



# Reports of Cases

OPINION OF ADVOCATE GENERAL  
SZPUNAR  
delivered on 23 November 2023<sup>1</sup>

**Case C-801/21 P**

**European Union Intellectual Property Office**

**v**

**Indo European Foods Ltd**

(Appeal – EU trade mark – Opposition proceedings – Opposition dismissed – Action for annulment – Subject matter of the action – Interest in bringing proceedings – Withdrawal of the United Kingdom from the European Union)

## **I. Introduction**

1. By its appeal, the European Union Intellectual Property Office (EUIPO) requests the annulment of the judgment of the General Court of the European Union of 6 October 2021, *Indo European Foods v EUIPO – Chakari (Abresham Super Basmati Sela Grade One World's Best Rice)* (T-342/20, 'the judgment under appeal', EU:T:2021:651), by which the General Court upheld the appeal brought by Indo European Foods Ltd against the decision of the Fourth Board of Appeal of EUIPO of 2 April 2020 (Case R 1079/2019-4) ('the decision at issue') concerning the application for registration of the figurative mark Abresham Super Basmati Sela Grade One World's Best Rice.

2. This case provides the Court of Justice with the opportunity to clarify the issue of the extinction, during the proceedings, of the right on which an opposition to the registration of an EU trade mark was based, on account of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union.

3. More specifically, the question arises as to the procedural effect of such extinction, since the appeal relates exclusively to the examination by the General Court of the admissibility of the action for annulment of the decision dismissing the opposition.

<sup>1</sup> Original language: French.

## II. Legal context

### A. *International law*

4. The first, fourth and eighth paragraphs of the preamble to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community,<sup>2</sup> which was adopted on 17 October 2019 and entered into force on 1 February 2020, provide:

‘Considering that on 29 March 2017 the [United Kingdom], following the outcome of a referendum held in the United Kingdom and its sovereign decision to leave the European Union, notified its intention to withdraw from the [Union] ... in accordance with Article [50 TEU] ...,

...

Recalling that, pursuant to Article 50 TEU ... and subject to the arrangements laid down in this Agreement, the law of the Union ... in its entirety ceases to apply to the United Kingdom from the date of entry into force of this Agreement,

...

Considering that it is in the interest of both the Union and the United Kingdom to determine a transition or implementation period during which ... Union law ... should be applicable to and in the United Kingdom, and, as a general rule, with the same effect as regards the Member States, in order to avoid disruption in the period during which the agreement(s) on the future relationship will be negotiated’.

5. Article 1 of that agreement, entitled ‘Objective’, states:

‘This Agreement sets out the arrangements for the withdrawal of the [United Kingdom] from the [Union] ...’

6. Under Article 126 of the Withdrawal Agreement, entitled ‘Transition period’:

‘There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020.’

7. Article 127 of that agreement, entitled ‘Scope of the transition’, states, in paragraphs 1, 3 and 6:

‘1. Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period.

...

3. During the transition period, the Union law applicable pursuant to paragraph 1 shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States, and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union.

<sup>2</sup> OJ 2020 L 29, p. 7; ‘the Withdrawal Agreement’.

...

6. Unless otherwise provided in this Agreement, during the transition period, any reference to Member States in the Union law applicable pursuant to paragraph 1, including as implemented and applied by Member States, shall be understood as including the United Kingdom.’

8. Under the fourth paragraph of Article 185 of the Withdrawal Agreement:

‘Parts Two and Three, with the exception of Article 19, Article 34(1), Article 44, and Article 96(1), as well as Title I of Part Six and Articles 169 to 181, shall apply as from the end of the transition period.’

## ***B. European Union law***

### *1. Regulation No 207/2009*

9. Regulation (EC) No 207/2009<sup>3</sup> was amended by Regulation (EU) 2015/2424<sup>4</sup> (‘Regulation No 207/2009’), which entered into force on 23 March 2016.<sup>5</sup>

10. Recitals 2 to 4, 6 and 7 of Regulation No 207/2009 provide:

‘(2) It is desirable to promote throughout the [Union] a harmonious development of economic activities and a continuous and balanced expansion by completing an internal market which functions properly and offers conditions which are similar to those obtaining in a national market. In order to create a market of this kind and make it increasingly a single market, not only must barriers to free movement of goods and services be removed and arrangements be instituted which ensure that competition is not distorted, but, in addition, legal conditions must be created which enable undertakings to adapt their activities to the scale of the [Union], whether in manufacturing and distributing goods or in providing services. For those purposes, trade marks enabling the products and services of undertakings to be distinguished by identical means throughout the entire [Union], regardless of frontiers, should feature amongst the legal instruments which undertakings have at their disposal.

(3) For the purpose of pursuing the [Union’s] said objectives it would appear necessary to provide for ... arrangements for [EU] trade marks whereby undertakings can by means of one procedural system obtain [EU] trade marks to which uniform protection is given and which produce their effects throughout the entire area of the [Union]. The principle of the unitary character of the [EU] trade mark thus stated should apply unless otherwise provided for in this Regulation.

