Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 13 November 2025[1]

Case C-298/23

Inter IKEA Systems BV
v
Algemeen Vlaams Belang VZW,
S,
T,
U,
V,
Vrijheidsfonds VZW

(Request for a preliminary ruling from the Nederlandstalige Ondernemingsrechtbank Brussel (Brussels Business Court (Dutch-speaking), Belgium))

(Reference for a preliminary ruling – Trade marks – Effects of a trade mark – Rights conferred by a trade mark – Right to object to the use by a third party of an identical or similar sign – Due cause – Use of such a sign by a third party in the context of a political campaign)

I. Introduction

1. Free political debate is an essential element of any democratic society. Political actors use various forms of expression, such as exaggeration or humour, to reach the widest possible electorate, draw attention to problems of general interest, highlight their ability to solve them or criticise their opponents. Nevertheless, there are limits to such debates, having regard to the rules that apply to them and to the rights of others. As the present case illustrates, however, it is sometimes difficult to determine those limits, in so far as they result from a reconciliation between various competing rights and interests. The present reference for a preliminary ruling concerns the interpretation of provisions of Directive (EU) 2015/2436[2] and Regulation (EU) 2017/1001[3] and thus provides the Court with an opportunity to clarify the relevant criteria for striking the balance between freedom of expression and the rights conferred on proprietors of trade marks with a reputation.

[1] Original language: French.

[2] Directive 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).

[3] Regulation of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

II. Legal framework

A. European Union law

1. Directive 2015/2436

2. Article 10 of Directive 2015/2436, entitled 'Rights conferred by a trade mark', is worded as follows:

'1. The registration of a 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 registered trade mark, the proprietor of that registered 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 trade mark and is used in relation to goods or services which are identical with those for which the trade mark is registered;

(b) the sign is identical with, or similar to, the 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 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 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 trade mark is registered, where the latter has a reputation in the Member State 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 trade mark.

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

(a) affixing the sign to the goods or to the packaging thereof;

(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;

(c) importing or exporting the goods under the sign;

(d) using the sign as a trade or company name or part of a trade or company name;

(e) using the sign on business papers and in advertising;

(f) using the sign in comparative advertising in a manner that is contrary to Directive 2006/114/EC. [4]

[4] Directive of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ 2006 L 376, p. 21).

…

6. Paragraphs 1, 2, 3 and 5 shall not affect provisions in any Member State relating to the protection against the use of a sign other than use for the purposes of distinguishing goods or services, where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.'

2. Regulation 2017/1001

3. Article 9 of Regulation 2017/1001, which is headed 'Rights conferred by an EU trade mark', provides:

'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:

(a) affixing the sign to the goods or to the packaging of those goods;

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

(c) importing or exporting the goods under the sign;

(d) using the sign as a trade or company name or part of a trade or company name;

(e) using the sign on business papers and in advertising;

(f) using the sign in comparative advertising in a manner that is contrary to [Directive 2006/114].

…'

B. The Benelux Convention

4. Article 2.20 of the Benelux Convention on Intellectual Property (Trade Marks and Designs) [5] ('the Benelux Convention'), which is headed 'Rights conferred by a trade mark', provides:

'1. The registration of a trade mark referred to in Article 2.2 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 registered trade mark, and without prejudice to the possible application of ordinary law in matters of civil liability, the proprietor of that registered trademark shall be entitled to prevent all third parties not having his consent from using any sign where such sign:

…

(c) is identical with, or similar to, the 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 trade mark is registered, where the latter has a reputation in the Benelux territory and where use in the course of trade of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark;

(d) is used for purposes other than those of distinguishing goods or services, where use of the sign without due cause, would take unfair advantage of or be detrimental to the distinctive character or the repute of the trade mark.

…'

III. The facts of the main proceedings, the question referred and the procedure before the Court

5. Inter IKEA Systems BV ('IKEA'), known to the general public for its do-it-yourself furniture supplied in kit form with instructions, is the proprietor of three Benelux trade marks and one EU trade mark, which are registered for several classes of goods and services.

6. On 14 November 2022, the political party Vlaams Belang publicly presented, at a press conference, its programme for reforming asylum and immigration policy in Belgium, which it called the 'IKEA-PLAN – Immigratie Kan Echt Anders' ('IKEA plan – Immigration really can be different') and which consisted of 15 political proposals described as 'ready to assemble'. IKEA's trade marks appeared in the illustrations which accompanied the presentation, together with characters resembling those that appear in assembly instructions for IKEA products. A document containing a more developed political plan which mentioned that presentation was published on a website. The press conference was also mentioned on Vlaams Belang's social media channels and subsequently shared by interested parties.

7. On 22 November 2022, IKEA brought trade mark infringement proceedings before the Nederlandstalige Ondernemingsrechtbank Brussel (Brussels Business Court (Dutch-speaking), Belgium), the referring court, against the Vrijheidsfonds and Algemeen Vlaams Belang, two

[5] Convention of 25 February 2005, signed in The Hague by the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands.

non-profit-making associations, and against natural persons representing Vlaams Belang.[6] The referring court held the proceedings to be admissible only in so far as they related to the Vrijheidsfonds, which conducted the Vlaams Belang campaign in the name and on behalf of that party or its leaders.

8. The referring court states that the Vrijheidsfonds acknowledged that it had used IKEA's trade marks without its consent and undertook to cease such use pending the decision of the referring court concluding the main proceedings. The Vrijheidsfonds is said to have used the reputation of those trade marks in order to reinforce its message and increase its reach, which, it submits, constitutes 'due cause' within the meaning of Article 9(2)(c) of Regulation 2017/1001 and Article 10(2)(c) and Article 10(6) of Directive 2015/2436.

9. In that regard, the referring court considers that, although the exclusive right of a trade mark proprietor is a property right guaranteed by Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter'), it is not absolute.

10. The exercise of that right is limited to situations in which the use of the trade mark by a third party, in particular where the mark has a reputation, undermines its functions. Furthermore, the original function of the mark, in so far as it is linked to the principle of speciality, can only be undermined where there is a likelihood of confusion in the mind of the consumer as to the origin of the product bearing the sign. The investment function of the mark can only be undermined where the use by a third party of a sign identical with the mark in relation to goods or services identical with, or similar to, those for which the mark is registered substantially interferes with the proprietor's use of its trade mark to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty. Similarly, undermining of the advertising function entitles the proprietor to prohibit use of the mark only where that use adversely affects the mark as a factor in sales promotion or as an instrument of the proprietor's commercial strategy.

11. The referring court notes that the protection against use in relation to other types of goods and services is further limited by the possibility of the third party relying on 'due cause'.

12. That court states that the concept of 'due cause' must be interpreted in a manner consistent with the fundamental principle of freedom of expression, protected by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') and by Article 11 of the Charter, and that, consequently, the present case concerns a conflict between fundamental rights of the same rank, namely freedom of expression and the right to property.

13. In that regard, the referring court notes that, during the preparatory work on Directive 2015/2436, the European Parliament had envisaged including parodic use of a trade mark among the exceptions to the exclusive right,[7] as provided for in the federal act governing trade marks in

[6] It is apparent from the written observations of the Vrijheidsfonds that that political party is a de facto association without legal personality, which is why the action in the main proceedings was brought, inter alia, against the natural persons representing all the members of that de facto association.

[7] The referring court did not provide a reference for the document mentioning that proposal, but I note that it is apparent from the European Parliament legislative resolution of 25 February 2014 on the proposal for a directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (OJ 2017 C 285, p. 262) that the Parliament, following its first reading, had proposed amending Article 14, which is headed 'Limitation of the effects of a trade mark', so as to include, among the exceptions to the exclusive right of the trade mark proprietor, its use by a third party 'for the purposes of parody, artistic expression, criticism or comment'.

the United States of America, the Lanham Act of 1946 (15 U.S.C. 1125). However, this proposal was not taken up, and the circumstances which may constitute 'due cause' in the context of parodic use of a trade mark have not yet been defined.

14. The referring court states that in the judgment in *Leidseplein Beheer and de Vries*,[8] the Court nevertheless abandoned the restrictive interpretation of 'due cause', holding that that concept 'may not only include objectively overriding reasons but may also relate to the subjective interests of a third party using a sign which is identical or similar to the mark with a reputation'.

15. The referring court also states that 'due cause' is interpreted differently in the Netherlands and Belgium, with the Belgian courts interpreting that concept very restrictively.

16. That court also observes that the Benelux Court of Justice, in its judgment in *Moët Hennessy Champagne Service* v *Cedric Art*,[9] held that 'artistic licence constitutes due cause within the meaning of [Article 2.20(2)(d) of the Benelux Convention] for the use of a sign identical with, or similar to, the trade mark, for purposes other than distinguishing goods or services, if the artistic expression is original and results from a creative process which is not intended to be detrimental to the trade mark or its proprietor'.

17. The wording of the questions of interpretation that gave rise to that judgment was virtually identical to that of the question referred in the present case. According to the referring court, without ruling on the relevance of the specific criteria mentioned in those questions, the Benelux Court of Justice adopted a broad interpretation of 'due cause', holding that a cause based on freedom of expression could be excluded only where the third party intended to cause harm to the trade mark proprietor.

18. It was in those circumstances that the Nederlandstalige Ondernemingsrechtbank Brussel (Brussels Business Court (Dutch-speaking)), by decision of 4 May 2023, received at the Court on 8 May 2023, decided to stay the proceedings and to refer the following question to the Court of Justice:

'Can freedom of expression, including the freedom to express political opinions and political parody, as guaranteed by Article 10 [ECHR] and Article 11 of the [Charter], constitute "due cause" for using a sign identical or similar to a well-known trade mark within the meaning of Article 9(2)(c) of [Regulation 2017/1001] as well as Article 10(2)(c) and Article 10(6) of [Directive 2015/2436]?

If so, what are the criteria to be taken into account by the national court in assessing the balance between those fundamental rights, and the importance to be attached to each of them?

In particular, can the national court take into account the following criteria, and/or are there additional criteria:

– the extent to which the expression has a commercial character or purpose;

– the extent to which competitive motives are at play between parties;

– the extent to which the expression has a public interest, is socially relevant or opens a debate;

[8] Judgment of 6 February 2014, *Leidseplein Beheer and de Vries* (C-65/12, EU:C:2014:49, paragraphs 45 and 46).

[9] Judgment of 14 October 2019 (Case A 2018/1).

– the relationship between the above criteria;

– the degree of reputation of the trade mark invoked;

– the extent of the infringing use, its intensity and systematic nature and the extent of its distribution, by territory, time and volume, also taking into account the extent to which this is proportionate to the message that the expression is intended to convey;

– the extent to which the expression, and circumstances accompanying that expression, such as the name of the expression and its promotion, are detrimental to the reputation, distinctive character and image of the trade marks invoked (the "advertising function");

– the extent to which the expression exhibits its own original contribution and the extent to which an attempt has been made to avoid confusion or association with the trade marks invoked, or the impression that there is a commercial or other connection between the expression and the trade mark proprietor (the "origin function"), also taking into account the manner in which the trade mark proprietor has built up a certain image and reputation in advertising and communication?'

19. Written observations were submitted by IKEA, the Vrijheidsfonds and the European Commission. Those same interested parties were represented at the hearing held on 10 June 2025.

IV. Analysis

20. By the question it has referred for a preliminary ruling, the referring court asks the Court, in essence, what criteria are to be taken into account in assessing whether there is 'due cause', within the meaning of Article 9(2)(c) of Regulation 2017/1001 and Article 10(2)(c) and Article 10(6) of Directive 2015/2436, for the use of a sign by an association acting in the name and on behalf of a political party for the purposes of disseminating and promoting its programme.

21. Before beginning the analysis of that question, it is necessary to consider its admissibility, which is contested by IKEA.

A. Admissibility

22. In its written observations, IKEA submits that it has appealed against the judgment which gave rise to the present request for a preliminary ruling, that the referring court must therefore relinquish jurisdiction, as a consequence of the devolutive effect of the appeal, and hence that there is no longer any need to adjudicate. Furthermore, IKEA submits, referring to the order in *Nationale Loterij*,[10] that even if the request is not withdrawn, there is no need to respond to it, since the justification for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute.

[10] Order of 24 March 2009 (C-525/06, EU:C:2009:179, paragraphs 10 and 11).

23. It is settled case-law that the Court must abide by the decision to refer, which must have its full effect so long as it has not been revoked.[11] The referring court, which states that IKEA's appeal was dismissed as inadmissible, considers that the Court should answer the question referred, and has not revoked its order for reference.

24. Moreover, unlike the case which gave rise to the order in *Nationale Loterij*,[12] which concerned a dispute that had been resolved by a court of appeal, which had thus assumed responsibility for ensuring compliance with EU law,[13] the dispute in the present case has not yet been resolved, in particular as regards the aspects covered by the question referred.

25. It follows that the question referred for a preliminary ruling is admissible and that it is appropriate to rule on the request.

B. Substance

1. The scope of the question referred

26. This reference for a preliminary ruling concerns the interpretation of provisions of Directive 2015/2436 and of Regulation 2017/1001. The Benelux trade marks held by IKEA are covered by the protection system of the Benelux Convention, which was adopted on the basis of the trade mark directives,[14] meaning that Directive 2015/2436 determines the regime applicable to those trade marks, while the EU trade mark held by IKEA is covered by Regulation 2017/1001.

27. As is apparent from Article 10(1) of Directive 2015/2436 and Article 9(1) of Regulation 2017/1001, registration of a national or EU trade mark confers on its proprietor an exclusive right therein. However, both of those acts provide that the exercise of that right is subject to certain limitations.

28. In that regard, the exclusive right enables the trade mark proprietor to protect its specific interests as proprietor of the mark, that is to say, to ensure that the trade mark can fulfil its functions. Therefore, the exercise of that right must be reserved to cases in which a third party's use of the sign adversely affects, or is liable adversely to affect, one of the functions of the trade mark. Those functions include the essential function of the mark, which is to guarantee to consumers the origin of the product or service in question, as well as other functions such as that of guaranteeing the quality of the product or service or that of communication, investment or advertising.[15]

29. Consequently, pursuant to Article 10(2)(a) and (b) of Directive 2015/2436 and Article 9(2)(a) and (b) of Regulation 2017/1001, the proprietor of a national or EU trade mark may oppose the use of an identical sign in relation to goods or services identical to those for which the trade mark has been registered and, where there is a likelihood of confusion, the use of a sign identical with, or similar to, the trade mark for goods or services identical with, or similar to, such goods or services.

[11] See, in particular, judgment of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraph 89 and the case-law cited).

[12] Order of 24 March 2009 (C-525/06, EU:C:2009:179, paragraphs 10 and 11).

[13] Order of 24 March 2009, *Nationale Loterij* (C-525/06, EU:C:2009:179, paragraphs 8 and 9).

[14] See, to that effect, judgment of 6 February 2014, *Leidseplein Beheer and de Vries* (C-65/12, EU:C:2014:49, paragraph 43).

[15] See, to that effect, judgment of 22 September 2011, *Interflora and Interflora British Unit* (C 323/09, EU:C:2011:604, paragraphs 37 and 38).

30. In European Union trade mark law, greater protection is given to marks with a reputation than to ordinary marks. [16] Thus, under Article 10(2)(c) of Directive 2015/2436 and Article 9(2)(c) of Regulation 2017/1001, the proprietor of a trade mark with a reputation may object to the use of a sign by a third party even where the sign is not identical to the mark and there is no likelihood of confusion. Those provisions also enable proprietors of reputed trade marks to prevent the use, in the course of trade, by third parties, of signs identical with or similar to their marks, where such use takes unfair advantage of the distinctive character or the repute of those marks ('parasitism' or 'free-riding') or is detrimental to their distinctive character ('dilution', 'whittling away' or 'blurring') or repute ('tarnishment' or 'degradation'). [17]

31. Nevertheless, the purpose of both Directive 2015/2436 and Regulation 2017/1001 is generally to strike a balance between the interest which the proprietor of a trade mark has in safeguarding its essential function, on the one hand, and the interests of other economic operators in having signs capable of denoting their products and services, on the other.

32. The interests of a third party in using, in the course of trade, a sign similar to a mark with a reputation must be considered in the light of the possibility for the user of that sign to claim 'due cause'. [18] Where the proprietor of the mark with a reputation has demonstrated the existence of one of the forms of injury referred to in Article 10(2)(c) of Directive 2015/2436 and Article 9(2)(c) of Regulation 2017/1001, the onus is on the third party using a sign similar to the mark with a reputation to establish that he or she has due cause for using such a sign within the meaning of those provisions. [19]

33. Thus, the concept of 'due cause', through which the referring court seeks to reconcile the right to property and freedom of expression, is at the heart of the present case.

