

Court of Justice EU, 26 September 2013,
Centrotherm Systemtechnik v OHIM II



TRADEMARK LAW – LITIGATION

The Court cannot judge over evidences not proofed by the Board of Appeal.

- 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.

Source: curia.europa.eu

Court of Justice EU, 26 September 2013

(L. Bay Larsen, J. Malenovský, U. Lõhmus, M. Safjan, A. Prechal

JUDGMENT OF THE COURT (Fourth Chamber)
26 September 2013

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. Lõhmus, 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

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 in 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 *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.**

OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 16 May 2013 (1)

Case C-609/11 P and Case C-610/11 P

Centrotherm Systemtechnik GmbH

v

Office for Harmonisation in the Internal Market

(Trade Marks and Designs) (OHIM)

and

centrotherm Clean Solutions GmbH & Co. KG

(Appeal – Community trade mark – Application for revocation – Evidence filed after expiry of the time-limit set by OHIM – Allocation of the burden of proof – Examination of facts by OHIM of its own motion – Probative value of sworn statement)

1. On 15 September 2011, the General Court issued two judgments in actions brought against the same decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market ('OHIM' or 'the Office') of 25 August 2009 relating to revocation proceedings between *centrotherm Clean Solutions GmbH & Co. KG* ('Clean Solutions') and *Centrotherm Systemtechnik GmbH* ('Systemtechnik'). (2) *Systemtechnik* has appealed against each judgment.

2. In both appeals, questions are raised as regards the burden of proof in revocation proceedings before OHIM and the extent to which the Board of Appeal can take into account evidence filed after the expiry of the time-limit set by the Cancellation Division. I discuss separate but related questions in the context of opposition proceedings in my Opinions in Case C-

621/11 P New Yorker SHK Jeans v OHIM and in Cases C-120/12 P, C-121/12 P and C-122/12 P Rintisch v OHIM, which are also delivered today.

Procedural rules

3. Article 134(2) and (3) of the Rules of Procedure of the General Court provide:

'2. The interveners referred to in paragraph 1 [namely, parties to the proceedings before the Board of Appeal other than the applicant] 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.

Such submissions seeking orders or putting forward pleas in law in the intervener's response shall cease to have effect should the applicant discontinue the proceedings.'

EU trade mark law

4. When the application for revocation was filed on 7 February 2007, Regulation No 40/94 on the Community trade mark ('Regulation No 40/94') (3) was still in force. That regulation was later repealed and replaced by Regulation No 207/2009 on the Community trade mark ('Regulation No 207/2009'), (4) which entered into force on 13 April 2009 (and thus before the Board of Appeal issued its decision of 25 August 2009, which was the subject of the two actions before the General Court). I shall therefore refer to Regulation No 207/2009 in this Opinion.

5. Article 15(1) of Regulation No 207/2009, entitled 'Use of Community trade marks', states:

'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, [(5)] unless there are proper reasons for non-use.

...

6. Article 51 sets out the grounds for revocation:

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

...

7. Article 57 concerns inter alia the examination of an application for revocation:

'1. On the examination of the application for revocation of rights or for a declaration of invalidity, the Office shall invite the parties, as often as necessary, to file observations, within a period to be fixed by the Office, 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. If, at the date on which the Community trade mark application was published, the earlier Community trade mark had been registered for not less than five years, the proprietor of the earlier Community trade mark shall furnish proof that, in addition, the conditions contained in Article 42(2) were satisfied at that date. In the absence of proof to this effect the application for a declaration of invalidity shall be rejected. If the earlier Community trade mark has been used in relation to part only of the goods or services for which it is registered, it shall, for the purpose of the examination of the application for a declaration of invalidity, be deemed to be registered in respect only of that part of the goods or services.

...

8. Article 65 provides for actions to be brought before the Court against decisions of the Board of Appeal:

'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.

...

9. According to Article 76, entitled 'Examination of the facts by the Office of its own motion',

'1. In proceedings before it the Office shall examine the facts of its own motion; however, in proceedings relating to relative grounds for refusal of registration, [(6)] the Office shall be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought.

2. The Office may disregard facts or evidence which are not submitted in due time by the parties concerned.'

10. Article 78, entitled 'Taking of evidence', states:

'1. In any proceedings before the Office, 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.

...

11. Regulation No 2868/95 ('the Implementing Regulation') (7) lays down rules necessary for the implementation of the Regulation No 207/2009. (8) Its rules 'should ensure the smooth and efficient operating of trade mark proceedings before the Office'. (9)

12. According to Rule 22 of the Implementing Regulation,

'(1). A request for proof of use pursuant to Article [42(2) or (3)] [(10)] of Regulation No 207/2009] shall be admissible only if the applicant submits such a request within the period specified by the Office pursuant to Rule 20(2).

(2). Where the opposing party has to furnish proof of use or show that there are proper reasons for non-use, the Office 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, the Office 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. Rule 37 describes what an application for revocation or for a declaration of invalidity must contain. As regards the grounds on which the application is based, Rule 37(b)(iv) states that it shall contain 'an indication of the facts, evidence and arguments presented in support of those grounds'.

14. According to Rule 40, entitled 'Examination of the application for revocation or for a declaration of invalidity',

'(1). Every application for revocation or for declaration of invalidity which is deemed to have been filed shall be notified to the proprietor of the Community trade mark. When the Office has found the application admissible, it shall invite the proprietor of the Community trade mark to file his observations within such period as it may specify.

(2). If the proprietor of the Community trade mark files no observations, the Office may decide on the revocation or invalidity on the basis of the evidence before it.

(3). Any observations filed by the proprietor of the Community trade mark shall be communicated to the applicant, who shall be requested by the Office, if it sees fit, to reply within a period specified by the Office.

...

(5). In the case of an application for revocation based on Article [51(1)(a) of Regulation No 207/2009], [(11)] the Office 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*.

(6). If the applicant has to furnish proof of use or proof that there are proper reasons for non-use under Article [57(2) or (3) of Regulation No 207/2009], the Office shall invite the applicant 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 application for declaration of invalidity shall be rejected. Rule 22(2), (3) and (4) shall apply *mutatis mutandis*.'

The procedure before OHIM

15. Systemtechnik applied on 7 September 1999 for registration of the word mark 'CENTROTHERM' as a Community trade mark in connection with goods and services in Classes 11, 17, 19 and 42 of the Nice Agreement. (12) The mark was registered on 19 January 2001.

16. On 7 February 2007, Clean Solutions applied for revocation of that mark in connection with all goods and services for which it was registered. Its request was based on the fact that the mark had not been used.

17. Following notification of the revocation request, Systemtechnik was invited on 15 February 2007 to submit comments and proof of genuine use of the mark in question within a period of three months. On 11 May 2007, Systemtechnik contested the request for revocation and produced several documents to show genuine use of its mark: 14 digital photographs, four invoices and a statement by its manager dated 26 April 2007 entitled 'sworn declaration'. It also stated that it had in its possession numerous other copies of invoices which it opted not to submit at that stage of the proceedings for reasons of confidentiality. Systemtechnik asked the Cancellation Division to specify if it wanted other evidence and individual documents to be added to the file.

18. On 30 October 2007, the Cancellation Division revoked Systemtechnik's Community trade mark in relation to all the goods and services for which it was registered. The revocation was based on what is now Article 51(1)(a) of Regulation No 207/2009: Systemtechnik had adduced insufficient evidence to prove genuine use of its mark.

19. Systemtechnik appealed against that decision. With its appeal, it filed other evidence, including samples of the products, certificates, declarations, invoices and pictures.

