JUDGMENT OF THE COURT (Second Chamber)

19 December 2012 (*)

(Community trade mark – Regulation (EC) No 207/2009 – Article 15(1) – 'Genuine use of the trade mark' – Territorial scope of use – Use of the Community trade mark in a single Member State – Whether sufficient)

In Case C-149/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Gerechtshof te 's-Gravenhage (Netherlands), made by decision of 1 February 2011, received at the Court on 28 March 2011, in the proceedings

Leno Merken BV

v

Hagelkruis Beheer BV,

THE COURT (Second Chamber),

composed of A. Rosas, acting as President of the Second Chamber, U. Lõhmus (Rapporteur), A. Ó Caoimh, A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 April 2012,

after considering the observations submitted on behalf of:

– Leno Merken BV, by D.M. Wille, advocaat,

– Hagelkruis Beheer BV, by J. Spoor, advocaat,

– the Netherlands Government, by C. Wissels and C. Schillemans, acting as Agents,

– the Belgian Government, by J.-C. Halleux, acting as Agent,

– the Danish Government, by C.H. Vang, acting as Agent,

– the German Government, by K. Petersen, acting as Agent,

– the French Government, by J. Gstalter, acting as Agent,

– the Hungarian Government, by M. Ficsor, K. Szíjjártó and K. Molnár, acting as Agents,

– the United Kingdom Government, by S. Ossowski, acting as Agent,

– the European Commission, by T. van Rijn, F.W. Bulst and F. Wilman, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 July 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 15(1) of Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

2 The reference has been made in proceedings between Leno Merken BV ('Leno') and Hagelkruis Beheer BV ('Hagelkruis') concerning the opposition filed by Leno, the proprietor of the Community trade mark ONEL, against registration by Hagelkruis of the Benelux trade mark OMEL.

Legal context

Regulation No 207/2009

3 Recitals 2 to 4, 6 and 10 in the preamble to Regulation No 207/2009 state:

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

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

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

...

(6) The Community law relating to trade marks nevertheless does not replace the laws of the

Member States on trade marks. It would not in fact appear to be justified to require undertakings to apply for registration of their trade marks as Community trade marks. National trade marks continue to be necessary for those undertakings which do not want protection of their trade marks at Community level.

...

(10) There is no justification for protecting Community trade marks or, as against them, any trade mark which has been registered before them, except where the trade marks are actually used.'

4 Article 1(2) of Regulation No 207/2009 provides:

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

5 Article 15 of that regulation, entitled 'Use of Community trade marks', provides:

'1. If, within a period of five years following registration, the proprietor has not put the Community trade mark to genuine use in the Community in connection with the goods or services in respect of which it is registered, or if such use has been suspended during an uninterrupted period of five years, the Community trade mark shall be subject to the sanctions provided for in this Regulation, unless there are proper reasons for non-use.

The following shall also constitute use within the meaning of the first subparagraph:

(a) use of the Community trade mark in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered;

(b) affixing of the Community trade mark to goods or to the packaging thereof in the Community solely for export purposes.

2. Use of the Community trade mark with the consent of the proprietor shall be deemed to constitute use by the proprietor.'

6 Article 42 of Regulation No 207/2009, entitled 'Examination of opposition', provides, in paragraphs 2 and 3:

'2. If the applicant so requests, the proprietor of an earlier Community trade mark who has given notice of opposition shall furnish proof that, during the period of five years preceding the date of publication of the Community trade mark application, the earlier Community trade mark has been put to genuine use in the Community in connection with the goods or services in respect of which it is registered and which he cites as justification for his opposition, or that there are proper reasons for non-use, provided the earlier Community trade mark has at that date been registered for not less than five years. In the absence of proof to this effect, the opposition shall be rejected. ...

3. Paragraph 2 shall apply to earlier national trade marks referred to in Article 8(2)(a), by

substituting use in the Member State in which the earlier national trade mark is protected for use in the Community.'