34. Before proceeding to interpret that concept, it seems to me that it would be helpful to summarise the general applicability conditions of the provisions of trade mark law in order, so to speak, to 'prepare the ground' for the analysis that will follow.

35. The use of a sign identical with, or similar to, a trade mark, in particular a trade mark with a reputation, may be opposed by the proprietor under Article 10(2) of Directive 2015/2436 and Article 9(2) of Regulation 2017/1001 where it occurs both 'in the course of trade' and in relation to 'goods or services'. In that context, it should be noted that the distinction between those two applicability conditions is not clear and that, as I will set out below, [20] they appear to overlap, in part, in certain circumstances.

36. Although the question referred does not ask about the general applicability conditions of Article 10(2) of Directive 2015/2436 and Article 9(2) of Regulation 2017/1001, those provisions are not without relevance in the context of striking a fair balance between the rights conferred by a trade mark and freedom of expression. Academic commentators have observed that in certain

[16] See judgment of 6 February 2014, *Leidseplein Beheer and de Vries* (C-65/12, EU:C:2014:49, paragraph 39).

[17] See, to that effect, judgment of 18 June 2009, *L'Oréal and Others* (C-487/07, EU:C:2009:378, paragraphs 39 to 41).

[18] See, to that effect, judgment of 6 February 2014, *Leidseplein Beheer and de Vries* (C-65/12, EU:C:2014:49, paragraphs 41 to 43).

[19] See judgment of 6 February 2014, *Leidseplein Beheer and de Vries* (C-65/12, EU:C:2014:49, paragraph 44).

[20] See points 63 and 67 of this Opinion.

situations which appear to involve a conflict between the right to property and freedom of expression, there is no conflict, because the sign is not used in the course of trade [21] or in relation to goods or services. [22]

37. Furthermore, it may be that an examination of those two general conditions will assist the referring court, given that the action before it is based both on the provisions of trade mark law relating to the exclusive right of a proprietor and on Article 2.20(2)(d) of the Benelux Convention, relating to the forms of injury referred to in Article 10(6) of Directive 2015/2436 and resulting from the use of a sign 'for purposes other than to distinguish goods or services', which does not require that such use takes place in the course of trade. [23]

38. In that regard, the parties to the main proceedings were in dispute at the hearing as to whether the two conditions in question are met in the present case. According to the Vrijheidsfonds, the use at issue does not fall within the private sphere but constitutes use in the course of trade, in so far as it was intended to obtain an economic advantage. On the other hand, IKEA submits that its trade marks were not used to distinguish goods and services, and that its action should therefore be examined under Article 2.20(2)(d) of the Benelux Convention, the wording of which corresponds to that of Article 10(6) of Directive 2015/2436.

39. I would note that the question referred also concerns the latter provision and the concept of 'due cause' which it employs.

40. Article 10(6) of Directive 2015/2436 provides, in particular, that paragraphs 1 and 2 thereof do not affect national provisions relating to the protection of a sign against use other than for the purposes of distinguishing goods or services, where such use *without due cause* takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

41. The EU legislature thus intended to point out that the protection of a trade mark against uses of a sign other than for the purposes of distinguishing goods or services is outside the scope of the harmonisation effected by EU law. That interpretation is confirmed on reading Article 10(6) of Directive 2015/2436 in the light of recital 40 of that directive, [24] as well as the case-law relating to a similar provision in the predecessor of that directive. [25]

42. Consequently, where the sign is not used for the purposes of distinguishing goods or services, it is necessary to refer to the legal orders of the Member States to determine the extent and nature, if any, of the protection afforded to proprietors of trade marks. In that area, the Member States

[21] See Bochaczewski, M., 'Conflicts Between Trade Mark Rights and Freedom of Expression Under EU Trade Mark Law: Reality or Illusion?' *International Review of Intellectual Property and Competition Law*, 2020, p. 858. See also, to that effect, Todorski, T., 'The concept of "due cause" and its role in safeguarding fundamental rights under EU trade mark law: how should the CJEU rule in *IKEA*, C-298/23?', *Journal of Intellectual Property Law & Practice*, 2024, Vol. 19, No 11, p. 814. Without questioning that the applicability condition requiring the sign to be used in the course of trade can contribute to the balancing of the right to property against freedom of expression, Todorski considers that its contribution is insufficient to resolve all the issues in this area.

[22] See Bochaczewski, M., 'Conflicts Between Trade Mark Rights and Freedom of Expression Under EU Trade Mark Law: Reality or Illusion?', op. cit., pp. 861 to 867, and Jacques, S., 'The EU trade mark system's lost sense of humour', *Intellectual Property Quarterly*, 2024, No 1, p. 20.

[23] It is apparent from the order for reference that the action is also based on national provisions relating to civil liability and unfair competition and on Article 9(2)(c) and Article 17(2) of Regulation 2017/1001. Under the latter provision, that regulation does not prevent actions concerning an EU trade mark being brought under the law of Member States relating in particular to civil liability and unfair competition.

[24] That recital states that '[Directive 2015/2436] should not exclude the application to trade marks of provisions of law of the Member States other than trade mark law, such as provisions relating to unfair competition, civil liability or consumer protection.'

[25] See, to that effect, judgment of 21 November 2002, *Robelco* (C-23/01, EU:C:2002:706, paragraph 31). See also Opinion of Advocate General Ruiz-Jarabo Colomer in *Robelco* (C-23/01, EU:C:2002:212, point 34).

may decide whether or not to adopt legislation; if they do so, under the conditions that they lay down, they may require the sign and the trade mark to be identical, or to be similar, or to be linked in some other way,[26] and may also decide whether or not to employ the concept of 'due cause'.

43. Two points must be made at this stage.

44. In the first place, Directive 2015/2436 does not attach any legal consequences to the use – with or without due cause – of a sign for purposes other than distinguishing goods or services. Furthermore, in so far as, a priori, the concept of 'due cause' employed in Article 10(6) of that directive does not have a legal meaning of its own, the criteria for determining whether there is 'due cause', within the meaning of that provision, cannot be identified by means of an interpretation of EU law. Therefore, I do not propose to interpret that provision.

45. In the second place, a Member State may decide to introduce the concept of 'due cause' into its national legislation on the protection of trade marks against use of a sign for purposes other than distinguishing goods or services and consider that that concept has the same meaning as in Article 10(2)(c) of Directive 2015/2436. In that case, an interpretation of that provision could be useful to the national court hearing an action based on that legislation. However, such legislation would not fall within the scope of that directive or, in the absence of other applicable EU provisions, within the scope of EU law. In that second case, the Charter would not be applicable.[27] Furthermore, in determining whether there is 'due cause' based on a balance struck between freedom of expression and other rights, the national court must take account of the fact that that balancing exercise is not carried out in situations where the sign is used 'in the course of trade' and 'in relation to goods and services', within the meaning of Directive 2015/2436. Thus, that exercise may not result in the same balance as is struck between freedom of expression and the rights conferred under that directive. As I will set out below,[28] in accordance with the case-law of the European Court of Human Rights (ECtHR), the exercise of that freedom based on the use of a sign outside the commercial sphere is likely to benefit from more extensive protection than the use of a sign within that sphere.

46. For the sake of completeness and in order to provide the referring court with a useful answer, I will consider whether the use of a sign identical with, or similar to, a trade mark in the context of a political campaign conducted by an association in the name and on behalf of a political party and its leaders constitutes use in the course of trade and in relation to goods or services, within the meaning of the provisions of trade mark law.

2. The use of a sign in the course of trade and in relation to goods or services

47. It is apparent from the order for reference and from argument at the hearing that the object of the Vrijheidsfonds, according to its articles of association, is to support the Vlaams Belang financially and materially.[29] It was in that capacity that the Vrijheidsfonds conducted the

[26] See, to that effect, judgment of 21 November 2002, *Robelco* (C-23/01, EU:C:2002:706, paragraphs 34 and 35).

[27] See, to that effect, judgment of 19 November 2019, *TSN and AKT* (C-609/17 and C-610/17, EU:C:2019:981, paragraph 53).

[28] See point 121 of this Opinion.

[29] See also, as regards that association and that political party, judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds* (C-201/13, EU:C:2014:2132, paragraph 7).

campaign in question, in the name and on behalf of that political party. Moreover, the defendants in the main proceedings appear to agree that the trade marks at issue were used in order to reinforce the message of that political party, amplify its 'echo' and disseminate it.