20. On 25 August 2009, the Board of Appeal annulled the decision of the Cancellation Division and dismissed the application for revocation in respect of certain goods in Classes 11, 17 and 19. As regards those goods, it found that evidence of genuine use of the mark had been adduced because the photographs

showed the nature of the use and the invoices showed marketing under the contested mark. However, the Board of Appeal dismissed the remainder of the appeal. As regards the services and other goods, it found that the manager's sworn statement was insufficient proof unless supported by additional evidence of its content. Furthermore, the Cancellation Division was not obliged to ask for other documents. Nor was it required to consider the file in another case pending before OHIM. 21. On 22 October 2009, Clean Solutions appealed against the decision of the Board of Appeal (Case T-427/09). On 26 October 2009, Systemtechnik did the same (Case T-434/09).

Judgments of the General Court

Case T-427/09 (the subject of the appeal in Case C-609/11 P)

22. The General Court upheld the action brought by Clean Solutions by annulling the decision of the Board of Appeal in so far as it annulled the decision of the Cancellation Division of 30 October 2007. It ordered OHIM to pay its own costs and those of Clean Solutions. Systemtechnik was ordered to pay its own costs.

23. Clean Solutions' action was based on a single plea in law, namely that, in finding that the evidence submitted by Systemtechnik was sufficient to prove genuine use of the mark, the Board of Appeal infringed Article 51(1)(a) of Regulation No 207/2009 and Rules 22(2) and (3) and 40(5) of the Implementing Regulation.

24. At paragraphs 21 to 30 of its judgment, the General Court set out the legal background against which it would consider that plea. Apart from summarising the case-law on the definition of genuine use and the means to prove that use, the General Court outlined the objective of, and the procedure for imposing, the sanction of revocation and the principles governing evidence in revocation proceedings.

25. At paragraph 25, the General Court stated 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. Moreover, the condition of genuine use of the mark requires that that mark, as protected on the relevant territory, be used publicly and outwardly'*.

26. It further stated at paragraph 26 that *'[a]lthough the concept of genuine use ... 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'*.

27. The General Court held, at paragraph 27, that assessing whether a particular mark has been put to

genuine use involves 'an overall assessment of the documents in the file ... 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'. At paragraph 30, it added 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'.

28. Starting from paragraph 31 of its judgment, the General Court addressed Clean Solutions' argument that the findings of the Board of Appeal lacked an adequate factual basis. The paragraphs relevant to the present appeal are the following:

'32. In the present case, the evidence adduced by the intervener to the Cancellation Division to show genuine use of its mark are the sworn statement of its manager, four invoices and fourteen 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 ... is based on the sworn statement of the intervener's manager. Indeed ... 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 ... 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 ..

...

37. It follows that, before OHIM, the intervener 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.

...

43. Accordingly, it must be held that an overall assessment of the evidence ... 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 the intervener for those products.

45. This conclusion is not called into question by the intervener's arguments ... 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 the intervener chose to restrict the evidence adduced 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 the intervener claims to have achieved. It must also be noted that the intervener confirmed during the hearing that there was no direct link between the invoices and the photographs which it had submitted to OHIM.'

Case T-434/09 (the subject of the appeal in Case C-610/11 P)

29. In its judgment in Case T-434/09, the General Court dismissed the action. It ordered Systemtechnik to pay the costs and Clean Solutions to bear its own costs.

30. As regards the first plea in law, according to which OHIM incorrectly appraised the evidence of genuine use produced before the Cancellation Division, the General Court described, at paragraphs 21 to 32, the legal background against which it would consider this plea (as in paragraphs 21 to 32 of its judgment in Case T-427/09).

31. Next, at paragraphs 32 to 34 of its judgment, it focused on the probative value of the sworn statement of Systemtechnik's manager:

'32. It should be borne in mind that the evidence adduced by the applicant to the Cancellation Division to show genuine use of its mark are the sworn statement of its manager, four invoices and fourteen digital photographs.

33. At the outset, it is important to note that it is settled case-law that, in order to assess the probative value of "statements in writing sworn or affirmed or having a similar effect under the law of the State in which the statement is drawn up" within the meaning of Article 78(1)(f) of Regulation No 207/2009, it is necessary to check the probability and the veracity of the account it contains, by taking account of, inter alia, the person from whom the document originates, 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 ..

34. It must therefore be considered that, in view of the clear links between the author of the statement and the applicant, a probative value cannot be attributed to that statement unless it is supported by the fourteen photographs and the four invoices in question.'

32. The General Court then examined the invoices (paragraphs 35 to 37) and photographs (paragraphs 38 to 43) before concluding that:

'44. It follows from the above that neither the photographs nor the invoices corroborate the statement of the applicant's manager, in so far as he maintains that the following goods had been marketed under the CENTROTHERM mark during the relevant period: mechanical parts for air-conditioning, steam generating, drying and ventilating installations; air-filter apparatus and parts therefor; seals, packing materials; packing, stopping and insulating materials; semi-processed plastics in extruded form for use in manufacture; building materials; reinforcing materials for building purposes; wall linings, building panels, panels; lengthening pieces for chimneys, chimney cowl, chimney pots and mantelpieces.

45. Accordingly, it must be held that an overall assessment of the evidence in the file does not allow the conclusion, without resorting to probabilities or presumptions, that the CENTROTHERM mark was the subject of genuine use during the relevant period for the goods and services other than those referred to at paragraph 11 above.'

33. As regards the second plea in law according to which OHIM infringed its duty to examine relevant facts of its own motion, the General Court reasoned as follows:

'51. At the outset, the Court notes the wording of Article 76(1) of Regulation No 207/2009, under which "[i]n proceedings before it the Office shall examine the facts of its own motion; however, in proceedings relating to relative grounds for refusal of registration, the Office shall be restricted in this examination to the facts, evidence and arguments provided by the parties".

52. In the present case, it should be pointed out that the grounds justifying the declaration of revocation are, like the grounds justifying refusal of registration, of both an absolute and relative nature.

53. According to Article 51(1) of Regulation No 207/2009, the rights of the proprietor of the Community trade mark are to be declared to be revoked if, within a continuous period of five years, it was not put to genuine use ..., if, in consequence of acts or inactivity of the proprietor, the trade mark has become the common name in the trade for a product or service in respect of which it is registered ... or if, in consequence of the use made of it by the proprietor of the trade mark or with his consent, the trade mark is liable to mislead the public ..

54. Although the last two conditions relate to absolute grounds for refusal, as is apparent from Article 7(1)(b) to (d) and (g) of Regulation No 207/2009, the first condition relates to a provision falling within the examination of relative grounds for refusal, namely Article 42(2) of Regulation No 207/2009. Consequently, it must be concluded that OHIM's examination of the question of genuine use of the Community trade mark in revocation proceedings is subject to Article 76(1), in fine, of Regulation No

207/2009, which provide that that examination is limited to facts provided by the parties.

55. Accordingly, the applicant's premiss, according to which OHIM erred in limiting its examination to evidence which it submitted, is incorrect.'

34. As regards the third plea in law according to which OHIM allegedly failed to take account of the evidence produced before the Board of Appeal, the General Court said the following:

'61. Firstly, it should be recalled that OHIM's examination of the question of genuine use of the Community trade mark is ... subject to the application of Article 76(1), in fine, of Regulation No 207/2009. That provision provides that the examination by OHIM shall be restricted to the facts provided by the parties. It follows that the applicant's contention that OHIM was obliged to complete its file of its own motion must be rejected.

62. Secondly, the possibility for parties to proceedings before OHIM to submit facts and evidence after the expiry of the periods specified for that purpose does not exist unconditionally, but, as follows from case-law, is subject to the condition that there is no provision to the contrary. It is only if that condition is met that OHIM has a degree of latitude as regards the taking into account of facts and evidence submitted out of time ..

63. In the present case, there is a provision which precludes the taking into account of the material submitted to the Board of Appeal, namely Rule 40(5) of [the Implementing Regulation].'

35. Finally, as regards the plea of illegality of Rule 40(5) of the Implementing Regulation, the General Court rejected that plea based on the following considerations:

'67. The General Court finds that, although it is true that the rules of [the Implementing Regulation] cannot contradict the provisions and scheme of Regulation No 207/2009, there is no inconsistency to be found between Rule 40(5) of [the Implementing Regulation] and the provisions on revocation in Regulation No 207/2009.

68. Although Regulation No 207/2009 lays down the substantive rule, namely revocation for Community trade marks which have not been put to genuine use, [the Implementing Regulation] specifies the applicable procedural rules, in particular allocation of the burden of proof and the consequences of failure to meet the time-limits imposed. Moreover ... it is apparent from the scheme of Regulation No 207/2009 that, as regards the application for revocation for lack of genuine use, the extent and intensity of OHIM's examination are constrained by the facts, evidence and arguments provided by the parties.

69. Clearly the arguments put forward by the applicant do not in any way show that the procedural provision in Rule 40(5) of [the Implementing Regulation] – which allocates the burden of proof to the proprietor of the Community trade mark and provides that the failure to produce sufficient evidence by the time-limit set shall lead to a declaration of revocation – might contradict Regulation No 207/2009.

70. As regards the alleged breach of the principle of proportionality it should be noted that non-compliance, without just grounds, with time-limits, which are of fundamental importance to the proper functioning of a Community system, may be penalised in Community legislation by forfeiture of a right, without that being inconsistent with the principle of proportionality ...

71. Finally, it should be noted that the argument that Rule 40(5) of [the Implementing Regulation] is contrary to the right to property and the right to a fair hearing is unfounded. That rule in no way affects the rights of a proprietor of a Community trade mark unless he chooses, as the applicant did in this case, not to provide before OHIM, by the time-limit set, the material in its possession showing genuine use of its mark.'

Summary of the appeals and the form of remedies sought

Case C-609/11 P

36. Systemtechnik asks the Court to set aside the judgment of the General Court in Case T-427/09, to dismiss the action of Clean Solutions against the decision of the Board of Appeal of 25 August 2009 and to order Clean Solutions to pay the costs.

37. The appeal is based on four grounds: (i) infringement of Article 65 of Regulation No 207/2009, read in conjunction with Article 134(2) and (3) of the Rules of Procedure of the General Court, because the General Court did not decide on all pleas in law; (ii) infringement of Articles 51(1)(a) and 76 of Regulation No 207/2009, because the General Court relied on a mistaken premiss that the trade mark proprietor has the burden of proving genuine use of its mark in revocation proceedings; (iii) infringement of Article 51(1)(a) of Regulation No 207/2009, because the General Court found that, contrary to the Court's case-law, mere minimal use cannot constitute genuine use and (iv) infringement of Article 78(1)(f) of Regulation No 207/2009, read together with Rule 22 of the Implementing Regulation, because the General Court did not reject OHIM's position according to which the sworn statement of the manager does not constitute evidence within the meaning of those provisions.

Case C-610/11 P

38. Systemtechnik asks the Court to set aside the judgment of the General Court in Case T-434/09 and to annul the decision of the Board of Appeal in so far as it grants the application for a declaration of revocation. It also asks the Court to order OHIM and Clean Solutions to pay the costs.

39. Systemtechnik's appeal is based on four grounds: (i) infringement of Article 51(1)(a) of Regulation No 207/2009, because the General Court disregarded the probative value of the sworn statement; (ii) infringement of Article 76(1) of Regulation No 207/2009, because the General Court did not interpret that provision so as to mean that in revocation proceedings the competent authority has a duty to examine relevant facts of its own motion; (iii) infringement of Articles 51(1)(a) and 76(1) and (2) of Regulation No 207/2009, because the General Court

failed to find that OHIM has discretion to take into account documents presented by the appellant in the proceedings before the Board of Appeal and (iv) in the alternative, the General Court erred by failing to find that Rule 40(5) of the Implementing Regulation does not apply.

Summary of the parties' arguments

Case C-609/11 P

First ground: Article 65 of Regulation No 207/2009 and Article 134(2) and (3) of the Rules of Procedure of the General Court

40. According to Systemtechnik, the General Court erred in not addressing its arguments regarding the Board of Appeal's failure to take into account (i) the sworn statement, (ii) the documents in the file and (iii) the evidence submitted in support of the appeal before it. In particular, the General Court should have interpreted those arguments as meaning that Systemtechnik was asking it to uphold the decision of the Board of Appeal but to substitute different reasoning.

41. OHIM asks this Court to reject this ground of appeal because Systemtechnik asked the General Court to dismiss the action without seeking an order annulling or altering the decision of the Board of Appeal on a point not raised in the application.

42. Clean Solutions submits that, at paragraph 32 of the judgment under appeal, the General Court described the evidence in the file as well as that presented to the Board of Appeal. It also follows from paragraph 37 that the General Court did not fail to decide on Systemtechnik's argument on the need to take into account the sworn statement. Rather, it stated there that the content of that statement was not supported, in any event, by the file. Moreover, the introductory part to the judgment under appeal demonstrates that the General Court took into account all of Systemtechnik's arguments. Clean Solutions further submits that the General Court is not obliged to state expressly in the grounds for its decision all the different points made in the parties' observations. Finally, Clean Solutions argues that the first ground must be rejected because Systemtechnik is asking the Court to determine whether the General Court properly established and appreciated the facts at issue. That type of review falls outside the scope of this Court's jurisdiction in an appeal.

Second ground: Articles 51(1)(a) and 76 of Regulation No 207/2009

43. Systemtechnik submits that, at paragraph 46 of the judgment under appeal, the General Court implies that the proprietor of the contested mark has the burden of showing genuine use of its mark. That position is contrary to Regulation No 207/2009 because, on the one hand, revocation proceedings are subject to the rule in the first part of Article 76(1) of Regulation No 207/2009, according to which OHIM is to examine the facts of its own motion while, on the other hand, other provisions of that regulation show that, in the context of Article 51(1)(a) of Regulation No 207/2009, the burden of proof does not rest with the proprietor of the

mark. The General Court should therefore have held that it was for OHIM to examine the facts of its own motion.

44. Systemtechnik argues that the competence described in Article 76(1) requires OHIM to examine all the information presented to it irrespective of when it was submitted. OHIM is thus precluded from refusing to consider evidence because it was submitted after the expiry of the time-limit set. Unlike the rules governing proof of genuine use in opposition and invalidity procedures, (13) Article 51 of Regulation No 207/2009 prescribes, in revocation proceedings, neither an obligation to prove use nor the legal consequences resulting from the lack of such proof. The proprietor of a mark is thus not required to prove genuine use of its mark following such a request by a third party. Nor can the mark automatically be revoked because the proprietor did not show use of its mark. That interpretation of Article 51 is also fully consistent with general principles governing the allocation of the burden of proof and in particular the principle that the party who asserts a right must show the facts supporting the assertion.

45. A different interpretation would entail the risk of the proprietor of a mark having to defend itself continually against revocation requests and thus be subject to long and costly procedures. In that regard, the revocation procedure also differs from opposition and invalidity proceedings because the result of the rejection of an opposition or request for invalidity is not the permanent loss of a trade mark.

46. OHIM considers that the General Court was right to hold that revocation proceedings relate to a provision governing relative grounds of refusal, namely Article 42(2) of Regulation No 207/2009. A revocation proceeding, like proceedings based on relative grounds of refusal, is an inter partes proceeding aimed at protecting the interests of competitors by limiting monopoly positions of proprietors who do not use their mark. The principle that OHIM examines of its own motion does not apply to that type of proceeding. That is logical because the proprietor is the party most likely to be able to produce the necessary evidence to establish the presence of the mark on the relevant market. Moreover, it would be difficult to ask the requesting party to demonstrate the non-use of another party's mark.

47. As regards the argument that the General Court should have taken account of the evidence submitted before the Board of Appeal, OHIM agrees with the position taken by the General Court in cases such as *New Yorker SHK Jeans v OHIM* (14) and submits that, taking into account the parallels between Rules 22(2) and 40(5) of the Implementing Regulation, the same interpretation must be applied to both provisions.

