: affixing of the mark for the sole purpose of exportation, an activity which does not enable the creation and maintenance of a market share in the territory of the European Union either.

Third ground: infringement of Article 76(2) of the Community Trade Mark Regulation

It is clear from the provision and from the case-law that the general rule is the admission of allegations and evidence even when submitted out of time. Accordingly, the discretion conferred on EUIPO must be interpreted narrowly and require an explanation justifying refusal. Discretion does not mean arbitrariness or subjectivity.

The new invoices and packaging labels submitted at the end of the appeal procedure, numbered from Document No 1 to Document No 7, were fundamental for, having been issued by other European firms, they were capable of dispelling the doubts raised as regards the invoices issued by the Dutch firm 'Nidera General Merchandise, B.V.'.

When providing proof of use of its mark, the opponent faced chronological difficulties: the evidence had to be gathered three years after such use, and geographical difficulties: the opponent is a Mexican company and its interests are mainly situated in the American continent.

Consideration of the chronological and geographical circumstances, and the fundamental importance of the documents submitted out of time for the resolution of the proceedings, should have led to those documents being admitted, resulting in a finding that there was proof of real and genuine use of the opponent's earlier mark and enabling the required comparison of the marks at issue to be carried out in order to determine the existence of likelihood of confusion on the part of the consumer.

([1]) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version) OJ 2009 L 78, p. 1

([2]) 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

Request for a preliminary ruling from the Tribunale di Udine (Italy) lodged on 24 February 2016 — Criminal proceedings against Giorgio Fidenato and Others

(Case C-111/16)

(2016/C 191/10)

Language of the case: Italian

Referring court

Tribunale di Udine

Criminal proceedings against:

Giorgio Fidenato, Leandro Taboga and Luciano Taboga

Questions referred

1. When requested to do so by a Member State, is the Commission required, for the purposes of Article 54(1) of Regulation No 178/2002, ([1]) to adopt emergency measures within the meaning of Article 53 of Regulation No 178/2002, even if in the Commission's assessment in respect of certain food or feed there is no serious, evident risk to human and animal health or to the environment?

2. Where the Commission notifies the Member State which had sought its assessment that its assessment is at odds with the Member State's request — an assessment which in theory precludes the need to adopt emergency measures — and where, accordingly, the Commission does not adopt such emergency measures within the meaning of Article 34 Regulation No 1829/2003 ([2]) as requested by that Member State, is the Member State which made the request authorised, pursuant to Article 53 of Regulation No 178/2002, to adopt interim emergency measures?

3. May considerations relating to the precautionary principle which go beyond the parameters of serious and evident risk to human or animal health or the environment in the use of food or feed justify the adoption of interim emergency measures by a Member State within the meaning of Article 34 of Regulation No 1829/2003?