Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

27 October 2022*

(Reference for a preliminary ruling – Trade-mark law – Regulation (EU) 2017/1001 – Article 15(2) – Directive (EU) 2015/2436 – Article 15(2) – Exhaustion of the rights conferred by a trade mark – Cylinders containing carbon dioxide – Placing on the market in a Member State by the trade mark proprietor – Activity of a reseller consisting in refilling and relabelling cylinders – Opposition brought by the trade mark proprietor – Legitimate reasons to oppose further commercialisation of the goods bearing the trade mark)

In Case C-197/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein oikeus (Supreme Court, Finland), made by decision of 9 March 2021, received at the Court on 29 March 2021, in the proceedings

Soda-Club (CO2) SA,

SodaStream International BV

v

MySoda Oy,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, D. Gratsias, M. Ilešič (Rapporteur), I. Jarukaitis, and Z. Csehi, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Soda-Club (CO2) SA and SodaStream International BV, by J. Bonsdorf, H. Pohjola and B. Rapinoja, asianajajat,

– MySoda Oy, by H.-M. Elo and E. Hodge, asianajajat,

* Language of the case: Finnish.

– the Finnish Government, by S. Hartikainen, A. Laine and H. Leppo, acting as Agents,

– the European Commission, by É. Gippini Fournier, M. Huttunen and T. Sevón, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 May 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 13(2) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended by Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 (OJ 2015 L 341, p. 21) ('Regulation No 207/2009'), of Article 15(2) of 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), of Article 7(2) of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25) and of Article 15(2) of Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (OJ 2015 L 336, p. 1).

2 The request has been made in proceedings between Soda-Club (CO2) SA and SodaStream International BV (together 'SodaStream') and MySoda Oy concerning an alleged infringement of the EU and the national trade marks SODASTREAM and Soda-Club of which the former are the proprietors.

Legal context

European Union law

Regulation No 207/2009

3 Article 13 of Regulation No 207/2009, entitled 'Exhaustion of the rights conferred by a [European Union] trade mark', provided:

'1. A [European Union] trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the [European Economic Area (EEA)]] under that trade mark by the proprietor or with his consent.

2. Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.'

Regulation 2017/1001

4 Regulation 2017/1001, which repealed and replaced Regulation No 207/2009 with effect from 1 October 2017, contains Article 9, entitled 'Rights conferred by an EU trade mark', which is worded as follows:

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

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

(a) the sign is identical with the EU trade mark and is used in relation to goods or services which are identical with those for which the EU trade mark is registered;

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

(c) the sign is identical with, or similar to, the EU trade mark irrespective of whether it is used in relation to goods or services which are identical with, similar to or not similar to those for which the EU trade mark is registered, where the latter has a reputation in the Union and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the EU trade mark.

3. The following, in particular, may be prohibited under paragraph 2:

…

(b) offering the goods, putting them on the market, or stocking them for those purposes under the sign, or offering or supplying services thereunder;

…'

5 Article 15 of Regulation 2017/1001, entitled 'Exhaustion of the rights conferred by an EU trade mark', provides:

'1. An EU trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the [EEA] under that trade mark by the proprietor or with his consent.

2. Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.'

Directive 2008/95

6 Article 7 of Directive 2008/95, entitled 'Exhaustion of the rights conferred by a trade mark', provides:

'1. The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.

2. Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.'

7 Directive 2008/95 was repealed, with effect from 15 January 2019, by Directive 2015/2436.

Directive 2015/2436

8 Article 10 of Directive 2015/2436, entitled 'Rights conferred by a trade mark', provides, in its paragraphs 1 and 3:

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

…

3. The following, in particular, may be prohibited under paragraph 2:

…

(b) offering the goods or putting them on the market, or stocking them for those purposes, under the sign, or offering or supplying services thereunder;

…'

9 Article 15 of that directive, entitled 'Exhaustion of the rights conferred by a trade mark', is worded as follows:

'1. A trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Union under that trade mark by the proprietor or with the proprietor's consent.

2. Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.'

Finnish law

10 Under Finnish law, exhaustion of the rights conferred by a trade mark is the subject of Paragraph 9 of the tavaramerkkilaki (544/2019) (Law on trade marks No 544/2019), of 26 April 2019, entered into force on 1 May 2019. That provision provides, in its subparagraph 1, that a trade mark

proprietor may not prohibit the use of the trade mark in relation to goods which have been put on the market in the EEA under that trade mark by the proprietor or with his or her consent. Without prejudice to that subparagraph 1, subparagraph 2 of that provision states that the trade mark proprietor may prohibit the use of that mark in relation to goods if the proprietor has legitimate reasons to oppose further offering or commercialisation of the goods. In particular, the trade mark proprietor may prohibit the use of that mark where the condition of the goods is changed or impaired after they have been put on the market.

11 Paragraph 10(a) of the tavaramerkkilaki (1715/1995) (Law on trade marks No 1715/1995), which was in force until 31 August 2016, and then Paragraph 8 of the tavaramerkkilaki (616/2016) (Law on trade marks No 616/2016), which was in force until 30 April 2019, corresponded, in essence, to Paragraph 9 of the Law on trade marks No 544/2019, applicable from 1 May 2019.

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 SodaStream, a multinational entity, manufactures and sells carbonating machines, which allow consumers to prepare sparkling water and flavoured non-alcoholic beverages from tap water. In Finland, SodaStream markets those machines with a carbon dioxide refillable cylinder, which it also offers for sale separately. The companies making up SodaStream are the proprietors of the EU trade marks and the national trade marks SODASTREAM and Soda-Club. Those marks appear on the labelling of, and are engraved on, the aluminium body of those cylinders.

13 MySoda, a company whose registered office is in Finland, markets in that Member State carbonating machines for beverages under the MySoda trade mark in packaging that does not normally include a carbon dioxide cylinder. Since June 2016, MySoda has been offering for sale carbon dioxide cylinders that are filled in Finland and are compatible with both its own carbonating machines and those of SodaStream. Some of those cylinders were originally put on the market by SodaStream.

14 After receiving from distributors SodaStream cylinders that have been returned empty by consumers, MySoda refills them with carbon dioxide. It replaces the original labels with its own labels, while leaving visible the SodaStream's trade marks engraved on the cylinders.

15 In so doing, MySoda uses two different labels. The former, of pink colour, displays, in large letters, the MySoda logo and the text 'Finnish carbon dioxide for carbonating machines', and, in small letters, the word MySoda, as the company that has filled the cylinder, and a reference to its website for further information. The latter label, of white colour, displays the words 'carbon dioxide' in capital letters in five languages, and included in the product information, written in small letters, is the name MySoda, it being the company that had filled the cylinder, and a statement that that company has no connection with the original supplier of the cylinder or with its company or registered trade mark which appear on the cylinder. That label also includes a reference to the MySoda website for further information.

16 SodaStream brought an action before the markkinaoikeus (Market Court, Finland) seeking a declaration that MySoda had infringed, in Finland, the trade marks SODASTREAM and SODACLUB by putting on the market and selling refilled cylinders of carbon dioxide bearing those trade marks without the authorisation of their proprietors.

17 SodaStream has claimed that MySoda's conduct adversely affects the rights conferred by those marks and creates a significant likelihood of confusion for the public concerned as to the origin of carbon dioxide cylinders by creating the false impression that there is a commercial or economic connection between SodaStream and MySoda.

18 SodaStream has also stated that the carbon dioxide cylinders sold on the Finnish market are not all of the same quality and do not all have the same characteristics. Resellers who fill SodaStream cylinders, without authorisation, do not necessarily have the knowledge and know how required to ensure that those cylinders are used and handled safely and properly. SodaStream cannot be held liable for damage caused by carbon dioxide cylinders refilled by those resellers.

