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Judgment of the Court of Justice in Case C-337/22 P | EUIPO v Nowhere

### **Brexit and EU trade marks: Earlier rights based solely on UK law can no longer be relied upon in support of an opposition where EUIPO rules after the end of the transition period**

An application for registration of an EU figurative mark for various goods, including in the clothing sector, was filed in 2015. This application was opposed by Nowhere Co. Ltd, a company established in Japan, on the basis of several unregistered figurative signs used in the course of trade in the United Kingdom and protected under UK law. The opposition was based on the existence of prior unregistered rights, a ground for refusal of registration under EU law.

After the opposition was rejected, first by the Opposition Division and then by the Board of Appeal of the European Union Intellectual Property Office (EUIPO), the General Court annulled the decision of the Board of Appeal rejecting Nowhere's action on the ground that the earlier UK rights could not be relied on after the expiry of the transition period laid down in the Withdrawal Agreement. <sup>1</sup> The General Court held that, since the application for an EU trade mark had been lodged before the United Kingdom's withdrawal from the European Union and before the expiry of the transition period, the earlier rights invoked in the United Kingdom could still be taken into account, even if EUIPO ruled after that date. EUIPO brought an appeal against the General Court's judgment.

**In its judgment delivered on 5 February, the Court of Justice sets aside the judgment of the General Court and upholds EUIPO's decision.**

The Court specifies that the provision allowing an opposition to be based on an unregistered sign contains two separate requirements. <sup>2</sup> First, the sign must have given rise to the acquisition of prior rights before the date of filing or priority of the EU trade mark application. Secondly, it must still confer on its proprietor, at the time of EUIPO's decision, the right to prohibit the use of a more recent trade mark.

While the first requirement makes it possible to establish the anteriority of the sign relied on, the second requirement requires that legal protection continue to exist throughout the proceedings. The Court notes that the wording of the provision, drafted in the present tense, and its purpose preclude an opposition from succeeding on the basis of rights which ceased to have effect before the adoption of the decision. It adds that the opposite solution cannot be justified in this case by the existence of a potential conflict before the expiry of the transition period, since the EU trade mark in question cannot, in any event, be valid and enforceable until after that period. The disappearance, during the proceedings, of the protection of an earlier right is therefore a relevant factor which the EUIPO must take into account and which may lead to the rejection of the opposition.

Secondly, the Court states that, at the end of the transition period following the United Kingdom's withdrawal from the EU, rights based exclusively on UK law no longer fall within the territorial scope of EU law. In the absence of transitional provisions providing for the continuation of those rights in pending opposition proceedings, they can no longer be invoked where EUIPO rules after that date. This solution is consistent with the unitary character of the EU trade mark and does not undermine legal certainty or legitimate expectations, since no relevant conflict can arise within the territory of the European Union between the trade mark applied for and a right now limited to the United Kingdom.

Lastly, the Court finds that the state of the proceedings permits it to give final judgment. It dismisses the action brought by Nowhere Co. Ltd against the decision of the Board of Appeal of EUIPO, considering that the opposition could not, in any event, succeed since the earlier rights relied on had ceased to be enforceable in the EU before the adoption of the contested decision. The Court thus brings an end to the dispute without referring it back to the General Court.

**NOTE:** EU trade marks and Community designs are valid for the entire territory of the European Union. EU trade marks coexist with national trade marks. Community designs coexist with national designs. Applications for registration of EU trade marks and Community designs are addressed to EUIPO. Actions against its decisions may be brought before the General Court.

**NOTE:** An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text and, as the case may be, an abstract](#) of the judgment is published on the CURIA website on the day of delivery.

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<sup>1</sup> Judgment of 16 March 2022, *Nowhere v EUIPO – Ye (APE TEES)*, [T-281/21](#).

<sup>2</sup> Article 8(4) of Council [Regulation \(EC\) No 207/2009](#) of 26 February 2009 on the Community trade mark (repealed and replaced by [Regulation \(EU\) 2017/1001](#) of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark).