Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

12 December 2018 *

(EU trade mark — Revocation proceedings — EU collective figurative mark representing a circle with two arrows — Genuine use of the mark — Partial revocation — Declaration of partial revocation — Article 15(1) of Regulation (EC) No 207/2009 (now Article 18(1) of Regulation (EU) 2017/1001) — Article 51(1)(a) of Regulation No 207/2009 (now Article 58(1)(a) of Regulation 2017/1001) — Rule 22(4) of Regulation (EC) No 2868/95 (now Article 10(4) of Delegated Regulation (EU) 2018/625) — Affixing of the mark on packaging — Perception of the relevant public)

In Case T-253/17,

Der Grüne Punkt — Duales System Deutschland GmbH, established in Cologne (Germany), represented by P. Goldenbaum, I. Rohr and N. Ebbecke, lawyers,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by D. Hanf, acting as Agent,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO being

Halston Properties, s.r.o., established in Bratislava (Slovakia),

ACTION brought against the decision of the Fifth Board of Appeal of EUIPO of 20 February 2017 (Case R 1357/2015-5), relating to revocation proceedings between Halston Properties and Der Grüne Punkt — Duales System Deutschland,

THE GENERAL COURT (Fourth Chamber),

composed of H. Kanninen, President, J. Schwarcz and C. Iliopoulos (Rapporteur), Judges,

Registrar: R. Ūkelytė, Administrator,

having regard to the application lodged at the Court Registry on 28 April 2017,

having regard to the response lodged at the Court Registry on 21 July 2017,

further to the hearing on 12 June 2018,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

1 On 12 June 1996, the applicant, Der Grüne Punkt — Duales System Deutschland GmbH, filed an application for registration of an EU collective trade mark with the European Union Intellectual Property Office (EUIPO) pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), as amended, itself replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1)).

2 The collective mark in respect of which registration was sought ('the contested mark') is the following figurative sign:



3 The goods and services in respect of which registration was sought are in Classes 1 to 35, 39, 40 and 42 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond, for each of those classes, to the following description:

– Class 1: 'Chemicals used in industry, science and photography, as well as in agriculture, horticulture and forestry; unprocessed artificial resins, unprocessed plastics; manures; fire-extinguishing compositions; tempering and soldering preparations; chemical substances for preserving foodstuffs; tanning substances; adhesives used in industry';

– Class 2: 'Paints, varnishes, lacquers; preservatives against rust and against deterioration of wood; colorants; mordants; raw natural resins; metals in foil and powder form for painters, decorators; printers and artists';

– Class 3: 'Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices';

– Class 4: 'Industrial oils and greases; lubricants; dust absorbing, wetting and binding compositions; fuels (including motor spirit) and illuminants; candles, wicks';

– Class 5: 'Pharmaceutical, veterinary and sanitary preparations; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides';

– Class 6: ‘Common metals and their alloys; metal building materials; transportable buildings of metal; materials of metal for railway tracks; non-electric cables and wires of common metal; ironmongery, small items of metal hardware; pipes and tubes of metal; safes; goods of common metal included in Class 6; ores’;

– Class 7: ‘Machines for processing metal, wood, paper, textiles, plastic materials or construction materials; machines and electrical apparatus for household and office included in Class 7; machine tools; motors and engines (except for land vehicles); machine coupling and transmission components (except for land vehicles); agricultural implements included in this class; incubators for eggs’;

– Class 8: ‘Hand tools; hand-operated implements for household and garden as well as for processing metal, wood, paper, textiles, plastic materials and construction materials included in Class 8; cutlery; side arms; razors’;

– Class 9: ‘Scientific, nautical, surveying, electric, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving, and teaching apparatus and instruments; electrical apparatus and instruments included in this class; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus’;

– Class 10: ‘Surgical, medical, dental and veterinary apparatus and instruments, artificial limbs, eyes and teeth; orthopaedic articles; suture materials’;

– Class 11: ‘Apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes’;

– Class 12: ‘Vehicles; apparatus for locomotion by land, air or water’;

– Class 13: ‘Firearms; ammunition and projectiles; explosives; fireworks’;

– Class 14: ‘Precious metals and their alloys and goods in precious metals or coated therewith, included in Class 14; jewellery, precious stones; horological and chronometric instruments’;

