

**Case C-148/21****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

8 March 2021

**Referring court:**

Tribunal d'arrondissement (Luxembourg)

**Date of the decision to refer:**

5 March 2021

**Applicant:**

Mr Christian Louboutin

**Defendants:**

Amazon Europe Core Sàrl

Amazon EU Sàrl

Amazon Services Europe Sàrl

**I. Subject matter and facts of the main proceedings:**

- 1 Mr Christian Louboutin is the proprietor of the position mark known as the 'red sole', represented and described as follows in the registration documents for goods in Class 25 'high-heeled shoes (other than orthopaedic footwear)', namely EU trade mark registration No 8845539 and Benelux trade mark registration No 0874489:



‘The mark consists of the colour red (Pantone 18-1663TP) applied to the sole of a shoe as shown (the contour of the shoe is not part of the trade mark but is intended to show the positioning of the mark)’.

- 2 The Amazon group offers online sales of various goods and services, both directly on its own behalf and indirectly for third-party sellers.
- 3 Amazon regularly displays on its websites advertisements for red-soled shoes put on the market without Mr Christian Louboutin’s consent.
- 4 On 1 March 2019, Mr Christian Louboutin brought proceedings on the basis of his Benelux trade mark before the President of the tribunal de l’entreprise francophone de Bruxelles (Brussels Companies Court (French-speaking)), Belgium, seeking injunctory relief against Amazon Europe core, Amazon eu and Amazon services Europe.
- 5 By judgment of 7 August 2019, the President of that court held that the use made of the trade mark in all the advertisements complained of was attributable to the parties against which the proceedings had been brought and prohibited its use subject to a financial penalty.
- 6 By judgment of 25 June 2020, the cour d’appel de Bruxelles (Court of Appeal, Brussels) set aside the judgment in part and decided, in particular, that only the advertisements relating to shoes sold by Amazon could be the subject of prohibitory measures, as the use of the other advertisements could be attributed only to the third-party sellers.
- 7 Mr Christian Louboutin appealed on a point of law against that judgment.
- 8 On 19 September 2019, Mr Christian Louboutin brought proceedings before the tribunal d’arrondissement de Luxembourg, (District Court, Luxembourg), on the basis of his EU trade mark, against Amazon Europe core, Amazon eu and Amazon services Europe (also ‘Amazon’), which, in various capacities, operate the websites amazon.fr, amazon.de, amazon.es, amazon.it and amazon.co.uk aimed more specifically at consumers in the European Union, seeking an injunction against their use of his trade mark and damages for the harm caused by its use.

## **II. European Union law:**

*Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark*

- 9 Article 9 provides, in the passages of interest in the present case:

‘Rights conferred by an EU trade mark

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;

...

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/EC.

...'

### **III. Positions of the parties:**

#### ***Mr Christian Louboutin***

- 10 The applicant bases his action for an injunction and for damages on Article 9(2)(a) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European trade mark, complaining of Amazon's use, without his consent, of an identical sign (the red sole) for identical goods in the course of trade.
- 11 In this instance, the alleged use by Amazon consists in (i) the publication on its online stores of advertisements relating to goods bearing a sign that infringes the applicant's trade mark and (ii) stocking, shipment and delivery of those goods.

- 12 He maintains that that use is indeed attributable to Amazon, in that Amazon plays an active role in the actions complained of and in that the advertisements relating to the infringing goods form part of its own commercial communication. Amazon does not merely provide a neutral service, creating the technical conditions necessary for others to commit the act constituting use. Its commercial communication is essentially constructed on its capacity as distributor of the goods offered for sale on its sites. All the goods offered on line by Amazon appear in a separate post which, like a normal advertisement issued by a distributor, is characterised by the dominant presence of the trade mark of the distributor Amazon. All the advertisements are displayed uniformly, which proves the active role played by Amazon. The fact that certain goods are sold by third parties is not made clear on its websites.
- 13 Amazon cannot therefore be characterised as a mere neutral host or intermediary, since it assists third-party sellers, in particular by optimising the presentation of their offers.
- 14 Furthermore, Amazon's use of identical signs also lies in the shipping of the infringing shoes to final consumers, owing to its active role and to the fact that it is or should be aware of the nature of the goods shipped from its distribution centres.

