



## Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 September 2013\*

(Appeals — Regulations (EC) Nos 207/2009 and 2868/95 — Revocation proceedings — Community word mark CENTROTHERM — Genuine use — Concept — Evidence — Sworn statement — Article 134(1) to (3) of the Rules of Procedure of the General Court — General Court's powers of review — Scope of pleas in law and forms of order sought by an intervener)

In Case C-609/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 25 November 2011,

**Centrotherm Systemtechnik GmbH**, established in Brilon (Germany), represented by A. Schulz and C. Onken, Rechtsanwälte, and by F. Schmidt, Patentanwalt,

appellant,

the other parties to the proceedings being:

**centrotherm Clean Solutions GmbH & Co. KG**, established in Blaubeuren (Germany), represented by O. Löffel and P. Lange, Rechtsanwälte,

applicant at first instance,

**Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)**, represented by G. Schneider, acting as Agent,

defendant at first instance,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, U. Löhmus, M. Safjan and A. Prechal (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 7 February 2013,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2013,

gives the following

\* Language of the case: German.

## Judgment

- 1 By its appeal, Centrotherm Systemtechnik GmbH ('Centrotherm Systemtechnik') seeks to have set aside the judgment of the General Court of the European Union of 15 September 2011 in Case T-427/09 *centrotherm Clean Solutions v OHIM - Centrotherm Systemtechnik (CENTROTHERM)* [2011] ECR II-6207 ('the judgment under appeal'), by which that court upheld the action of centrotherm Clean Solutions GmbH & Co. KG ('centrotherm Clean Solutions') for partial annulment of the decision of Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 25 August 2009 (Case R 6/2008-4) ('the contested decision') relating to revocation proceedings brought by centrotherm Clean Solutions against the Community word mark CENTROTHERM, which is held by Centrotherm Systemtechnik.
- 2 It should be noted that, on 15 September 2011, the General Court also gave judgment in a parallel case between the same parties and also involving the contested decision: Case T-434/09 *Centrotherm Systemtechnik v OHIM - centrotherm Clean Solutions (CENTROTHERM)* [2011] ECR II-6227, by which it dismissed the action brought by Centrotherm Systemtechnik for partial annulment of that decision.
- 3 That judgment is the subject-matter of an appeal brought by Centrotherm Systemtechnik (Case C-610/11 P).

### Legal context

- 4 Under Article 134(1) to (3) of the Rules of Procedure of the General Court:
  - '1. The parties to the proceedings before the Board of Appeal other than the applicant may participate, as interveners, in the proceedings before the General Court by responding to the application in the manner and within the period prescribed.
  2. The interveners referred to in paragraph 1 shall have the same procedural rights as the main parties. They may support the form of order sought by a main party and they may apply for a form of order and put forward pleas in law independently of those applied for and put forward by the main parties.
  3. An intervener, as referred to in paragraph 1, may, in his response lodged in accordance with Article 135(1), seek an order annulling or altering the decision of the Board of Appeal on a point not raised in the application and put forward pleas in law not raised in the application.
- ...

### *Regulation (EC) No 207/2009*

- 5 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1) codified and repealed Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

6 Article 15 of Regulation No 207/2009 provides, under the title ‘Use of Community trade marks’:

‘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.

...’

7 Article 51 of that regulation provides:

‘1. The rights of the proprietor of the Community trade mark shall be declared to be revoked on application to [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; ...

...

2. Where the grounds for revocation of rights exist in respect of only some of the goods or services for which the Community trade mark is registered, the rights of the proprietor shall be declared to be revoked in respect of those goods or services only.’

8 In section 5, entitled ‘Proceedings in [OHIM] in relation to revocation or invalidity’, under Title VI of Regulation No 207/2009, Article 57 thereof provides:

‘1. On the examination of the application for revocation of rights or for a declaration of invalidity, [OHIM] shall invite the parties, as often as necessary, to file observations, within a period to be fixed by [OHIM], on communications from the other parties or issued by itself.

2. If the proprietor of the Community trade mark so requests, the proprietor of an earlier Community trade mark, being a party to the invalidity proceedings, shall furnish proof that, during the period of five years preceding the date of the application for a declaration of invalidity, 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 application, 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 application for a declaration of invalidity shall be rejected. ...

...’

9 Article 65 of Regulation No 207/2009 provides:

‘1. Actions may be brought before the Court of Justice against decisions of the Boards of Appeal on appeals.

...

3. The Court of Justice has jurisdiction to annul or to alter the contested decision.

4. The action shall be open to any party to proceedings before the Board of Appeal adversely affected by its decision.

...'

10 Under section 1, entitled 'General provisions', of Title IX, entitled 'Procedure', of Regulation No 207/2009, Article 76 states, under the title 'Examination of the facts by [OHIM] of its own motion':

'1. In proceedings before it [OHIM] shall examine the facts of its own motion; however, in proceedings relating to relative grounds for refusal of registration, [OHIM] shall be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought.

2. [OHIM] may disregard facts or evidence which are not submitted in due time by the parties concerned.'

11 Article 78(1) of Regulation No 207/2009 provides:

'In any proceedings before [OHIM], the means of giving or obtaining evidence shall include the following:

...

(f) statements in writing sworn or affirmed or having a similar effect under the law of the State in which the statement is drawn up.'

*Regulation (EC) No 2868/95*

12 Rule 22(2) to (4) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1), as amended by Commission Regulation (EC) No 1041/2005 of 29 June 2005 (OJ 2005 L 172, p. 4) ('Regulation No 2868/95'), states:

'2. Where the opposing party has to furnish proof of use or show that there are proper reasons for non-use, [OHIM] shall invite him to provide the proof required within such period as it shall specify. If the opposing party does not provide such proof before the time limit expires, [OHIM] shall reject the opposition.

3. The indications and evidence for the furnishing of proof of use shall consist of indications concerning the place, time, extent and nature of use of the opposing trade mark for the goods and services in respect of which it is registered and on which the opposition is based, and evidence in support of these indications in accordance with paragraph 4.

4. The evidence shall be filed in accordance with Rules 79 and 79a and shall, in principle, be confined 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].'

13 Under Article 40(5) of Regulation No 2868/95:

'In the case of an application for revocation based on Article [51](1)(a) of [Regulation No 207/2009], [OHIM] shall invite the proprietor of the Community trade mark to furnish proof of genuine use of the mark, within such period as it may specify. If the proof is not provided within the time limit set, the Community trade mark shall be revoked. Rule 22(2), (3) and (4) shall apply mutatis mutandis.'

## Background to the dispute

- 14 The facts of the dispute were set out as follows by the General Court in paragraphs 1 to 12 of the judgment under appeal:
- 1 On 7 September 1999, [Centrotherm Systemtechnik] filed an application for registration of a Community trade mark with [OHIM] pursuant to [Regulation No 40/94] ...
  - 2 The mark for which registration was sought is the word sign CENTROTHERM.
  - 3 The goods and services in respect of which registration was sought are in Classes 11, 17, 19 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 ...
  - 4 The mark CENTROTHERM was registered for the goods and services referred to in paragraph 3 above on 19 January 2001 as a Community trade mark.
  - 5 On 7 February 2007, [centrotherm Clean Solutions] filed with OHIM, under Articles 15 and 50(1)(a) of Regulation No 40/94 (now Articles 15 and 51(1)(a) of Regulation No 207/2009) an application for revocation of the mark CENTROTHERM for all of the registered goods and services.
  - 6 The application for revocation was notified to [Centrotherm Systemtechnik] on 15 February 2007, which was invited to submit any comments and proof of genuine use of the contested mark within a period of three months.
  - 7 In its comments of 11 May 2007, [Centrotherm Systemtechnik] contested the application for revocation and, in order to demonstrate genuine use of its mark, produced the following:
    - 14 digital photographs;
    - 4 invoices;
    - a declaration, headed ‘eidesstattliche Versicherung’ (sworn declaration), made by Mr W., acting in his capacity as manager of [Centrotherm Systemtechnik].
  - 8 [Centrotherm Systemtechnik] stated that it was in possession of many other copies of invoices which, at the outset, it would not be submitting, for reasons of confidentiality. Asserting that it could submit other documents, [it] asked the Cancellation Division of OHIM to adopt a procedural measure accordingly in the event that it wished that other evidence and individual documents be added to the file.
  - 9 On 30 October 2007, the Cancellation Division revoked the CENTROTHERM mark, finding that the evidence adduced by [Centrotherm Systemtechnik] was insufficient to demonstrate genuine use of that mark.
  - 10 On 14 December 2007, [Centrotherm Systemtechnik] filed an appeal against that decision, which the Fourth Board of Appeal upheld in part by decision of 25 August 2009 (“the contested decision”).
  - 11 The Board of Appeal annulled the decision of the Cancellation Division and dismissed the application for revocation in respect of the goods “exhaust gas pipes for heating installations, chimney flues, boiler pipes (tubes) for heating installations; brackets for gas burners; mechanical parts for heating, mechanical parts for gas installations; faucets for pipes; chimney blowers” in

Class 11, “junctions for pipes, pipe sleeves, reinforcing materials for pipes, flexible pipes, all the aforesaid goods not of metal” in Class 17, and “pipes, pipework, in particular for building; branching pipes; chimney shafts” in Class 19. The Board of Appeal dismissed the remainder of the appeal.

- 12 In particular, the Board of Appeal found that evidence of genuine use of the CENTROTHERM mark, in respect of the period of five years preceding submission of the application for revocation, namely 7 February 2007 (“the relevant period”), for the goods mentioned in paragraph 11 above had been adduced, since the photographs submitted by [Centrotherm Systemtechnik] demonstrated the nature of the mark’s use and the invoices produced showed that the goods mentioned had been marketed under the contested mark.’
- 15 The following remarks on the background to the case as outlined by the General Court are in order.
- 16 First of all, as evidenced inter alia by paragraph 13 of the General Court’s judgment in the parallel Case T-434/09 *Centrotherm Systemtechnik v OHIM – centrotherm Clean Solutions (CENTROTHERM)*, the Board of Appeal considered, as regards the other goods and services for which the mark CENTROTHERM had been registered, that Centrotherm Systemtechnik had only provided the statement of its manager by way of evidence, which did not, in the Board’s view, suffice to prove genuine use of that mark. In that regard, the Board of Appeal pointed out that the Cancellation Division was neither obliged to ask for other documents nor to take account of the file of another case also pending before OHIM.
- 17 Secondly, it is apparent from paragraph 36 of the contested decision that, as regards the additional evidence provided by Centrotherm Systemtechnik before the Board of Appeal, the Board considered that such ‘additional evidence was adduced out of time and cannot be taken into consideration’ as ‘the time-limit referred to in the second sentence of Rule 40(5) of [Regulation No 2868/95] is a limitation period non-compliance with which entails revocation of the trade mark pursuant to the third sentence of Rule 40(5) [of that regulation]’. In paragraph 37 of that decision, the Board of Appeal added, in that regard, that even though it is free, under Article 76(2) of Regulation No 207/2009, to take account or not of evidence adduced out of time, there were no grounds in that case for it to exercise that discretion in favour of the applicant. The Board added that the applicant had put forward only general arguments about the role and value of the trade mark right and had not argued that it was impossible to make out proof of use at first instance.

### **The judgment under appeal**

- 18 By application lodged at the Registry of the General Court on 22 October 2009, centrotherm Clean Solutions brought an action for annulment of the contested decision in so far as it had dismissed the application for revocation of the mark CENTROTHERM.
- 19 In support of that action, centrotherm Clean Solutions relied on a single plea in law, alleging incorrect assessment of the evidence. In finding that the evidence adduced by Centrotherm Systemtechnik before the Cancellation Division was insufficient to make out proof of genuine use of the mark at issue, the Board of Appeal infringed Article 51(1)(a) of Regulation No 207/2009 and Rules 22(2) and (3) and 40(5) of Regulation No 2868/95.
- 20 By the judgment under appeal, the General Court upheld that action by annulling the contested decision in so far as it had annulled in part the decision of the Cancellation Division of 30 October 2007.

- 21 In paragraphs 21 to 24 of the judgment under appeal, the General Court began by referring to the objective of the sanction of revocation, the procedural rules and the principles governing evidence in revocation proceedings, as evidenced in particular by Article 51(1)(a) of Regulation No 207/2009 and Rule 40(5) of Regulation No 2868/95.
- 22 Next, in paragraphs 25 to 30 of the judgment under appeal, the General Court made the following remarks:
- ‘25 According to case-law, 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. Moreover, the condition of genuine use of the mark requires that that mark, as protected on the relevant territory, be used publicly and outwardly (see judgment of the General Court of 27 September 2007, Case T-418/03 *La Mer Technology v OHIM – Laboratoires Goëmar (LA MER)*, ... paragraph 54, and case-law cited).
- 26 Although the concept of genuine use therefore excludes all minimal and insufficient use as the basis for a finding that a mark is being put to real and effective use on a given market, nevertheless the requirement of genuine use does not seek to assess commercial success or to review the economic strategy of an undertaking, nor is it intended to restrict trade mark protection to the case where large-scale commercial use has been made of the marks (Case T-194/03 *Il Ponte Finanziaria v OHIM - Marine Enterprise Projects (BAINBRIDGE)* [2006] ECR II-445, paragraph 32).
- 27 More specifically, to assess whether a particular trade mark has been put to genuine use in a particular case, an overall assessment of the documents in the file must be carried out, taking account of all the relevant factors in the case. In such an assessment, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned 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 [*La Mer Technology v OHIM – Laboratoires Goëmar (LA MER)*], paragraphs 53 to 55 and case-law cited).
- 28 As to the extent of the use to which the trade mark at issue has been put, account must be taken, in particular, of the commercial volume of the overall use, as well as of the length of the period during which the mark was used and the frequency of use (see [*La Mer Technology v OHIM – Laboratoires Goëmar (LA MER)*], paragraph 56 and case-law cited). That assessment entails a degree of interdependence of the factors taken into account. Thus, the fact that commercial volume achieved under the mark was not high may be offset by the fact that use of the mark was extensive or regular, and vice versa (see [*La Mer Technology v OHIM – Laboratoires Goëmar (LA MER)*], paragraph 57, and case-law cited).
- 29 However, the smaller the commercial volume of the exploitation of the mark, the more necessary it is for the proprietor of the mark to produce additional evidence to dispel any doubts as to the genuineness of its use (judgment of 18 January 2011 in Case T-382/08 *Advance Magazine Publishers v OHIM – Capela & Irmãos (VOGUE)*, ... paragraph 31).
- 30 Moreover, 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 (see [*La Mer Technology v OHIM – Laboratoires Goëmar (LA MER)*], paragraph 59, and case-law cited).’

- 23 Having stated, in paragraph 31 of the judgment under appeal, that it was in the light of all of the considerations referred to in paragraphs 21 to 30 therein that it fell to be determined whether the Board of Appeal had been right to consider in the contested decision that the evidence adduced by Centrotherm Systemtechnik before the Cancellation Division showed genuine use of the mark at issue in respect of the goods referred to in paragraph 11 therein, the General Court held as follows in paragraphs 32 to 37 of that judgment:
- ‘32 In the present case, the evidence adduced by [Centrotherm Systemtechnik] to the Cancellation Division to show genuine use of its mark are the sworn statement of its manager, 4 invoices and 14 digital photographs.
- 33 At the outset, it should be noted that it is not apparent from the Board of Appeal’s reasoning that its finding in relation to establishing genuine use of the goods referred to in paragraph 11 above is based on the sworn statement of [Centrotherm Systemtechnik’s] manager. Indeed, as is apparent from paragraphs 26 to 30 of the contested decision, it is the interaction between the probative value of the photographs and the four invoices which led the Board of Appeal to find that the genuine use of the CENTROTHERM mark had been proven. The references, made in paragraphs 27 and 31 of the contested decision, to that statement concern only its deficiencies and the lack of additional evidence supporting it.
- 34 It follows that it is necessary to examine whether the overall assessment of the photographs and the four invoices lead to the conclusion that the mark at issue has been put to genuine use in accordance with the principles established by the case-law referred to in paragraphs 25 to 29 above.
- 35 In that regard, it should be noted that, of the four invoices, three are dated July 2006 and relate to Denmark, Hungary and Slovakia and one is dated January 2007 and relates to Germany. The word “centrotherm” appears in the letterhead of those invoices, accompanied by [Centrotherm Systemtechnik’s] logo as its business name and its postal address.
- 36 Those invoices show multiple products related to plumbing (pipes, pipe sleeves, sets for connecting boilers, revision elbows, exhaust system covers) were sold by [Centrotherm Systemtechnik] to four clients for a sum which corresponds, including the invoice from 2007, to less than 0.03% of the turnover which [Centrotherm Systemtechnik’s] manager declared to have achieved in 2006 with the sale of the goods under the CENTROTHERM mark.
- 37 It follows that, before OHIM, [Centrotherm Systemtechnik] adduced relatively weak evidence of sales as compared with the sum indicated in the statement of its manager. Consequently, even if the Board of Appeal had taken that statement into account, it should be noted that there was insufficient evidence in the file supporting the statement as regards the value of sales. Moreover, as regards the temporal aspect of the use of the mark, those invoices concern a very short, even selective, period, namely 12, 18 and 21 July 2006 and 9 January 2007.’
- 24 In paragraphs 38 to 42 of the judgment under appeal, the General Court further considered the probative value of the photographs submitted by Centrotherm Systemtechnik.
- 25 It concluded its assessment and upheld the action on the basis of the following:
- ‘43 Accordingly, it must be held that an overall assessment of the evidence, as set out at paragraphs 35 to 42 above, does not allow the conclusion, without resorting to probabilities or presumptions, that the mark at issue was the subject of genuine use during the relevant period for the goods referred to at paragraph 11 above.



- 44 It follows that the Board of Appeal erred in finding that evidence of genuine use of the CENTROTHERM trade mark had been adduced by [Centrotherm Systemtechnik] for those products.
- 45 This conclusion is not called into question by [Centrotherm Systemtechnik's] arguments, set out in paragraphs 18 to 20 above, according to which, in essence, the specific nature of the market makes gathering evidence difficult.
- 46 There is no limit on the methods and means of proving genuine use of a mark. The Court's finding that genuine use has not been proven in the present case is not attributable to an excessively high standard of proof, but because [Centrotherm Systemtechnik] chose to restrict the evidence adduced (see paragraph 8 above). The Cancellation Division received poor quality photographs of objects whose article numbers do not correspond to the articles which, according to the few invoices submitted, were sold. Moreover, those invoices cover a short period and show sales of a minimal value as compared with those which [Centrotherm Systemtechnik] claims to have achieved. It must also be noted that [Centrotherm Systemtechnik] confirmed during the hearing that there was no direct link between the invoices and the photographs which it had submitted to OHIM.
- 47 The action should therefore be upheld.'

#### **Forms of order sought by the parties before the Court of Justice**

- 26 By its appeal, Centrotherm Systemtechnik asks the Court to set aside the judgment under appeal, to dismiss the action brought by centrotherm Clean Solutions at first instance and to order it to pay the costs.
- 27 OHIM contends that the appeal should be upheld and that centrotherm Clean Solutions should be ordered to pay the costs.
- 28 centrotherm Clean Solutions contends that the appeal should be dismissed and that Centrotherm Systemtechnik should be ordered to pay the costs.

#### **The appeal**

- 29 Centrotherm Systemtechnik relies on four grounds in support of its appeal.

#### *Preliminary remarks*

- 30 It will be apparent from the discussion of the background to the case set out in paragraph 14 of this judgment that, although the revocation proceedings in question were brought pursuant to Regulation No 40/94, the contested decision was delivered by the Board of Appeal of OHIM after Regulation No 207/2009 entered into force.
- 31 However, since the latter regulation merely codified Regulation No 40/94 and the relevant provisions thereof did not undergo any amendment in the course of that codification, references will be made only to Regulation No 207/2009 in the discussion below.

*Consideration of the first ground of appeal: infringement of Article 65 of Regulation No 207/2009 and of Article 134(2) and (3) of the Rules of Procedure of the General Court*

Arguments of the parties

- 32 By its first ground of appeal, Centrotherm Systemtechnik argues that the judgment under appeal disregards its right as intervener under Articles 65 of Regulation No 207/2009 and 134(2) and (3) of the Rules of Procedure of the General Court to apply for forms of order and put forward pleas in law independently with a view inter alia to having the decision delivered by a Board of Appeal of OHIM altered.
- 33 In Centrotherm Systemtechnik's submission, it is evident from paragraphs 33 and 34 of the judgment under appeal that, in order to rule on the action before it, the General Court restricted its assessment to the question whether the photographs and invoices submitted by Centrotherm Systemtechnik before the Cancellation Division led to the conclusion that genuine use of the mark at issue had been proven, as the Board of Appeal found that it had in the contested decision.
- 34 Yet, as its statement in response lodged before the General Court shows, Centrotherm Systemtechnik was not seeking only to have the action brought by centrotherm Clean Solutions dismissed by that court. In its statement in response, Centrotherm Systemtechnik also developed a line of argument in which it criticised the Board of Appeal for having failed to take account of the sworn statement of its manager, of the additional evidence adduced by it before the Board of Appeal and of other evidence contained in the trade mark file and aimed at having the General Court find, in the light of the evidence, that genuine use of the mark at issue had been proven. Following that line of argument, the General Court ought to have interpreted Centrotherm Systemtechnik's application as also asking it to uphold the contested part of the contested decision but to substitute different reasoning.
- 35 OHIM contends that Centrotherm Systemtechnik sought only dismissal of the action brought by centrotherm Clean Solutions and that it did not seek annulment or alteration of the contested decision.
- 36 According to centrotherm Clean Solutions, it is apparent from paragraphs 32 and 37 of the judgment under appeal that the General Court took note of the evidence adduced by Centrotherm Systemtechnik and that it ruled on Centrotherm Systemtechnik's argument concerning the need to take into consideration the sworn statement, although it found that the content thereof was not corroborated by the evidence in the file. It is, moreover, not necessary for the General Court to rule specifically on each point put forward in a party's line of argument.

Findings of the Court

- 37 It should be borne in mind, as a preliminary point, that it is apparent from Article 65(1) and (3) of Regulation No 207/2009 that actions may be brought against decisions of the Boards of Appeal of OHIM before the Court of Justice of the European Union, which has jurisdiction to annul or to alter such decisions.
- 38 Moreover, Article 134(1) and (2) of the Rules of Procedure of the General Court provides that the parties to the proceedings before the Board of Appeal other than the applicant may participate, as interveners, in the proceedings before the General Court and may, in that capacity, apply for a form of order and put forward pleas in law independently of those applied for and put forward by the main parties. Article 134(3) of the Rules of Procedure adds, in that regard, that such an intervener may, in his response, seek an order annulling or altering the decision of the Board of Appeal on a point not raised in the application and put forward pleas in law not raised in the application.

- 39 It follows from the foregoing that, in its capacity as intervener in the proceedings for partial annulment of the contested decision brought by centrotherm Clean Solutions before the General Court, Centrotherm Systemtechnik could have applied for annulment or alteration of that decision.
- 40 It should be noted at the outset that, by this ground of appeal, Centrotherm Systemtechnik does not allege that it asked for annulment of the contested decision before the General Court.
- 41 It does state, however, that, given the reasons set out in its statement in response before the General Court, that court ought to have construed the forms of order sought as asking it to dismiss the action brought by centrotherm Clean Solutions, if necessary after having substituted its own assessment for that of the Board of Appeal by virtue of its power to alter decisions.
- 42 First of all, in the remedies sought as set out in its statement in response lodged before the General Court, Centrotherm Systemtechnik asked only for that court to ‘dismiss the action’, without in any way mentioning, even in the alternative, annulment or alteration of the contested decision.
- 43 Yet the very wording of Article 134(2) and (3) of the Rules of Procedure of the General Court makes it clear that an intervener may put forward, in its statement in response, independent ‘forms of order’ seeking annulment or alteration of the contested decision. It follows that, in principle, what an intervener intends to seek on the basis of that provision must be clear from the forms of order sought in its statement in response (see, to that effect in respect of the application initiating proceedings, order of 28 June 2011 in Case C-93/11 P *Verein Deutsche Sprache v Council*, paragraph 18).
- 44 Next, it is clear that, as with the remedies sought as set out in Centrotherm Systemtechnik’s statement in response, nor does the line of argument developed by it in that response express clearly and specifically a request for alteration of the contested decision.
- 45 Lastly, even if the statements set out in paragraphs 49 to 56 of the statement in response, relating to the sworn statement, and in paragraphs 23 and 57 thereof, concerning the evidence in the file of the mark at issue and that put forward by Centrotherm Systemtechnik before the Board of Appeal, could, as that party contends, be construed as asking the General Court to take that evidence into account by virtue of its power to alter decisions, the fact remains that the ground of appeal alleging that the General Court failed, incorrectly, to exercise that power cannot be upheld in the present case.
- 46 First of all, it is clear that, in so far as that ground of appeal seeks, in essence, to criticise the General Court for having failed to take account of the sworn statement in question, it is factually incorrect. In paragraph 37 of the judgment under appeal, the General Court held that even if that statement had been taken into account by the Board of Appeal, it had to be noted that there was insufficient evidence in the file supporting the statement as regards the value of sales.
- 47 It follows that the overall assessment of the evidence considered in paragraphs 35 to 42 of the judgment under appeal, at the end of which the General Court held, in paragraph 43, that that evidence did not lead to the conclusion that the mark at issue had been put to genuine use is based *inter alia* on a consideration of that sworn statement and an assessment of the probative value attaching to that statement and to the other evidence considered.
- 48 Secondly, and in so far as this ground of appeal in essence criticises the General Court for having failed to take account, in the exercise of its power to alter decisions, of the evidence in the file of the mark at issue and that adduced before the Board of Appeal, it should be borne in mind that the General Court’s power to alter decisions does not have the effect of conferring on that court the power to carry out an assessment on which the Board of Appeal has not yet adopted a position. Exercise of the power to alter decisions must therefore, in principle, be limited to situations in which the General

Court, after reviewing the assessment made by the Board of Appeal, is in a position to determine, on the basis of the matters of fact and of law as established, what decision the Board of Appeal was required to take (Case C-263/09 P *Edwin v OHIM* [2011] ECR I-5853, paragraph 72).

- 49 In the present case, it is clear from paragraphs 32 to 37 of the contested decision that the Board of Appeal refused specifically to take the evidence in question into consideration, thereby refraining from making any ruling whatsoever on its probative value.
- 50 In those circumstances, Centrotherm Systemtechnik could not ask the General Court to examine, for the purpose of possibly altering the contested decision, the probative value of evidence which had not been examined by the Board of Appeal in that decision.
- 51 It follows from all the foregoing considerations that the first ground of appeal must be dismissed.

*Consideration of the second ground of appeal: infringement of Articles 51(1)(a) and 76(1) of Regulation No 207/2009*

#### Arguments of the parties

- 52 By its second ground of appeal, Centrotherm Systemtechnik submits that in considering, as is implicitly apparent from the judgment under appeal and particularly paragraph 46 thereof, that Centrotherm Systemtechnik had the burden of proving genuine use of the mark at issue, the General Court made an error of law.
- 53 On the one hand, the rule under Article 76(1) of Regulation No 207/2009 that OHIM is to examine the facts of its own motion applies in the context of revocation proceedings.
- 54 On the other hand, whilst Articles 42(2) and 57(2) of Regulation No 207/2009 provide that the proprietor of the earlier mark must furnish proof of genuine use of that mark, failing which his application for a declaration of invalidity must be rejected, Article 51 of that regulation contains no similar specifications for revocation proceedings.
- 55 In those circumstances, the rule relating to the burden of proof laid down in Rule 40(5) of Regulation No 2868/95 disregards Regulation No 207/2009 and should not be applied. It follows that the General Court ought to have taken account of all of the evidence available to it.
- 56 In OHIM's submission, given the inter partes and sui generis nature of revocation proceedings, the principle that OHIM is to examine the facts of its own motion is not applicable and it is for the proprietor of the mark, who is in possession of the requisite evidence for that purpose, to prove that he made genuine use of that mark.
- 57 centrotherm Clean Solutions adds that Article 76(1) of Regulation No 207/2009 does not apply to revocation proceedings. Rule 40(5) of Regulation No 2868/95, however, determines the detailed procedural rules applicable to revocation proceedings, by providing expressly that the proprietor of the mark must furnish proof of genuine use of that mark. Moreover, in the judgment under appeal, the General Court did not in any way affirm that the burden of proof rests with the proprietor of the mark.

#### Findings of the Court

- 58 It should be observed as a preliminary point that in the judgment under appeal the General Court did not in any way affirm that the burden of proof rests with the proprietor of the earlier mark.

- 59 Secondly, it should be observed that paragraph 46 of that judgment, in which the appellant alleges that the General Court did adopt such a position, is not sufficiently unequivocal to lead to such a conclusion.
- 60 Thirdly and most importantly, it is clear that Centrotherm Systemtechnik does not explain how such an implicit assessment and error of law allegedly arising therefrom, even if that were the case, would be such as to require the judgment under appeal to be set aside.
- 61 Furthermore, it should be noted, first of all, as observed above in paragraphs 40 to 42 of this judgment, in its statement in response before the General Court, Centrotherm Systemtechnik did not in any way ask for annulment of the contested decision. It cannot, therefore, in the context of the present appeal, complain that the General Court failed to annul that decision due to an error of law allegedly made by the Board of Appeal in finding that the burden of proof of genuine use of the mark rested with the proprietor of that mark.
- 62 Next, nor should Centrotherm Systemtechnik criticise the General Court for having failed to take account of the evidence in the trade mark file and that adduced before the Board of Appeal in order to find, in the judgment under appeal, that it was not necessary to grant revocation of the mark at issue since, as is apparent from paragraphs 48 to 50 of this judgment, no request was made to the General Court for annulment of the contested decision and nor could it have done so, given the aforementioned evidence.
- 63 Lastly, it must be borne in mind that, by its action, centrotherm Clean Solutions restricted itself to arguing that the Board of Appeal had found that the evidence adduced before the Cancellation Division proved genuine use of the mark at issue.
- 64 It follows from the foregoing that, in order to rule on the action and the pleas in law put forward before it, the General Court was not in any way required to rule on the question of who had the burden of proof of genuine use of that mark.
- 65 It also follows that even if the implicit error of law that Centrotherm Systemtechnik alleges is to be found in the judgment under appeal did exist, it would not be grounds for setting that judgment aside.
- 66 It follows from the foregoing considerations that the second ground of appeal must be dismissed.

*Consideration of the third ground of appeal: infringement of Article 51(1)(a) of Regulation No 207/2009*

Arguments of the parties

- 67 By its third ground of appeal, Centrotherm Systemtechnik alleges that, as is apparent from paragraph 26 of the judgment under appeal, the General Court based itself on the scenario in which the concept of genuine use excludes all minimal and insufficient use. In so doing, the General Court disregarded the Court of Justice's case-law, according to which the requirement of genuine use must exclude only token use for the sole purpose of preserving the rights conferred by registration of the mark.
- 68 In Centrotherm Systemtechnik's submission, that error of law served as the basis for the incorrect assessment made by the General Court in paragraphs 36 and 37 of the judgment under appeal, where it is stated that relatively weak evidence of sales was adduced, corresponding to a mere 0.03% of the declared turnover.

69 OHIM and centrotherm Clean Solutions submit, firstly, that paragraph 26 of the judgment under appeal, which refers to minimal and insufficient use ‘as the basis for a finding that a mark is being put to real and effective use on a given market’ is fully in line with the Court’s case-law. Secondly, the General Court’s assessment that the evidence of sales adduced are insufficient to lead to a finding of genuine use of the mark is not subject to review in the context of an appeal.

#### Findings of the Court

70 It is clear, first of all, that this third ground of appeal is based on an incorrect reading of the judgment under appeal. In taking part of a sentence in paragraph 26 of that judgment out of context, Centrotherm Systemtechnik distorts the scope of that paragraph.

71 To begin with, the assessment made in paragraph 26 cannot be read in isolation from paragraph 25 of the judgment under appeal, where the General Court reaffirmed *inter alia* 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.

72 It was in the light of the principles it had just reiterated that the General Court stated, in paragraph 26 of the judgment under appeal, that the concept of genuine use ‘therefore’ excludes all minimal and insufficient use ‘as the basis for a finding that a mark is being put to real and effective use on a given market’, before referring, in the same paragraph, to the case-law according to which the requirement of genuine use does not seek to assess commercial success or to review the economic strategy of an undertaking; nor is it intended to restrict trade mark protection to the case where large-scale commercial use has been made of the marks.

73 Moreover, nor must it be forgotten that paragraphs 25 and 26 are part of a broader review of the case-law relating to the concept of genuine use of the mark, including references to guidance from the case-law on the extent of use and, in particular, the commercial volume of the use, as discussed in paragraphs 27 to 29 of the judgment.

74 It follows that the statement in paragraph 26 of the judgment under appeal, by which the General Court restricts itself to looking back at consistent guidance from the case-law, contains no error of law.

75 Secondly, regarding paragraphs 36 and 37 of the judgment under appeal, it should be noted that they are part of a complex analytical process, of which they are merely a link in the chain, intended, as stated in paragraph 34 thereof, to examine whether the overall assessment of the photographs and the four invoices lead to the conclusion that the mark at issue has been put to genuine use in accordance with the principles established by the case-law referred to in paragraphs 25 to 29 thereof.

76 In that context, the findings and assessments made by the General Court, *inter alia* in paragraphs 36 and 37, concerning the frequency of the commercial actions referred to, the period over which they extended and the commercial volume involved, cannot be isolated from the set of other considerations – including, in particular, the examination of the photographs contained in paragraphs 38 to 42 of the judgment under appeal – which the General Court took into account in finding that genuine use of the mark at issue had not been proven in the case before it.

77 Such findings and assessments come within the scope of the facts of the case (see, to that effect, Case C-234/06 P *Il Ponte Finanziaria v OHIM* [2007] ECR I-7333, paragraph 75) and, save where they are distorted, are accordingly not a question of law which is subject to review by the Court of Justice on appeal.

78 It follows from the foregoing considerations that the third ground of appeal must be dismissed.

*Consideration of the fourth ground of appeal: infringement of Article 78(1)(f) of Regulation No 207/2009 and of Rule 22 of Regulation No 2868/95*

#### Arguments of the parties

- 79 By its fourth ground of appeal, Centrotherm Systemtechnik maintains that the General Court made an error of law in failing to refute the Board of Appeal's finding that the sworn statement is not evidence for the purposes of Rule 22(4) of Regulation No 2968/95, read in conjunction with Article 78(1)(f) of Regulation No 207/2009.
- 80 According to the appellant, if the General Court had done so and taken account of the fact that it cannot be required that any information contained in a sworn statement must be corroborated by other evidence, it would have been led to adopt a different position on the issue of whether there was genuine use of the mark at issue.
- 81 According to OHIM, it is apparent from paragraph 37 of the judgment under appeal and from paragraph 34 of the judgment in the parallel Case T-434/09 *Centrotherm Systemtechnik v OHIM – centrotherm Clean Solutions (CENTROTHERM)*, that the General Court did not state as a matter of general principle that sworn statements may not have any probative value. Rather, it examined the statement in question and found, at the end of an assessment which may not be reviewed on appeal that, in the case before it, additional evidence was necessary, given the links between the author of the statement in question and Centrotherm Systemtechnik.
- 82 centrotherm Clean Solutions argues that since the disputed statement made by the Board of Appeal was not raised in the action before the General Court, that court was under no obligation to overrule it. Nor did the General Court endorse it, as it merely stated in paragraph 37 of the judgment under appeal that even if the Board of Appeal had taken that statement into account, it would have had to hold that there was insufficient evidence in the file supporting the statement as regards the value of sales.

#### Findings of the Court

- 83 It should be observed, in the first place, that this fourth ground of appeal partly overlaps with the first ground of appeal in that the first ground criticised the General Court for having failed, like the Board of Appeal before it, to take account of the sworn statement as evidence of use of the mark, whereas had it done so, it would have been able to find, in the exercise of its power to alter the decision, that proof of genuine use had been made out.
- 84 As observed earlier in the discussion of the first ground of appeal in paragraphs 46 and 47 of this judgment, it is apparent from paragraphs 37 and 43 of the judgment under appeal and from paragraph 46 thereof that the assessment of all of the evidence which led the General Court to hold that proof of genuine use of the mark at issue had not been made out encompassed both the disputed statement and the other evidence adduced before the Cancellation Division of OHIM and that the General Court, in so doing, in no way held that such a statement was not admissible as evidence.
- 85 In the second place, as regards Centrotherm Systemtechnik's argument that the General Court held, incorrectly, that any information contained in a sworn statement had to be corroborated by other evidence, thereby depriving such statements of any independent probative value, suffice it to note that the assessment made by the General Court in paragraph 37 of the judgment under appeal has no such scope. In that paragraph, the General Court merely emphasised the vast difference between statements

relating to annual turnover figures allegedly achieved by Centrotherm Systemtechnik between 2002 and 2006 contained in the sworn statement of the manager of Centrotherm Systemtechnik and the relatively minimal and limited sales volumes for a very short, even selective, period, as indicated in the invoices actually produced by Centrotherm Systemtechnik.

- 86 It follows from the foregoing considerations that the fourth ground of appeal must be dismissed.
- 87 Accordingly, since none of the grounds of appeal put forward by Centrotherm Systemtechnik have been successful, the appeal must be dismissed.

### **Costs**

- 88 Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since centrotherm Clean Solutions has applied for costs to be awarded against Centrotherm Systemtechnik, and since Centrotherm Systemtechnik has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by centrotherm Clean Solutions. OHIM must bear its own costs.

On those grounds, the Court (Fourth Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders Centrotherm Systemtechnik GmbH to bear its own costs and to pay those incurred by Clean Solutions GmbH & Co. KG;**
- 3. Orders the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) to bear its own costs.**

[Signatures]