48. Clean Solutions does not interpret Article 76(1) of Regulation No 207/2009 so as to mean that OHIM must examine the facts of its own motion in revocation proceedings where it is only the question of genuine use of the mark that is at issue. In that regard, Rule 40(5) of the Implementing Regulation provides that a

Community trade mark must be revoked if its proprietor does not prove genuine use within the time-limit set by OHIM. The third sentence of that provision further states that Rule 22(2) to (4) applies *mutatis mutandis*. It follows that, in the context of revocation proceedings, the proprietor of the mark bears the burden of showing genuine use of its mark.

Third ground: Article 51(1)(a) of Regulation No 207/2009

49. Systemtechnik submits that the General Court erred, at paragraph 26 of its judgment, in holding that the concept of genuine use excludes all minimal and insufficient use. It should have applied existing case-law on genuine use that suggests a different interpretation.

50. OHIM argues that this ground is clearly unfounded because it is based on an incomplete reproduction of the judgment under appeal. In particular, Systemtechnik fails to note that the General Court found that minimal and insufficient use was excluded as the basis for a finding that a mark is being put to real and effective use.

51. Clean Solutions submits that the third ground is unfounded, for reasons similar to those advanced by OHIM. In its view, the reasoning set out at paragraphs 26 to 30 of the judgment shows that the General Court took account of all the conditions resulting from the Court's case-law on the notion of genuine use. Clean Solutions submits that, by its third ground of appeal, Systemtechnik is really inviting this Court to replace the General Court's assessment of the facts and the evidence by its own.

Fourth ground: Article 78(1)(f) of Regulation No 207/2009 read together with Rule 22 of the Implementing Regulation

52. Systemtechnik submits that the General Court erred by upholding, at paragraph 37 of its judgment, the position of the Board of Appeal that a sworn statement is not a means of giving evidence under Article 78(1)(f) of Regulation No 207/2009. In previous cases, such a statement has been accepted to be admissible evidence and to have sufficient probative value, even in the absence of further proof supporting the information contained therein.

53. OHIM argues that the Court of Justice has no jurisdiction to review the General Court's assessment, at paragraph 34 of the judgment, of the probative value of the sworn statement because that is an assessment of facts. In any event, OHIM contends that Systemtechnik misunderstood that part of the judgment. The General Court did not reject the probative value in abstracto of a sworn statement. Nor did it articulate principles governing the admissibility of that type of evidence. Rather, it found that in the present case other evidence was necessary because of the identity of the author of the statement.

54. Clean Solutions points out that, at paragraph 31 of the Board of Appeal's decision of 25 August 2009, OHIM stated that the sworn statement formed part of a party's arguments. That part of the decision was not subject to appeal before the General Court. Nor did the

General Court endorse the position of the Board of Appeal or state that all information contained in the statement must be supported by additional evidence. Clean Solutions further submits that Systemtechnik has omitted to refer to more recent case-law of the General Court holding that a statement of an executive cannot constitute evidence if it is not supported by additional material.

Case C-610/11 P

First ground: Article 51(1)(a) of Regulation No 207/2009

55. Systemtechnik alleges that the General Court erred, at paragraph 34 of its judgment, in finding that the sworn statement can have a probative value only if it is supported by other evidence submitted to the Cancellation Division. The General Court has previously held that sworn statements are admissible evidence and that their content does not need to be supported by other evidence. Moreover, by failing to take into account the fact that none of the other parties seriously or substantially contested the content of the statement, the General Court acted contrary to the principle according to which a determination of genuine use must be based on a global assessment, taking into account all relevant elements of the case.

56. OHIM's position on this ground of appeal is the same as that on the fourth ground of appeal in Case C-609/11 P.

57. Clean Solutions takes the same position as OHIM. In its view, the General Court neither found that a sworn statement cannot have probative value nor erred in appreciating the actual probative value of the statement at issue. Instead, the General Court considered the link between the author of the statement and the proprietor of the mark, and in that context found that the statement did not have probative value in the absence of supporting evidence. That assessment of the probative value of a sworn statement is not a question of law that can be subject to review by this Court in an appeal. Moreover, it is of no consequence that the General Court did not take account of the fact that the content of the sworn statement was not contested. First, the probative value of a statement does not depend solely on whether its content is contested. Second, Systemtechnik could have invoked this argument in relation to its second ground of appeal. Finally, the General Court has found that Article 76(1) of Regulation No 207/2009 cannot be interpreted so as to mean that OHIM is obliged to consider a fact invoked by one party to be established if it was not contested. (15)

Second ground: Article 76(1) of Regulation No 207/2009

58. Systemtechnik submits that the General Court erred by failing to apply Article 76(1) of Regulation No 207/2009, according to which OHIM must examine the facts of its own motion in proceedings other than those regarding relative grounds of refusal to register. OHIM thus cannot exclude evidence on the basis that it was presented late and must ask for additional documents if it considers that necessary.

59. OHIM's position is the same as that which it adopted on the first part of the second ground of appeal in Case C-609/11 P.

60. Clean Solutions disagrees with Systemtechnik's interpretation of Regulation No 207/2009 and relies on Rule 40(5) of the Implementing Regulation to argue that, in the context of revocation proceedings, the proprietor has the burden of showing genuine use of its trade mark. The General Court was also right to hold that OHIM can consider only the evidence submitted by the proprietor. In so far as Systemtechnik argues that OHIM should have examined the facts of its own motion and asked for additional evidence, Clean Solutions submits that such an argument pertains to an alleged error in the finding and assessment of facts and therefore falls outwith the jurisdiction of the Court of Justice in an appeal.

Third ground: Articles 51(1)(a) and 76(1) and (2) of Regulation No 207/2009

61. The third ground of appeal appears to consist of two parts.

62. First, Systemtechnik alleges that the General Court erred in holding that the late submission of evidence before the Board of Appeal precludes OHIM from taking it into account. The General Court should have concluded that the evidence was not submitted late. Nor did Systemtechnik need to submit evidence of genuine use of the mark. In that regard, no provisions similar to Articles 42(2) and 57(2) of Regulation No 207/2009 apply to revocation proceedings.

63. Second, (apart from arguments similar to those made in relation to the second ground of appeal in Case C-609/11 P) Systemtechnik alleges that, assuming that the Court holds that OHIM cannot examine facts of its own motion in revocation proceedings, the General Court erred in taking the view that OHIM has no discretion to consider evidence submitted after the expiry of the time-limit set by the Cancellation Division. Systemtechnik argues that the General Court erred, at paragraph 63 of its judgment, when holding that Rule 40(5) of the Implementing Regulation is an exception to the general rule on discretion to take into account late evidence. The General Court should have held that OHIM had the discretion and should have exercised it.

64. OHIM's position is that which it adopted on the second part of the second ground of appeal in Case C-609/11 P.

65. Clean Solutions submits that a proprietor must show genuine use within the time-limit set. It considers that the General Court's reasoning on whether OHIM has discretion to consider evidence filed after the expiry of the time-limit set is in conformity with existing case-law.

Fourth ground: Rule 40(5) of the Implementing Regulation

66. If the Court were to disagree with Systemtechnik's interpretation of Rule 40(5) of the Implementing Regulation, Systemtechnik submits that the General Court erred by not declaring that provision inapplicable in the present case. The provision cannot apply

because, on the one hand, it is incompatible with the wording and objective of Regulation No 207/2009 and, on the other hand, its application would be contrary to the principle of proportionality.

67. Clean Solutions disagrees because neither OHIM nor the General Court may refuse to apply Rule 40(5) of the Implementing Regulation as long as that provision is not found to be invalid.

Assessment

Preliminary remarks

68. First, I recall that the jurisdiction of the Court of Justice in appellate proceedings is limited to points of law. (16) This Court cannot review the General Court's findings and assessment of facts unless there is a clear distortion of the facts in the judgment under appeal. In so far as Systemtechnik in both appeals asks the Court to review the General Court's assessment of facts, such grounds of appeal or arguments must be rejected as being inadmissible.

