



## Reports of Cases

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, Rechtsanwälte,

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

\* Language of the case: German.

## 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 *cistus* 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 *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.
- 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 trade-mark 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.**

[Signatures]