7 Article 51 of Regulation No 207/2009, entitled 'Grounds for revocation', provides, in paragraph 1(a):

'The rights of the proprietor of the Community trade mark shall be declared to be revoked on application to the Office [for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)] or on the basis of a counterclaim in infringement proceedings:

(a) if, within a continuous period of five years, the trade mark has not been put to genuine use in the Community in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use; ...'.

8 Under Article 112 of the regulation:

'1. The applicant for or proprietor of a Community trade mark may request the conversion of his Community trade mark application or Community trade mark into a national trade mark application:

(a) to the extent that the Community trade mark application is refused, withdrawn, or deemed to be withdrawn;

(b) to the extent that the Community trade mark ceases to have effect.

2. Conversion shall not take place:

(a) where the rights of the proprietor of the Community trade mark have been revoked on the grounds of non-use, unless in the Member State for which conversion is requested the Community trade mark has been put to use which would be considered to be genuine use under the laws of that Member State;

...'

Directive 2008/95/EC

9 Recital 2 in the preamble to 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) states:

'The trade mark laws applicable in the Member States before the entry into force of [First Council] Directive 89/104/EEC [of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1)] contained disparities which may have impeded the free movement of goods and freedom to provide services and may have distorted competition within the common market. It was therefore necessary to approximate the laws of the Member States in order to ensure the proper functioning of the internal market.'

10 Article 10(1) of Directive 2008/95 provides:

'If, within a period of five years following the date of the completion of the registration procedure, the proprietor has not put the trade mark to genuine use in the Member State in connection with the goods or services in respect of which it is registered, or if such use has been suspended during an uninterrupted period of five years, the trade mark shall be subject to the sanctions provided for in this Directive, unless there are proper reasons for non-use.

...'

The Benelux Convention on Intellectual Property

11 The Benelux Convention on Intellectual Property (Trade Marks and Designs), signed in the Hague on 25 February 2005, in the amended version in force since 1 February 2007 ('the BCIP'), is intended, among other things, to assemble in a systematic and transparent fashion in a single text, uniform laws implementing First Directive 89/104, which has been repealed and replaced by Directive 2008/95.

12 Article 2.3 of the BCIP provides:

'In determining the order of priority for filings, account shall be taken of rights, existing at the time of filing and maintained at the time of the litigation, in:

(a) identical trade marks filed for identical goods or services;

(b) identical or similar trade marks filed for identical or similar goods or services, where there exists a likelihood of confusion on the part of the public that includes the risk of association with the earlier trademark;

…'.

13 Paragraph 1 of Article 2.14 of the BCIP provides:

'1. The applicant for or the proprietor of an earlier trade mark may, within a period of two months starting with the first day of the month following publication of the filing, submit a written notice of opposition to the Office in respect of a trade mark which:

(a) in the order of priority, ranks after its own trade mark, in accordance with Article 2.3(a) and (b), or

…'.

14 Under Article 2.45 of the BCIP, 'Article 2.3 and Article 2.28.3(a) shall apply where the registration is based on a prior filing of a Community trade mark'.

15 Article 2.46 of the BCIP provides:

'Article 2.3 and Article 2.28.3(a) shall apply to Community trade marks for which seniority on the Benelux territory is validly claimed in accordance with the Regulation on the Community trade mark even if the Benelux or international trade mark on which seniority is based has been voluntarily cancelled or has expired'.

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

16 On 27 July 2009, Hagelkruis filed an application at the Benelux Office for Intellectual Property (Trade Marks and Designs) ('BOIP') for registration of the word mark OMEL in respect of services in Classes 35 (advertising and publicity; business administration; office functions; business management; marketing), 41 (education, courses and training sessions; organisation of seminars and trade shows) and 45 (legal services) of the Nice Agreement of 15 June 1957 concerning the International

Classification of Goods and Services for the Purposes of the Registration of Marks, as revised and amended.

17 Leno is the proprietor of the Community word mark ONEL, which was filed on 19 March 2002 and was registered on 2 October 2003, for services in Classes 35, 41 and 42 of the Nice Agreement.