48. In order to determine whether the use of a sign identical with, or similar to, a trade mark, in the context of a political campaign, by an association conducting that campaign in the name and on behalf of a political party, constitutes use in the course of trade and in relation to goods or services to which the proprietor of the trade mark may object, under Article 10(2)(c) of Directive 2015/2436 and Article 9(2)(c) of Regulation 2017/1001, it is necessary to analyse the following circumstances: first, the fact that the sign is used by a non-profit-making association; second, that association is acting in the name and on behalf of a third party; and third, the association is seeking to promote a political message in the interests of the third party.

(a) The use of a sign by a non-profit-making entity

49. It is settled case-law that the use of a sign constitutes use in the course of trade where it occurs not as a private matter, but in the context of commercial activity with a view to economic advantage.[30] The exclusive rights conferred by a trade mark may, as a rule, be relied on by the proprietor of that trade mark only as against economic operators and, consequently, only in the context of a trading business.[31] If the transactions carried out, by reason of their volume, their frequency or other characteristics, go beyond the scope of a private activity, whoever carries out those transactions will be acting in the course of trade.[32]

50. In that respect, on the one hand, an activity forming part of a political campaign is, by its very nature, not carried out in the private sphere. That cannot be doubted as regards a press conference organised to ensure the widest possible dissemination of the announcement of a new political programme which is then made available online.

51. On the other hand, it might be questioned whether such an activity, although falling outside the private sphere, presents the economic aspect needed for it to be regarded as an activity carried out in the course of trade.

52. However, the fact that the Vrijheidsfonds is a non-profit-making association is not decisive in determining whether it used the trade marks concerned in the course of trade.

53. Although the Court has not yet had occasion to consider the question of the use of trade marks by non-profit-making entities in the course of trade, to which the proprietor may object under the provisions cited in the question referred in the present case, it has provided useful guidance in that regard in its judgment in *Verein Radetzky-Orden*,[33] concerning the concept of genuine use.

[30] Judgment of 16 July 2015, *TOP Logistics and Others* (C-379/14, EU:C:2015:497, paragraph 43).

[31] Judgment of 30 April 2020, *A (Infringement by importing ball bearings)* (C-772/18, EU:C:2020:341, paragraph 23).

[32] Judgments of 12 July 2011, *L'Oréal and Others* (C-324/09, EU:C:2011:474, paragraph 54), and of 30 April 2020, *A (Infringement by importing ball bearings)* (C-772/18, EU:C:2020:341, paragraph 23).

[33] Judgment of 9 December 2008 (C-442/07, EU:C:2008:696).

54. To put the considerations relating to that concept into context, it should be observed that the proprietor of a trade mark is liable to revocation if, within a continuous period of five years, it has not been put to genuine use in the Member State concerned in connection with the goods or services in respect of which it is registered. [34]

55. In that regard, first, leaving aside the possible financial aspect of the activity of a non-profit-making association, to which I will return below, [35] the Court has held that a trade mark is put to genuine use where such an association uses the trade mark, in its relations with the public, in announcements of forthcoming events, on business papers and on advertising material and where the association's members wear badges featuring that trade mark when collecting and distributing donations. [36] In that context, the Court stated that the fact that goods or services are offered on a non-profit-making basis is not decisive. The fact that a charitable association does not seek to make profit does not mean that its objective cannot be to create and, later, to preserve an outlet for the goods or services of that association in respect of which the trade mark was registered. [37] Equally, it cannot be ruled out, the Court held, that trade marks registered by a non-profit-making association may have a *raison d'être*, in that they protect the association against the possible use in business of identical or similar signs by third persons. [38]

56. If, to avoid losing the exclusive right it derives from its trade mark, a non-profit-making association can rely on use for the purposes of identifying and promoting its goods or services, it – and every other proprietor of a trade mark – should also be able to rely on that exclusive right to protect itself against its trade mark being used on a non-profit-making basis by a third party in order to identify or promote the goods or services of that third party. Accordingly, such use of a sign by a third party must also be regarded as use in the course of trade.

57. That interpretation is supported by the Court's more general case-law on the assessment of whether use of a trade mark is genuine. In making that assessment, regard must be had to all the facts and circumstances relevant to establishing whether there is real commercial exploitation of the mark in the course of trade. [39] I would recall [40] that the Court has held that use by a non-profit-making association for the purposes of identifying or promoting its goods or services to the public and of distinguishing them from goods or services not originating from that association constitutes such commercial exploitation in the course of trade.

58. It follows from the foregoing that a non-profit-making association may also make use of a sign in the course of trade where that sign is publicly used with a view to identifying and promoting its goods or services.

59. For the sake of completeness, still in relation to its status as a non-profit-making body, the Vrijheidsfonds stated at the hearing that the Belgian Parliament makes grants to political parties based on their election results. There is therefore an indirect but identifiable link between the effort devoted to political campaigns and the funds made available to a given political party or the entities that support it. That is an additional reason to consider that the Vrijheidsfonds made use of signs in a context that can be assimilated to that of trade. Indeed, in a similar situation, in

[34] See Article 19(1) of Directive 2015/2436 and Article 18(1) of Regulation 2017/1001.

[35] See point 59 of this Opinion.

[36] Judgment of 9 December 2008, *Verein Radetzky-Orden* (C-442/07, EU:C:2008:696, paragraph 24).

[37] Judgment of 9 December 2008, *Verein Radetzky-Orden* (C-442/07, EU:C:2008:696, paragraphs 16 and 17).

[38] Judgment of 9 December 2008, *Verein Radetzky-Orden* (C-442/07, EU:C:2008:696, paragraph 19).

[39] See, to that effect, judgment of 19 December 2012, *Leno Merken* (C-149/11, EU:C:2012:816, paragraph 29).

[40] See point 55 of this Opinion.

the judgment in *Verein Radetzky-Orden*,[41] the Court drew attention to the fact that various types of non-profit-making associations which, at first sight, offer their services for free, are in reality financed through subsidies or receive payment in various forms.

60. In view of the fact that the Vrijheidsfonds acknowledges that it conducted the campaign in the name and on behalf of Vlaams Belang, the question now arises of whether use is also considered to be in the course of trade where a third party uses a sign identical with, or similar to, a trade mark not in its own interest, but in the interest of another person.

(b) The use of a sign in the name and on behalf of a third party

61. As regards whether the person concerned can be considered to have him- or herself used a sign identical to a trade mark, although that person was acting in the economic interests of a third party, the Court has stated that, in order to identify use in the course of trade, ownership of the goods on which the trade mark is affixed is of no relevance.[42]

62. If, having regard to the considerations I set out in point 57 of this Opinion, the 'economic' interest of a third party may consist in the creation or preservation of an outlet for non-profit-making goods or services, the fact that the Vrijheidsfonds used the signs at issue to reinforce the message of a political party and to distinguish it from that of other parties is not, in itself, a basis for concluding that that use was not in the course of trade.

63. I note that the Court used the same reasoning I have set out in point 61 of this Opinion to support the interpretation that use of a sign by a third party constitutes use 'in relation to goods or services', within the meaning of the provisions of trade mark law, even where the third party is acting on behalf of another person to whom the goods or services in question belong.[43]

64. That brings me to the examination of the applicability condition of Article 10(2) of Directive 2015/2436 and Article 9(2) of Regulation 2017/1001 which requires a sign to be used in relation to goods or services. It could be questioned whether the use of a sign to disseminate a political message constitutes use 'in relation to goods or services', within the meaning of the provisions of EU trade mark law.

(c) The use of a sign for political purposes

65. In order for a proprietor to object to use under trade mark law, the use must not only be in the course of trade, but also in relation to goods or services.

66. The condition requiring the sign to be used in relation to products or services is expressly laid down in the introductory wording of Article 10(2) of Directive 2015/2436 and of Article 9(2) of Regulation 2017/1001.[44] Given its general nature, that condition also applies to trade marks with a reputation, and the particularity of the protection granted to such trade marks lies in the fact that

[41] See, to that effect, judgment of 9 December 2008, *Verein Radetzky-Orden* (C-442/07, EU:C:2008:696, paragraph 18).

[42] See judgment of 30 April 2020, *A (Infringement by importing ball bearings)* (C-772/18, EU:C:2020:341, paragraph 27).

[43] See order of 19 February 2009, *UDV North America* (C-62/08, EU:C:2009:111, paragraphs 47 to 51), and judgments of 12 July 2011, *L'Oréal and Others* (C-324/09, EU:C:2011:474, paragraph 91), and of 15 December 2011, *Frisdranken Industrie Winters* (C-119/10, EU:C:2011:837, paragraph 32).