*Amazon*

- 15 First of all, Amazon raises two pleas of inadmissibility, claiming that the writ is void (obscure wording) and that the applicant lacks *locus standi* and has no interest in bringing the proceedings. In addition, by way of counterclaim, it seeks a declaration that the trade mark relied on is void.
- 16 Amazon then maintains, in essence, that as an online marketplace operator it cannot be liable for the uses made by sellers who use its platform.
- 17 The operating method of Amazon's marketplace, which is made available to third-party sellers, is not significantly different from that of other marketplaces. The inclusion of Amazon's logo in third-party sellers' advertisements on Amazon's websites does not mean that Amazon adopts those advertisements; furthermore, the other platforms also employ that technique, which allows the origin of the operational services to be indicated.
- 18 Consumers navigating on Amazon's websites are perfectly capable of not systematically assimilating third-party sellers' goods and trade marks with those of the marketplace operators. In Amazon's submission, it is not correct to assert that the public would not see Amazon's websites as market places but exclusively as a distributor's platforms.
- 19 It is wrong to claim, moreover, that the ancillary services offered by Amazon would justify third-party sellers' offers being assimilated with Amazon's

advertising. Thus, eBay, whose status as a pure marketplace is not questioned by anyone, also provides purchasers with a specific guarantee.

- 20 The fact that offers are presented on Amazon's websites in different categories to ensure a logical display is dictated by the large number of offers published and is not such as to incorporate them in Amazon's commercial communication.
- 21 Amazon further maintains that the fact that its different entities ship, on behalf of others, goods bearing a trade mark does not constitute use of the mark. It asserts that it has not been established that it was or ought to have been aware of the infringing nature of certain third-party goods stocked and shipped by it. The Court of Justice and numerous national courts have confirmed that a supplier of services consisting in the stocking and shipping of goods does not assume any liability for any infringement of a trade mark by those goods.
- 22 The fact that it creates the technical conditions necessary for the use of a sign and is remunerated for that service does not mean that the provider of that service itself makes use of that sign.
- 23 The warehousekeeper can be deemed to have the intention of putting the goods which it stocks on the market only when it stocks the goods for the purpose of reselling them in its own name for its own financial advantage or when it is no longer able to determine the identity of the third party and itself decides to sell the goods of unknown origin. The same applies to shipping services, as the case-law consistently rejects the liability of the shipper in that respect.
- 24 Amazon maintains, last, that the analysis of the attributability of the use of a trade mark by an online marketplace operator must be carried out independently of the analysis of any active role played by that operator, as the concept of 'active role' relates to the liability of hosts under the legislation covering e-business.
- 25 An advertisement remains attributable to the advertiser and not to the website operator so long as it is displayed on the website in accordance with the advertiser's instructions.

#### **IV. Findings of the court:**

- 26 The court rejects, first of all, the pleas of inadmissibility and the counterclaim seeking a declaration that the mark is void.
- 27 It then frames the dispute by stating that the claim is based solely on Article 9(2)(a) of Regulation 2017/1001, which refers to the use without the consent of the proprietor of the mark of a sign identical with the mark.
- 28 Mr Christian Louboutin asserts that, first, the inclusion on Amazon's websites of advertisements for infringing goods, even when they are offered for sale by third

parties, and, second, the shipment of those goods constitute uses covered by Article 9(2)(a) of Regulation 2017/1001. Amazon contests those assertions.

- 29 Before examining the uses complained of, the court notes that the functions carried out by the three defendants in the Amazon group differ.
- 30 Amazon EU, whose activity consists in the retail sale of Amazon's own goods, in its name and on its behalf, is not involved in third-party sales and it is therefore not clear how that entity may be regarded as making use of the signs advertised on Amazon's websites by third-party sellers. It might however be considered to be using signs that infringe the trade mark if offers for sale are made in its own name.
- 31 It is not clear how Amazon Europe core, which is responsible for the technical functioning of Amazon's websites, might be considered to make use of the signs complained of. The fact nonetheless remains that because it makes the technical support for the operation of the websites available to the other entities in the Amazon group its liability cannot be precluded outright.
- 32 Amazon Services Europe is responsible for the 'Sell on Amazon' service, which allows third-party sellers to have access to Amazon's online market platform in order to put their own goods on sale there. It must therefore be determined whether that activity, consisting in displaying third-party sellers' offers at the same time as offers from Amazon itself, may entail the use by Amazon of signs that infringe the mark.
- 33 However, on the ground that their activities are so closely interlinked as to create an impression of unity in the perception of users, the court is not ruling at this stage on the possible respective liability of the different entities in the Amazon group. The respective liabilities will be examined only if liability in principle is established with respect to Amazon.