<sup>3</sup> Council Regulation of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

<sup>4</sup> Regulation of the European Parliament and of the Council of 16 December 2015 amending Regulation No 207/2009 (OJ 2015 L 341, p. 21).

<sup>5</sup> Given the date on which the contested application for registration was filed, 14 June 2017, which is decisive for the purposes of identifying the applicable substantive law, the facts of the case are governed by the substantive provisions of Regulation No 207/2009, as amended by Regulation 2015/2424.

(4) The barrier of territoriality of the rights conferred on proprietors of trade marks by the laws of the Member States cannot be removed by approximation of laws. In order to open up unrestricted economic activity in the whole of the internal market for the benefit of undertakings, trade marks should be created which are governed by a uniform [EU] law directly applicable in all Member States.

...

(6) The [EU] law relating to trade marks nevertheless does not replace the laws of the Member States on trade marks. It would not in fact appear to be justified to require undertakings to apply for registration of their trade marks as [EU] trade marks. National trade marks continue to be necessary for those undertakings which do not want protection of their trade marks at [EU] level.

(7) The rights in [an EU] trade mark should not be obtained otherwise than by registration, and registration should be refused in particular ... if it conflicts with earlier rights.'

11. Article 1 of Regulation No 207/2009, entitled 'EU trade mark', states, in paragraph 2:

'An EU trade mark shall have a unitary character. It shall have equal effect throughout the Union: it shall not be registered, transferred or surrendered or be the subject of a decision revoking the rights of the proprietor or declaring it invalid, nor shall its use be prohibited, save in respect of the whole Union. This principle shall apply unless otherwise provided in this Regulation.'

12. Article 6 of that regulation, entitled 'Means whereby an EU trade mark is obtained', states:

'An EU trade mark shall be obtained by registration.'

13. Article 8 of that regulation, entitled 'Relative grounds for refusal', states, in paragraph 4:

'Upon opposition by the proprietor of a non-registered trade mark or of another sign used in the course of trade of more than mere local significance, the trade mark applied for shall not be registered where and to the extent that, pursuant to the Union legislation or the law of the Member State governing that sign:

- (a) rights to that sign were acquired prior to the date of application for registration of the EU trade mark, or the date of the priority claimed for the application for registration of the EU trade mark;
- (b) that sign confers on its proprietor the right to prohibit the use of a subsequent trade mark.'

14. Article 9 of that regulation, entitled 'Rights conferred by an EU trade mark', states, in paragraphs 1 and 2:

'1. The registration of an EU trade mark shall confer on the proprietor exclusive rights therein.

2. Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the EU trade mark, the proprietor of that EU trade mark shall be entitled to prevent all third parties not having his consent from using in the course of trade, in relation to goods or services, any sign where:

...

(b) the sign is identical with, or similar to, the EU trade mark and is used in relation to goods or services which are identical with, or similar to, the goods or services for which the EU trade mark is registered, if there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;

...'

15. Under Article 9b of Regulation No 207/2009, entitled 'Date from which rights against third parties prevail':

'1. The rights conferred by an EU trade mark shall prevail against third parties from the date of publication of the registration of the trade mark.

2. Reasonable compensation may be claimed in respect of acts occurring after the date of publication of an EU trade mark application, where those acts would, after publication of the registration of the trade mark, be prohibited by virtue of that publication.

3. A court seized of a case shall not decide upon the merits of that case until the registration has been published.'

## 2. Regulation (EU) 2017/1001

16. Regulation (EU) 2017/1001<sup>6</sup> amended and replaced Regulation No 207/2009 with effect from 1 October 2017.<sup>7</sup> Recital 12 of that regulation states:

'In order to ensure legal certainty and full consistency with the principle of priority, under which a registered earlier trade mark takes precedence over later registered trade marks, it is necessary to provide that the enforcement of rights conferred by an EU trade mark should be without prejudice to the rights of proprietors acquired prior to the filing or priority date of the EU trade mark. ...'

17. Article 46 of that regulation, entitled 'Opposition', states, in paragraph 1:

'1. Within a period of three months following the publication of an EU trade mark application, notice of opposition to registration of the trade mark may be given on the grounds that it may not be registered under Article 8:

...

<sup>6</sup> Regulation of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

<sup>7</sup> It should be noted that the opposition to registration of the mark applied for was filed on 13 October 2017, with the result that the procedural rules of Regulation 2017/1001, relating to opposition and appeal proceedings, which are intended to apply as from the date on which they entered into force, are applicable in this case.

(c) by the proprietors of earlier marks or signs referred to in Article 8(4) and by persons authorised under the relevant national law to exercise these rights;

...'

18. Article 47 of that regulation, entitled 'Examination of opposition', states, in paragraph 5:

'If examination of the opposition reveals that the trade mark may not be registered in respect of some or all of the goods or services for which the EU trade mark application has been made, the application shall be refused in respect of those goods or services. Otherwise the opposition shall be rejected.'

19. Article 51 of that regulation, entitled 'Registration', states, in paragraph 1:

'... where any opposition entered has been finally disposed of by withdrawal, rejection or other disposition, the trade mark and the particulars referred to in Article 111(2) shall be recorded in the Register. The registration shall be published.'

20. Article 66 of Regulation 2017/1001, entitled 'Decisions subject to appeal', states, in paragraph 1:

'An appeal shall lie from decisions of any of the decision-making instances of the Office listed in points (a) to (d) of Article 159 .... Those decisions shall take effect only as from the date of expiration of the appeal period referred to in Article 68. The filing of the appeal shall have suspensive effect.'

21. Article 71 of that regulation, entitled 'Decisions in respect of appeals', states, in paragraph 3:

'The decisions of the Board of Appeal shall take effect only as from the date of expiry of the period referred to in Article 72(5) or, if an action has been brought before the General Court within that period, as from the date of dismissal of such action or of any appeal filed with the Court of Justice against the decision of the General Court.'

22. Article 72 of that regulation, entitled 'Actions before the Court of Justice', states, in paragraphs 1, 2, 3 and 6:

1. Actions may be brought before the General Court against decisions of the Boards of Appeal in relation to appeals.

2. The action may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the TFEU, infringement of this Regulation or of any rule of law relating to their application or misuse of power.

3. The General Court shall have jurisdiction to annul or to alter the contested decision.

...

6. The Office shall take the necessary measures to comply with the judgment of the General Court or, in the event of an appeal against that judgment, the Court of Justice.'

### III. Background to the dispute

23. The background to the dispute was set out in detail in the judgment under appeal, to which reference is made in that regard.<sup>8</sup> The main points that are needed in order to understand this Opinion may be summarised as follows.

24. On 14 June 2017, Mr Hamid Ahmad Chakari filed an application for registration of an EU trade mark with EUIPO. The application was published in *European Union Trade Marks Bulletin* No 169/2017, of 6 September 2017.

25. On 13 October 2017, Indo European Foods filed a notice of opposition to registration of the mark applied for. The opposition was based on an earlier non-registered word mark used in the United Kingdom. The ground relied on in support of the opposition was that set out in Article 8(4) of Regulation 2017/1001. Indo European Foods argued, in essence, that it was entitled under the applicable law in the United Kingdom to prevent use of the mark applied for by means of the ‘extended’ form of the action for passing off.

26. On 5 April 2019, the Opposition Division rejected the opposition in its entirety. It found that the evidence submitted by Indo European Foods was insufficient to prove that the earlier mark had been used in the course of trade of more than mere local significance before the relevant date and in the relevant territory.

27. On 16 May 2019, Indo European Foods filed a notice of appeal against the decision of the Opposition Division.

28. By the decision at issue, the Fourth Board of Appeal of EUIPO dismissed the appeal as unfounded on the ground that Indo European Foods had failed to prove that the ‘extended’ form of the action for passing off would allow it to prohibit the use of the mark applied for in the United Kingdom.

### IV. The procedure before the General Court and the judgment under appeal

29. By application lodged at the Registry of the General Court on 2 June 2020, Indo European Foods brought an action for annulment and alteration of the decision at issue.

30. In support of its action, Indo European Foods relied on a single plea in law, alleging infringement of Article 8(4) of Regulation No 207/2009.

31. In its response, EUIPO maintained, inter alia, that, in so far as the opposition to registration of the trade mark applied for was based on an earlier non-registered trade mark in the United Kingdom, although the protection conferred on that trade mark by the law of the United Kingdom remained relevant during the transition period provided for in Articles 126 and 127 of the Withdrawal Agreement (‘the transition period’), the opposition proceedings and the action before the General Court were, however, devoid of purpose on the expiry of that period. Furthermore, EUIPO maintained that, since the annulment of the decision at issue could no longer procure any advantage to Indo European Foods, the latter no longer had any interest in bringing proceedings before the General Court.

<sup>8</sup> Judgment under appeal, paragraphs 1 to 12.

32. In the judgment under appeal, the General Court held that the action was admissible and annulled the decision at issue. As regards the arguments relating to admissibility raised by EUIPO, the General Court held, first, in paragraphs 17 to 23 of that judgment, that it could not be found that the action becomes devoid of purpose when, in the course of proceedings, an event occurs as a result of which an earlier trade mark could lose the status of a non-registered trade mark or of another sign used in the course of trade of more than mere local significance, in particular following the withdrawal of a Member State from the European Union, without the General Court taking into account matters arising after the adoption of the decision at issue, which are not capable of affecting the merits of that decision. Second, in paragraphs 24 to 27 of that judgment, the General Court rejected EUIPO's arguments seeking to demonstrate that Indo European Foods' interest in bringing proceedings had ceased to exist, holding that it could not be argued that, in the event of annulment of the decision at issue, the Board of Appeal would be obliged to dismiss the action in the absence of an earlier trade mark protected by the law of a Member State, since the Board of Appeal must place itself, for the purposes of assessing the facts, not at the time of the new decision, but at the stage at which the action found itself before the decision at issue.

