Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 25 June 2020[1]

Case C-763/18 P

Wallapop, SL
v
European Union Intellectual Property Office (EUIPO),

Unipreus, SL

(Appeal — EU trade mark — Opposition proceedings — Figurative mark containing the verbal element 'wallapop' — Earlier national figurative mark containing the verbal element 'wala w' — Article 8(1)(b) of Regulation No 207/2009 — Similarity between the services — Class 35 — Retail services — Online marketplace)

I. Introduction

1. The appellant in these proceedings, Wallapop, SL ('Wallapop') is a Spanish company, which operates an online marketplace. Its application for smartphones and tablets and its web page allow users to sell and buy online items. Wallapop filed an application with the European Union Intellectual Property Office (EUIPO) for registration of a figurative mark containing the word 'wallapop'. Protection was sought for services under Class 35 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, inter alia, for certain online trading services relating to the operation of an online marketplace and related services.

2. Unipreus, SL ('Unipreus'), a Spanish retailer of footwear, brought opposition proceedings against Wallapop's application based on an earlier figurative Spanish trade mark which includes the verbal element 'wala w', registered for services under Class 35 for 'retailing of sporting articles'.

3. By decision of 18 January 2017 ('the contested decision'), the Fifth Board of Appeal of EUIPO rejected the appeal by Unipreus against the decision of the Opposition Division of EUIPO rejecting the opposition. In the contested decision, the Fourth Board of Appeal of EUIPO found that there was no likelihood of confusion between the signs at issue because the services covered by the mark applied for and the earlier Spanish mark were different.[2]

[1] Original language: English.

[2] See point 14 of this Opinion.

4. In its judgment of 3 October 2018, *Unipreus* v *EUIPO — Wallapop (wallapop)* (T-186/17, not published, EU:T:2018:640; 'the judgment under appeal'), the General Court upheld Unipreus' action for annulment against the contested decision. The General Court concluded that the services at issue were, at the very least, similar to a low degree.

5. These are the issues which now arise from the judgment under appeal: are online trading services relating to the operation of an online marketplace different or similar to retailing services? Alternatively, should such online trading services relating to the operation of an online marketplace be included in the notion of 'retail services', following the recent judgment of the Court in *Tulliallan Burlington* v *EUIPO*? [3]

6. Before turning to these questions, it is, however, first necessary to set out the legal context and history of these proceedings, and to describe the facts of the case in more detail.

II. Legal context

A. Regulation No 207/2009

7. Article 8(1) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union Trade mark, [4] as amended, provides as follows:

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

…

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

B. Directive 2011/83

8. Article 6 of Directive (EU) 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive

[3] Judgment of 4 March 2020, *Tulliallan Burlington* v *EUIPO* (C-155/18 P to C-158/18 P, EU:C:2020:151; 'the judgment in *Tulliallan Burlington*').

[4] OJ 2009 L 78, p. 1. Regulation No 207/2009 was 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).

85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council[5] is entitled 'Information requirements for distance and off-premises contracts'. Its paragraph 1(b) and (c) provides:

'1. Before the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner:

…

(b) the identity of the trader, such as his trading name;

(c) the geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting'.

C. Regulation No 524/2013

9. Article 4(1)(f) of Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)[6] provides:

'1. For the purposes of this Regulation:

…

(f) "online marketplace" means a service provider, as defined in point (b) of Article 2 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), which allows consumers and traders to conclude online sales and service contracts on the online marketplace's website'.

D. Directive 2016/1148

10. Article 4(17) of Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union[7] states:

'For the purposes of this Directive, the following definitions apply:

…

"online marketplace" means a digital service that allows consumers and/or traders as respectively defined in point (a) and in point (b) of Article 4(1) of Directive 2013/11/EU of the European

5 OJ 2011 L 304, p. 64.

6 OJ 2013 L 165, p. 1.

7 OJ 2016 L 194, p. 1.

Parliament and of the Council [of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (OJ 2013 L 165, p. 63)] to conclude online sales or service contracts with traders either on the online marketplace's website or on a trader's website that uses computing services provided by the online marketplace'.

III. Background to the dispute

11. On 18 September 2014, Wallapop filed an application for registration of an EU trade mark with EUIPO pursuant to Regulation No 207/2009. Registration as a mark was sought for the following figurative sign ('the contested trade mark'):



12. The services in respect of which registration was sought fall within Class 35 and correspond, in particular, to the following description:

'Online trading, namely operation of online markets for buyers and sellers of goods and services; Online trading services in which sellers post products or services to be offered for sale and purchasing or bidding is done via the internet in order to facilitate the sale of goods and services by others via a computer network; providing evaluative feedback and ratings of sellers' goods and services, the value and prices of sellers' goods and services, buyers' and sellers' performance, delivery, and overall trading experience in connection therewith; providing a searchable online evaluation database for buyers and sellers; providing of business information relating to goods and/or services, and evaluation and classification of the aforesaid goods and services, and of the purchasers and sellers of the aforesaid goods and/or services; seeking, compilation, systemisation, processing and providing of business information for others; …'

13. On 7 January 2015, Unipreus filed a notice of opposition pursuant to Article 41 of Regulation No 207/2009 to the registration of the contested trade mark in respect of the services referred to in point 12 above.

14. The opposition was based, inter alia, on the Spanish national trade mark No 2874101, reproduced below, applied for on 30 April 2009 and registered on 10 November 2009, for the services falling within Class 35 corresponding to the following description: 'Retailing of sporting articles'.



15. The grounds relied on in support of the opposition were those set out in Article 8(1)(b) of Regulation No 207/2009.

16. On 19 October 2015, the Opposition Division rejected the opposition for the services referred to in point 12 above.

17. On 24 November 2015, Unipreus filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009, against the Opposition Division's decision requesting that it be annulled in so far as the opposition was rejected for the services referred to in point 12 of this Opinion.

18. By the contested decision, the Fifth Board of Appeal of EUIPO dismissed the appeal as regards those services. The Board of Appeal found that the signs under comparison, considered as a whole, were similar to a low degree, but that the services referred to in point 12 of this Opinion were different from the services of the earlier Spanish trade mark and that, therefore, there was no likelihood of confusion between the signs in connection with those services.

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

19. By application lodged at the Registry of the General Court on 23 March 2017, Unipreus brought an action for annulment against the contested decision. In support of its action, Unipreus relied on a single plea in law based on an infringement of Article 8(1)(b) of Regulation No 207/2009.

20. In the judgment under appeal, the General Court upheld the action brought by Unipreus and thus its single plea in law. The General Court found, in paragraph 54 of the judgment under appeal, that the services referred to in point 12 of this Opinion and the services of the earlier Spanish trade mark were, at the very least, similar to a low degree. Accordingly, that court annulled the contested decision in so far as it found that those services were not similar to the services in respect of which the earlier Spanish trade mark was registered.

21. First, the General Court found in paragraph 36 of the judgment under appeal that the notion of 'retail' includes both sales in physical premises and online sales and that, therefore, contrary to the conclusion reached by the Board of Appeal, the earlier Spanish trade mark also covered online sales of sporting articles. In paragraph 37 of the judgment under appeal, the General Court noted that, since the services of the contested trade mark refer to 'online trading', the prospect that Wallapop would use a 'classic' website in order to sell directly goods or services to users could not be excluded. The General Court inferred from this, in paragraph 38 of the judgment under appeal, that the distribution channels of the services at issue were, at the very least, similar to a low degree and not different as considered by the Board of Appeal.

22. Second, as regards the nature, the intended purpose and the method of use of the services at issue, the General Court recalled that, according to the case-law, [8] the objective of retail trade is the sale of goods to consumers. [9] The General Court found that in the present case there was a partial overlap between the services of the contested trade mark, which refers to 'online trading', and the services of the earlier Spanish trade mark, which covers retailing, including online, of sporting articles. [10] The General Court held that this conclusion was not called into question by the argument that the contested trade mark did not concern actual retail services, but intermediation services or services relating to the management of online marketplaces, including provision of business information. According to that court, providing such information aims at facilitating retail sales, including sporting articles. Therefore, through the services covered by the contested trade mark, the general public is able to purchase products that are identical or similar to those sold by Unipreus. The General Court thus found that the services covered by the contested trade mark responded indirectly to a need, for the general public, similar to that of retailing services covered by the earlier Spanish trade mark. Consequently, according to the General Court, the intended purpose and the method of use of the services at stake were, at the very least, similar to a low degree and not different, as considered by the Board of Appeal. [11]

23. Third, the General Court noted that Wallapop's application for registration referred only to 'buyers' and 'sellers', without specifying whether the intermediation services covered by the contested trade mark targeted private or professional individuals. That court held that, therefore, it was not excluded that the contested trade mark would be used to put professional sellers and consumers in touch with each other and to manage a platform, which would allow sales of new products and not only of second-hand goods. Consequently, the General Court found that the Board of Appeal erroneously considered that the services at issue did not target the same consumers. [12]

24. Fourth, the General Court found that a consumer could analyse the offers of the same product both on Unipreus' website 'www.walashop.com' and on the website 'www.walapop.com' or on the corresponding mobile application. Furthermore, according to that court, the Board of Appeal did not explain why using a mobile application that allows a consumer to be in touch with the sellers of certain products and to have those products delivered is not, to a certain extent, substitutable with buying those products in a physical store or online. Accordingly, the General Court found that it was not possible to exclude the existence of any competitive relationship between the services at issue and that, therefore, the Board of Appeal had erroneously considered that they were not in competition with one another. [13]

V. Forms of order sought and the procedure before the Court

25. By its appeal, Wallapop claims that the Court should:

– set aside the judgment under appeal;

[8] The General Court referred to paragraph 34 of the judgment of 7 July 2005, *Praktiker Bau- und Heimwerkermärkte* (C-418/02, EU:C:2005:425; 'the judgment in *Praktiker*').

[9] See paragraph 39 of the judgment under appeal.

[10] See paragraphs 41 to 44 of the judgment under appeal.

[11] See paragraphs 41 to 44 of the judgment under appeal.

[12] See paragraphs 46 to 49 of the judgment under appeal.

[13] See paragraphs 50 to 53 of the judgment under appeal.

– order Unipreus to pay the costs incurred by it in connection with the proceedings of first instance and before the Court.

26. Unipreus claims that the Court should:

– dismiss the appeal;

– order Wallapop to pay the costs.

27. EUIPO claims that the Court should:

– uphold Wallapop's appeal;

– order Unipreus to pay the costs.

28. Written observations were submitted by Wallapop, Unipreus and EUIPO. Wallapop, Unipreus and EUIPO appeared at the hearing before the Court on 12 March 2020.

VI. The appeal

29. In support of its appeal, Wallapop relies on a single ground of appeal based on an infringement of Article 8(1)(b) of Regulation No 207/2009.

A. Arguments of parties

30. In its single ground of appeal, Wallapop claims that the General Court erred in law in so far as it concluded that the services covered by the contested trade mark are similar to a low degree to the services covered by the earlier Spanish trade mark.

31. The ground of appeal is essentially divided into two parts.

32. In its first part, Wallapop claims that the General Court misconstrued the concept of 'online market place', as it results from different provisions of EU law and from the case-law of the Court.