– Class 15: ‘Musical instruments’;

– Class 16: ‘Paper, cardboard and goods made from these materials included in Class 16; printed matter; bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists’ materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging included in Class 16; playing cards; printers’ type; printing blocks’;

– Class 17: ‘Rubber, gutta-percha, gum, asbestos, mica and goods made from these materials included in Class 17; plastics in extruded form for use in manufacture; packing, stopping and insulating materials; flexible pipes, not of metal’;

– Class 18: ‘Leather and imitations of leather, and goods made of these materials included in this class; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery’;

– Class 19: ‘Building materials (non-metallic); rigid pipes for building; asphalt, pitch and bitumen; transportable buildings (non-metallic); monuments, not of metal’;

– Class 20: ‘Furniture, mirrors, picture frames; goods included in Class 20 of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials, or of plastics’;

– Class 21: ‘Household or kitchen utensils included in this class and containers (not of precious metal or coated therewith); combs and sponges; brushes (except paint brushes); brush-making materials; articles for cleaning purposes; steelwool; unworked or semi-worked glass (except glass used in buildings); glassware, porcelain and earthenware included in this class’;

– Class 22: ‘Ropes, string, nets, tents, awnings, tarpaulins, sails, sacks and bags (included in this class); padding and stuffing materials (except of rubber or plastics); raw fibrous textile materials’;

– Class 23: ‘Yarns and threads, for textile use’;

– Class 24: ‘Textiles and textile goods included in Class 24; bed covers and household linen’;

– Class 25: ‘Clothing, footwear, headgear’;

– Class 26: ‘Lace and embroidery, ribbons and braid; buttons, hooks and eyes, pins and needles; artificial flowers’;

– Class 27: ‘Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; wall hangings (non-textile)’;

– Class 28: ‘Games and playthings; gymnastic and sporting articles included in this class; decorations for Christmas trees’;

– Class 29: ‘Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs, milk and milk products; edible oils and fats’;

– Class 30: ‘Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery; ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ice’;

– Class 31: ‘Agricultural, horticultural and forestry products and grains not included in other classes; live animals; fresh fruits and vegetables; seeds, natural plants and flowers; foodstuffs for animals, malt’;

– Class 32: ‘Beers, mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages’;

– Class 33: ‘Alcoholic beverages (except beers)’;

– Class 34: ‘Tobacco; smokers’ articles; matches’;

– Class 35: ‘Advertising’;

– Class 39: ‘Transport; packaging and storage of goods’;

– Class 40: ‘Treatment of materials; recycling of packaging materials’;

– Class 42: ‘Waste disposal; creation of software for data processing’.

4 The regulations governing use of the contested mark filed with the application for registration provide, inter alia, in paragraph 6 that the contested mark was created 'to enable consumers and traders to recognise packaging which is included in the [d]ual [s]ystem and for which a contribution to the financing of the system has been made, as well as goods with such packaging, and to distinguish them from other packaging and goods …'.

5 The contested mark was registered as an EU collective mark on 19 July 1999 under the number 298273 for the goods and services set out in paragraph 3 above.

6 The registration of the contested mark was renewed on 25 September 2006 and on 17 May 2016.

7 On 2 November 2012, the other party to the proceedings before EUIPO, Halston Properties, s.r.o., filed an application for revocation of the contested mark on the basis of Article 51(1)(a) of Regulation No 207/2009 (now Article 58(1)(a) of Regulation 2017/1001) on the ground that that mark had not been put to genuine use for the goods for which it had been registered. That application was directed against all of the goods in Classes 1 to 34 listed in paragraph 3 above. The services covered by the contested mark were not disputed.

8 The applicant produced numerous documents attesting to the use of the contested mark. These include various licensing agreements and other documents governing use of the contested mark on packaging.