## **V. Forms of order sought and the procedure before the Court of Justice**

33. By order of 7 April 2022, the Court allowed this appeal to proceed, having found that EUIPO's request that the appeal be allowed to proceed demonstrated, to the requisite legal standard, that the appeal raised an issue that was significant with respect to the unity, consistency and development of EU law.

34. By decision of the President of the Court of 16 June 2022, the Federal Republic of Germany was granted leave to intervene in support of EUIPO.

35. By order of the President of the Court of 16 December 2022, Walsall Conduits Ltd's application to intervene in support of Indo European Foods was dismissed.

36. By its appeal, EUIPO claims that the Court should:

- set aside the judgment under appeal;
- declare that there is no need to adjudicate on the action brought by Indo European Foods against the decision at issue;
- order Indo European Foods to pay the costs of these proceedings and of the proceedings before the General Court.

37. By its response, Indo European Foods contends that the Court should:

- dismiss the appeal;
- order EUIPO to pay the costs of the present proceedings.

38. The Federal Republic of Germany supports the forms of order sought by EUIPO.



39. EUIPO and Indo European Foods presented oral argument at the hearing held on 14 September 2023.

## VI. Analysis

40. In support of its appeal, EUIPO raises a single ground of appeal, alleging infringement by the General Court of the condition relating to Indo European Foods' continuing interest in bringing proceedings, which is divided into three parts. By the first part of the single ground of appeal, EUIPO claims that the General Court erred in law by confusing the concept of a 'review of legality' and the autonomous requirement of continuing interest in bringing proceedings. By the second part of that ground of appeal, EUIPO argues that the General Court erred in law and failed to state sufficient reasons for its decision by failing to assess *in concreto* whether Indo European Foods retained an interest in bringing proceedings, in the light of the specific features of trade mark law. By the third part of that ground of appeal, EUIPO argues that the errors made by the General Court had the effect of imposing on EUIPO an obligation to disregard the legal effects of the end of the transition period.

41. I shall begin my analysis by examining the first part of the single ground of appeal, setting out the reasons why I am of the opinion that it should be rejected (A). I shall then demonstrate that, in my view, Indo European Foods has an interest in bringing proceedings before the General Court, meaning that the second and third parts of the single ground of appeal must also be rejected and cannot lead to the judgment under appeal (B and C) being set aside.

### ***A. The first part of the single ground of appeal: the purpose of the action before the General Court***

42. By the first part of its single ground of appeal, EUIPO argues that, in paragraphs 15 to 21 of the judgment under appeal, the General Court erred in law by focusing, in order to determine whether Indo European Foods still had an interest in bringing proceedings, on the question of whether the end of the transition period was capable of affecting the legality of the decision at issue at the time it was adopted. EUIPO claims that, in so doing, the General Court confused the review of legality with the requirement for a continuing interest in bringing proceedings.

43. It seems to me, however, that those arguments are the result of a misreading of the judgment under appeal and of the case-law cited therein.

44. I note that, contrary to EUIPO's submissions, the General Court, in paragraphs 15 to 21 of the judgment under appeal, did not examine the issue of Indo European Foods' continuing interest in bringing proceedings or that of the legality of the decision at issue, but that of the *action becoming devoid of purpose*, specifically, the decision of the Board of Appeal of 2 April 2020 by which the latter dismissed the notice of opposition filed by Indo European Foods.

45. The purpose of an action and the interest in bringing proceedings of the person bringing such an action are two separate issues. The purpose of an action for annulment is an objective element, namely the measure in respect of which annulment is sought. The interest in bringing proceedings is a subjective element, intended to establish whether the action may, through its outcome,

procure an advantage to the party which brought it.<sup>9</sup>

46. It is true that these two elements are often linked, particularly since the existence of an interest in bringing proceedings is assessed ‘in the light of the purpose of the action’<sup>10</sup> and since the action becoming devoid of purpose necessarily results in the interest in bringing proceedings ceasing to exist. However, an applicant’s interest in bringing proceedings may also cease to exist even though the purpose of the action subsists.<sup>11</sup>

47. In order for an action for annulment to continue to have a purpose, the decision to which it relates must continue to have effect. Thus, it is settled case-law that the purpose of the action may cease to exist, inter alia, as a result of the withdrawal or replacement of the measure during the course of the proceedings.<sup>12</sup> Similarly, an action relating to a decision of EUIPO concerning a notice of opposition becomes devoid of purpose where that notice of opposition has been withdrawn following an agreement between the parties,<sup>13</sup> where the trade mark on which the opposition was based has been declared invalid<sup>14</sup> or where the application for registration which a party had opposed has itself been withdrawn.<sup>15</sup>

48. I note that, in each of those situations, the Court of Justice has held that the purpose of an action for annulment had ceased to exist when, during the proceedings, an event producing *ex tunc* effects had occurred, with the result that the decision in question should be found to have never existed.

49. In such circumstances, in order to respond to EUIPO’s argument that the action before the General Court has become devoid of purpose, it was for the General Court to examine whether the extinction – after the end of the transition period and in the course of the proceedings before the General Court – of the earlier right on which the notice of opposition at issue in the decision at issue was based was capable of affecting the dispute relating to the rejection of the notice, with the result that that dispute should be found to have never existed.

50. Thus, contrary to EUIPO’s submissions, the General Court sought to determine, not whether the end of the transition period following the United Kingdom’s withdrawal from the European Union was capable of affecting the *legality* of the decision at issue, but only whether that event had an effect on the continuing purpose of the action.

51. In that regard, it is clear from paragraphs 20 and 21 of the judgment under appeal that the General Court held that, although it is apparent from the case-law that the extinction of the earlier right on which the opposition is based due to the withdrawal of the United Kingdom from the European Union is capable of affecting the outcome of the opposition when it occurs in the

<sup>9</sup> Judgments of 4 June 2015, *Andechser Molkerei Scheitz v Commission* (C-682/13 P, EU:C:2015:356, paragraph 25); of 17 September 2015, *Mory and Others v Commission* (C-33/14 P, EU:C:2015:609, paragraph 55); and of 20 December 2017, *Binca Seafoods v Commission* (C-268/16 P, EU:C:2017:1001, paragraph 44).

<sup>10</sup> Judgments of 28 May 2013, *Abdulrahim v Council and Commission* (C-239/12 P, EU:C:2013:331, paragraph 61), and of 17 September 2015, *Mory and Others v Commission* (C-33/14 P, EU:C:2015:609, paragraph 57).

<sup>11</sup> See, by way of illustration, judgment of 18 March 2010, *Centre de Coordination Carrefour v Commission* (T-94/08, EU:T:2010:98).

<sup>12</sup> Judgment of 1 June 1961, *Meroni and Others v High Authority* (5/60, 7/60 and 8/60, EU:C:1961:10, p. 213).

<sup>13</sup> Order of 17 April 2018, *Westbrae Natural v EUIPO – Kaufland Warenhandel (COCONUT DREAM)* (T-65/17, not published, EU:T:2018:204, paragraphs 20 to 22).

<sup>14</sup> Order of 14 February 2017, *Helbrecht v EUIPO – Lenci Calzature (SportEyes)* (T-333/14, EU:T:2017:108, paragraphs 21 to 24).

<sup>15</sup> Order of 14 February 2023, *Laboratorios Ern v EUIPO – Arrowhead Pharmaceuticals (TRiM)* (T-428/22, not published, EU:T:2023:80).

course of the proceedings before EUIPO, the action before it cannot, by contrast, lose its purpose merely because the trade mark on which the opposition is based has become invalid during the course of the proceedings before it.

52. According to EUIPO, while it is clear that, in the event that the earlier right on which the notice of opposition is based ceases to exist during the course of the proceedings before EUIPO prior to the decision at issue, it should be concluded that the action has become devoid of purpose because that decision has become inoperative, it cannot automatically be inferred from the fact that the earlier right ceased to exist only after the adoption of that decision that the action retains its purpose. In particular, EUIPO argues that the fact that it may have been possible for the earlier right to form the basis of an opposition in the past does not indicate that the applicant has a specific, current and vested interest in bringing proceedings.

53. However, as I have stated in points 42 and 43 of this Opinion, it is clear from the judgment under appeal that, by those grounds, the General Court did not rule on the question of the existence of an interest in bringing proceedings, but only on the question of the continuing purpose of the proceedings, with the result that the argument put forward by EUIPO seems to me to be ineffective.

54. Furthermore, the General Court's analysis is, in my view, free from any error of law. The General Court makes a justified distinction between the purpose of the notice of opposition before EUIPO and the purpose of the action before the General Court. The purpose of the proceedings before EUIPO is the notice of opposition, based on a United Kingdom right. That notice of opposition may therefore, in theory, become devoid of purpose if the earlier right on which it was based ceases to exist during the course of the proceedings. However, the action before the General Court concerns the decision adopted at the end of the proceedings before EUIPO, at a time when the right on which the notice of opposition was based was still valid.

55. In that regard, as the General Court rightly points out, grounds arising after the adoption of the decision at issue cannot be taken into account where those grounds have no effect on the opposition proceedings culminating in the proceedings before the General Court.<sup>16</sup>

56. The extinction of the earlier right due to the withdrawal of the United Kingdom from the European Union, when it occurs once the decision has been adopted, cannot have any effect on the proceedings before EUIPO, since it cannot be considered to eliminate the earlier right such that it is deemed to have never existed. As Indo European Foods submits, nothing in the Withdrawal Agreement leads to the conclusion that the withdrawal of the United Kingdom from the European Union leads to the extinction *ex tunc* of the earlier rights. On the contrary, it is clear from that agreement that, until the end of the transition period, EU law remains applicable to the United Kingdom. The withdrawal of that Member State from the European Union must therefore be regarded not as meaning that it has never been a member of the European Union and that, consequently, intellectual property rights based on its national law have never had any relevance in the EU legal order, but only as meaning that those rights no longer have, from the end of the transition period, the effects set out in Regulation 2017/1001.