18 On 18 August 2009, Leno filed an opposition against Hagelkruis's application for registration of the trade mark OMEL, relying on the provisions of Article 2.14.1 in conjunction with those of Article 2.3(a) or (b) of the BCIP. Hagelkruis responded to the opposition asking Leno to provide proof of use of the Community trade mark.

19 By decision of 15 January 2010, the BOIP rejected the opposition on the ground that Leno had not shown that it had put its ONEL trade mark to genuine use during the period of five years preceding the date of publication of the disputed trade mark application. Leno appealed that decision before the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague).

20 According to the referring court, it is common ground between the parties (i) that the two trade marks are similar (ii) that they are registered for identical or similar services and (iii) that OMEL is liable to give rise to a likelihood of confusion on the part of the public as referred to in Article 2.3(b) of the BCIP. They disagree, however, on the interpretation of the notion of 'genuine use', as referred to in Article 15 of Regulation No 207/2009, and, in particular, on the extent of the territorial area that is required for genuine use.

21 It follows from the explanations provided by the referring court that, although Leno has shown that it put the earlier trade mark ONEL to genuine use in the Netherlands throughout the relevant period, it has not produced proof that that mark has been used in the rest of the Community.

22 The referring court observes that it follows from the Court's case-law (see the judgments in Case C-40/01 *Ansul* [2003] ECR I-2439, paragraph 43, and Case C-416/04 P *Sunrider* v *OHIM* [2006] ECR I-4237, paragraphs 66, 70 to 73 and 76, and the order in Case C-259/02 *La Mer Technology* [2004] ECR I-1159, paragraph 27) that 'genuine use' is a concept which has its own independent meaning in European Union law, that the territorial extent of the use is just one of the factors to be taken into account in assessing whether or not an earlier trade mark has been put to 'genuine use' for the goods or services for which it has been registered and that use of the trade mark in a single Member State does not necessarily mean that 'genuine use' in the Community is out of the question.

23 The referring court is unsure, however, of the importance of Joint Statement No 10 regarding Article 15 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994, L 11, p. 1), entered in the minutes of the meeting of the Council of the European Union at which Regulation No 40/94 was adopted (published in the Official Journal of OHIM, 1996, p. 613; the 'Joint Statement'), according to which '[t]he Council and the Commission consider that use which is genuine within the meaning of Article 15 in one country constitutes genuine use in the Community'.

24 In those circumstances, the Gerechtshof te 's-Gravenhage decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Article 15(1) of [Regulation No 207/2009] be interpreted as meaning that use of a Community trade mark within the borders of a single Member State is sufficient to constitute genuine use of that trade mark, given that, had it been a national trade mark, such use would have been regarded as genuine use in that Member State (see Joint Statement No 10 regarding

Article 15 of [Regulation No 40/94] and the Opposition Guidelines of the OHIM)?

2. If Question 1 is answered in the negative, can the use of a Community trade mark within a single Member State as described above never be regarded as "genuine use" in the Community as referred to in Article 15(1) of [Regulation No 207/2009]?

3. If the use of a Community trade mark within a single Member State can never be regarded as genuine use in the Community, what requirements apply – in addition to the other factors – in respect of the territorial scope of the use of a Community trade mark when assessing genuine use in the Community?

4. Or else – as an alternative to the above – must Article 15 of [Regulation No 207/2009] be interpreted as meaning that the assessment of genuine use in the Community should be carried out wholly in the abstract, without reference to the borders of the territory of the individual Member States (and that, for example, market share (product markets/geographic markets) should be taken as the point of reference)?'

Consideration of the questions referred

25 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 15(1) of Regulation No 207/2009 must be interpreted as meaning that the genuine use of a Community trade mark in a single Member State is sufficient to satisfy the requirement for 'genuine use in the Community' within the meaning of that provision or whether the territorial borders of the Member States should be disregarded in the assessment of that requirement.

