Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 13 September 2018 [1]

Case C-194/17 P

Georgios Pandalis
v

European Union Intellectual Property Office (EUIPO)

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

I. Introduction

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

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

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

1 Original language: German.

2 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), as amended by the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (OJ 2012 L 112, p. 21). Now replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1.)

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

II. Legal framework

A. EU Trade Mark Regulation

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

'1. The following shall not be registered:

…

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service.'

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

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

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

…

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

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

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

B. Directive 2002/46

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Judgment of the General Court

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

IV. Appeal proceedings and forms of order sought

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

19. He claims that the Court should:

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

(2) annul the decision of the First Board of Appeal of EUIPO of 30 October 2015 (Case R 2839/2014-1) relating to revocation proceedings brought against EU trade mark No 001273119 CYSTUS;

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

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

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

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

(1) dismiss the appeal and

(2) order the appellant to pay the costs.

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

4 Footnote not relevant to the English version.

V. Legal assessment

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

A. Preliminary remark

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

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

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

26. Instead, it simply found, for some of the products mentioned, namely 'Pilots Friend Immunizer®', 'Immun44® Saft', 'Immun44® Kapseln' and 'the other products for which the term "Cystus" was used exclusively in the expressions "Cystus 52" or "Cystus 052", with or without the "®" symbol', that the term 'Cystus' was not used as a trade mark but in a descriptive manner. These findings are contested by Mr Pandalis in his second ground of appeal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 Paragraph 57 of the contested decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

53. However, the Court also considers that the EU Trade Mark Regulation acknowledges a certain degree of distinctiveness of the earlier trade mark in opposition proceedings. [9] This idea can be easily transposed to the assessment of genuine use of a registered EU trade mark.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The inclusion of other products

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

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

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

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

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

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

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

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

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

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

4. Interim conclusion

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

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

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

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

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

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

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

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

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

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

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

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

81. Furthermore, according to paragraph 34 of the contested decision, the addition of the '®' symbol 'is … to be understood as meaning that his [Mr Pandalis'] advertising ultimately communicates the fact that he acquired a trade mark right in a descriptive indication …'.

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

83. However, this interpretation is not compelling.

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

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

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

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

88. The third ground of appeal is therefore unfounded.

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

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

VI. Costs

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

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

VII. Conclusion

91. I therefore propose that the Court should:

(1) dismiss the appeal;

(2) order Georgios Pandalis to pay the costs of the proceedings.

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