9 By decision of 26 May 2015, the Cancellation Division of EUIPO partially upheld the application for revocation and declared the rights of the applicant to be revoked as from 2 November 2012 for certain goods ('the goods at issue'), namely all of the goods in Classes 1 to 34 referred to in paragraph 3 above with the exception of the following:

– Class 6: 'Packaging made of metal, included in Class 6';

– Class 16: 'Packaging made of paper and cardboard included in Class 16; plastic materials for packaging, included in Class 16';

– Class 17: 'Packaging made of rubber, gutta-percha, gum, asbestos and mica, included in Class 17';

– Class 18: 'Packaging made of leather and imitations of leather, included in Class 18';

– Class 20: 'Packaging made of wood, cork, reed, cane, wicker and substitutes for these materials, or of plastic, included in Class 20';

– Class 21: 'Household or kitchen containers for packaging (not of precious metal or coated therewith); packaging made of glassware, porcelain and earthenware, included in Class 21';

– Class 22: 'Packaging included in Class 22';

– Class 24: 'Textile packaging included in Class 24'.

10 On 8 July 2015, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009 (now Articles 66 to 71 of Regulation 2017/1001), against the decision of the Cancellation Division in so far as it had revoked the applicant's rights in respect of the goods at issue.

11 By decision of 20 February 2017 (Case R 1357/2015-5) ('the contested decision'), the Fifth Board of Appeal of EUIPO dismissed the appeal. In particular, it found that the applicant had not adduced evidence to show that it had used the contested mark in accordance with its essential function of guaranteeing the identity of the origin of the goods at issue. In that regard, it noted, as a preliminary

observation, that account should be taken of the fact that the contested mark was a collective mark which, as such, was used in a manner preserving its rights when it was used in accordance with its function of identifying the goods and services of members of the association. Next, the question of whether the contested mark had been used to indicate the origin of the goods covered by the contested mark had to be assessed in the light of the perception of the relevant public, which, in the present case, would associate the contested mark with 'environmentally sound conduct on the part of the undertaking' and would perceive that mark as an indication that packaging waste designated by the sign could be collected, and then recovered, in containers or sacks provided specifically for that purpose.

12 The Board of Appeal observed that, since the contested mark merely indicated to the average relevant consumer in the European Union that packaging waste thus designated could be collected and recovered according to a certain system, from that consumer's point of view the contested mark had not been used to show the origin of the goods at issue. Even though the packaging and the product appeared to constitute 'a unit' at the point of sale, the relevant consumer would be quite capable of distinguishing between a mark indicating the commercial origin of the product and a mark indicating that used, empty packaging waste could be recovered after the consumer had unpacked, used or consumed the product itself. Since a product on the packaging of which the contested mark was visible was indistinguishable from an identical product the packaging of which did not reproduce that mark, the contested mark did not indicate that the goods were of a certain quality.

13 Furthermore, according to the Board of Appeal, the applicant had failed to prove that the use of the contested mark was intended to create or preserve an outlet for the goods at issue. All of the documents produced concerned use of the contested mark in connection with sales packaging.

Forms of order sought

14 The applicant claims that the Court should:

– annul the contested decision;

– order EUIPO to pay the costs.

15 EUIPO contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

16 In support of its action, the applicant relies on a single plea in law, alleging infringement of Article 15(1) of Regulation No 207/2009 (now Article 18(1) of Regulation 2017/1001), read in conjunction with Article 66 thereof (now Article 74 of Regulation 2017/1001).

17 The applicant submits, in essence, that the documents which it has produced demonstrate a commercial use of the contested mark not only for the packaging of goods but also for the packaged goods at issue.

18 In the first place, it argues that EUIPO failed to take into account that the evidence of use covers not solely packaging sold separately but also sales packaging, which is to say packaging offered as forming a unit with the product at the point of sale. This is an instance of multiple labelling of goods on their packaging, which is a widespread practice and one to which the public is accustomed.

19 In the second place, the applicant submits that, as is apparent from Rule 22(4) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (now Article 10(4) of Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation 2017/1001 and repealing Delegated Regulation (EU) 2017/1430 (OJ 2018 L 104, p. 1)), the reproduction of the contested mark on packaging relating to the goods at issue is direct proof that the contested mark was used in a way that preserved rights. As a general rule, the public attributes a sign affixed to packaging to the product and not to its packaging.

20 In the third place, according to the applicant, the public understands the contested mark not to mean that the packaging in question is of a certain physical quality or comes from a specific packaging supplier, but rather, in accordance with paragraph 6 of the regulations governing use of the contested mark and in line with the specific function of a collective mark, to mean that the packaging is part of a sound waste management system and, at the same time, that the producer of the goods at issue participates in the applicant's licensing system. This is especially the case since the contested mark's users are not producers of packaging but the sellers or producers of packaged goods.