(a) *The attributability of the use of the sign in the advertisements*

- 34 It is not disputed that the use of a mark may take various forms, set out in a non-exhaustive manner in Article 9(3) of Regulation 2017/1001; in particular, in the context of advertising, its use may consist in stocking and putting on the market goods bearing the sign.
- 35 Amazon contends that it does not use the signs at issue, since, as the operator of an online marketplace, it could not be liable for the content published on its websites.
- 36 Mr Christian Louboutin, on the other hand, maintains that the principles applicable to online marketplaces according to the case-law of the Court of Justice are not applicable to Amazon, on the basis that Amazon must be characterised as a distributor of the goods sold on its websites and that the advertisements placed by third-party sellers form part of Amazon's own commercial communication.

- 37 The expression ‘using’ involves active behaviour and direct or indirect control of the act constituting the use. In that regard, the Court of Justice ‘has ... already had occasion to point out that, according to its ordinary meaning, the expression “using” involves active behaviour and direct or indirect control of the act constituting the use. In that regard, it has noted that ... Article 9(3) of Regulation 2017/1001, which lists in a non-exhaustive manner the types of use which the trade mark proprietor may prohibit, refers exclusively to active behaviour on the part of the third party’ (judgment of 2 April 2020, *Coty Germany*, C-567/18, EU:C:2020:267, paragraph 37 and the case-law cited).
- 38 In the judgment of 12 July 2011, *L’Oréal and Others* (C-324/09, EU:C:2011:474, paragraph 102), the Court of Justice held that, in the context of a pure online marketplace, the advertisements placed online by third-party sellers do not constitute use by the operator of the marketplace, since those advertisements do not form part of the operator’s commercial communication.
- 39 While Amazon pleads in favour of a straightforward application of that case-law to the present dispute, Mr Christian Louboutin maintains that Amazon’s activities constitute active behaviour and therefore justify a prohibition on its use of the impugned signs.
- 40 The expression ‘online marketplace’ designates any platform which brings together online buyers and sellers, allowing sellers to take advantage of the functionalities and the visibility of the platform, in return for payment of commission.
- 41 It is common ground that Amazon publishes on its online stores advertisements relating to its own goods, which it sells and ships in its own name, and advertisements placed by third-party sellers, who themselves ship the goods sold, or entrust the shipping of their goods to Amazon, which receives them in its distribution centres and ships them to purchasers from its warehouses.
- 42 It is also common ground that the advertisements are grouped in different categories and sub-categories according to a ‘browse-tree’ structure, which does not distinguish between goods sold by Amazon and those sold by third-party sellers, as the information relating to the seller and the shipper appears on the screen only when the advertisements are consulted individually and, with particular regard to shoes, only at the time when the desired shoe size is specified.
- 43 The court notes that the operating method of Amazon’s platforms, which consists in a mixture of advertisements placed, on the one hand, by Amazon and, on the other, by third-party sellers, is different from that of other marketplaces such as eBay or Rakuten, which display only advertisements placed by third-party sellers and do not carry out any sales activity. However, Amazon is not alone in operating that business model, as operators like Cdiscount also host third-party sellers’ goods alongside their own range of goods.