69. Second, Systemtechnik alleges infringements of Regulation No 207/2009 and the Implementing Regulation. The latter contains rules necessary for implementing the former. (17) It cannot therefore be interpreted in a manner that would be contrary to Regulation No 207/2009. However, that regulation may be silent on a particular matter, such as the allocation of the burden of proof in revocation proceedings, while the wording of the Implementing Regulation can be construed so as to set out rules on that matter. In such cases, it cannot be concluded that the Implementing Regulation is not in conformity with Regulation No 207/2009. For that reason, I find no merit in the logic applied by Systemtechnik in relation to several grounds of appeal according to which the Implementing Regulation cannot state a rule that is neither confirmed nor excluded by the wording of Regulation No 207/2009.

70. Finally, in connection with Article 78(1)(f) of Regulation No 207/2009, Systemtechnik submits a series of arguments relating to the admissibility under German law of evidence such as the sworn statement of its manager. Clearly, the position under German law on this point is of no consequence to the admissibility of evidence under Regulation No 207/2009 and the Implementing Regulation. I shall therefore dismiss those arguments without further consideration.

71. The grounds of appeal in both cases partly overlap and I am unconvinced that there is an obvious, clear way of presenting my analysis of them. After reflection, I have decided to group them by subject-matter, cross-referencing the individual grounds of appeal.

Failure to decide on all pleas in law: Article 65 of Regulation No 207/2009 and Article 134(2) and (3) of the Rules of Procedure of the General Court (first ground of appeal in Case C-609/11 P)

72. In Case T-427/09, Systemtechnik was an intervener. Article 134(2) of the General Court's Rules of Procedure states that an intervener 'shall have the same procedural rights as the main parties' and 'may apply for a form of order and put forward pleas in law

independently from those applied for and put forward by the main parties'. It may also, according to Article 134(3) of those Rules of Procedure, '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'.

73. It follows that, just as with the main parties' arguments, the General Court must respond in a sufficient manner to the intervener's arguments by offering reasoning that enables the intervener to know why the General Court rejected its arguments. In the present appeal, Systemtechnik essentially asks this Court to review whether the General Court complied with that obligation.

74. I consider it did.

75. Before the General Court, Systemtechnik did not request an order annulling or altering the decision of the Board of Appeal. Instead, it supported OHIM's request that the appeal be dismissed. Its arguments focused on why the Board of Appeal concluded that the evidence filed was sufficient to prove genuine use. (18)

76. Since Systemtechnik failed to ask the General Court to modify the reasoning of the Board of Appeal's decision, I agree with OHIM that on appeal it cannot ask the Court of Justice to find that the General Court erred in not doing so. Systemtechnik must thus bear the consequence of its own omission.

77. I therefore conclude that this ground of appeal must be rejected as unfounded.

Failure to hold that OHIM must examine the relevant facts of its own motion: Articles 51(1)(a) and 76 of Regulation No 207/2009 (second ground of appeal in Case C-609/11 P; second ground of appeal and first part of the third ground of appeal in Case C-610/11 P)

78. Systemtechnik argues in Case C-609/11 P that, by failing to hold that OHIM must examine the facts of its own motion in revocation proceedings, the General Court did not apply the proper principle governing the allocation of the burden of proof in that type of proceeding. The premiss for that argument is that revocation is an absolute ground of refusal. It follows also that OHIM cannot refuse to take into account evidence that was submitted after the time-limit set by it. Systemtechnik submits that the General Court erred by failing to hold that OHIM may consider all the information presented before it irrespective of its date of submission.

79. This ground of appeal corresponds in essence with the second ground of appeal and the first part of the third ground of appeal in Case C-610/11 P, though the former is not based on an infringement of Article 51(1)(a) of Regulation No 207/2009. It concerns the allocation of the burden of proof in revocation proceedings initiated through an application based on the latter provision. Depending on where that burden falls, it will or will not be necessary to address the argument regarding OHIM's treatment of evidence filed after the expiry of the time-limit set.

80. In its judgment in Case T-427/09, the General Court did not expressly consider that issue, though its reasoning on the single plea in law in that case was based on the premiss that a trade mark proprietor whose trade mark is the subject of an application for revocation needs to file evidence of genuine use of its mark. By contrast, in its judgment in Case T-434/09, the General Court was asked to consider the same point in the context of the second plea in law alleging infringement of OHIM's duty to examine the relevant facts of its own motion. There, at paragraph 54 of its judgment, it held that Article 51(1)(a) of Regulation No 207/2009 concerns a provision falling within the examination of relative grounds for refusal and 'consequently' that OHIM's examination is limited to the facts provided by the parties.

81. Whilst I disagree with the reasoning of the General Court's judgment in Case T-434/09, I do not find an error in the conclusion that it reached.

82. A registered Community trade mark may be declared to be revoked upon application to OHIM or on the basis of a counterclaim in infringement proceedings. (19) Revocation of a mark extinguishes, in principle as from the date of the application for revocation or of the counterclaim, the rights of the proprietor in relation to that mark and the goods or services designated by it. (20) Revocation is one type of sanction to which a Community trade mark is subject if its proprietor has not put the mark to genuine use in the Community in connection with the goods or services in respect of which it is registered. (21)

83. Unlike grounds for invalidity or grounds of refusal, and contrary to what the General Court stated at paragraph 52 of its judgment in Case T-434/09, no distinction is made in Article 51 of Regulation No 207/2009 or elsewhere between relative and absolute grounds of revocation. In the present case, Clean Solutions applied for revocation based on Article 51(1)(a) of Regulation No 207/2009. That provision does not prescribe any form of procedure. It thus does not resolve who has the burden of proof in such proceedings.

84. The relevant procedural rules are to be found in Articles 56 and 57 of Regulation No 207/2009. Apart from providing (in Article 56(2)) that the application for revocation must be filed 'in a written reasoned statement', neither Article 56 nor Article 57 addresses fully the allocation of the burden of proof. In particular, Article 57(2) concerns the situation where, upon a request by the proprietor of the contested trade mark, the proprietor of the earlier mark who is a party to invalidity proceedings 'shall furnish proof' that there has been genuine use of its mark. It does not resolve who must prove lack of genuine use in revocation proceedings.

85. Regulation No 207/2009 must be read together with the Implementing Regulation.

86. Rule 37 of the Implementing Regulation elaborates on the requirements of an application for revocation, that is, the written reasoned statement referred to in Article 56(2) of Regulation No 207/2009. In particular,

Rule 37(b)(iv) provides that the application must contain ‘an indication of the facts, evidence and arguments presented in support of [the grounds on which the application is based]’. (22) The wording used appears to suggest that it is not necessary to furnish all of those facts and evidence, though I accept that other language versions of that rule could be read differently. (23)

87. That application is then notified to the proprietor of the Community trade mark and examined by OHIM to determine its admissibility. (24) If it is admissible, under Rule 40(1), OHIM ‘shall invite the proprietor of the Community trade mark to file his observations within such period as it may specify’. If the application is based on the ground described in Article 51(1)(a) of Regulation No 207/2009, then under Rule 40(5), 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’.

88. The requirement that the applicant provide support for its claim in its application is thus an element of the admissibility of the request for revocation. By contrast, the requirement that the proprietor furnish proof of use only applies in so far as the request is admissible and thus may affect the substantive protection of a Community trade mark.

89. A combined reading of the relevant provisions of Regulation No 207/2009 and the Implementing Regulation also shows that in circumstances such as those at issue, on the one hand, the party applying for revocation cannot do so without indicating support for its contention that the contested trade mark has not been put to genuine use in the Community and, on the other hand, the party against whom the revocation application is directed must furnish proof of genuine use of the mark. (25)

90. Furnishing proof of genuine use of the mark is clearly more onerous than merely indicating the facts, evidence and arguments presented in support of the claim that the contested trade mark has not been put to genuine use in the Community.