26 As a preliminary point, it should be borne in mind that the protection of trade marks is characterised, within the European Union, by the coexistence of several systems of protection. First, according to recital 2 in the preamble thereto, the purpose of Directive 2008/95 is to approximate national trade mark laws in order to remove any existing disparities which may impede the free movement of goods and the freedom to provide services and which may distort competition within the common market (see, to that effect, Case C-190/10 *GENESIS* [2012] ECR I-0000, paragraphs 30 and 31).

27 Second, as is apparent from recital 3 in the preamble to Regulation No 207/2009, the objective of that regulation is the creation of a Community regime for trade marks to which uniform protection is given and which produce their effects throughout the entire area of the European Union (see, to that effect, Case C-235/09 *DHL Express France* [2011] ECR I-0000, paragraph 41, and *GENESIS*, paragraph 35).

28 The Court has already – in the judgments in *Ansul* and *Sunrider* v *OHIM* and the order in *La Mer Technology* – interpreted the concept of 'genuine use' in the context of the assessment of whether national trade marks had been put to genuine use, considering it to be an autonomous concept of European Union law which must be given a uniform interpretation.

29 It follows from that line of authority that there is 'genuine use' of a trade mark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark. When assessing whether use of the trade mark is genuine, 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, particularly the usages regarded as warranted in the economic sector concerned as a

means of maintaining or creating market share for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark (see *Ansul*, paragraph 43, *Sunrider* v *OHIM*, paragraph 70, and the order in *La Mer Technology*, paragraph 27).

30 The Court has also stated that the territorial scope of the use is only one of several factors to be taken into account in the determination of whether that use is genuine or not (see *Sunrider* v *OHIM*, paragraph 76).

31 That interpretation may be applied by analogy to Community trade marks since, in requiring that the trade mark be put to genuine use, Directive 2008/95 and Regulation No 207/2009 pursue the same objective.

32 Indeed, it follows both from recital 9 to the directive and from recital 10 to the regulation that the European Union legislature intended to make the preservation of the rights connected to the trade mark conditional upon it actually being used. As the Advocate General has pointed out in points 30 and 32 of her Opinion, a Community trade mark which is not used could obstruct competition by limiting the range of signs which can be registered as trade marks by others and by denying competitors the opportunity to use that trade mark or a similar one when putting onto the internal market goods or services which are identical or similar to those covered by the mark in question. Consequently, non-use of a Community trade mark also risks restricting the free movement of goods and services.

33 Account must none the less be taken, when applying by analogy to Community trade marks the case-law cited in paragraph 29 of this judgment, of the difference between the territorial extent of the protection conferred on national trade marks and that of the protection afforded Community marks, a difference which is in any event apparent from the wording of the provisions relating to the requirement for genuine use which apply to those two types of marks respectively.

34 Thus, on the one hand, Article 15(1) of Regulation No 207/2009 provides that, '[i]f, within a period of five years following registration, the proprietor has not put the Community trade mark to genuine use in the Community in connection with the goods or services in respect of which it is registered, or if such use has been suspended during an uninterrupted period of five years, the Community trade mark shall be subject to the sanctions provided for in this Regulation, unless there are proper reasons for non-use'. On the other, Article 10 of Directive 2008/95 lays down in essence the same rule in respect of national trade marks, whilst providing that they must have been put to genuine use 'in the Member State'.

35 That difference between the two sets of trade mark rules as regards the territorial scope of 'genuine use' is also emphasised by Article 42(3) of Regulation No 207/2009. That provides that the rule set out in paragraph 2 of Article 42 – namely that where notice of opposition has been given, the applicant for a Community trade mark may require proof that the earlier Community trade mark has been put to genuine use in the Community – is also applicable to earlier national trade marks 'by substituting use in the Member State in which the earlier national trade mark is protected for use in the Community'.

36 It should, however, be observed that, as is apparent from the case-law referred to in paragraph 30 of this judgment, the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase 'in the Community' is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use.