- 44 Mr Christian Louboutin maintains that that mixture of own sales and third-party sales has the consequence that Amazon could not be regarded as a marketplace operator in the sense provided by the Court of Justice, but must be regarded as a distributor which is itself liable for the content of all the advertisements displayed. That creates in the perception of the relevant public, who is an averagely observant internet user, an impression that all the goods sold on Amazon's websites are Amazon's goods, or at least that the advertisements placed by third-party sellers are part of Amazon's own commercial communication.
- 45 The court, unlike Mr Christian Louboutin, considers that the services offered by Amazon via its websites constitute services supplied by an online marketplace, in so far as, even though there is a mixture of different types of offers, the fact remains that all the attributes of online marketplaces are also found in the activity of Amazon Services Europe, in particular in the context of its 'Sell with Amazon' service.
- 46 The fact that in addition to those services other services, in particular the marketplace operator's own offers, and stocking and shipping services, are available, and even that no distinction is made between those services, so that confusion is liable to be created in the minds of internet users using the platforms, does not preclude Amazon's platforms being classified as marketplaces.
- 47 However, it is necessary to examine whether that particular function of the platforms operated by Amazon may lead to third-party sellers' advertisements being incorporated in such a way that Amazon might be considered to be using the offending signs in its own commercial communication, according to the expression used by the Court of Justice in the judgment of 12 July 2011, *L'Oréal and Others*, C-324/09, EU:C:2011:474, paragraph 102).
- 48 The court recalls that, in that judgment, the Court of Justice held that if a sign identical with, or similar to, the proprietor's trade mark to be 'used' by a third party, that implies, at the very least, that that third party uses the sign in its own commercial communication, and concluded that an online marketplace operator did not make such use of the sign.
- 49 Since, however, the judgment concerned the platform eBay, which, as is well known, displays its users' advertisements only as an intermediary and not as a seller and distributor, that case-law cannot be directly applied to a platform with a different operating method.
- 50 According to the case-law of the Court of Justice, the concept of 'use' of a trade mark 'covers a situation in which a trade intermediary, which is acting in its own name but on behalf of the vendor and is thus not an interested party in relation to trade in goods in which it is itself a contractual party, uses, in its business papers, a sign which is identical with a Community trade mark in relation to goods or services which are identical with those for which the mark is registered' (order of 19 February 2009, *UDV North America*, C-62/08, EU:C:2009:111, paragraph 54



and operative part). See also, to the same effect, judgment of 30 April 2020, *A (Infringement by importing ball bearings)*, C-772/18, EU:C:2020:341.

- 51 It is therefore irrelevant whether the goods sold on Amazon's websites are economically attributable to Amazon.
- 52 The fact nonetheless remains that, in the judgment of 12 July 2011, *L'Oréal and Others* (C-324/09, EU:C:2011:474, paragraph 102), the Court of Justice introduced the concept of 'own commercial communication', in the sense that, when a sign is included in a trader's own commercial communication, that trader may be considered to be using that sign and, consequently, to incur liability for infringement of a trade mark.
- 53 It is therefore appropriate to examine the various arguments put forward by Mr Christian Louboutin according to which Amazon should be regarded as making use of the signs at issue by incorporating third-party offers in its own commercial communication.
- 54 Mr Christian Louboutin thus refers to the uniform nature of the advertisements, with each advertisement featuring Amazon's well known semi-figurative trade mark and Amazon being involved in the format and composition of the advertisements; to the discretion with which information relating to the sellers of the goods is displayed; to Amazon's active intervention in the preparation of the advertisements; to its intervention in the stocking and shipping of the goods; and to its active intervention in the setting of selling prices.
- 55 Amazon's active intervention may be further inferred from the presentation of the various shops, with the systematic use of the personal pronoun 'our' to describe the offer present on Amazon's websites, and also from the presence of general categories such as 'best sellers', 'most sought after' or 'most popular', without distinction as to the origin of the goods.
- 56 Mr Christian Louboutin further observes that Amazon's advertisements are displayed in the advertising sections of other websites, such as online newspapers or social network sites.
- 57 It may be inferred, in his submission, that a reasonably well informed and reasonably observant internet user would perceive Amazon as the distributor of all the goods offered on its websites, its role as distributor, moreover, being underlined by Amazon itself.
- 58 Notwithstanding its abundant case-law, the Court of Justice has never ruled on the question whether an online distributor of goods which at the same time operates an online marketplace may be regarded as incorporating third-party offers in its own commercial communication. In fact, all the precedents cited by the parties proceed from the concept that third-party advertisements do not form part of the platform operator's own commercial communication.

- 59 The court therefore proposes to refer a first question to the Court of Justice.
- 60 Amazon has submitted mainly that the first question is unnecessary and irrelevant in the light of the case-law of the Court of Justice.
- 61 It submits that the Court of Justice has already had occasion to answer the proposed question, particularly in *Coty Germany* (C-567/18, EU:C:2020:267), in which the Advocate General had concluded that the question referred for a preliminary ruling should be answered in the affirmative. However, the Court of Justice chose not to follow the Advocate General, and merely confirmed that the operator of an online marketplace did not use the sign attributable to third-party sellers and made clear that the liability of those operators had to be analysed from the aspect of other legal rules.
- 62 The court recalls that in that case the following question had been referred to the Court of Justice for a preliminary ruling: ‘Does a person who, on behalf of a third party, stores goods which infringe trade mark rights, without having knowledge of that infringement, stock those goods for the purpose of offering them or putting them on the market, if it is not that person himself but rather the third party alone which intends to offer the goods or put them on the market?’
- 63 In answer to that question, the Court of Justice ruled that Article 9(3) of Regulation 2017/1001 must be interpreted as meaning that ‘a person who, on behalf of a third party, stores goods which infringe trade mark rights, without being aware of that infringement, must be regarded as not stocking those goods in order to offer them or put them on the market for the purposes of those provisions, if that person does not itself pursue those aims’.
- 64 In doing so, the Court of Justice therefore addressed the question solely from the aspect of the stocking of goods, without envisaging a broader analysis of the business model employed by the various entities of the Amazon group.
- 65 The Advocate General had considered that Article 9(3)(b) of Regulation 2017/1001 must be interpreted as meaning that:
- ‘...’
- However, if that person is actively involved in the distribution of those goods under a scheme exhibiting the features of the “Fulfilment by Amazon” program, which the seller joins, that person may be regarded as storing those goods for the purposes of offering them or putting them on the market.
  - ...’.
- 66 In that ruling, the Court of Justice did not take account of the Avocate General’s reservations concerning Amazon’s possible liability as stockist.

- 67 However, that does not permit the conclusion that the Court of Justice has already adopted a position, even implicitly, on the problem now referred to this court, which not only relates to the stocking by Amazon of goods sold by third parties, but raises a wider issue concerning the classification of the incorporation of third party offers in its own commercial communication.
- 68 It follows that the proposed question for a preliminary ruling has not already been answered by the Court of Justice and that it is therefore relevant in principle.
- 69 Nor does the fact that the question referred might, if necessary, find a solution in the rules applicable to e-commerce definitively preclude liability under the rules governing the protection of trade marks.
- 70 It must therefore be held that the question for a preliminary ruling as suggested by this court is relevant in the light of the dispute before it and the answers already given by the Court of Justice in the context of other cases.
- 71 The court notes that the proposed question as reformulated by Amazon no longer refers to the concept of the ‘mixing’ of offers of different origins, a concept which is nonetheless at the root of the problem raised by the present dispute.
- 72 Amazon further maintains that it does not intervene in any way with the setting of prices by third-party sellers.
- 73 The court notes that the formulation used in that respect by the court in its draft question suggests that Amazon intervenes directly in price-setting. However, it is not disputed that Amazon provides assistance in pricing and various articles in well-known newspapers such as *The Wall Street Journal* or *The New York Times* submitted to the court suggest that Amazon acts indirectly on prices by putting pressure on third-party sellers not to offer their goods at a lower price on other websites. The question should therefore be reformulated to indicate that Amazon provides assistance in the pricing of third-party goods, but without completely eliminating the question of pricing.
- 74 The court will submit, next, question 2, suggested by Mr Christian Louboutin.
- 75 Mr Christian Louboutin emphasises the importance of the relevant public’s perception of the active role or of incorporation of the sign in question in the operator’s own commercial communication, as that perception is liable to render the use of a sign identical with or similar to a trade mark attributable to the operator, and he requests the court to refer a question in that respect to the Court of Justice.
- 76 The cour d’appel de Bruxelles (Court of Appeal, Brussels, Belgium) decided against that argument in its judgment of 25 June 2020, which is currently the subject of an appeal on a point of law to the Cour de cassation (Court of Cassation).