91. In my view, the applicant must state clearly the legal assertions that it is making and identify the relevant facts and supporting evidence that lead it to request revocation of the mark at issue. It is thus insufficient to file a frivolous or unsubstantiated application for revocation. OHIM must declare such applications inadmissible. Otherwise, I agree with Systemtechnik that the proprietor of a mark would risk having to defend itself continually against applications for revocation.

92. At the same time, the exercise of the right to apply for revocation would become impossible or excessively difficult if an applicant were to be required to adduce negative proof, that is to say, to establish that there is no genuine use.

93. I therefore take the view that the applicant does not have to furnish detailed evidence of the lack of genuine use of the proprietor’s mark. Rather, it must make a reasonable case that legitimate concerns exist about the use of the mark.

94. If the application is deemed to be admissible, the Implementing Regulation expressly provides that the proprietor must furnish proof of genuine use of its mark. It is the proprietor who is best placed to provide detailed evidence of how the mark has been put to use in conformity with the general requirement of use articulated in Article 15(1) of Regulation No 207/2009 and to establish why there is no cause to revoke the mark. If it fails to do so, protection of the mark is no longer justified.

95. Unlike Systemtechnik, I do not consider that Article 76(1) of Regulation No 207/2009 provides a basis for a different interpretation.

96. Article 76(1) does not concern the allocation of the burden of proof as between the applicant and the proprietor of a mark in revocation proceedings. Rather, it defines the scope of OHIM’s contribution to fact-finding in procedures before it and delineates the allocation of responsibility in fact-finding as between the competent authority and the parties in proceedings before it.

97. The first part of Article 76(1) articulates a wide principle according to which OHIM ‘shall examine the facts of its own motion’ ‘[i]n proceedings before it’. The second part sets out an exception that applies in proceedings relating to relative grounds for refusal of registration. When examining absolute grounds for refusal, OHIM is thus required to examine, of its own motion, the relevant facts which might lead to apply such a ground. (26)

98. If the first part applies, the question of the allocation of the burden of proof between the proprietor of the contested mark and the party requesting revocation does not necessarily arise, since OHIM is expressly required to play an active role in the examination of relevant facts.

99. In my opinion, however, it does not apply.

100. It is true that the scope of the first part is circumscribed by the broad term ‘proceedings’. It does not discriminate between proceedings. The second part, by contrast, applies to ‘proceedings relating to relative grounds for refusal of registration’. A strict textual reading of both parts would appear to suggest that revocation proceedings fall within the scope of the general rule because such proceedings are proceedings before OHIM and they are not proceedings relating to relative grounds for refusal of registration.

101. To my knowledge, the Court has not yet considered the application of either the first or second part of Article 76 to revocation proceedings such as those at issue. Rather, it has confirmed that the first part applies when proceedings involve absolute grounds of refusal of registration, that is to say, grounds that are not related to earlier rights and which lead to an *ex parte* procedure before OHIM. In contrast, revocation proceedings are *inter partes* proceedings.

102. Systemtechnik, Clean Solutions and OHIM each attempt to widen the scope of either the first part or the second part.

103. I do not consider these arguments to be successful because the wording of Article 76(1) is clear: the first

part applies to proceedings before OHIM whereas the second part applies to proceedings relating to relative grounds for refusal of registration of a trade mark. Even if, as the General Court held at paragraph 52 of its judgment in Case T-434/09, an analogy can be drawn between relative and absolute grounds for revocation and those for refusal of registration, I find that there exists no similar analogy between revocation and refusal of registration themselves.

104. However, reading Article 76(1) in the light of its context and object and purpose shows that, despite the wording, OHIM cannot be required to examine the facts of its own motion in circumstances such as those at issue.

105. First, the claim that a registered Community trade mark has not been put to genuine use can be made solely in inter partes procedures. OHIM cannot of its own motion reject an opposition to registration or revoke a registered mark for reasons relating to the lack of genuine use. Rather, the claim can be made (i) by the applicant in its defence against the party opposing registration (Article 42(2) of Regulation No 207/2009); (ii) as a ground to request revocation of an existing Community trade mark (Article 51(1)(a) of Regulation No 207/2009); or (iii) as a basis for a counterclaim in infringement proceedings (Article 100 of Regulation No 207/2009). In my view, it would be absurd if Article 76 were to be read so as to imply that in each of these proceedings, a party must put forward a claim and that it is then for OHIM to seek and produce the evidence in support of that claim or in favour of the party which is alleged not to have used its trade mark.

106. Second, it would be entirely impracticable and inefficient if OHIM were required to examine of its own motion whether or not a mark has been put to genuine use. OHIM cannot be expected to obtain 'all the facts and circumstances relevant to establishing whether the commercial use of the mark is real in the course of trade, 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'. (27)

107. Those facts and circumstances can be put before OHIM through the various forms of evidence described in Article 78 of Regulation No 207/2009 and in individual provisions addressing the claim of genuine use, though other forms of evidence appear to be admissible. Those forms of evidence, such as packages, labels, price lists, catalogues, etc. are material evidence available to the party who is alleged not to have used its mark. While OHIM can ask that party to submit such evidence, it cannot find it itself. It is plain that, if revocation proceedings are to operate smoothly and efficiently, OHIM should not be charged with the burden of examining of its own motion the facts relevant to establishing whether or not the mark has been actually used.

108. Third, Regulation No 207/2009 and the Implementing Regulation set out specific rules

governing the allocation of the burden of proof in invalidity and opposition proceedings where a claim or allegation of non-use is made. (28) In relation to each of those proceedings, the text of these regulations expressly provides – in almost identical terms – which party is to furnish proof of genuine use. Yet, if the literal reading of Article 76(1) were correct, the proprietor of an earlier mark would have the burden of proof in invalidity and opposition proceedings, whereas in revocation proceedings (where the claim of non-use can also be made), it would be for OHIM to examine the same type of point of its own motion.

109. It follows also that Systemtechnik's argument that OHIM may consider all the information presented before it irrespective of its date of submission is without merit.

110. Against that background, I consider that the second ground of appeal in Case C-609/11 P and the second ground of appeal and the first part of the third ground of appeal in Case C-610/11 P should be rejected as unfounded. The General Court did not err in law in concluding, at paragraph 46 of the judgment in Case T-427/09, that genuine use had not been proven because Systemtechnik chose to restrict what evidence it filed, thereby implying that the proprietor has the burden of proof in this type of proceeding. Nor did it err in adopting the same position, on a more explicit basis, at paragraph 55 of its judgment in Case T-434/09.

Failure to hold that OHIM has discretion to take into account documents presented by the appellant in proceedings before the Board of Appeal: Articles 51(1)(a) and 76 of Regulation No 207/2009 (second part of the third ground of appeal in Case C-610/11 P)

111. The second part of the third ground of appeal in Case C-610/11 P arises if the Court rejects the argument that OHIM must examine the relevant facts of its own motion.

112. If OHIM's examination in revocation proceedings such as those at issue is limited to the facts, evidence and arguments provided by the parties, Systemtechnik submits that the General Court infringed Article 76(2) of Regulation No 207/2009 when holding that OHIM has no discretion in those circumstances to take into account evidence submitted after the expiry of the time-limit set by OHIM. In that regard, Systemtechnik submits also that Rule 40(5) of the Implementing Regulation is not an exception to the general principle that OHIM has discretion in such matters.

113. The argument put forward by Systemtechnik is similar to that supporting the sole ground of appeal in Case C-621/11 P *New Yorker SHK Jeans v OHIM* – a case in which I also deliver my Opinion today. That case involves an opposition proceeding where, following a request by the applicant, the opposing party had to furnish proof of genuine use of its mark. OHIM took into account evidence submitted by the opposing party in response to OHIM's invitation to respond to the applicant's argument that the evidence already

submitted was insufficient to show genuine use. In my Opinion in that case, I concluded that Rule 22(2) of the Implementing Regulation and Article 42 of Regulation No 207/2009, when read together, do not exclude OHIM's discretion to consider evidence submitted after the expiry of the initial time-limit set, provided that that discretion is exercised in a manner that guarantees respect for the principles of good administration and procedural efficiency and protection of the right to be heard. Put differently, I do not consider that it is never possible for OHIM to exercise a discretion in opposition proceedings to consider further evidence.