21 Furthermore, the applicant claims that the contested mark also indicates certain intangible characteristics of the goods at issue. The mark, it argues, shows that the goods originate from an undertaking that has invested financially in ensuring that the packaging is disposed of in accordance with Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3) and that expenditure incurred to that end contributes towards ensuring better recycling of used packaging, avoiding unnecessary packaging costs, reducing the burden on public waste disposal services and, lastly, protecting the environment as far as possible. The idea conveyed by the contested mark and perceived by the relevant public is connected to a specific characteristic, namely the undertaking's conduct. The contested mark hence expresses an intangible characteristic of the goods at issue. The consumer will choose not the packaging itself but a specific product in packaging because that product originates from an undertaking which has invested financially in the packaging of the product in question in order to ensure that that packaging and packaging of that type are disposed of in accordance with Directive 2008/98.

22 EUIPO disputes that reasoning.

23 Firstly, it should be recalled that, under Article 15(1) of Regulation No 207/2009, 'if, within a period of 5 years following registration, the proprietor has not put the EU trade mark to genuine use in the Union 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 5 years, the EU trade mark shall be subject to the sanctions provided for in this Regulation, unless there are proper reasons for non-use'.

24 Under Article 51(1)(a) of Regulation No 207/2009, the rights of a proprietor of an EU trade mark are to be declared to be revoked, on application to EUIPO or on the basis of a counterclaim in infringement proceedings, if, within a continuous period of 5 years, the trade mark has not been put to genuine use in the European Union in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use. Pursuant to Article 66(3) of Regulation No 207/2009, Article 51 of that regulation also applies to EU collective marks.

25 Under Rule 22(3) and (4) of Regulation No 2868/95 (now Article 10(3) and (4) of Delegated Regulation 2018/625), applicable to revocation proceedings under Rule 40(5) of that regulation (now Article 19(1) of Delegated Regulation 2018/625), the proof of use must cover the place, time, extent and nature of the use which has been made of the mark and is limited, in principle, to the submission of supporting

documents and items such as packages, labels, price lists, catalogues, invoices, photographs, newspaper advertisements, and statements in writing as referred to in Article 78(1)(f) of Regulation No 207/2009 (now Article 97(1)(f) of Regulation 2017/1001).

26 As is apparent from the case-law, there is genuine use of a trade mark where it 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 (see, by analogy, judgment of 11 March 2003, *Ansul*, C-40/01, EU:C:2003:145, paragraph 43). In this respect, it should be noted that, similarly, the essential function of an EU collective mark is to distinguish the goods or services of the members of the association which is the proprietor of the mark from those of other undertakings (see, to that effect, judgment of 20 September 2017, *The Tea Board* v *EUIPO*, C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 63).

27 In the assessment as to whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark in the course of trade is real, particularly whether such use is viewed as warranted in the economic sector concerned in order to maintain or create a share in the market 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 judgment of 10 September 2008, *Boston Scientific* v *OHIM — Terumo (CAPIO)*, T-325/06, not published, EU:T:2008:338, paragraph 30 and the case-law cited).

28 Moreover, genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but has to be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (see judgment of 23 September 2009, *Cohausz* v *OHIM — Izquierdo Faces (acopat)*, T-409/07, not published, EU:T:2009:354, paragraph 36 and the case-law cited). An overall assessment must be made, taking into account all the relevant factors of the particular case and implying some interdependence between the factors taken into account (see judgment of 18 January 2011, *Advance Magazine Publishers* v *OHMI — Capela & Irmãos (VOGUE)*, T-382/08, not published, EU:T:2011:9, paragraph 30 and the case-law cited).

29 Similarly, if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof of genuine use of the mark in relation to a part of those goods or services affords protection only for the sub-categories to which the goods or services for which the trade mark has actually been used belong (see, to that effect, judgments of 14 July 2005, *Reckitt Benckiser (España)* v *OHIM — Aladin (ALADIN)*, T-126/03, EU:T:2005:288, paragraph 45, and of 13 February 2007, *Mundipharma* v *OHIM — Altana Pharma (RESPICUR)*, T-256/04, EU:T:2007:46, paragraph 23).