[44] Although that condition was not expressly laid down by the acts which preceded Directive 2015/2436 and Regulation 2017/1001 and was introduced, in its current form, by Regulation (EU) 2015/2424, it was also applicable during the currency of those acts. In the latter respect, see, in particular, order of 19 February 2009, *UDV North America* (C-62/08, EU:C:2009:111, paragraph 42).

the proprietor is entitled to prohibit the use of a sign identical with, or similar to, the trade mark even in relation to goods or services completely different from those for which the trade mark is registered. That condition is also apparent from a comparison of the scope of Article 10(2)(c) with that of Article 10(6) of that directive. The scope of those provisions depends on whether the trade mark is used for the purposes of distinguishing the goods or services in question as originating from a particular undertaking, that is to say, as a trade mark as such, or whether it is used for other purposes. [45]

67. Furthermore, as I have stated, [46] a sign is also used 'in the course of trade' when it is used publicly by a non-profit-making association with a view to creating or preserving an outlet for *goods or services* of a third party. Thus, from the point of view of characterising the use of a trade mark by a non-profit-making entity, the two applicability conditions laid down by Article 10(2) of Directive 2015/2436 and Article 9(2) of Regulation 2017/1001 appear to overlap in part.

68. As regards the assessment of whether the use is 'in relation to goods or services', it follows from the case-law referred to in point 63 of this Opinion that the use of a sign identical with, or similar to, a trade mark in relation to goods or services *of a third party* or *of the person on whose behalf that third party is acting* constitutes conduct to which the trade mark proprietor may object, under Article 10(2) of Directive 2015/2436 and Article 9(2) of Regulation 2017/1001. [47]

69. Furthermore, it is apparent from the judgment in *Google France and Google* [48] that the uses, listed in Article 10(3) of Directive 2015/2436 and Article 9(3) of Regulation 2017/1001, to which the proprietor of a trade mark may object, are uses 'in relation to goods or services'. That judgment concerns the acts that preceded that directive and that regulation which, among the uses to which the proprietor may object, mentioned only affixing the sign to the goods or to packaging thereof, offering the goods or services for sale under the sign, importing or exporting under the sign, and using the sign on business papers and in advertising.

70. Under the acts currently in force, the non-exhaustive list of uses of a sign that may be prohibited by the proprietor now also includes, inter alia, use 'as a trade or company name'. At first sight, the addition of that use might suggest that the legislature wished to limit the relevance of the condition requiring the sign to be used 'in relation to goods or services'. However, it is clear from the recitals of those acts [49] that that addition enshrines the Court's case-law holding that, where the use of a company name, trade name or shop name is limited to identifying a company or designating a business which is being carried on, such use cannot be considered as being 'in relation to goods or services'. Conversely, there is use 'in relation to goods or services' where the third party uses that sign in such a way that a link is established between the sign which constitutes the company, trade or shop name of the third party and the goods marketed or the services provided by the third party. [50] A sign is therefore used 'in relation to goods or services' not only where it is directly and obviously used to identify or promote the goods or services of a third party, but also where it is used in a way that is indirectly linked to such products or services.

45 Judgment of 23 February 1999, *BMW* (C-63/97, EU:C:1999:82, paragraph 20).

46 See point 58 of this Opinion.

47 See also, to that effect, judgment of 12 June 2008, *O2 Holdings and O2 (UK)* (C-533/06, EU:C:2008:339, paragraph 34).

48 See judgment of 23 March 2010 (C-236/08 to C-238/08, EU:C:2010:159, paragraphs 61 and 65).

49 See recital 19 of Directive 2015/2436 and recital 13 of Regulation 2017/1001.

50 See, in particular, judgment of 11 September 2007, *Céline* (C-17/06, EU:C:2007:497, paragraphs 22 and 23).

71. I conclude that the use of a sign which is not linked to the products or services of a person other than the proprietor cannot be regarded as use 'in relation to products or services'.[51] Thus, first, where a sign identical with, or similar to, a trade mark is used exclusively in connection with the goods or services of the proprietor of that trade mark, even for the purposes of criticising that proprietor or its goods or services, that use does not take place in circumstances enabling the proprietor to object to it under the provisions of trade mark law. Second, even parodic use of a sign identical with, or similar to, a trade mark constitutes use 'in relation to goods or services' in so far as it is linked to the goods or services of a person other than the proprietor.

72. In the present case, I am of the view that, as IKEA stated at the hearing, there is no link between IKEA's trade mark and the use made of it. Furthermore, it seems clear to me that the signs in question were used not to initiate a debate about IKEA or its products, but in the interests of a political party, in order to promote its political message and distinguish it from that of other Belgian parties.

73. The question thus arises of whether the Vrijheidsfonds used a sign in relation to a product or service.

74. In that regard, it is true that the organisation of political meetings, defined as 'the organisation of a gathering of people for various political purposes or with a view to discussing relevant issues', constitutes a service falling within Class 45 within the meaning of the Nice Agreement listed under heading 450 238, the classes of that agreement describing the goods and services for which trade mark protection may be claimed in the course of trade. More generally, Class 45 includes personal and social services rendered by others to meet the needs of individuals, and heading 450 238 would therefore appear to concern a service relating to the logistics of a political meeting, provided to a person wishing to organise or participate in it. However, in the present case, IKEA's trade marks were not used in relation to a service consisting in the organisation of a press conference, but in relation to the programme of a political party which, at such a conference, was promoted under signs identical with, or similar to, those trade marks.

75. A political programme is not in itself either a product or a service. It is informative in nature, setting out the objectives and plan of action of the entity which drew it up or adopted it. The fact that the sign under which the programme is announced may, in the mind of the public, be associated with that entity does not mean that the sign is used 'in relation to goods or services'.[52]

76. Conversely, where the use of a sign occurs in circumstances establishing a link with the goods or services of that entity, it is properly characterised as use 'in relation to goods or services'. By way of illustration, use in relation to goods might consist in affixing the sign under which a programme is disseminated on objects distributed to supporters of a political party, and use in relation to services might take the form of organising an event under that same sign. In my view, the use of a sign in advertising carried out by or for an entity which distributes such objects or organises such events would also constitute use 'in relation to goods or services'.

[51] Such a situation cannot be equated with that in which an advertiser uses, in comparative advertising intended to promote its goods or services, a sign identical with, or similar to, the trade mark of a competitor, for the purpose of identifying the goods or services offered by that competitor. That situation would be analysed as use in relation to the advertiser's own goods or services. See judgment of 12 June 2008, *O2 Holdings and O2 (UK)* (C-533/06, EU:C:2008:339, paragraphs 35 and 36).

[52] See point 70 of this Opinion.

77. It is for the referring court to ascertain whether the Vrijheidsfonds has used signs identical with, or similar to, the well-known trade marks 'in the course of trade' and 'in relation to goods or services'. If it has, that would mean that Article 10(2)(c) of Directive 2015/2436 and Article 9(2)(c) of Regulation 2017/1001 are, in principle, applicable in the dispute in the main proceedings. On the other hand, if that court comes to the conclusion that the use does not satisfy the general applicability conditions of those provisions, it will have to examine the action in the main proceedings with regard, in particular, to the provision of the Benelux Convention relating to the infringements referred to in Article 10(6) of that directive.

78. It will then be for the referring court to ascertain whether IKEA has demonstrated that the use of its trade marks without its consent by the Vrijheidsfonds tends to dilute or tarnish them or constitutes an act of free riding.

79. In that regard, that court does not ask the Court about the interpretation of Article 10(2)(c) of Directive 2015/2436 and Article 9(2)(c) of Regulation 2017/1001 in so far as those provisions specify the types of injury to which a proprietor of a trade mark with a reputation may object. Furthermore, it is apparent from the order for reference and from its written observations that the Vrijheidsfonds, in order to justify the use of IKEA's trade marks, argues that freedom of expression constitutes 'due cause', which is a matter to be determined after it has been found that one of the types of injury referred to in those provisions has occurred. Since that argument has no bearing on that finding, I will focus my analysis on the interpretation of the concept of 'due cause'.

80. Whatever conclusion is reached by the referring court, an interpretation of the concept of 'due cause' will be of assistance to it in resolving the dispute before it, since that concept is employed in all the provisions referred to above.