114. In the context of revocation proceedings, I consider that a similar question should be answered differently.

115. No provision similar to Article 42(2) of Regulation No 207/2009 applies to revocation proceedings. Whilst Article 57(2) of Regulation No 207/2009 is functionally equivalent to Article 42(2), it applies only to invalidity proceedings.

116. Why is there no such equivalent provision for revocation proceedings where the request is based on lack of genuine use of the contested mark?

117. In opposition and invalidity proceedings, the lack of genuine use is invoked in reaction to, respectively, the opposition or the request that a mark be declared invalid. Articles 42(2) and 57(2) set out the procedural framework that applies to a procedural issue in the course of proceedings that are governed by a separate set of rules.

118. In a revocation proceeding, the lack of genuine use is not raised in a similar way; rather, it forms the basis for the application itself. Logically therefore, the legislature did not provide a separate set of rules similar to those found in Articles 42(2) and 57(2).

119. But if that is the case, does any other provision of Regulation No 207/2009 prevent OHIM from exercising the type of discretion described in Article 76(2) of Regulation No 207/2009 in revocation proceedings?

120. Article 57(1) of Regulation No 207/2009 is the sole provision governing the filing of observations in revocation proceedings. It articulates the same rule as that which applies to the examination of an opposition and application for declaration of invalidity, namely that, in examining the application, 'OHIM shall invite the parties, as often as necessary, to file observations, within a period to be fixed by the Office, on communications from the other parties or issued by itself'. (29) That provision does not lay down the consequences attached to the late submission of evidence. Nor does it in any other way specify a rule different from that articulated in Article 76(2) of Regulation No 207/2009 which, it will be recalled, expressly permits OHIM to 'disregard facts or evidence which are not submitted in due time by the parties concerned'.

121. In the present case, OHIM therefore did have a discretion to exclude the filing of further evidence to corroborate the manager's sworn statement after the expiry of the time-limit set.

122. Can a provision in the Implementing Regulation, such as Rule 40(5), none the less exclude that discretion?

123. No.

124. I do not consider that the Implementing Regulation can exclude the application of Article 76(2) of Regulation No 207/2009 without a basis in Regulation No 207/2009 itself for that exclusion.

125. I take as my starting point the rule set out in Article 76(2) of Regulation No 207/2009. In *OHIM v Kaul*, the Court found that that general rule applies unless there is an express provision to the contrary which excludes that discretion. (30)

126. Where can we look for such a provision?

127. In Regulation No 207/2009 or in the Implementing Regulation.

128. With regard to the latter, I would distinguish between two possible categories of rules. First, there may be a rule in the Implementing Regulation which confirms a rule found in Regulation No 207/2009 which excludes discretion. It can certainly be argued that that is the correct reading of the relationship between Rule 22(2) of the Implementing Regulation and the second sentence of Article 42(2) of Regulation No 207/2009. (31) Second, there may be no provision in Regulation No 207/2009 that excludes the discretion whilst there may be a rule in the Implementing Regulation. But, in that event, can a rule in the Implementing Regulation be a sufficient basis for concluding that OHIM has no discretion?

129. I consider that it cannot. The Implementing Regulation cannot contradict Regulation No 207/2009.

130. In my opinion, Rule 40(5) of the Implementing Regulation is an example of the second type of rule. The first sentence of that rule makes Article 57(1) practicable and implements it by setting out how OHIM must exercise the discretion granted in the context of an application for revocation based on Article 51(1)(a) of Regulation No 207/2009. By contrast, the second sentence states a rule that is opposite to that found in Regulation No 207/2009: it excludes discretion and the application of Article 76(2) of Regulation No 207/2009.

131. Regulation No 207/2009 thus says 'yes, there is discretion' and the Implementing Regulation says 'there is no discretion'. In those circumstances, I consider that the Implementing Regulation contradicts Regulation No 207/2009. Priority must therefore be given to the latter.

132. I therefore agree with *Systemtechnik* that the General Court infringed Article 76(2) of Regulation No 207/2009 by finding, at paragraph 63 of its judgment in Case T-434/09, that Rule 40(5) of the Implementing Regulation is a provision that excludes the type of discretion described in Article 76(2).

133. I therefore conclude that the appeal is well founded in so far as it concerns the second part of the third ground of appeal in Case C-609/11 P.

134. The General Court should have concluded that OHIM had a discretion and then examined how OHIM,

and in particular the Board of Appeal, exercised that discretion in the present case.

The holding that mere minimal use cannot constitute genuine use: Article 51(1)(a) of Regulation No 207/2009 (third ground of appeal in Case C-609/11 P)

135. I reject the allegation that the General Court made an error of law in paragraph 26 of its judgment in Case T-427/09 by finding that genuine use cannot be interpreted so as to encompass minimal and insufficient use.

136. Clean Solutions and OHIM have rightly stated that this ground of appeal is unfounded because Systemtechnik has misrepresented the content of the finding at paragraph 26 of that judgment.

137. Paragraph 26 begins as follows: ‘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 ...’. The General Court was describing how use in a given market can be shown and be found to contribute to establishing genuine use of the mark. That is evident from reading the first part of the sentence together with the second part where the General Court went on to hold that showing use in a given market does not require proof of commercial success, economic strategy or large-scale commercial use. It also follows from reading paragraph 26 together with paragraph 25, where the General Court defined the concept of ‘genuine use of a trade mark’.

138. I would endorse the General Court’s approach here.

139. In my view, in paragraph 26 of its judgment, the General Court made the point that none of these factors taken individually can form the basis for concluding that a trade mark has been put to actual use in a given market. Consistent therewith, it went on to observe, in paragraph 28, that ‘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’ and, in paragraph 29, that ‘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’. In my opinion, that reasoning is fully consistent with the need for an overall assessment of all relevant factors as was recently held by this Court in *Leno Merken*. (32)

140. I therefore conclude that the third ground of appeal is unfounded.

Failure to reject OHIM’s position on the probative value of the sworn statement of the manager of the appellant: Article 78(1)(f) of Regulation No 207/2009 and Rule 22 of the Implementing Regulation (fourth ground of appeal in Case C-609/11 P) and Article 51(1)(a) of Regulation No 207/2009 (first ground of appeal in Case C-610/11 P)

141. Systemtechnik appears to argue in Case C-609/11 P that the General Court found in its judgment in Case

T-427/09 that the sworn statement of the appellant’s manager was inadmissible evidence.

142. In my view, the General Court made no such finding.

143. Nowhere in the judgment under appeal do I find any indication that the General Court declared the sworn statement (or, indeed, any of the other types of evidence adduced before the Board of Appeal) to constitute inadmissible evidence. Rather, at paragraph 37, the General Court assessed the probative value of the sworn statement in the particular circumstances of the case before it. At paragraph 33, it noted that the Board of Appeal’s reasoning was based on the interaction between the probative value of the photographs and the four invoices. It then scrutinised that reasoning at paragraphs 34 to 36. Based on the factual assessment of those two types of evidence, the General Court concluded, at paragraph 37, with the statement that there was ‘relatively weak evidence of sales as compared with the sum indicated in the statement of [the] manager’. That assessment of the facts falls outwith the scope of this Court’s powers of review in an appeal.

144. I therefore consider that the fourth ground of appeal in Case C-609/11 P must be rejected as inadmissible.

145. The first ground of appeal in Case C-610/11 P overlaps with the fourth ground of appeal in Case C-609/11 P regarding the General Court’s position on the sworn statement.