37 It is therefore necessary, in order to reply to the questions raised, to ascertain what is encompassed by the phrase 'genuine use in the Community' for the purposes of Article 15(1) of Regulation No 207/2009.

38 There is no reference in the text of Article 15(1) to the territories of the Member States. However, it is clear from the provision that the Community trade mark must be used in the Community, which means, in other words, that use of the mark in third States cannot be taken into account.

39 In the absence of further specification in Article 15(1) of Regulation No 207/2009, account should be taken of the context of that provision, of the scheme laid down by the legislation in question and of the objectives which that legislation pursues.

40 As regards the objectives pursued by Regulation No 207/2009, if recitals 2, 4 and 6 thereto are read together, it is apparent that the regulation seeks to remove the barrier of territoriality of the rights conferred on proprietors of trade marks by the laws of the Member States by enabling undertakings to adapt their activities to the scale of the Community and carry them out without restriction. The Community trade mark thus enables its proprietor to distinguish his goods and services by identical means throughout the entire Community, regardless of frontiers. On the other hand, undertakings which do not wish to protect their trade marks at Community level may choose to use national trade marks and are not obliged to apply for registration of their marks as Community marks.

41 In order to achieve those objectives, the European Union legislature provided, in Article 1(2) of Regulation No 207/2009 read together with recital 3 thereto, for the Community trade mark to have a unitary character, which results in it enjoying uniform protection and having equal effect throughout the entire area of the Community. It may not, in principle, be registered, transferred or surrendered or be the subject of a decision revoking the rights of its proprietor or declaring it invalid, nor may its use be prohibited, save in respect of the whole Community.

42 The purpose of the system of Community trade marks is thus – as can be seen from recital 2 to Regulation No 207/2009 – to offer on the internal market conditions which are similar to those obtaining in a national market. In that context, if it were held that particular significance should be given, in the framework of the Community arrangements for trade marks, to the territories of the Member States, that would frustrate the objectives described in paragraph 40 of this judgment and would be detrimental to the unitary character of the Community trade mark.

43 Admittedly, a systematic examination of Regulation No 207/2009 reveals that reference is made in the wording of certain of its provisions to the territory of one or more Member States. It should be noted, however, that such references are made particularly in relation to national trade marks, in the provisions relating to jurisdiction and procedure in legal actions relating to Community trade marks and in the rules dealing with international registration, whilst the phrase 'in the Community' is generally used in connection with the rights conferred by the Community trade mark.

44 It follows from the foregoing considerations that the territorial borders of the Member States should be disregarded in the assessment of 'genuine use in the Community' within the meaning of Article 15(1) of Regulation No 207/2009.

45 That interpretation is not undermined by either the Joint Statement referred to in paragraph 23 of this judgment, according to which 'use which is genuine within the meaning of Article 15 in one country constitutes genuine use in the Community', or the Opposition Guidelines of OHIM which contain in essence the same rule.

46 First, regarding the Joint Statement, it is settled case-law that, where a statement recorded in Council minutes is not referred to in the wording of a provision of secondary legislation, it cannot be used for the purpose of interpreting that provision (Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18; Case C-104/01 *Libertel* [2003] ECR I-3793, paragraph 25; Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 42, and Case C-356/05 *Farrell* [2007] ECR I-3067, paragraph 31).

47 Moreover, the Council and the Commission expressly acknowledged that limitation in the preamble to that Statement, according to which 'since [t]he following statements of the Council and the Commission are not part of the legal text, they are without prejudice to the interpretation of that text by the Court.'

48 Second, it is to be noted that the OHIM Guidelines are not binding legal acts for the purpose of interpreting provisions of European Union law.

49 Nor can the Court accept the submission, made by some of the interested persons to have lodged observations in these proceedings, that the territorial scope of the use of a Community trade mark cannot under any circumstances be limited to the territory of a single Member State. That submission is based on Article 112(2)(a) of Regulation No 207/2009 pursuant to which it is possible, where the rights of the proprietor have been revoked on grounds of non-use, to convert a Community trade mark into a national trade mark application if, 'in the Member State for which conversion is requested, the Community trade mark has been put to use which would be considered to be genuine use under the laws of that Member State'.