57. In such circumstances, I take the view that the General Court was right to hold that the action before it retained its purpose. It follows that the first part of the single ground of appeal must be dismissed as unfounded.

<sup>16</sup> Judgment of 8 October 2014, *Fuchs v OHIM – Les Complices (Star within a circle)* (T-342/12, EU:T:2014:858, paragraph 24).

***B. The second part of the single ground of appeal: the continued interest in bringing proceedings***

58. By the second part of the single ground of appeal, EUIPO submits, first, that the General Court erred in law by not examining *in concreto* Indo European Foods' interest in bringing proceedings and by merely rejecting EUIPO's arguments disputing its existence. EUIPO argues that, in so doing, the General Court also failed to state sufficient reasons for its decision. Second, EUIPO submits that the General Court erred in law by focusing its analysis on whether the earlier right is capable of constituting the basis of the opposition and by thus disregarding the specific features of opposition proceedings and EU trade mark law.

59. As regards EUIPO's first argument, it is settled case-law that it is for the applicant to prove its interest in bringing proceedings, which is an essential and fundamental prerequisite for any legal proceedings.<sup>17</sup>

60. However, it seems to me to be clear, albeit implicitly, from the judgment under appeal that the General Court found that Indo European Foods' interest in bringing proceedings at the time when the action was brought existed and was not contested, since the decision at issue adversely affected it. EUIPO argued, before the General Court, that that interest in bringing proceedings was likely to cease to exist because of the end of the transition period and put forward two arguments to that effect, which the General Court rejected. The General Court thus held, in paragraph 28 of the judgment under appeal, that Indo European Foods' interest in bringing proceedings, which had been established, had not ceased to exist. In those circumstances, I fail to see the supposed reversal of the burden of proof alleged by EUIPO.

61. The General Court merely found that the arguments put forward by EUIPO were not capable of calling into question the existence of Indo European Foods' interest in bringing proceedings, with the result that it cannot be held that the General Court erred in law or failed to state sufficient reasons for its decision.

62. In any event, I take the view that, even if it were established, the error of law committed by the General Court in assessing Indo European Foods' interest in bringing proceedings as a result of a reversal of the burden of proof could not lead to the judgment under appeal being set aside. It is clear from the case-law of the Court of Justice that, if the grounds of a decision of the General Court reveal an infringement of EU law but the operative part of the decision can be seen to be well founded on other legal grounds, that infringement is not capable of leading to the annulment of that decision and a substitution of grounds must be made.<sup>18</sup> That is the situation in the present case, for the reasons I will now explain.

63. An interest in bringing proceedings is an essential and fundamental prerequisite for any action for annulment brought under Article 263 TFEU by a natural or legal person and is equally necessary where the General Court may not only annul the decision at issue, but also alter it, as provided for in Article 72(3) of Regulation 2017/1001. The existence of such an interest

<sup>17</sup> Judgments of 4 June 2015, *Andechser Molkerei Scheitz v Commission* (C-682/13 P, EU:C:2015:356, paragraph 27); of 20 December 2017, *Binca Seafoods v Commission* (C-268/16 P, EU:C:2017:1001, paragraph 45); and of 7 November 2018, *BPC Lux 2 and Others v Commission* (C-544/17 P, EU:C:2018:880, paragraph 33).

<sup>18</sup> Judgment of 6 November 2018, *Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 48).

presupposes that annulment of the contested measure must be capable, in itself, of having legal consequences and may therefore, through its outcome, procure an advantage for that person.<sup>19</sup>

64. Furthermore, as the General Court pointed out in the judgment under appeal, an interest in bringing proceedings must not only exist at the stage of lodging the action, but must also continue until the final decision.<sup>20</sup>

65. In the present case, it is clear that, at the time the action was lodged, Indo European Foods had an interest in seeking the annulment of the decision at issue. By that decision, the Board of Appeal of EUIPO dismissed its notice of opposition filed under Article 46 of Regulation 2017/1001. The annulment of that decision was therefore capable, through its outcome, of procuring an advantage for it by leading the Board of Appeal of EUIPO to carry out a re-examination of the notice of opposition potentially favourable to Indo European Foods.

66. It must then be determined whether the withdrawal of the United Kingdom from the European Union is capable of altering that finding.

67. To that end, it is necessary, according to EUIPO, to determine whether the registration of the EU trade mark application at issue, despite the end of the transition period, is still capable of adversely affecting the legal interests of Indo European Foods, which the General Court failed to do. Due to the specific nature of opposition proceedings, the essential function of the trade mark, the principle of territoriality and the unitary character of the trade mark, if the EU trade mark at issue is registered, there can be no conflict between that mark and the right relied on by Indo European Foods, on either a *ratione loci* or *ratione temporis* basis. It follows that the answer to that question must be in the negative and implies the disappearance of Indo European Foods' interest in bringing proceedings.