33. Wallapop contends that Article 4(1)(f) of Regulation No 524/2013 and Article 4(17) of Directive 2016/1148 outline the fundamental elements of the notion of an 'online market place' under EU law. It results from those provisions that an 'online market place' is a digital service or an information society service, which allows third parties, namely, professionals and/or consumers, to conclude commercial transactions or service contracts independently of the online marketplace service provider.

34. According to Wallapop, the General Court failed to consider a fundamental characteristic of the services offered by online marketplaces resulting from that definition, namely, that online marketplaces do not make online sales, but rather offer intermediation services to third parties who use such services to perform online trading on the platform. The General Court thus gave an interpretation based on trade mark law of the services provided by an online market place, which is incompatible with the uniform concept of 'online market place' as defined under EU law.

35. Wallapop further claims that the General Court's reasoning is incompatible with the concept of provider of information society service given by the Court of Justice in the judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981). In that judgment, the Court held that a provider of intermediation services by electronic means, such as Uber, cannot be considered as a simple provider of information society services whenever it offers services that go beyond connecting third parties on the platform and it determines certain decisive elements of the transactions that take place on the platform. However, in the present case, Wallapop contends that, contrary to Uber, it simply provides intermediation services and related services and that it does not carry out any other distinct activities.

36. In the second part of its ground of appeal, Wallapop, supported by EUIPO, claims that the General Court misconstrued the relevant factors that should be taken into account in the assessment of the similarity of the services concerned.

37. First, as regards the General Court's assessment of distribution channels, Wallapop and EUIPO contend that the fact that Unipreus sells its products online on its 'classic' website cannot lead to the conclusion that the services at issue are similar. According to them, the General Court's approach gives rise to a disproportionate broadening of the scope of the earlier trade mark. The internet is not a distribution channel; it is simply a form of media or a support to different distribution channels. It is simplistic to base the similarity between the services at issue on the fact that they have the internet as a common feature. Wallapop does not sell products directly on its platform. In any case, whenever platform operators sell products on their platforms, they provide services that are different from online marketplace services. Furthermore, the trader (Wallapop) is under an obligation by virtue of Article 6(1)(b) of Directive 2011/83 to provide the consumer with its identity. [14]

38. Second, as regards the nature of the services at issue, Wallapop and EUIPO criticise the General Court for having failed to put forward any element that supports the finding that the services of the contested trade mark include activities constituting retail sale services.

39. Wallapop and EUIPO further argue that the General Court based its analysis of the similarity of the services in question on a partial or erroneous reading of the wording of the list of services for which registration of the contested trade mark was sought. Consequently, that court erroneously concluded, in paragraph 37 of the judgment under appeal, that those services constituted retail services and not digital services allowing third parties to carry out online sales. Regarding the first two services referred to in point 12 of this Opinion, a complete reading of that wording should have led the General Court to conclude that it is not the provider of intermediation services, but the third parties using those services, who make sales on the platform. Regarding the other four services, Wallapop and EUIPO reproach the General Court for having failed to identify them and for having brought them together into a single group referred to as 'the provision of business information useful for sales'. [15] If the General Court had properly analysed such services, it should have concluded that they are digital services necessary to the functioning of an online marketplace. Furthermore, Wallapop contends that it does not provide any information to encourage the conclusion of sales transactions, but that the sellers themselves provide such information.

[14] It may be convenient to observe at this juncture that the fact the name of the trader is provided may be a relevant factor in assessing the risk of confusion, but so far as the question of confusion in the context of a trade mark application is concerned, this could not be dispositive.

[15] In paragraph 41 of the judgment under appeal.

40. Third, Wallapop and EUIPO contend that the intended purposes of the services covered by the contested trade mark are totally different from the intended purpose of retail services covered by the earlier Spanish trade mark. The intended purpose of the first two intermediation services referred to in point 12 of this Opinion is to offer and maintain a digital space for the exchange of products or services between third parties, sellers and buyers, without any link with the operator of the service. Like the owner of a building used as a shopping centre who rents premises to third parties to allow them to market their products, the owner of a virtual marketplace provides digital services aimed at providing digital space and tools to assist marketing carried out by third parties. The intended purpose of the second group of ancillary services mentioned above is to enable sellers and buyers to be easily informed about the possibilities offered by a virtual platform in order, respectively, to sell or buy products. The General Court erred in law by judging that the intended purposes of those services were similar to a low degree.

41. Wallapop argues further that the General Court's approach contradicts its own case-law relating to the determination of a primary and of a secondary intended purpose. According to that case-law,[16] when comparing products of services, it is necessary to identify their dominant intended purpose in order to assess their similarity. Thus, even if the services covered by the contested trade mark may indirectly have the same intended purpose of the services of the earlier trade mark, namely to allow consumers to purchase sporting articles, according to Wallapop, that in no way alters the fact that the dominant intended purposes of the services at issue are different. The fact that some services can indirectly satisfy the same need does not prevent the relevant consumer from perceiving them as distinct.

42. Fourth, Wallapop contends that the services covered by the contested trade mark do not compete with those of the earlier trade, since they do not relate to retail trading. They compete rather with other information society services.

43. Unipreus argues that the comparison of the services at issue needs to take account of the market reality and of the perception of the average consumer. Seen in this light, the General Court's assessment is correct and Wallapop's arguments are based on an artificial approach.

44. Unipreus essentially submits that the services at issue are not different, but similar. Those services target the same public, namely the general public who wants to purchase the same or similar products, in particular, clothing, shoes and sporting goods. They share the same objective, namely to enable the general public to satisfy the purchasing needs of those products. They are complementary, as the consumer can use both services to buy those products. Finally, they are also competing with one another, since in the eyes of the consumer, those services are interchangeable in so far as the consumer can analyse the offer for the same product both on the Unipreus' web page and on Wallapop's mobile application or internet site.

[16] Wallapop refers to the judgment of 2 July 2015, *BH Stores* v *OHIM — Alex Toys (ALEX)* (T-657/13, EU:T:2015:449, paragraphs 64 to 66).

B. Analysis

1. Preliminary observations

45. According to settled case-law of the Court of Justice, it follows from a reading of Article 256 TFEU, in conjunction with the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, second, to assess those facts, save where they have been distorted. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions which the General Court has drawn from them. [17]

46. In addition, it follows from equally settled case-law that the Court of Justice has no jurisdiction to find the facts or, as a rule, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. That appraisal does not, therefore, constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice. In that regard, it should be recalled that there is distortion of the clear sense of the evidence where, without recourse to new evidence, the assessment of the existing evidence appears to be clearly incorrect. [18]

47. Factual assessments that are not subject to review by the Court of Justice on appeal include the General Court's findings in relation to the characteristics of the relevant public and to the attention, perception or attitude of consumers, and the assessment made by the General Court, in the context of the examination of the likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009, of the similarities between the signs at issue. The same must be true of the assessment made by the General Court, in the context of the examination of that likelihood of confusion, of the similarities between the goods or services covered by the marks at issue. [19]

48. These particular considerations are especially relevant so far as the single ground of appeal is concerned.

2. First part of the single grounds of appeal: whether the General Court misconstrued or misapplied the definition of online marketplace under Union law and the case-law of the Court of Justice

49. It may be convenient to deal first with the first part of the single ground of appeal, namely, that the General Court misconstrued or, at least, misapplied the definition of 'online marketplace' as defined inter alia by Article 4(1)(f) of Regulation No 524/2013 and Article 4(17) of Directive 2016/1148 and the reasoning of the Court of Justice in the judgment of 20 December 2017, *Asociación Professional Elite Taxi* (C-434/15, EU:C:2017:981).

[17] Order of 3 June 2015, *The Sunrider Corporation* v *OHIM* (C-142/14 P, not published, EU:C:2015:371, paragraph 47).

[18] Order of 3 June 2015, *The Sunrider Corporation* v *OHIM* (C-142/14 P, not published, EU:C:2015:371, paragraphs 48 and 49).

[19] See order of 3 June 2015, *The Sunrider Corporation* v *OHIM* (C-142/14 P, not published, EU:C:2015:371, paragraphs 51 and 52). See, also, judgment of 7 May 2009, *Waterford Wedgwood* v *Assembled Investments (Proprietary) and OHIM* (C-398/07 P, not published, EU:C:2009:288, paragraph 42).

50. For my part, I do not think that this is correct.

51. First, it may be noted that the definitions in Article 4(1)(f) of Regulation No 524/2013 and Article 4(17) of Directive 2016/1148 apply simply for the purposes of that particular regulation and that particular directive. This is particularly clear from the very wording of the provisions in question, which provide: 'for the purposes of this Regulation' and 'for the purposes of this Directive'. The definitions in question therefore do not purport to apply more generally to the registration of trade marks in general or to the registration of trade marks in respect of retail services under Class 35 in particular, although I accept that the definitions of 'online marketplace' contained therein are useful and can be applied at least by analogy in the context of the present case. [20] This may be so in particular when assessing whether the services in question are in competition with each other and the extent to which (if at all) they overlap, as found by the General Court in paragraph 40 of the judgment under appeal. [21]

52. Second, in any event, I do not accept that the General Court misunderstood or misapplied the definitions of 'online marketplace' in Article 4(1)(f) of Regulation No 524/2013 and Article 4(17) of Directive 2016/1148 or the reasoning of the Court of Justice in Case C-434/15.

53. It is perfectly clear from a consideration of paragraphs 37 and 41 of the judgment under appeal that the General Court well understood that Wallapop, in accordance with its trade mark application, intends to offer, inter alia or in particular, an online platform or services of intermediation or management *rather than sales services as such*.

54. In that regard, the General Court found in paragraph 37 of the judgment under appeal that the trade mark application refers, in particular, to 'online sales services, that is to say, the operation of online markets for sellers and buyers of goods and services; e-commerce services where sellers display goods or services for sale for which purchases or offers are made via the internet in order *to facilitate the sale of goods and services by third parties on a global computer network*'. [22]

55. In my view, the General Court did not confuse the distinction between facilitating the sale of goods by a third party [23] and the exercise of a decisive influence over the terms of sale of the goods offered [24] or, indeed, the sale of goods as such in an online context.

56. Moreover, the General Court also found as a matter of fact in paragraph 37 of the judgment under appeal, despite the arguments of Wallapop and EUIPO to the contrary recited in paragraphs 37 and 41 of the judgment under appeal, that Wallapop's trade mark application *also includes* the use of a conventional internet site to make online sales. That finding in paragraph 37 of the judgment under appeal, rather than demonstrating that the General Court misconstrued

[20] See, by analogy, order of 3 June 2015, *The Sunrider Corporation* v *OHIM* (C-142/14 P, not published, EU:C:2015:371, paragraphs 55 to 56). In that order, the Court of Justice recalled that its jurisdiction under Article 256 TFEU to review the legal characterisation of facts made by the General Court, relates, as a general rule, to legal characterisations that are to be made by the General Court *in the light of the rules and principles governing EU law on EU trade marks*.

[21] In paragraph 23 of judgment of 29 September 1998, *Canon* (C-39/97, EU:C:1998:442), the Court stated that in assessing the similarity of the goods or services concerned, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their end users and their method of use and whether they are in competition with each other or are complementary.

[22] Emphasis added. See, also, paragraph 40 of the judgment under appeal.

[23] See, by analogy, judgment of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112).