3. Whether there is 'due cause'

(a) The scope of the question referred

81. As regards the first part of the question referred, which relates to freedom of expression, IKEA submits that it is worded in a very general way and proposes that it should be reworded to relate only to the situation where a third party uses a trade mark for the sole purpose of using its reputation to reinforce a political message. As to the second part of that question, IKEA considers that it should also be reworded, on the ground that it refers to certain criteria for determining whether there is 'due cause' that are irrelevant, while omitting other, relevant, criteria.

82. In that regard, I would point out that the right to determine the questions to be put to the Court devolves on the national court alone and the parties may not change their tenor. [53]

83. Moreover, while it may be general in nature, the first part of the question referred is not without interest in relation to the answer to be given to the second part. It is not clear whether – and, if so, to what extent – the arguments based on the exercise of freedom of expression should be taken into account in assessing whether there is 'due cause'.

[53] See, to that effect, judgment of 6 October 2015, *T-Mobile Czech Republic and Vodafone Czech Republic* (C-508/14, EU:C:2015:657, paragraph 28).

84. That being so, having regard to the second part of the question referred, in order to provide the referring court with a useful answer, I will focus my analysis on the use of a sign to disseminate and promote a political programme. The referring court is seeking to ascertain the criteria that are relevant in striking the balance – in the context of determining whether there is 'due cause' – between the right to property and freedom of expression and, as I will demonstrate, the fact that that freedom is exercised in a political context is not irrelevant in striking the balance between the fundamental rights at issue.

(b) Trade mark law and freedom of expression

85. By the first part of the question referred, the referring court seeks to ascertain whether recourse to the concept of 'due cause', within the meaning of Article 9(2)(c) of Regulation 2017/1001 and Article 10(2)(c) of Directive 2015/2436, may serve as a mechanism for satisfying the requirements of protection of freedom of expression, as guaranteed by Article 11 of the Charter, in the field of trade mark law.

86. In that regard, the acts of EU law relating to trade marks do not define 'due cause', and that concept must therefore be interpreted in the light of the overall scheme and objectives of the system of which it forms part. [54]

87. The Court has held that that concept is an expression of the general objective of the legal acts concerning trade marks, which is to strike a balance between, on the one hand, the interests of the proprietor of a trade mark in safeguarding the essential function of that mark and, on the other hand, *the interests of a third party in using, in the course of trade, such a sign for the purposes of denoting the goods and services that it markets*. [55] It follows that that concept may not only include objectively overriding reasons but may also relate to the *subjective interests* of a third party. [56]

88. The question is whether the use of a sign for the purpose of reinforcing a political message may constitute 'due cause', and whether freedom of expression provides an adequate analytical basis for determining whether there is 'due cause'.

89. That question pertains to the fact that there is a commercial dimension to both the protection of trade mark rights and the taking into account of a third party's interests as 'due cause'. I would note that, a priori, the legal framework of trade mark law is not the most appropriate for resolving tensions between free political debate and the rights of another person who does not wish to be drawn into the marketplace of ideas. Nonetheless, that is the legal framework that must be applied where the activity of a third party is based on the use of a sign corresponding to a trade mark with a reputation and causes injury to it.

90. In that respect, the rights of the trade mark proprietor are protected by Article 17 of the Charter, paragraph 2 of which expressly refers to intellectual property. Similarly, Article 1 of Protocol No 1 to the ECHR guarantees the right to protection of property, and this protection also applies to intellectual property rights, including trade marks. [57]

[54] See judgment of 6 February 2014, *Leidseplein Beheer and de Vries* (C-65/12, EU:C:2014:49, paragraph 28).

[55] See judgment of 30 May 2018, *Tsujimoto* v *EUIPO* (C-85/16 P and C-86/16 P, EU:C:2018:349, paragraph 90).

[56] See judgment of 6 February 2014, *Leidseplein Beheer and de Vries* (C-65/12, EU:C:2014:49, paragraph 45).

[57] ECtHR, 11 January 2007, *Anheuser-Busch Inc. v. Portugal* (CE:ECHR:2007:0111JUD007304901).

91. In addition, Article 10 ECHR and Article 11 of the Charter guarantee freedom of expression to 'everyone', without making any distinction based on whether or not the aim pursued is remunerative. Those provisions therefore apply not only to certain types of information, ideas or modes of expression of a political nature, but also to information of a commercial nature.[58] Irrespective of whether the sign is used in the context of a political campaign as a trade mark, I see no reason to consider that conduct intended to disseminate and promote a political message cannot benefit from the protection guaranteed by those provisions. Moreover, as regards the ideas and information expressed, Article 11 of the Charter also protects, in addition to their substance, their mode of expression, such that the choice of a certain style or symbolism in political life falls within the scope of that provision.

92. Where several fundamental rights are at issue, it is necessary to weigh them against one another in the light of the requirements laid down in Article 52(1) of the Charter.[59]

93. The search for such a balance is also part of the mechanism for protecting freedom of expression under the ECHR, Article 10(2) of which provides that the exercise of that freedom may be subject to such restrictions as are prescribed by law and are necessary in a democratic society, in particular 'for the protection of the reputation or rights of others'. The ECtHR recognises that, when examining the necessity of an interference in a democratic society in the interests of the 'protection of the reputation or rights of others', it may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by that convention which may come into conflict with each other in certain cases.[60]

94. Thus, in order to meet the requirements of the protection of fundamental rights, EU law must ensure a fair balance between the rights and freedoms at stake. However, trade mark law does not make express provision for the possibility of limiting the rights conferred by a trade mark in the interests of third parties who wish to exercise their freedom of expression.

95. In essence, by describing the conduct of third parties to which a trade mark proprietor may object, Article 10 of Directive 2015/2436 and Article 9 of Regulation 2017/1001 draw the contours of the proprietor's exclusive right, while Article 14 of each of those acts sets out the limitations of the effects of the trade mark.

96. The idea of extending the list of restrictions of the effects of the trade mark by providing for the restriction in favour of certain forms of the exercise of freedom of expression was proposed during the preparatory work on Directive 2015/2436[61] and Regulation 2017/1001,[62] but that proposal was not adopted. Thus, whereas in the field of copyright, Article 5(3)(k) of Directive

[58] See, in particular, ECtHR, 24 February 1994, *Coca v. Spain* (CE:ECHR:1994:0224JUD001545089, § 35).

[59] See, to that effect, judgment of 19 December 2019, *Deutsche Umwelthilfe* (C-752/18, EU:C:2019:1114, paragraph 45). It is not clear whether, in addition to the link between the proprietor and its trade mark, the reputation of a trade mark and its distinctive character are also protected by Article 17(2) of the Charter. However, it follows from Article 10(2) ECHR that, in balancing the interests at stake, freedom of expression must be reconciled with the 'rights of others', which need not necessarily be protected as fundamental rights.

[60] See, in particular, ECtHR, 7 February 2012, *Axel Springer AG v. Germany* (CE:ECHR:2012:0207JUD003995408, §§ 78 to 84).

[61] It is apparent from the legislative resolution of 25 February 2014 that the Parliament, following its first reading, proposed amending Article 14, which is headed 'Limitation of the effects of a trade mark', so as to include, among the exceptions to the exclusive right of the trade mark owner, its use by a third party 'for the purposes of parody, artistic expression, criticism or comment'.

[62] See European Parliament legislative resolution of 25 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on the Community trade mark (COM(2013)161 – C7-0087/2013 – 2013/0088(COD)). That limitation related to the use of the trade mark to designate or refer to goods or services as being those of the trade mark proprietor, in particular where such use 'is made for the purposes of parody, artistic expression, criticism or comment'.

2001/29/EC[63] provides for an exception to the principle of protection of the work on the grounds of caricature, parody or pastiche, as EU law currently stands, the legal framework applicable to trade marks does not contain a similar provision.

97. At the outset, it must be observed that the very fact of delimiting, by means of the general conditions of application of Article 10(2) of Directive 2015/2436 and Article 9(2) of Regulation 2017/1001, the scope of the exclusive right conferred by a trade mark, in particular a trade mark with a reputation, stems from the search for a fair balance between the rights of trade mark proprietors and the rights of others, including freedom of expression. Seen from that perspective, the general conditions providing that the proprietor's monopoly covers only the use of a sign 'in the course of trade' and 'in relation to goods or services' make it possible to exclude from the scope of trade mark law certain uses of a sign in which freedom of expression is at stake. Nevertheless, given the tendency to interpret these conditions in a functional manner,[64] there are many situations where freedom of expression is at stake which fall within that scope.