- 77 The question of the public's perception of the more or less active role played by the marketplace operator in the publication of advertisements and thus the question whether the advertisements displayed are part of the operator's own commercial communication may however be significant.
- 78 It is thus appropriate to ask whether the fact that the public perception attributes an advertisement or an offer to a digital sales platform operator's own communication amounts to a genuine incorporation of the offer in that operator's own commercial communication, thereby rendering the operator liable under trade mark law.
- (b) *Use of the signs by the shipping of goods bearing the sign at issue*
- 79 Mr Christian Louboutin maintains that the fact that Amazon ships from its distribution centres goods sold by third parties may be classified as use, since, unlike a stockist who in principle is unaware of any possible infringements of trade marks by goods stocked for third-party sellers, the shipper is in principle aware of such infringements. The applicant takes issue with the cour d'appel de Bruxelles (Court of Appeal, Brussels) for having found that shipping is merely an extension of stocking and for having on that basis applied the *Coty* case-law of the Court of Justice and thus held that there was no 'use' by Amazon.
- 80 He maintains that the combination of the display of advertisements and the storing and shipping of infringing goods constitutes actual knowledge of the infringing sign having been affixed to the goods in question and asks this court to request a preliminary ruling on that point from the Court of Justice.
- 81 In the judgment of 2 April 2020, *Coty Germany*, C-567/18, EU:C:2020:267, the Court of Justice emphasised in its answer to the question for a preliminary ruling the importance of the purpose for which the goods are held.
- 82 Accordingly, in order for the stocking of goods bearing signs identical with or similar to trade marks to be capable of being classified as 'use' of those trade marks, a further requirement is that the economic operator stocking the goods must itself pursue the objective referred to by those provisions, which consists in offering goods or in putting them on the market.
- 83 That judgment did not cover the shipping of the goods following their storage, since, in the case referred to the Court of Justice, the shipping was carried out by an external supplier.
- 84 Although question 3 suggested by Mr Christian Louboutin is already partly included in the second question, it provides some additional details which should be referred to the Court of Justice in the interest of being as complete as possible.

**V. The questions for a preliminary ruling:**

85 The court submits the following questions:

1. Is Article 9(2) of Regulation 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark to be interpreted as meaning that the use of a sign identical with a trade mark in an advertisement displayed on a website is attributable to the website operator or to entities economically linked with it owing to the combination on that website of the operator's or its economically linked entities' own offers and those of third-party sellers, by the incorporation of those advertisements in the operator's or its economically linked entities own commercial communication?

Is such incorporation strengthened by the fact that:

- the advertisements are presented uniformly on the website?
- the operator's own advertisements and those of economically linked entities and the advertisements of third-party sellers are displayed without distinction as to their origin, but clearly display the logo of the operator or of economically linked entities, in the advertising categories of third-party websites in the form of 'pop-ups'?
- the operator or economically linked entities offer a comprehensive service to third-party sellers, including providing assistance in preparing the advertisements and setting selling prices, stocking the goods and shipping them?
- the website of the operator and economically linked entities is designed in such a way as to be presented in the form of shops and labels such as 'best sellers', 'most sought after' or 'most popular', without apparent distinction, at first sight, between the operator's and economically linked entities' own goods and third-party sellers' goods?

2. Is Article 9(2) of Regulation 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark to be interpreted as meaning that the use of a sign identical with a trade mark in an advertisement displayed on an online store is, in principle, attributable to its operator or to economically linked entities if, in the perception of a reasonably well informed and reasonably observant internet user, that operator or an economically linked entity has played an active role in the preparation of that advertisement or if that advertisement is perceived as forming part of that operator's own commercial communication?

Is such a perception influenced by:

- the fact that that operator and/or economically linked entities is a well-known distributor of a vast range of goods, including goods in the category of those featured in the advertisement; or
- the fact that the advertisement thus displayed shows a heading in which the service mark of that operator or economically linked entities is reproduced, that mark being well known as a distributor’s mark; or
- the fact that that operator or economically linked entities offer, together with that display, services traditionally offered by distributors of goods in the same category as that to which the goods featured in the advertisement belongs?

3. Must Article 9(2) of Regulation 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark be interpreted as meaning that the shipment, in the course of trade and without the consent of the proprietor of a trade mark, to the final consumer of goods bearing a sign identical with the mark, constitutes use attributable to the shipper only if the shipper has actual knowledge that the sign has been affixed to the goods?

Is such a shipper the user of the sign concerned if the shipper itself or an economically linked entity has informed the final consumer that it will undertake the shipment after it or an economically linked entity has stocked the goods for that purpose?

Is such a shipper the user of the sign concerned if the shipper itself or an economically linked entity has previously made an active contribution to the display, in the course of trade, of an advertisement for the goods bearing that sign or has taken the final consumer’s order on the basis of that advertisement?