[24] See, by analogy, judgment of 22 March 2017, *GROFA and Others* (C-435/15 and C-666/15, EU:C:2017:232). Contrary to the aforementioned judgment, there is no indication in the judgment under appeal that the matter of exercising decisive influence over the terms of sale of goods or services was of any relevance.

the notion of 'online market place', demonstrates, in my view, that the General Court was perfectly aware of the different nature of the services that may be provided over the internet that it considered that Wallapop sought to register and their different mode of operation.

57. I would note in that regard that Wallapop considers that the General Court erred in finding in paragraph 37 of the judgment under appeal that it cannot be excluded that Wallapop's application applies to the use of a conventional website to make online sales. [25]

58. In my view, while Wallapop disputes that finding of fact of the General Court in paragraph 37 of the judgment under appeal, [26] it has not alleged that the General Court distorted the facts in that regard.

59. I therefore consider that that argument is inadmissible.

60. Moreover, in that regard, the statement of the General Court in paragraph 38 of the judgment under appeal that the channels of distribution of services are slightly similar cannot be faulted in respect of the use of a conventional website by both Wallapop and Unipreus for the purposes of making online sales.

61. I would also stress the fact that in paragraph 38 of the judgment under appeal the General Court specifically stated in relation to that finding in paragraph 37 of that judgment that 'even if that is only one of the factors to be taken into consideration, it must be found that the channels of distribution of the services in dispute are at least slightly similar …'.

62. Wallapop has not criticised the adequacy of that reasoning. I therefore consider that the General Court's finding in paragraph 38 of the judgment under appeal with respect to the channels of distribution of the services must be upheld.

63. I consider that Wallapop's submission that the General Court erred in finding that the channels of distribution of the services in question are at least slightly similar is therefore unfounded.

64. Despite this finding, it is perhaps nevertheless necessary for the sake of completeness and for legal clarity in this field to examine whether the finding of the General Court in paragraph 38 of the judgment under appeal that the (other) distribution channels of the services in question, namely Wallapop's platform which facilitates the sale of goods and services by third parties and Unipreus' more conventional website, constitute similar channels of distribution.

65. I propose to do this in point 72 et seq. below.

66. The first part of the single ground of appeal should thus, in my view, be rejected by the Court as unfounded.

[25] See paragraph 67 et seq. of Wallapop's appeal.

[26] See point 36 of this Opinion.

3. Second part of the single ground: whether the General Court misconstrued the relevant factors which should be taken into account in any assessment of the similarity of the services concerned

67. Here, one may observe that Article 8(1)(b) of Regulation No 207/2009 provides that, upon opposition by the proprietor of an earlier trade mark, the contested trade mark is not to be registered if, because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected.

68. It is settled case-law that, for the purposes of applying Article 8(1)(b) of Regulation No 207/2009, the likelihood of confusion presupposes both that the trade mark applied for and the earlier trade mark are identical or similar, and that the goods or services covered in the application for registration are identical or similar to those in respect of which the earlier trade mark was registered, those conditions being cumulative. [27]

69. The settled case-law also establishes that, in assessing the similarity of the goods or services at issue, all the relevant factors relating to those goods or services should be taken into account. Those factors include, in particular, their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary. [28]

70. The Board of Appeal held in the contested decision that the signs in question were similar, if, admittedly, only to a small degree. That finding was not called into question before the General Court nor, indeed, before the Court of Justice.

71. In passing, moreover, it might be observed that it has not been suggested that the earlier mark ('wala w') has a reputation in Spain such that the use of a similar mark 'would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark' within the meaning of Article 8(5) of Regulation 207/2019. [29]

72. It must be noted, however, that the General Court did not, *as such*, pronounce at all on the question of confusion. The appeal against the decision of the Board of Appeal was instead upheld on the rather narrow ground that — as the General Court found in paragraph 54 of the judgment under appeal — the Board of Appeal had wrongly concluded that that the services covered by the trade marks were different, when in fact, they were similar, albeit to a low degree.

73. It follows, therefore, that the only ground of opposition to the registration of the later Wallapop trade mark with which we are concerned is, accordingly, that of, in the words of Article 8(1)(b) of Regulation n 207/2019, the identity or similarity of the services covered by Wallapop's application to those of the earlier trade mark.

74. I now propose to examine whether the General Court was correct in its assessment that services covered by Wallapop's application and Unipreus' trade mark are at least slightly similar.

[27] Judgment of 20 September 2017, *The Tea Board* v *EUIPO* (C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 47 and the case-law cited).

[28] See judgment of 29 September 1998, *Canon* (C-39/97, EU:C:1998:442, paragraph 23), and judgment of 20 September 2017, *The Tea Board* v *EUIPO* (C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 48 and the case-law cited).

[29] For which see, for example, judgment of 27 November 2008, *Intel Corporation* (C-252/07, EU:C:2008:655).

75. This part of the single ground of appeal is divided into four sub-parts. Wallapop considers that the General Court erred in its finding as follows:

– first, that the distribution channels of the marks in question are similar;

– second, that the services to which the trade mark application refers are retail services;

– third, that the intended purposes and public perception of the services in question are similar; and,

– fourth, that the services in question are in competition.

76. I propose to consider these arguments in turn, but since they all overlap and in effect run into each other, some repetition is perforce necessary.

(a) First sub-part: whether the distribution channels of the marks in question are similar

77. As I indicated in point 63 above, I consider that this submission is unfounded in relation to the question of the operation of a conventional website to make online sales by Wallapop and Unipreus.

78. I will however deal with Wallapop's claim to the effect that the General Court erred in considering that the internet is a channel of distribution and not a simple medium for different channels of distribution, for the purposes of completion and legal clarity.