98. At first sight, it might also seem arguable that considerations relating to the exercise of freedom of expression cannot be invoked to justify the use of trade marks with a reputation because, by granting them enhanced protection strictly limited to the three types of injury concerned, the EU legislature has already struck the balance between the rights of the proprietors of such trade marks and freedom of expression.

99. However, first, it must be observed that that is not the case, since the concept of 'due cause' makes it possible to respond to the subjective interests of third parties on a case-by-case basis, which further strengthens its purpose of protecting fundamental rights.

100. Second, Directive 2015/2436 and Regulation 2017/1001 recognise the need to strike a balance, when they are applied, between the rights conferred by the trade mark and fundamental freedoms, in particular freedom of expression.[65] In the same vein, the Court has expressly rejected the idea that 'there is, in the field of art, culture and literature, a constant concern to preserve freedom of expression which does not exist in the field of trade marks'[66], and held that freedom of expression must be taken into account when applying one of the grounds for refusal to register a trade mark.

101. Third, apart from the concept of 'due cause', EU trade mark law does not possess a mechanism capable of meeting the need to strike a balance between the rights conferred by a trade mark with a reputation and freedom of expression.

102. Article 14(1)(c) of Directive 2015/2436 and of Regulation 2017/1001 include, among the limitations of the effects of a trade mark, a limitation relating to the use of the trade mark, in the course of trade, for the purpose of identifying or referring to goods or services as those of the proprietor of that trade mark. Furthermore, it is apparent from paragraph 2 of those articles that the proprietor may not prohibit such use provided that it is made in accordance with honest practices in industrial or commercial matters.

[63] Directive of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 1).

[64] See points 58 and 70 of this Opinion.

[65] See recital 21 of Regulation 2017/1001 and recital 27 of Directive 2015/2436.

[66] See judgment of 27 February 2020, *Constantin Film Produktion* v *EUIPO* (C-240/18 P, EU:C:2020:118, paragraph 56).

103. It is important to note, in that regard, that, according to academic commentators, certain forms of the exercise of freedom of expression are capable of falling within that limitation.[67] At first sight, given that the arguments relating to the exercise of that freedom can be raised in reliance on that limitation, it is not necessary to permit third parties to raise those same arguments as 'due cause'.

104. In that regard, Article 14(1)(c) of Directive 2015/2436 and of Regulation 2017/1001 concern referential use of the trade mark ('for the purpose of identifying or referring to goods or services as those of the proprietor of that trade mark'), without, however, covering a wider range of other types of conduct consisting in the use of a sign exclusively in connection with goods or services of a third party.

105. As regards such conduct, the absence of a provision limiting the rights conferred by a trade mark in order to ensure respect for freedom of expression does not appear to give rise to any particular doubt in the case of ordinary trade marks whose protection depends, inter alia, on double identity or likelihood of confusion, because those requirements circumscribe the scope of the proprietor's exclusive right and leave sufficient room for manoeuvre to reconcile the conflicting rights. However, those requirements are irrelevant having regard to the enhanced protection afforded to trade marks with a reputation. Accordingly, to reject the interpretation on which arguments based on the exercise of freedom of expression may constitute 'due cause' would be to eliminate any possibility of balancing that freedom against the rights of proprietors of trade marks with a reputation.

106. Thus, in the absence of other provisions allowing the rights conferred by a trade mark with a reputation to be reconciled with freedom of expression where the trade mark is not used to designate the goods or services of its proprietor, recourse to the concept of 'due cause' must serve as a mechanism for satisfying the requirements of protection of the fundamental rights at stake.

107. In that respect, I would observe that the exercise of freedom of expression does not in itself constitute 'due cause'. On the other hand, the same reasons that lead to giving precedence to the protection of that freedom when balancing it against the rights of others may validly be regarded as constituting such cause.

108. I therefore propose that the answer to the first part of the question referred should be that recourse to the concept of 'due cause', within the meaning of Article 9(2)(c) of Regulation 2017/1001 and Article 10(2)(c) of Directive 2015/2436, may serve as a mechanism for satisfying the requirements of protection of freedom of expression, as guaranteed by Article 11 of the Charter, in the field of trade mark law.

109. That consideration brings me to an examination of the criteria for assessing whether there is 'due cause' based on freedom of expression.

[67] See, in particular, Sosnitza, O., in Hildebrandt, U. and Sosnitza, O. (eds.), *EU Trade Mark Regulation: Article-by-Article Commentary*, Munich, 2023, Beck-Hart, p. 316.

(c) The criteria for assessing whether there is 'due cause'

110. By the second part of the question referred, the referring court asks the Court, in essence, about the criteria for determining whether there is 'due cause', within the meaning of Article 9(2)(c) of Regulation 2017/1001 and Article 10(2)(c) of Directive 2015/2436, which could compel the proprietor of a trade mark with a reputation to tolerate unauthorised use made of it by a third party to disseminate and promote a political programme.

111. The eight criteria for assessing whether there is 'due cause' listed in the question referred appear to be given by way of example, since some of them do not correspond to the facts of the dispute in the main proceedings [68] and the question referred is open-ended ('are there additional criteria'). I will therefore concentrate on the criteria which are most relevant and necessary in resolving the dilemma faced by the referring court.

112. First, the case-law of the Court provides useful guidance as to the criteria for assessing the existence of 'due cause'.

113. In the judgment in *Interflora and Interflora British Unit*,[69] the Court held, following an examination of the use of keywords for internet referencing, that where the advertisement displayed on the internet on the basis of a keyword corresponding to a trade mark with a reputation puts forward – without offering a mere imitation of the goods or services of the proprietor of that trade mark, without being detrimental to the repute or the distinctive character of that mark and without, moreover, adversely affecting the functions of the trade mark concerned – an alternative to the goods or services of the proprietor of the trade mark with a reputation, such a use falls, as a rule, *within the ambit of fair competition in the sector for the goods or services concerned* and is thus not without 'due cause'.

114. Following a similar line of thinking, the Court stated, in the judgment in *Leidseplein Beheer and de Vries*, that in order to determine whether the use by a third party, before a trade mark with a reputation was filed, of a sign similar to that mark may constitute 'due cause', it is necessary to take into account, in particular, *the intention of the person using* that sign and to determine whether the sign was used *in good faith*.[70] In that regard, the Court held that it is necessary to determine whether the use of the sign did not constitute an attempt to take advantage of the repute of the mark in question, but rather *a genuine extension of the range of goods and services offered by a third party* who had been using that sign previously.[71]

115. Two conclusions can be drawn from those case-law considerations.

116. In the first place, the intention of a third party to achieve the result which the provisions whose interpretation is sought by the referring court seek to prohibit, namely the use of a sign in order to 'take unfair advantage' of the distinctive character of the trade mark or its repute or to 'be detrimental' to them, cannot constitute 'due cause'. In fact, a finding of one of those forms of injury is a precondition for the applicability of those provisions and cannot therefore enable a

[68] By way of illustration, with regard to the 'own original contribution' criterion, there was no perceptible difference between the signs used by the Vrijheidsfonds and IKEA's trade marks.

[69] Judgment of 22 September 2011 (C-323/09, EU:C:2011:604, paragraph 91).

[70] See judgment of 6 February 2014, *Leidseplein Beheer and de Vries* (C-65/12, EU:C:2014:49, paragraphs 53 to 56 and 60).

[71] See, to that effect, judgment of 6 February 2014, *Leidseplein Beheer and de Vries* (C-65/12, EU:C:2014:49, paragraphs 58 and 59).

third party to avoid the protection they provide. Thus, the use of a sign with the intention of riding in the wake of a trade mark with a reputation cannot, without other valid justification, constitute due cause.

117. In the second place, such a justification may be found to exist, in particular, where the use of a sign is necessary because of objectively overriding considerations or the subjective interests of a third party, including the economic and commercial relevance of that use. The requirement is not one of absolute necessity, however, but of a ground which, when *weighed against the interest of the proprietor* and taking into account *the standards of conduct generally accepted in the sector in which the third party operates*, justifies compelling the proprietor to tolerate the use of a sign identical or similar to its trade mark.

118. Similarly, as I have indicated,[72] the assessment of whether there is 'due cause', which is also based on the exercise of freedom of expression, is a matter of striking a balance between that freedom and the rights of the proprietor of a trade mark with a reputation.

119. According to the case-law of the ECtHR on balancing the right to property against freedom of expression, one especially relevant factor is whether, and to what extent, the expression at issue contributes to a debate of general interest.[73] In its case-law in the field of political speech and debate, the ECtHR also draws attention to the form of the expression and whether it is satirical in nature.[74]

120. In that respect, the question referred mentions, amongst other things, freedom to express political opinions and political parody, which may suggest that the Vrijheidsfonds made use of those forms of expression.