30 It is in the light of the foregoing that the present plea must be assessed.

31 As a preliminary observation, it should first of all be noted that, since the other party to the proceedings before EUIPO lodged its application for revocation with EUIPO on 2 November 2012, the five-year period referred to in Article 51(1)(a) of Regulation No 207/2009 runs from 2 November 2007 to 1 November 2012 ('the relevant period').

32 Moreover, it should be recalled that the subject matter of the proceedings is confined solely to the question of whether use preserving the rights of the contested mark has been proved in respect of the goods at issue. Packaging in Classes 6, 16 to 18, 20 to 22 and 24, for which the applicant has not been deprived of its rights, is not concerned.

33 As correctly stated by the applicant, the Board of Appeal did not question the fact that the contested mark has been put to genuine use as a collective trade mark in many EU Member States on goods packaging of all types. In view of the fact that, in accordance with the case-law cited in paragraph 29

above, proof of genuine use of the contested mark for some of these goods affords protection only to the sub-category or sub-categories to which the goods for which the EU trade mark has actually been used belong, the question therefore arises as to whether, as the applicant claims, proof of genuine use of the contested mark on packaging also constitutes proof of genuine use for the packaged goods themselves.

34 In that regard, the Board of Appeal found, in paragraph 31 of the contested decision, that use preserving rights may also be demonstrated by the submission of packages, in accordance with Rule 22(4) of Regulation No 2868/95. However, it correctly found that this did not exempt the applicant from its duty to prove that the use of the contested mark on packaging is also understood by the relevant public as constituting a use as a trade mark for the goods at issue.

35 In order for use of a trade mark to be considered genuine, the use must be consistent with the essential function of a trade mark, which is to guarantee to consumers or end-users the identity of the origin of goods or services by enabling them, without any possibility of confusion, to distinguish those goods or services from others which have another origin (see, by analogy, judgment of 11 March 2003, *Ansul*, C-40/01, EU:C:2003:145, paragraphs 36 and 43). Consequently, when assessing whether the use of the mark is genuine, regard must be had to the relevant public's perception.

36 In the present case, it should be observed, firstly, that the Board of Appeal was right to find that the goods at issue are intended mainly for the general public, such as, for instance, consumers of washing powder, cosmetics, medicines, tools, household appliances, electric appliances, clothing, food, stimulants, beverages and furniture, and that the specialist public is also partly targeted, such as, for example, experts in the fields of agriculture, trade and industry. Secondly, the Board of Appeal was correct in its assumption that the target public will pay a normal to high level of attention to the goods at issue, which comprise, firstly, consumer goods and objects used in everyday life but also, secondly, goods the acquisition of which entails significant expenditure or which may have serious economic, environmental or health implications, such as chemicals, industrial oils, lubricants, preservatives against deterioration of wood, disinfectants, medicines, machine tools, medical products and vehicles. Moreover, it must be pointed out that the Board of Appeal's definition of the relevant public and the considerations relating to its level of attention are not, in any event, contested by the parties.

37 Given the relevant public's point of view, the Board of Appeal rightly concluded that the applicant has not shown that it used the contested mark in accordance with its main function of guaranteeing the identity of the origin of the goods at issue.

38 In particular, the Board of Appeal acted correctly in finding, referring in this regard to the Court's findings in the judgment of 24 May 2007, *Duales System Deutschland* v *Commission* (T-151/01, EU:T:2007:154, paragraph 159), that the relevant public identifies the contested mark affixed to packaging as indicating that the packaging may be collected and recovered in accordance with a certain system. Indeed, as rightly observed by the Board of Appeal, it is a well-known fact, and, moreover, proved by the documents produced by the applicant, that the relevant public is used to the contested mark and has been familiar with the systems for recovering packaging waste for many years. According to the Board of Appeal's findings, referring in this regard to a study from a German polling institute submitted by the applicant, 98% of the population surveyed in Germany in 2003 were aware of the contested mark, and that same year 78% of the German population described the trade mark as the 'sign affixed to packaging to indicate to consumers that packaging is disposed of separately from residual waste in the dual system's collection containers'. According to the Board of Appeal's same findings, referring in this respect to an annual report by the French undertaking Eco-Emballages (which is similar to the applicant undertaking), in 2010 the contested mark was reproduced on 95% of packaging in France and recognised by 75% of the French population, of whom 99.2% could sort their packaging waste.