79. At this point, a word of explanation regarding the debate in respect of what constitutes a retail service for the purposes of Class 35 services seems in order.

80. This issue was first squarely addressed by the Court in the judgment in *Praktiker*. In that case, Praktiker had filed for registration with the Deutsches Patent- und Markenamt (German Patent and Trade Mark Office) the mark 'Praktiker' in relation to, inter alia, the service described as 'retail trade in building, home improvement, gardening and other consumer goods for the do-it-yourself sector'. The Deutsches Patent- und Markenamt rejected that application. It considered that the concept of 'retail trade' claimed did not denote independent services having autonomous economic significance. That concept related only to the distribution of goods as such.

81. In its judgment, the Court noted that the objective of retail trade is the sale of goods to consumers. That trade includes, in addition to the legal sales transaction, all activity carried out by the trader for the purpose of encouraging the conclusion of such a transaction. That activity consists, inter alia, in selecting an assortment of goods offered for sale and in offering a variety of services aimed at inducing the consumer to conclude the abovementioned transaction with the trader in question rather than with a competitor.

82. The Court found that there was no overriding reason which precludes those services from being covered by the concept of 'services' and thus held that the concept of 'services' covers services provided in connection with retail trade in goods. [30]

83. The judgment in *Praktiker* naturally loomed large in the most recent case to consider this issue, namely, the judgment in *Tulliallan Burlington*. [31] In that case, the question was whether the operator of a shopping arcade which specialised in the sale of luxury items came within the category of retail services protected by Class 35. In its judgment, the General Court, relying on the judgment in *Praktiker*, concluded that the operator of shopping arcade did come within that category. [32]

84. The decision of the General Court was then appealed to the Court of Justice. In my Opinion in *Tulliallan Burlington* v *EUIPO*, [33] I expressed certain reservations regarding the correctness of that finding. Those reservations were summed up thus in point 96 of my Opinion:

'It is clear from the Court's uniform interpretation of "retail services" under Class 35 that those services cannot, however, apply to shopping arcade services as the entity which provides those services does not in fact trade in the goods in question. Rather the entity in question provides services to the trader of the goods which, in my view, are quite distinct from those of retail services under Class 35 and are, in fact provided for elsewhere in another class. Thus, for example, the shopping arcade services could include the rental of shops under Class 36 and the provision of advertising and promotion services under Class 35.' [34]

85. That analysis of the judgment in *Praktiker* was not, however, followed by the Court in the judgment in *Tulliallan Burlington*. The Court concluded to the contrary, saying, for example (in paragraphs 127 to 128):

'127. Accordingly, the concept of "retail services" covers services which are aimed at the consumer and which consist, on behalf of the businesses occupying a shopping arcade's stores, in bringing together a variety of goods in a range of stores enabling the consumer to conveniently view and purchase those goods and in offering a variety of services separate from the act of sale, which seek to ensure that that consumer purchases the goods sold in those stores.

128. It follows from the foregoing considerations that, as the General Court itself correctly held in paragraph 32 of the judgments under appeal, the Court of Justice's interpretation in paragraph 34 of the judgment in *Praktiker* does not support the assertion that the services provided by shopping arcades or shopping centres are, by definition, excluded from the scope of the concept of "retail services" defined in Class 35, within the meaning of the Nice Agreement.'

[30] The Court stated in paragraph 36 of the judgment in *Praktiker* that that consideration is illustrated by the Explanatory Note to Class 35 of the Nice Classification, according to which that class includes 'the bringing together, for the benefit of others, of a variety of goods … enabling customers to conveniently view and purchase those goods'.

[31] Judgment of 4 March 2020 (C-155/18 P to C-158/18 P, EU:C:2020:151).

[32] Judgment of 6 December 2017, *Tulliallan Burlington v EUIPO – Burlington Fashion (Burlington)* (T-120/16, EU:T:2017:873), paragraph 34.

[33] Opinion of Advocate General Hogan in Joined Cases *Tulliallan Burlington* v *EUIPO* (C-155/18 P to C-158/18 P, EU:C:2019:538).

[34] Opinion of Advocate General Hogan in Joined Cases *Tulliallan Burlington* v *EUIPO* (C-155/18 P to C-158/18 P, EU:C:2019:538). In point 95 of that Opinion, I noted that in paragraph 34 of the judgment in *Praktiker*, the Court found that 'the objective of retail trade is the sale of goods to consumers. That trade includes, in addition to the legal sales transaction, all activity carried out *by the trader* for the purpose of encouraging the conclusion of such a transaction. That activity consists, inter alia, in selecting an assortment of goods offered for sale and in offering a variety of services aimed at inducing the consumer to conclude the abovementioned transaction with the trader in question rather than with a competitor'. Emphasis added.

86. While the Court is not, of course, in any sense bound by a doctrine of precedent, the judgment in *Tulliallan Burlington* must nonetheless be taken to have settled the matter. We know, therefore, from that judgment that the services of conventional shopping arcades — 'aimed at the consumer with a view to enabling him or her to conveniently view and purchase those goods, for the benefit of the businesses occupying the arcade concerned'[35] — in principle, comes within the Class 35 definition of retail services.

87. It follows, therefore, that the fact that Wallapop maintains that it is not in itself engaged in retailing, but rather offers online intermediation services, even if this were true as a matter of fact, is not in itself sufficient to dispose of the issue.

88. The real question is whether and to what extent the principle laid down in the judgment in *Tulliallan Burlington* in respect of the services provided by an arcade applies to retail intermediation services which are offered online.