68. However, I take the view that the answer to that question is irrelevant to the determination of whether there is a continuing interest in bringing proceedings in order to seek the annulment of the decision at issue before the General Court.

69. First of all, I would point out that the existence of an interest in bringing proceedings at the time when the action was brought before the General Court did not depend on whether registration of the mark was capable of harming the legal interests of Indo European Foods. I therefore find it difficult to see why that should be the case with regard to the continuation of that interest.

70. Next, I believe that the question raised by EUIPO seeks, first and foremost, to establish whether Indo European Foods has an interest in opposing the registration of the EU trade mark before EUIPO. More specifically, the answer to that question falls within EUIPO's assessment of the notice of opposition. A negative answer must necessarily lead to the dismissal of the notice of opposition by EUIPO, but cannot mean that Indo European Foods had no interest in challenging that decision before the General Court and in having it annulled.

<sup>19</sup> Judgments of 4 June 2015, *Andechser Molkerei Scheitz v Commission* (C-682/13 P, EU:C:2015:356, paragraph 25), and of 13 July 2023, *D & A Pharma v EMA* (C-136/22 P, EU:C:2023:572, paragraphs 43 and 44).

<sup>20</sup> Paragraph 25 of the judgment under appeal. See also judgments of 4 June 2015, *Andechser Molkerei Scheitz v Commission* (C-682/13 P, EU:C:2015:356, paragraph 25); of 17 September 2015, *Mory and Others v Commission* (C-33/14 P, EU:C:2015:609, paragraph 55); and of 20 December 2017, *Binca Seafoods v Commission* (C-268/16 P, EU:C:2017:1001, paragraph 44).

71. In other words, the question of whether the registration of the EU trade mark at issue is capable of adversely affecting the legal interests of Indo European Foods must, first and foremost, be examined by EUIPO and may therefore, in my view, constitute a substantive issue in the context of an action for annulment which must be subject to a review of legality. That question cannot, however, affect the admissibility of that action.

72. In that regard, I would point out that EUIPO itself acknowledged, at the hearing, that a notice of opposition to an application for registration of an EU trade mark, filed after the end of the transition period and even though based on an earlier UK right, would be held to be inadmissible before EUIPO, but that an action for annulment of that decision would have to be held to be admissible by the General Court, albeit manifestly unfounded. In such circumstances, there is no reason to conclude that a similar action, such as that in the present case, is inadmissible where the earlier right on which the notice of opposition before EUIPO is based was not non-existent from the outset, but rather ceased to exist during the course of the proceedings.

73. Lastly, it seems to me that to render the continuation of the interest in bringing proceedings dependent on whether the registration of the trade mark was likely to harm Indo European Foods' legal interests despite the withdrawal of the United Kingdom from the European Union would lead to a circumvention of the case-law of the Court of Justice, according to which the General Court may not annul or alter a decision of a Board of Appeal on grounds which come into existence subsequent to the adoption of that decision.<sup>21</sup>

74. Thus, as EUIPO stated at the hearing, the dismissal of the action before the General Court on the grounds of inadmissibility would have led to the registration of the EU trade mark at issue, without there being any need for EUIPO to adopt a new decision.

75. I infer from this that, in such circumstances, the registration of the EU trade mark at issue would no longer follow from the reasons on which the decision at issue was originally based, but from the fact that such registration is not likely to harm Indo European Foods' interests due to the withdrawal of the United Kingdom from the European Union.

76. However, since that event occurred after the adoption of the decision at issue, it cannot therefore be used to justify its adoption after the fact.

77. In such circumstances, I take the view that the second part of the single ground of appeal should be dismissed as unfounded.

78. For the sake of completeness, I must also point out that, if it were necessary, *quod non*, in order to establish Indo European Foods' continuing interest in bringing proceedings, to determine whether the registration of the EU trade mark at issue was capable of adversely affecting its legal interests, it would also be necessary, contrary to EUIPO's submissions, to answer that question in the affirmative.

79. Article 11(2) of Regulation 2017/1001 provides that reasonable compensation may be claimed in respect of acts occurring after the date of publication of an EU trade mark application, where those acts would, after publication of the registration of the trade mark, be prohibited by virtue of that publication. According to Indo European Foods, that provision may allow the proprietor

<sup>21</sup> Judgment of 11 May 2006, *Sunrider v OHIM* (C-416/04 P, EU:C:2006:310, paragraph 55), and order of 30 June 2010, *Royal Appliance International v OHIM* (C-448/09 P, EU:C:2010:384, paragraphs 43 and 44).

of the mark at issue to bring infringement proceedings in the United Kingdom for acts committed between the publication of the trade mark application at issue and the end of the transition period.