121. It is apparent from the settled case-law of the ECtHR that, whilst there is little scope under Article 10(2) ECHR for restrictions on political speech or matters of general interest, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in commercial matters, it being understood that its width must be viewed in perspective when what is at stake is not only the strictly 'commercial' expression of an individual, but his or her participation in a debate concerning matters of general interest.[75]

122. In that regard, it is true that the political programme disseminated using IKEA's trade marks concerns a highly sensitive subject, namely asylum and immigration policy in one of the Member States, which is of legitimate interest to the public.

123. However, IKEA's action relates not to the content of a political programme, but to the dissemination of that programme under its trade marks. Thus, the assessment that the national court must make in order to determine whether there is 'due cause' in the main proceedings

[72] See point 92 of this Opinion.

[73] See ECtHR, 10 January 2013, *Ashby Donald and Others v. France* (CE:ECHR:2013:0110JUD003676908, §§ 39 to 42), and ECtHR, 19 February 2013, *Neij and Sunde Kolmisoppi v. Sweden* (CE:ECHR:2013:0219DEC004039712). See, to that effect, as regards that case-law, Spielmann, D., 'Copyright and human rights', in Edward, D, Kominos, A. and MacLennan, J., *Ian S. Forrester – A Scot without Borders*, Liber Amicorum, Vol. 1, Concurrences Review, New York, 2015, pp. 264 to 267 and 269.

[74] The classification of a form of expression as parody plays an important role in the caselaw of the ECtHR with regard to the acceptable restrictions on the freedom of expression. According to that court, caricature and parody are forms of artistic expression and social commentary which, by exaggerating and distorting reality, naturally aim to provoke and agitate. Accordingly, any interference with the right of an artist – or anyone else – to use such means of expression should be examined with particular care. See, to that effect, ECtHR, 14 March 2013, *Eon v. France* (CE:ECHR:2013:0314JUD002611810, §§ 58 to 60), and ECtHR, 22 November 2016, *Grebneva and Alisimchik v. Russia* (CE:ECHR:2016:1122JUD000891805, § 64).

[75] See ECtHR, 10 January 2013, *Ashby Donald and Others v. France* (CE:ECHR:2013:0110JUD003676908, § 39).

relates not to the political programme as such, but to the use of a sign corresponding to the reputed trade marks in order to increase the visibility of that programme and of the political party proposing it.

124. Seen from that perspective and subject to the verifications to be carried out by the referring court, the use of IKEA's trade marks was not justified by its contribution to a debate of general interest. The debate on asylum and immigration policy in no way concerns the trade marks at issue, their proprietor or its goods. Furthermore, that debate appears to relate to a subject which, as IKEA submitted at the hearing, is contrary to its political neutrality. In that regard, I would emphasise that it is for a third party seeking to rely on 'due cause' to establish that the expression based on the use of a sign in the field of political speech and debate targets the trade mark, the proprietor or its goods or services, or that the proprietor itself has, by its previous conduct, engaged in the debate of general interest at issue.

125. As regards the competitive relationship between the proprietor of a trade mark with a reputation and the third party that uses a sign identical with, or similar to, that trade mark, which is one of the criteria mentioned by the referring court, I consider that limitations on freedom of expression in the context of debate between the various political actors must be viewed with the utmost caution. Competition between political parties is natural and involves criticism of statements made by opponents. In contrast, it seems to me to be more difficult to grant the same level of protection to the conduct of a political actor seeking to involve a politically neutral entity in a debate in order to reinforce its own message.

126. The reputation of the trade mark in question, which was also mentioned by the referring court, does not provide any basis for calling that consideration into question. It is true that, according to the case-law of the ECtHR, to which the Vrijheidsfonds refers, large undertakings inevitably and knowingly lay themselves open to close scrutiny of their acts and the limits of acceptable criticism are wider in the case of such undertakings. However, first, that case-law concerns the situation where certain comments are directed at a specific large company. Second, the ECtHR also recognises the existence of a competing interest in protecting the commercial success and viability of undertakings, for the benefit of individuals, but also for the wider economic good.[76] The fact that a mark has a reputation, as a result of the commercial efforts made by the proprietor, cannot therefore be used as an argument to weaken the protection accorded to that mark.

127. In those circumstances, any contribution to the debate in the public interest made by the expression based on the use of signs corresponding to reputed trade marks in order to disseminate a political programme which does not concern those trade marks, their proprietor or its goods and services cannot, in view of the interest of that proprietor, outweigh the fact that such use must be understood as an attempt to ride in the wake of a reputed trade mark in order to promote one's own interests. Such a form of expression cannot benefit from the enhanced protection afforded to the exercise of the freedom where it contributes to a debate of general interest and, in the absence of any other valid justification, cannot be considered to be use for due cause.

[76] See ECtHR, 15 February 2005, *Steel and Morris v. the United Kingdom* (CE:ECHR:2005:0215JUD006841601, § 94).

128. Finally, to return to the concept of 'political parody' and the relevance of the potentially satirical nature of the use of a sign, I would point out that that concept is descriptive in nature and has no legal meaning of its own. The concept of 'political parody' seems to relate to use of a sign which is both in the form of parody and in the context of a political debate.

129. In that regard, in the first place, it is clear from the case-law of the ECtHR concerning freedom of expression[77] and that of the Court concerning copyright[78] that parody has two essential characteristics: first, it evokes an existing work, while having appreciable differences from that work, and second, it is humorous or mocking. It will therefore be for the referring court to ascertain whether the signs used by the Vrijheidsfonds are perceptibly different from IKEA's trade marks and whether their humorous nature is due to the efforts of that association or the context in which it placed them, or whether the Vrijheidsfonds was expressing a satirical opinion about that company or its goods.

130. In the second place, it should be borne in mind that, with regard to the competing rights at stake, even comments that contribute to a debate of public interest must comply with the requirement of fair moderation. However, the parodic nature of such comments may justify exaggeration or distortion of reality. From that point of view, the criterion relating to the potentially satirical use of a sign is subsidiary to the criterion relating to contribution to a debate of public interest; the parodic form of an expression based on the use of a sign which contributes to such a debate may justify a certain immoderation in that expression.

131. For the sake of completeness, I would observe that the other criteria mentioned by the referring court, namely the extent of use of the sign and the extent to which it is detrimental, relate not to whether there is 'due cause', but to whether the trade mark has been infringed, and are therefore taken into account at earlier stages of the analysis.

132. In the light of the foregoing, I propose that the answer to the second part of the question referred should be that the proprietor of a trade mark with a reputation cannot be compelled, by virtue of 'due cause', to tolerate, in the absence of another valid justification, the use by a third party of a sign identical with, or similar to, its trade mark, where the potential contribution of the mark to the debate of public interest does not outweigh the fact that that use must be understood as an attempt to ride in the wake of a trade mark with a reputation in order to disseminate and promote a political programme. That is the case where the programme does not raise issues relating to that mark, its proprietor or the proprietor's goods or services.

V. Conclusion

133. In the light of all the foregoing considerations, I propose that the Court of Justice answer the question referred by the Nederlandstalige Ondernemingsrechtbank Brussel (Brussels Business Court (Dutch-speaking), Belgium) for a preliminary ruling as follows:

Recourse to the concept of 'due cause', within the meaning of Article 10(2)(c) 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 and of Article 9(2)(c) of

[77] By way of illustration, in its judgment of 3 December 2024, *Yevstifeyev v. Russia*, (CE:ECHR:2024:1203JUD000022618, §§ 55 and 56), the ECtHR characterised as 'parody' a form of expression which echoed important compositional elements of a video and mocked the message of that video by means of satire.

[78] See judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds* (C-201/13, EU:C:2014:2132, paragraph 20).

Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, may serve as a mechanism for satisfying the requirements of protection of freedom of expression, as guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union, in the field of trade mark law.

The proprietor of a trade mark with a reputation cannot be compelled, by virtue of 'due cause', to tolerate, in the absence of another valid justification, the use by a third party of a sign identical with, or similar to, its trade mark, where the potential contribution of the mark to the debate of public interest does not outweigh the fact that that use must be understood as an attempt to ride in the wake of a trade mark with a reputation in order to disseminate and promote a political programme. That is the case where the programme does not raise issues relating to that mark, its proprietor or the proprietor's goods or services.