89. In the judgment in *Tulliallan Burlington* the Court held (in paragraph 130) that the concept of retail services included a shopping arcade's services 'aimed at the consumer with a view to enabling him or her to conveniently view and purchase those goods, for the benefit of the businesses occupying the arcade concerned'. The same may be said by analogy so far as intermediation services offered by an online retail shopping platform are concerned. While the traditional shopping arcade serves the purpose of providing a different range of retail offerings in one single convenient physical premises, a retail online platform such as that provided by Wallapop is, in effect, a form of 'virtual' shopping arcade which can be accessed via the internet.[36]

90. The traditional distinction between outlets selling to customers in physical premises, on the one hand, and those entities engaging in direct online sales, on the other, has in recent years been undermined — almost to the point of collapse — by both technological developments and changing patterns of consumer behaviour. All of this is further indicated by the fact that, as the General Court found in paragraph 51 of the judgment under appeal, a consumer searching for particular (new) sports footwear products could find the same products offered on the individual websites of both Unipreus ('www.walashop.com') and Wallapop ('www.wallapop.com'), even if in the latter case the retailer was a third party which happened to be using the Wallapop internet platform.

91. It is accordingly not in dispute that, as I have just pointed out, footwear sold online by Unipreus is also offered for sale on Wallapop's platform, even if this is done by third party retailers and not by Wallapop itself. I therefore consider that, from the point of view of a consumer seeking to purchase the goods in question, Wallapop's platform and Unipreus' site are similar channels of distribution. It is at that point that the risk of confusion between the two slightly similar marks might most acutely come into play.

[35] The judgment in *Tulliallan Burlington*, paragraph 130.

[36] In my view, the manner of retailing used (whether online or otherwise) to provide retail services under Class 35 is not relevant in order for them to fall within that class. Rather, what is important is the nature of the services in question. The General Court held in paragraph 36 of the judgment under appeal that 'retailing' includes sales from a shop and online sales over the internet. That finding is not disputed by Wallapop. I would note that in paragraph 125 of the judgment in *Tulliallan Burlington*, the Court pointed out that the explanatory note relating to Class 35 states that that class includes, in particular, the bringing together, for the benefit of others, of a variety of goods, excluding the transport thereof, enabling customers to conveniently view and purchase those goods. Those services may be provided by retail stores, wholesale outlets, through vending machines, mail order catalogues or by means of electronic media, for example, through websites or television shopping programmes.

92. To my mind, it is significant that in the judgment in *Tulliallan Burlington* the Court rejected the argument that the 'absence of any precise statement of the goods which may be sold in the various shops comprising a shopping arcade … precluded any association between those shops and the goods of the mark applied for' and, indeed, upheld the claim of the shopping arcade owners on that very ground.[37] The same is broadly true so far as the present appeal is concerned.

93. The claim made by Unipreus in the present case is, if anything, stronger. Unlike the judgment in *Tulliallan Burlington* — where the question of whether the fashion items produced by the defendant[38] were ever in fact in competition with the luxury fashion items sold by third party retailers in the appellant's arcade was at best uncertain — here, Unipreus has registered a trade mark for the services falling within Class 35 corresponding to the following description: 'Retailing of sporting articles'. Unipreus has thus specified both the services and the goods to which its trade mark relates and the validity of that trade mark has not been called into question. This is in full compliance with the case-law in both the judgment in *Praktiker* and the judgment in *Tulliallan Burlington*. In my view, it would be unacceptable if Unipreus could not rely on its trade mark to oppose the registration of a similar sign in Class 35 which does not specify the goods[39] merely because it specifies in greater detail the services to which it relates.

94. It is for these reasons that I consider that this sub-part should therefore be rejected as unfounded.

(b) Second sub-part: the nature of the services in question

95. Wallapop submits that the General Court failed to indicate in paragraph 39 et seq. of the judgment under appeal why the services in its trade marks application constitute retail services in accordance with paragraph 34 of the judgment in *Praktiker*.

96. Wallapop's essential argument is that the reasoning of the General Court on this point is inadequate and that it therefore erred in law.

97. It must be noted that the General Court found that the natures of the services in question are at least slightly similar. The adequacy of the reasoning must be judged in the light of that finding.

98. For my part, however, I consider that the General Court followed the reasoning set out in paragraph 34 of the judgment in *Praktiker* in much the same way as the Court of Justice had done in paragraph 130 of the judgment in *Tulliallan Burlington*.

99. In paragraph 39 of the judgment under appeal, the General Court recalled the finding of the Court of Justice in the judgment in *Praktiker* that the objective of retail trade is the sale of goods to consumers. That trade includes, in addition to the legal sales transaction, all activity carried out by the trader for the purpose of encouraging the conclusion of such a transaction. That activity consists, inter alia, in selecting an assortment of goods offered for sale and in offering a variety of services aimed at inducing the consumer to conclude the abovementioned transaction with the trader in question rather than with a competitor.

[37] The judgment in *Tulliallan Burlington*, paragraph 137.

[38] Burlington Fashion GmbH.

[39] A requirement imposed by the judgment in *Praktiker* and only relaxed in the judgment in *Tulliallan Burlington* in relation to the earlier trade mark whose validity was not questioned.

100. The General Court, applying the rationale of the judgment in *Praktiker*, found that *all* the services included in Wallapop's application — therefore, not only online sales services and e-commerce services, but also intermediation or management services of online markets for sellers and buyers, including the provision of business information useful for sales — came within the definition of retail services because all those services ultimately had the objective of inducing the sale of products to consumers. [40]

101. In my view, that reasoning is clearly adequate and illustrates the course of legal reasoning whereby the General Court reached its conclusions on that issue.

102. I therefore consider that this sub-part should be rejected as unfounded.

(c) Third sub-part: whether the intended purposes and public perception of the services in question are similar

103. A key part of Wallapop's submission is that the online nature of its intermediation services takes it outside the scope of retail services. It considers that the principal and dominant purpose of the services of the trade mark applied for (operation of online markets and related information services) is clearly different from that of the services of the opponent's trade mark (retail sale of sports equipment).