50 Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the territory of a single Member State in order for the use to be regarded as 'genuine use', it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the territory of a single Member State. In such a case, use of the Community trade mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national trade mark.

51 As the Advocate General has observed in point 63 of her Opinion, it is only where a national court finds that, when account is taken of all the facts of the case, use in a Member State was insufficient to constitute genuine use in the Community, that it may still be possible to convert the Community trade mark into a national trade mark, applying the exception in Article 112(2)(a) of Regulation No 207/2009.

52 Some of the interested persons to have submitted observations to the Court also maintain that, even if the borders of the Member States within the internal market are disregarded, the condition of genuine use of a Community trade mark requires that the trade mark should be used in a substantial part of the Community, which may correspond to the territory of a Member State. They argue that such a condition follows, by analogy, from Case C-375/97 *General Motors* [1999] ECR I-5421, paragraph 28, Case C-328/06 *Nieto Nuño* [2007] ECR I-10093, paragraph 17, and Case C-301/07 *PAGO International* [2009] ECR I-9429, paragraph 27).

53 That argument cannot be accepted. First, the cases in question concern the interpretation of provisions relating to the extended protection conferred on trade marks that have a reputation or are well known in the Community or in the Member State in which they have been registered. However, the requirement for genuine use, which could result in an opposition being rejected or even in the trade mark being revoked, as provided for in particular in Article 51 of Regulation No 207/2009, pursues a different objective from those provisions.

54 Second, whilst it is reasonable to expect that a Community trade mark should be used in a larger area than a national mark, it is not necessary that the mark should be used in an extensive geographic area for the use to be deemed genuine, since such a qualification will depend on the characteristics of the product or service concerned on the corresponding market (see, by analogy, with regard to the scale of the use, *Ansul*, paragraph 39).

55 Since the assessment of whether the use of the trade mark is genuine is carried out by reference to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered, it is impossible to determine a priori, and in the abstract, what territorial scope should be chosen in order to determine whether the use of the mark is genuine or not. A *de minimis* rule, which would not allow the national court to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, by analogy, the order in *La Mer Technology*, paragraphs 25 and 27, and the judgment in *Sunrider* v *OHIM*, paragraphs 72 and 77).

56 With regard to the use of the Community trade mark at issue in the main proceedings, the Court does not have the factual information necessary to enable it to provide the referring court with more specific guidance as to whether or not there is genuine use of that trade mark. As can be seen from the foregoing considerations, it is for the referring court to assess whether the mark in question is used in accordance with its essential function and for the purpose of creating or maintaining market share for the goods or services protected. That assessment must have regard to all the facts and circumstances relevant to the main proceedings, including the characteristics of the market concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity.

57 The answer to the questions referred is therefore that Article 15(1) of Regulation No 207/2009 must be interpreted as meaning that the territorial borders of the Member States should be disregarded in the assessment of whether a trade mark has been put to 'genuine use in the Community' within the meaning of that provision.

58 A Community trade mark is put to 'genuine use' within the meaning of Article 15(1) of Regulation No 207/2009 when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the Community for the goods or services covered by it. It is for the referring court to assess whether the conditions are met in the main proceedings, taking account of all the relevant facts and circumstances, including the characteristics of the market concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Second Chamber) hereby rules:

Article 15(1) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark must be interpreted as meaning that the territorial borders of the Member States should be disregarded in the assessment of whether a trade mark has been put to 'genuine use in the

Community' within the meaning of that provision.

A Community trade mark is put to 'genuine use' within the meaning of Article 15(1) of Regulation No 207/2009 when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the European Community for the goods or services covered by it. It is for the referring court to assess whether the conditions are met in the main proceedings, taking account of all the relevant facts and circumstances, including the characteristics of the market concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity.

[Signatures]

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* Language of the case: Dutch.