

GERMANY



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Genuine use must be proven by facts

In two cases between Centrotherm and OHIM, the General Court had to assess revocation of a Community trade mark (CTM) based on lack of genuine use.

In 1999, a CTM application Centrotherm was filed at OHIM, and registered in 2001. In 2007 another party filed an application for revocation. The applicant was invited by OHIM to submit comments and proof of genuine use within a set period.

Within the period, the applicant contested the application for revocation and filed 14 digital photographs, four invoices and a declaration, headed “eidesstattliche Versicherung” (affidavit) of its manager. The applicant made clear that he had many other invoices that, at the outset, he would for reasons of confidentiality not be submitting. The applicant asked OHIM to adopt procedural measures in the event that OHIM wished that other evidence and individual documents be added to the file.

OHIM entirely revoked the CTM. The Board of Appeal upheld the decision in part. Both parties appealed to the General Court.

The General Court confirmed revocation of the CTM in its entirety. It stated that genuine use of a trade mark cannot be proven 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. In order to assess the probative value of affidavits, it would be necessary to check the probability and the veracity of the account it contains, by taking account of the author, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable.

As there were clear links between the author and the applicant, the General Court came to the conclusion that a probative value could not be attributed unless it was supported by the further evidence provided.

The applicant provided three invoic-

es that together were less than 0.03 % of the achieved turnover under the mark in 2006. Additionally, the applicant conceded that the photos had not been taken during the relevant period. Finally, none of the article numbers that were identifiable on the photographed goods corresponded to the numbers on the invoices.

The General Court concluded that the further evidence did not corroborate the statement of the applicant's manager. Accordingly, the Court held that an overall assessment did not allow the conclusion, without resorting to probabilities or presumptions, that the mark was subject of genuine use during the relevant period.