39 The applicant does not question the Board of Appeal's finding that the relevant public understands the contested mark as signifying that the packaging is part of a sound waste management system. By contrast, it submits that, in addition to that understanding, the relevant public sees the mark as meaning that the producer of the goods at issue is part of the applicant's licensing system. The contested mark, it argues, consequently conveys an intangible characteristic of the goods at issue, namely the environmentally sound conduct on the part of the undertaking that produces or distributes the goods at issue. In the applicant's view, the public attributes the contested mark affixed to packaging to the product and not to the packaging thereof.

40 In this regard, it should be noted firstly that the applicant's observations are partially contradictory in so far as it submits, on the one hand, that the relevant public understands the mark as an indication that the sales packaging — as an integral part of the sales unit formed with the product — is part of a sound waste management system and, on the other hand, that the relevant public attributes the contested mark affixed to packaging to the product and not to the packaging thereof.

41 Next, it should be observed that the applicant's observations lack relevance. It is undeniably true that the contested mark, in accordance with its function as a collective mark, refers to the fact that the producer or distributor of the goods at issue is part of the applicant's licensing system and therefore indicates a degree of environmentally sound conduct on the part of that undertaking. However, the fact remains that, as the Board of Appeal correctly found, the relevant public is fully capable of distinguishing between a mark indicating the product's commercial origin and a mark indicating that empty, used packaging waste may be recovered after the consumer has unpacked, used or consumed the product itself, even if the packaging and the product appear to constitute 'a unit' at the point of sale. The evidence produced by the applicant also makes it clear that the goods themselves are usually labelled with marks belonging to different companies.

42 It follows that the use of the contested mark as a collective mark which identifies goods of the members of the association by distinguishing them from goods originating from undertakings which do not belong to that association will be perceived by the relevant public as a use in respect of packaging. The intangible characteristic alleged by the applicant and attributed to the contested mark, namely environmentally sound conduct on the part of the undertaking through its membership of the applicant's licensing system, will be attributed by the relevant public to the possibility of disposing of the packaging in an environmentally sound manner and not to such disposal of the packaged product itself, which may be unsuitable for environmentally sound disposal, such as firearms in Class 13.

43 Lastly, such an assessment is also confirmed by a reading of paragraph 6 of the regulations governing use of the contested mark, according to which the contested mark was created 'to enable consumers and traders to recognise packaging which is included in the [d]ual [s]ystem and for which a contribution to the financing of the system has been made, and also goods with such packaging, and to distinguish them from other packaging and goods …'. Consequently, the relevant public's understanding of the mark does not relate to an intangible characteristic of the goods at issue but rather to an intangible characteristic of the packaging of those goods which pertains to the dual system operated by the applicant.

44 The Board of Appeal therefore acted correctly in finding, in paragraphs 33, 35 and 37 of the contested decision, that the applicant had also failed to prove that the use of the contested mark was intended to create or preserve an outlet relative to other economic operators, at least as far as the goods at issue were concerned. As the mark is recognised by consumers solely as an indication that packaging waste thus designated may be disposed of at local collection facilities, affixing the contested mark on packaging merely reflects the fact that the undertaking, like all other economic operators, conducts itself in compliance with the requirement of Directive 2008/98, which places all undertakings under a duty to recover packaging waste.

45 Contrary to what the applicant claims, in the unlikely event that, where the offerings of the competition are identical, consumers will choose a packaged product on the basis of the quality of its packaging alone, the contested mark does not create or preserve an outlet in relation to other economic operators for the goods at issue but only for the packaging.

46 It follows from all of the foregoing that the applicant has not demonstrated, for the relevant period, genuine use such as to preserve the rights of the contested mark for the goods at issue and that, consequently, the single plea must be regarded as unfounded and, for that reason, rejected.

47 The action must therefore be dismissed.

Costs

48 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs incurred by EUIPO, in accordance with the form of order sought by EUIPO.

On those grounds,

The GENERAL COURT (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders Der Grüne Punkt — Duales System Deutschland GmbH to pay the costs.

Kanninen Schwarcz Iliopoulos

Delivered in open court in Luxembourg on 12 December 2018.

[Signatures]