19 MySoda has replied that changing the label does not adversely affect the function of the trade mark, which is to indicate the origin of the cylinder, since the relevant public understands that the labelling indicates solely the origin of the carbon dioxide and the identity of the reseller who has refilled the cylinder, the origin of which is engraved on the body of that cylinder.

20 By interlocutory judgment of 5 September 2019, the markkinaoikeus (Market Court) upheld in part SodaStream's claims. In doing so, it relied on the judgment of 14 July 2011, *Viking Gas* (C-46/10, EU:C:2011:485).

21 That court of first instance held that it had not been shown that MySoda's conduct changed or impaired the carbon dioxide cylinder or its contents, or damaged SodaStream's reputation due to risks to the safety of its goods, or that that conduct caused harm such as to give SodaStream a legitimate reason to oppose that conduct. As regards the white labels, that court took the view that they had not created a false impression as to an economic connection between MySoda and SodaStream. In contrast, it held that the use of pink labels was liable to create the impression in the mind of the average consumer, who is reasonably well-informed and reasonably observant, that there was such a connection. Accordingly, that court held that the use of those pinks labels justifies SodaStream opposition to MySoda's conduct.

22 SodaStream and MySoda have been granted leave to appeal against that judgment to the referring court, the Korkein oikeus (Supreme Court, Finland).

23 The referring court sets out, first of all, that EU law does not lay down detailed rules on the conditions for establishing whether there are legitimate reasons justifying the trade mark proprietor to oppose the commercialisation of goods after their placing on the market. The Court's case-law does not provide a clear answer to the questions raised in the case in the main proceedings.

24 First, the Court's case-law does not make it clear whether the conditions set out in the judgment of 11 July 1996, *Bristol-Myers Squibb and Others* (C-427/93, C-429/93 and C-436/93, EU:C:1996:282), apply to the repackaging of goods put on the market in the same Member State. Secondly, the referring court asks whether the replacement of the trade mark proprietor's label with a new label must be regarded as repackaging within the meaning of the case-law of the Court of Justice. It questions the importance to be attached to the fact that, in the dispute in the main proceedings, the product concerned consists, first, of the cylinder originating from the trade mark proprietor and, second, of carbon dioxide originating from the reseller. It is not clear whether it is decisive, in that regard, that the relevant public understands that the label indicates solely the origin of carbon dioxide, the origin of the cylinder being identified by means of the trade mark engraved on that cylinder.

25 The referring court takes the view, next, that the facts of the dispute in the main proceedings differ from those which gave rise to the judgment of 14 July 2011, *Viking Gas* (C-46/10, EU:C:2011:485). In the latter case, the marks affixed to gas bottles had not been removed or covered, which meant that the condition of the bottles had not been changed by masking their origin. In the present case, the reseller replaced the original label with its own label, which covers most of the cylinder's surface, while leaving visible the original trade mark engraved on the upper part of the cylinder.

26 The referring court notes, lastly, that, if the replacement of the original label were to be considered under the conditions set out in the judgment of 11 July 1996, *Bristol-Myers Squibb and Others* (C-427/93, C-429/93 and C-436/93, EU:C:1996:282), the Court's case-law does not make it clear whether, in assessing the condition relating to the need for such replacement, account should be taken of the intended purpose of the goods in question and, if so, in what way. The fact that carbon dioxide cylinders are intended to be reused and refilled numerous times is liable to alter the condition of the original labels. That court seeks to ascertain whether the breaking or detachment of the original label affixed by the proprietor of the trade mark, or the fact that a reseller has replaced that original label with its own label, may be regarded as circumstances which justify that the removal or replacement of the label by that of the reseller be considered to be necessary for the placing on the market of the cylinder refilled by that reseller.

27 In those circumstances, the Korkein oikeus (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the so-called *Bristol-Myers Squibb* criteria developed in the Court of Justice's case-law on repackaging and relabelling in cases of parallel imports, and in particular the condition of "necessity" also apply in the case of repackaging or relabelling of goods, which have been put on the market in a Member State by the trade mark proprietor or with its consent, for the purposes of resale in the same Member State?

(2) Where the trade mark proprietor has affixed its trade mark to the cylinder, both on the label and engraved on the neck of the cylinder, when putting a cylinder containing carbon dioxide on the market, do the *Bristol-Myers Squibb* criteria referred to above, and in particular the condition of "necessity" apply when a third party refills the cylinder with carbon dioxide for the purposes of resale, removes the original label and replaces it with a label bearing its own logo, while, at the same time, the trade mark of the person that put the cylinder on the market continues to be visible in the engraving on the neck of the cylinder?

(3) In the situation described above, can the view be taken that the removal and replacement of the label bearing the trade mark undermines, in principle, the function of the trade mark as an indication of the origin of the cylinder, or is it of significance, with regard to the applicability of the conditions for repackaging and relabelling, that:

– it is to be assumed that the relevant public should perceive the label as referring exclusively to the origin of the carbon dioxide contained in the cylinder (and thus to the person who has refilled the cylinder); or

– it is to be assumed that the relevant public should perceive the label as also referring, at least in part, to the origin of the cylinder?

(4) If the removal and replacement of the label affixed on carbon dioxide cylinders is to be assessed on the basis of the condition of necessity, can the fact that the labels affixed to the cylinders put on the market by the trade mark proprietor have been accidentally damaged or become detached or have been removed and replaced by a person's previous refilling constitute a circumstance on the basis of which the regular replacement of the labels by the label of the person who refilled the cylinders is to be regarded as being necessary for putting the refilled cylinders on the market?'

Consideration of the questions referred

28 At the outset, it should be noted that the questions referred by the referring court concern, as regards EU trade marks, the interpretation of Article 13(2) of Regulation No 207/2009 and Article 15(2) of Regulation 2017/1001 and, as regards national trade marks, the interpretation of Article 7(2) of Directive 2008/95 and Article 15(2) of Directive 2015/2436.

29 In that regard, it must be stated that the facts of the dispute in the main proceedings began in June 2016 and relate, for a part, to the provisions of Regulation No 207/2009 and Directive 2008/95 and, for the other part, to those of Regulation 2017/1001 and Directive 2015/2436. However, since the relevant provisions of those regulations and directives are drafted in terms which are in substance identical and since, for that reason, the answers to be given to the questions referred by the referring court are the same no matter which regulation or directive, respectively, applies, reference need only be made, for the purposes of answering those questions, to the provisions of Article 15 of Regulation 2017/1001 and of Article 15 of Directive 2015/2436 (see, by analogy, judgment of 9 November 2017, *Maio Marques da Rosa*, C-306/16, EU:C:2017:844, paragraph 32 and the case-law cited).

30 Furthermore, it is apparent from the order for reference that those questions are raised in proceedings arising from subsequent commercialisation, in Finland, of carbon dioxide cylinders manufactured and initially put on the market by SodaStream, which are intended to be reused and refilled numerous times. MySoda, after receiving, through distributors, SodaStream carbon dioxide cylinders that were returned empty by consumers, refills those cylinders, removes the label on which the original trade mark had been affixed and replaces it with its own labels showing the logo of MySoda, while leaving visible the original mark engraved on those cylinders.

31 In the light of those clarifications, it must be considered that the referring court, by its four questions, which it is appropriate to examine together, asks, in essence, whether, and, if so, under what conditions, the proprietor of a trade mark who has put on the market, in one Member State, goods bearing that mark and intended to be reused and refilled numerous times, is entitled, under Article 15(2) of Regulation 2017/1001 and Article 15(2) of Directive 2015/2436, to oppose further commercialisation of those goods in that Member State, by a reseller who has refilled them and replaced the label showing the original mark by another label, while leaving visible the original mark on those goods.