104. In this context, Wallapop considers, in effect, that the General Court erred in law in paragraph 43 of the judgment under appeal in considering that 'the services covered by the mark applied for indirectly satisfy a similar need, from the point of view of the general public, to the services for the retail sale of sports equipment covered by the earlier mark, and enable them to purchase the goods in question, after having gathered information on the goods covered'. It considers that the General Court thereby misinterpreted the concept of 'intended purpose'. Moreover, Wallapop notes that the list of services in its application are different and that the General Court should not have compared them en bloc with the services of the earlier Spanish trade mark.

105. To my mind, the judgment in *Tulliallan Burlington* is essentially dispositive of this question. As I have already indicated, given that the Court held in that case that a shopping arcade owner engaged in retail services for the purposes of Class 35, the same can be said for the operator of a virtual shopping arcade such as the internet platform hosted by Wallapop. Nor is this conclusion affected by the identification of any supposed dominant intended purpose of the services in question.

106. As far as the other four services referred to in Wallapop's trade mark application is concerned — such as providing evaluative feedback and ratings of sellers' goods and services, together with their general value and performance providing a searchable online evaluation database for buyers and sellers and the provision of business information relating to goods and/or services — it is true that those services were dealt with en bloc by the General Court in paragraphs 41 and 42 of the judgment under appeal. In essence, however, the General Court

[40] In paragraph 40 of the judgment under appeal, the General Court held that online sales services and e-commerce services overlap in part with retail sales services. In paragraphs 41 and 42 of the judgment under appeal, the General Court further justified its position by stating that the fact that Wallapop and EUIPO claim that the contested mark does not relate to retail services as such but to intermediation services is irrelevant, even if correct, given that they facilitate sales.

concluded that, viewed from the perspective of the general public, those services were no more than the provision of useful commercial information associated with the sale of the products themselves.

107. For my part, I find myself agreeing in this respect with the conclusions of the General Court. If one applies the rationale of the judgment in *Praktiker*, as interpreted in the judgment in *Tulliallan Burlington*, one is bound to say that those services must also be regarded as features of retail services if for no other reason than they amount to 'offering a variety of services separate from the act of sale, which seek to ensure that that consumer purchases the goods sold in those stores'. [41]

108. I do not doubt that, with the advent of online shopping, evaluative and comparative and feedback services of this nature can more readily and efficiently be offered to those who wish to use the online shopping platform. Yet this type of informational service does not, I think, differ in principle from the type of informational service that could have been — and very probably still is — provided by traditional shopping arcade owners. For even in the days before the advent of the internet, such arcade owners doubtless regularly provided information of this kind to their tenants concerning such matters as consumer preferences, the amount of footfall, the results of consumer surveys and so forth.

109. For all of these reasons, therefore, I consider that the intended purposes and public perceptions of those services do not take from their status as retail services for the purposes of Class 35 in the manner in which that term has been interpreted by this Court in the judgment in *Praktiker* and, more especially, the judgment in *Tulliallan Burlington*.

110. This claim must accordingly be rejected as unfounded.

(d) Fourth sub-part: whether the services covered by the contested trade mark of Wallapop compete with those of the earlier mark of Unipreus

111. Wallapop insists that the services which they offer are simply an information society service and they do not relate to retail trading.

112. Wallapop stresses the fact that the services designated by the trade mark applied for do not compete with the services for the sale of sporting goods of the opponent's trade mark, but rather with other digital services or information society services.

113. As is clear from points 45 and 46, as well as points 51 and 52 of this Opinion, the General Court's finding, in paragraph 37 of the judgment under appeal, that it cannot be excluded that Wallapop's application applies to the use of a conventional website to make online sales, is a finding of fact which cannot be challenged on appeal in the absence of an allegation that the facts have been distorted. It follows, therefore, that the services in question [42] are clearly in competition.

114. Moreover, as I have already observed, this argument is predicated on a sharp distinction between intermediated online services, online trading and retail trading at a physical premises. Yet, as Unipreus was at pains to emphasise during the course of the hearing, this comparison does not take account of market realities, the changes in consumers' habits with regard to online

[41] The judgment in *Tulliallan Burlington*, paragraph 127.

[42] The use of a conventional website to make online sales.

shopping and, above all, the perceptions of the average consumer. The very fact that, to repeat once again, the General Court found that sports footwear which Unipreus sold online is also offered for sale on Wallapop's platform in itself proves this point, even if the online retailing is done by third party retailers who have availed of those intermediation services and is not done by Wallapop itself.

115. This claim must accordingly be rejected as unfounded.

116. For all of the reasons set out in this Opinion, I consider that the General Court was fully entitled to reach its conclusions regarding the similarity of the services in question and that no error of law is thereby disclosed.

VII. Costs

117. In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, applicable to the procedure on an appeal 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 pleading.

118. Since Unipreus has applied for costs and Wallapop has been unsuccessful in its appeal, Wallapop should be ordered to bear its own costs and to pay those incurred by Unipreus.

119. Since EUIPO has been unsuccessful, but Unipreus did not request that it be ordered to pay the costs that Unipreus incurred in relation to the appeal proceedings, EUIPO must be ordered to bear its own costs in relation to these proceedings.

VIII. Conclusion

120. In the light of the foregoing considerations, I would accordingly propose that the Court:

– dismiss the present appeal and uphold the decision of the General Court;

– order Wallapop, SL to bear its own costs and to pay those incurred by Unipreus, SL in relation to the appeal proceedings;

– order the European Union Intellectual Property Office (EUIPO) to bear its own costs in relation to the appeal proceedings.