80. The exercise by the proprietor of the EU trade mark at issue of the right to claim reasonable compensation in such a situation is indeed hypothetical. The fact remains, however, that the existence of that right is, in my view, sufficient to establish Indo European Foods' interest in bringing proceedings, in so far as it means that that company may owe such reasonable compensation.

81. None of EUIPO's arguments in that regard can call that conclusion into question. As regards, first, the argument that the claim for reasonable compensation can be brought only against parties who were not proprietors of earlier rights, which excludes Indo European Foods, it seems to me to be somewhat contradictory. That would mean that, in the context of opposition proceedings, EUIPO may decide that Indo European Foods is not the proprietor of earlier rights in order to dismiss the notice of opposition to the application for registration of the EU trade mark, while accepting that, in the context of national proceedings for the granting of reasonable compensation, that company may rely on the ownership of earlier rights.

82. Second, as regards the argument that reasonable compensation can be claimed only in respect of acts which would be prohibited 'by virtue of the publication of the registration', and that this would therefore exclude the facts which occurred in the United Kingdom since that country was no longer a Member State of the European Union at the time of registration, it is, in my view, contrary to the objective of Article 11(2) of Regulation 2017/1001.

83. That provision is intended to make up for the fact that an EU trade mark is not enforceable against third parties before the publication of the application for registration, with the aim of providing a certain form of protection from the date of filing of that application for registration. In other words, before the publication of the registration of an EU trade mark, the latter enjoys legal protection which reflects, as Advocate General Wathelet pointed out, the fact that the legislature considers that an EU trade mark in the process of being acquired already warrants protection.<sup>22</sup> The Court of Justice has thus held that Article 11(2) of Regulation 2017/1001 lays down a right to reasonable compensation in order to grant a degree of protection to an applicant for a trade mark registration in the period between the date of publication of the application – the date from which the application is deemed to be known to third parties – and the date of publication of the mark's registration.<sup>23</sup>

84. The interpretation of that provision proposed by EUIPO would make it impossible to obtain any reasonable compensation for acts committed before publication of the registration of the EU trade mark in the territory of a Member State due to the subsequent withdrawal of that State from the European Union before registration and would thus prevent the protection of the EU trade mark, at least for the period between the filing of the application and the withdrawal of that Member State, at a time when EU law is still applicable, which would be contrary to the very objective of that provision.

85. Accordingly, I take the view that Indo European Foods did indeed have a continuing interest in bringing proceedings during the proceedings before the General Court.

<sup>22</sup> Opinion of Advocate General Wathelet in *Nikolajeva* (C-280/15, EU:C:2016:293, point 44).

<sup>23</sup> Judgment of 22 June 2016, *Nikolajeva* (C-280/15, EU:C:2016:467, paragraph 38).

***C. The third part of the single ground of appeal: the effects on the proceedings before EUIPO***

86. By the third part of its single ground of appeal, EUIPO argues that the General Court erred in law by requiring that the Board of Appeal, in paragraph 27 of the judgment under appeal, not take into account the legal effects of the end of the transition period on the present case in so far as, in the context of its re-assessment after the possible annulment of the decision at issue, EUIPO would be obliged not to examine whether Indo European Foods retains an interest in the annulment of the decision of the Opposition Division under appeal and, therefore, should examine the opposition on the basis of a conflict between rights which can never arise.

87. However, such an argument, in my view, neither effective nor capable of resulting in the judgment under appeal being set aside.

88. As I observed in my analysis of the second part of the single ground of appeal, the admissibility of the action for annulment of the decision at issue before the General Court does not depend on whether Indo European Foods retains an interest in the denial of registration of the mark at issue.

89. That question is only relevant during the course of the proceedings before EUIPO, but in no way prejudices Indo European Foods' right to seek the annulment of the decision at issue. The General Court cannot anticipate the outcome of EUIPO's re-examination of the notice of opposition for the purpose of ruling on the admissibility of the action for annulment, without, as I have pointed out, justifying the adoption of that decision on grounds which arose subsequent to that decision, contrary to the case-law of the Court of Justice.<sup>24</sup>

90. Thus, even if the withdrawal of the United Kingdom from the European Union could have the effect of leading the Board of Appeal of EUIPO to dismiss the notice of opposition,<sup>25</sup> it is for the Board of Appeal, and not for the General Court in the context of the examination of the admissibility of an action, to reach that conclusion.<sup>26</sup>

91. Accordingly, the third part of the single ground of appeal must be rejected as ineffective.

**VII. Conclusion**

92. In the light of the foregoing, I propose that the Court of Justice dismiss the appeal.

<sup>24</sup> See points 70 and 71 of this Opinion.

<sup>25</sup> That question has not yet been decided by the Court of Justice and is the subject matter of Case C-337/22 P, *EUIPO v Nowhere*, which is pending before the Court of Justice.

<sup>26</sup> Since such a decision may itself be the subject of a new action for annulment, without its admissibility being called into question, as EUIPO acknowledged at the hearing.