32 In that regard, it must, first of all, be borne in mind that Article 9 of that regulation and Article 10 of that directive respectively confer on the proprietor of an EU trade mark and on the proprietor of a national trade mark exclusive rights which entitle him or her to prevent any third party, in particular, from offering goods bearing his or her mark, putting them on the market or stocking them for those purposes. Article 15(1) of that regulation and Article 15(1) of that directive contain an exception to that rule, in that they provide that the trade mark proprietor's rights are

exhausted where the goods have been put on the market in the EEA under that mark by the proprietor himself or herself, or with his or her consent (see, by analogy, judgment of 14 July 2011, *Viking Gas*, C-46/10, EU:C:2011:485 paragraph 26 and the case-law cited).

33 In particular, as regards Articles 10 and 15 of Directive 2015/2436, it must be further stated that they effect a complete harmonisation of the rules relating to the rights conferred by a trade mark and accordingly define the rights of proprietors of trade marks in the European Union (see, to that effect, judgment of 22 September 2011, *Budějovický Budvar*, C-482/09, EU:C:2011:605, paragraph 32 and the case-law cited, and, by analogy, judgment of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624, paragraph 85 and the case-law cited).

34 However, under Article 15(2) of Regulation 2017/1001 and Article 15(2) of Directive 2015/2436, the proprietor of a trade mark may provide evidence of legitimate reasons to oppose subsequent commercialisation of goods bearing his or her trade mark, especially where the condition of the goods is changed or impaired after they have been put on the market. That ability to oppose, which amounts to a derogation from the fundamental principle of the free movement of goods, has the sole objective of safeguarding rights which form part of the specific subject matter of the mark, as understood in the light of its essential function (see, to that effect, judgment of 23 April 2002, *Boehringer Ingelheim and Others*, C-143/00, EU:C:2002:246, paragraph 28).

35 Consequently, as the Court has ruled on numerous occasions, the specific purpose of trade mark rights is, in particular, to guarantee to the proprietor of a trade mark that he or she has the right to use that trade mark for the purpose of putting a product into circulation for the first time and thus to protect him or her against competitors wishing to take advantage of the status and reputation of the trade mark by illegally selling goods bearing that mark. In order to determine the exact extent of this right exclusively conferred on the proprietor of the trade mark, regard must be had to the essential function of the trade mark, which is to guarantee the identity of the origin of the trade marked product to the consumer or end user by enabling him or her, without any possibility of confusion, to distinguish that product from goods having another origin (judgment of 20 December 2017, *Schweppes*, C-291/16, EU:C:2017:990, paragraph 37 and the case-law cited).

36 Therefore, the question whether the trade mark proprietor may oppose further commercialisation of goods bearing his or her trade mark and, in particular, the steps taken by the reseller concerning the removal of the original labels and the affixing of new labels to those goods, while leaving visible the original mark, must be examined in the light of the legitimate interests of the trade mark proprietor, in particular that of safeguarding the essential function of the trade mark, which is to guarantee the identity of the origin of the marked product to the consumer or end user.

37 As stated by the Advocate General in point 22 of his Opinion, in so far as it necessarily amounts to a limitation on the fundamental principle of the free movement of goods, the right of the trade mark proprietor to oppose further commercialisation of the goods bearing his or her trade mark is not unlimited.

38 In the present case, it is common ground that the carbon dioxide cylinders in question were put on the market in the EEA for the first time by the proprietors of the EU and the national trade marks affixed to them.

39 In that regard, it must be borne in mind that, according to the case-law of the Court of Justice, the sale of a refillable gas bottle by the proprietor of the marks affixed to it exhausts the rights which that proprietor derives from the registration of those marks and transfers to the purchaser the

right to use that bottle freely, including the right to exchange it or have it refilled by an undertaking of his or her choice. That right of the purchaser has, as its corollary, the right of competitors of the proprietor of the marks affixed on that bottle to refill and exchange the empty bottles (see, to that effect, judgment of 14 July 2011, *Viking Gas*, C-46/10, EU:C:2011:485, paragraph 35).

40 That being so, the activity of a reseller consisting of refilling the cylinders in question, that were returned empty by consumers, and affixing to them its own labels after removing those bearing the original marks, while leaving visible the original mark on the cylinders, is capable of falling within the scope of Article 15(2) of Regulation 2017/1001 and Article 15(2) of Directive 2015/2436.

41 However, as noted in paragraph 34 above, under Article 15(2) of Regulation 2017/1001 and Article 15(2) of Directive 2015/2436, the proprietor of a trade mark is entitled, despite the placing on the market of goods bearing his or her trade mark, to oppose further commercialisation of those goods where legitimate reasons justify such opposition. The situation relating to the alteration or impairment of the condition of goods, which is expressly provided for in those provisions, is given only as an example, since those provisions do not provide an exhaustive list of legitimate reasons which may exclude the application of the principle of exhaustion (see, to that effect, judgment of 14 July 2011, *Viking Gas*, C-46/10, EU:C:2011:485, paragraph 36 and the case-law cited).

42 In the context of parallel imports of repackaged pharmaceutical products, the Court has drawn up a list of conditions in order to frame the existence of such reasons in that specific context (see, in particular, judgment of 11 July 1996, *Bristol-Myers Squibb and Others*, C-427/93, C-429/93 and C-436/93, EU:C:1996:282).

43 In a context closer to that at issue in the main proceedings, the Court has held that such a legitimate reason also exists when the use by a third party of a sign identical with, or similar to, a trade mark seriously damages the reputation of that mark or when that use is carried out in such a way as to give the impression that there is a commercial connection between the trade mark proprietor and that third party, and in particular that that third party is affiliated to the proprietor's distribution network or that there is a special relationship between those two persons (see, to that effect, judgments of 8 July 2010, *Portakabin*, C-558/08, EU:C:2010:416, paragraphs 79 and 80, and of 14 July 2011, *Viking Gas*, C-46/10, EU:C:2011:485, paragraph 37).

44 It follows that a false impression which may arise in the minds of consumers as to whether there is an economic connection between the trade mark proprietor and a reseller is one of the legitimate reasons for which the trade mark proprietor may oppose further commercialisation of goods bearing his or her trade mark by a reseller, in particular where that reseller withdraws the label on which the original mark appears and affixes its own label to that product, while leaving visible the original mark engraved on the product. The fact that the measures taken by the reseller for the purposes of further commercialisation of the goods in question are located within the Member State in which those goods were initially put on the market is not decisive for the purposes of determining whether the trade mark proprietor's opposition is justified by such a legitimate reason.

45 In order to assess whether such a false impression exists, account must be taken of all the circumstances relating to the reseller's activity, such as the way in which the cylinders are presented to consumers following the new labelling and the conditions under which they are

sold, in particular the practices of refilling those cylinders which prevail in the sector concerned (see, to that effect, judgment of 14 July 2011, *Viking Gas*, C-46/10, EU:C:2011:485, paragraphs 39 and 40).

46 Although it is for the referring court to assess whether there is a false impression as to the economic connection between the proprietors of the trade marks and the reseller who refilled the cylinders at issue in the main proceedings, the Court may nevertheless provide that court with all the elements of interpretation under EU law which may be useful to it (see, by analogy, judgment of 7 April 2022, *Berlin Chemie A. Menarini*, C-333/20, EU:C:2022:291, paragraph 46 and the case-law cited).

47 Thus, it should be noted, in the first place, that the extent of the information appearing on the new labels is of significant importance. As stated by the Advocate General in point 51 of his Opinion, the overall impression created by the new label must be assessed in order to determine whether the information relating to the trade mark proprietor, who manufactured the cylinder, and that relating to the reseller, who refilled it, is clear and unambiguous to a consumer, who is reasonably well-informed and reasonably observant. That information, presented on the new label must, in particular, not give the impression that there is an economic connection between the reseller who refilled the cylinder and the proprietor of the original trade mark.

48 In the second place, in order to assess the impression created by the new labelling, account must also be taken of the practices in the sector concerned and the question whether consumers are accustomed to the cylinders being refilled by operators other than the proprietor of the original trade mark.

49 In that regard, the fact that the product at issue is made up of a cylinder intended to be reused and refilled numerous times, as well as its content, may be relevant for the purposes of determining whether there is such a false impression in the minds of consumers. It is true that account must be taken of the fact that, on account of the functional relationship between a cylinder and its content, the general public is likely to consider that both normally have the same commercial origin. However, if it were impossible to use compressed or liquefied gases independent of the metal containers holding them and if that type of cylinder may, accordingly, be regarded as packaging (see, to that effect, judgment of 20 November 2014, *Utopia*, C-40/14, EU:C:2014:2389, paragraph 40), those cylinders – in so far as they are intended to be reused and refilled numerous times, according to the logic of recycling – will not necessarily be perceived as having the same commercial origin as the gas which they contain.

50 As regards, in particular, the conditions to refill empty cylinders, it must be assumed, as stated by the Advocate General in point 56 of his Opinion, that a consumer, who goes directly to an operator other than the proprietor of the original mark to have an empty cylinder refilled or to exchange it for a refilled cylinder, will be more readily in a position to be aware that there is no economic connection between that competitor and the trade mark proprietor.

51 In the present case, as is apparent from the order for reference and the written observations of the parties to the main proceedings, neither the proprietors of the original trade marks nor the reseller offer their carbon dioxide cylinders directly to consumers, since those cylinders are available for sale only in the distributors' shops.

52 The absence of direct contact with the reseller may give rise to a likelihood of confusion in the minds of consumers as to the relationship between that reseller and the proprietors of the original trade marks. Such a situation is therefore liable to prevent the essential function of the trade mark, referred to in paragraph 35 of this judgment, from being fulfilled, and thus to justify the application of Article 15(2) of Directive 2015/2436 and Article 15(2) of Regulation 2017/1001.

53 In the third place, it follows from the case-law of the Court that the fact that the original mark of the cylinder remains visible in spite of the additional labelling affixed by the reseller constitutes a relevant factor in so far as it seems to rule out that the labelling changed the condition of the cylinders by masking their origin (see, to that effect, judgment of 14 July 2011, *Viking Gas*, C-46/10, EU:C:2011:485, paragraph 41).

54 In the light of all the foregoing considerations, the answer to the questions referred is that Article 15(2) of Regulation 2017/1001 and Article 15(2) of Directive 2015/2436 must be interpreted as meaning that the proprietor of a trade mark who has put on the market, in a Member State, goods bearing that mark and intended to be reused and refilled numerous times, is not entitled, under those provisions, to oppose subsequent commercialisation of those goods, in that Member State, by a reseller who has refilled them and has replaced the label on which the original mark appeared, by another label, while leaving visible the original mark on those goods, unless that new labelling creates a false impression, in the minds of consumers, that there is an economic connection between the reseller and the trade mark proprietor. That likelihood of confusion must be assessed globally in the light of the information appearing on the product and its new labelling and having regard to the distribution practices of the sector concerned and the level of knowledge that consumers have of those practices.

Costs

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 15(2) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark and Article 15(2) of Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks

must be interpreted as meaning that the proprietor of a trade mark who has put on the market, in a Member State, goods bearing that mark and intended to be reused and refilled numerous times, is not entitled, under those provisions, to oppose subsequent commercialisation of those goods, in that Member State, by a reseller who has refilled them and has replaced the label on which the original mark appeared by another label, while leaving visible the original mark on those goods, unless that new labelling creates a false impression, in the minds of consumers, that there is an economic connection between the reseller and the trade mark proprietor. That likelihood of confusion must be assessed globally in the light of the information appearing on the product and its new labelling and having regard to the distribution practices of the sector concerned and the level of knowledge that consumers have of those practices.

[Signatures]