146. In Case C-610/11 P, Systemtechnik alleges that the General Court made an error of law, at paragraph 34 of the judgment in Case T-434/09, in holding that a sworn statement by the manager of the proprietor of the mark can have probative value only if the statement is supported by other evidence.

147. The General Court’s reasoning in Case T-434/09 concerned the probative value of a sworn statement as a matter of principle. At paragraph 33, the General Court focused on the factors relevant to the assessment of the probative value, and not the admissibility, of the type of statement listed at Article 78(1)(f) of Regulation No 207/2009. Those factors include ‘the person from whom the document originates, 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’. Based on those considerations, the General Court then assessed, at paragraph 34, the probative value of the sworn statement filed by Systemtechnik. Because of the ‘clear links between the author of the statement and the applicant’, the General Court decided that ‘a probative value cannot be attributed to that statement unless it is supported by the 14 photographs and the 4 invoices in question’.

148. Systemtechnik expressly challenges the assessment at paragraph 34 of the judgment in Case T-434/09. However, that paragraph contains (unlike the reasoning at paragraph 33) a factual assessment by the

General Court. On appeal, it thus falls outwith the scope of the Court's jurisdiction.

149. I therefore consider that the first ground of appeal in Case C-610/11 P must be rejected because it is inadmissible.

Failure to find that Rule 40(5) does not apply: Rule 40(5) of the Implementing Regulation (fourth ground of appeal in Case C-610/11 P)

150. In view of my conclusion on the third ground of appeal in Case C-610/11 P, I consider that there is no need to examine again the issue of the application of Rule 40(5) of the Implementing Regulation.

Referral

151. Under the first paragraph of Article 61 of the Statute of the Court, the Court of Justice is to quash the judgment of the General Court if the appeal is well founded. Where the proceedings so permit, it may give itself final judgment in the matter. It may also refer the case back to the General Court.

152. I have concluded that the appeal in Case C-610/11 P is well founded in so far as it concerns the existence of OHIM's discretion to take account of evidence of genuine use which is filed out of time.

153. Against the background of the facts available and the exchange of argument of the parties both before the General Court and before this Court on this point, I consider that it is possible for the Court to give final judgment on whether the Board of Appeal properly exercised its discretion.

154. In the present case, the General Court did not, in the context of the third plea of law, consider the alternative finding of the Board of Appeal that, if it had a discretion, it would have decided not to take into account the evidence because no explanation was given for why that evidence was produced for the first time before it.

155. In my opinion, the Board of Appeal gave insufficient reasons for its decision to exercise its discretion against the appellant. In particular, it failed to consider the relevance of the evidence to the outcome of the revocation proceeding, that is, the issue of whether the appellant should lose the rights to its mark, and to address the Cancellation Division's failure to respond to Systemtechnik's request (having raised issues of confidentiality) that it adopt a procedural measure and specify if it wanted other elements of proof and individual documents to be added to the file. Based on the facts available, I consider that it was indispensable for the Board of Appeal to consider and weigh these two elements in deciding how to exercise its discretion.

156. I therefore conclude that the decision of the Board of Appeal must be annulled.

Costs

157. Under Article 138(1) of the Rules of Procedure, which applies to appeals on the basis of Article 184(1) of the same rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Where each party succeeds on some and fails on other heads, Article 138(3) states that the parties shall bear their own costs

and, where justified in the circumstances, the Court may order one party to pay a proportion of the costs of the other party.

158. In each case, all the parties have applied for costs.

159. In Case C-609/11 P, I consider that Systemtechnik, as the unsuccessful party, must pay the costs. In Case C-610/11 P, each party must bear its own costs because each was successful on certain points.

Conclusion

Case C-609/11 P

160. For the reasons stated, I propose that the Court should:

- Dismiss the appeal in its entirety; and
- Order Systemtechnik to pay the costs incurred by OHIM and Clean Solutions.

Case C-610/11 P

161. For the reasons stated, I propose that the Court should:

- Set aside the judgment of the General Court in Case T-434/09 *Centrotherm Systemtechnik v OHIM – centrotherm Clean Solutions (CENTROTHERM)*;
- Annul the decision of the Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 25 August 2009 in so far as it dismissed the appeal against the decision of the Cancellation Division of 30 October 2007; and
- Order each party to bear its own costs.

1 – Original language: English.

2 – Case T-427/09 *centrotherm Clean Solutions v OHIM – Centrotherm Systemtechnik (CENTROTHERM)* [2011] ECR II-6207, and Case T-434/09 *Centrotherm Systemtechnik v OHIM – centrotherm Clean Solutions (CENTROTHERM)* [2011] ECR II-6227.

3 – Council Regulation (EC) No 40/94 of 20 December 1993 (OJ 1994 L 11, p. 1), as amended.

4 – Council Regulation (EC) No 207/2009 of 26 February 2009 (codified version) (OJ 2009 L 78, p. 1). See Article 167.

5 – Such sanctions include revocation of the mark in question.

6 – As to whether the second part of the sentence in Article 76 also applies to proceedings relating to grounds for revocation, see points 101 to 108 below.

7 – Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1) as amended by, inter alia, Commission Regulation (EC) No 1041/2005 of 29 June 2005 (OJ 2005 L 172, p. 4).

8 – See the fifth recital in the preamble to the Implementing Regulation.

9 – See the sixth recital in the preamble to the Implementing Regulation.

10 – Article 42(2) and (3) of Regulation No 207/2009 describes the examination of an opposition in the context of which the trade mark applicant has requested that the opposing party furnish proof of genuine use of

his Community or national trade mark. The basis for applying Rule 22(2), (3) and (4) to revocation proceedings is found in Rule 40 of the Implementing Regulation. See point 13 below.

11 – See point 6 above.

12 – Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, as revised and amended.

13 – In particular, Articles 15(1), 42(2) and 57(2) of Regulation No 207/2009.

14 – Case T-415/09, now on appeal as Case C-621/11 P in which I am also delivering my Opinion today.

15 – Clean Solutions cites, in that regard, Case T-336/03 *Éditions Albert René v OHIM– Orange (MOBILIX)* [2005] ECR II-4667.

16 – Article 256 TFEU and Article 58 of the Statute of the Court of Justice.

17 – See the seventh recital in the preamble to the Implementing Regulation; final recital in the preamble to Regulation No 40/94. See also the 19th recital in the preamble to Regulation No 207/2009 and Article 162 of that regulation.

18 – See paragraphs 18 to 20 of the judgment under appeal.

19 – Article 51(1) of Regulation No 207/2009.

20 – Article 55(1) of Regulation No 207/2009.

21 – Article 15(1) of Regulation No 207/2009.

22 – Emphasis added.

23 – For example, the French text appears to be more neutral on this point because it provides that the request should contain ‘les faits, preuves et observations présentés à l’appui de la demande’. The Dutch and German texts, to give just two examples, appear to be more similar to the English text: the Dutch text states ‘een opgave van de feiten, bewijsmateriaal en argumenten die ter staving van deze gronden worden aangevoerd’ whereas the German text states ‘die Angabe der zur Begründung vorgebrachten Tatsachen, Beweismittel und Bemerkungen’.

24 – Rule 40(1) of the Implementing Regulation. The grounds of inadmissibility of such applications are set out in Rule 39 of the Implementing Regulation.

25 – Other language versions do not appear to contradict that reading. For example, the French text states ‘l’Office demande au titulaire de la marque communautaire la preuve de l’usage de la marque au cours d’une période qu’il précise’; the Dutch text states: ‘verzoekt het Bureau de eigenaar van het Gemeenschapsmerk binnen een door het Bureau te stellen termijn het bewijs van het normale gebruik van het merk te leveren’ and the German text reads as follows: ‘setzt das Amt dem Inhaber der Gemeinschaftsmarke eine Frist, innerhalb der er den Nachweis der ernsthaften Benutzung der Marke zu führen hat’.

26 – See, for example, Case C-265/09 P *OHIM v Borco-Marken-Import Matthiesen* [2010] ECR I-8265, paragraph 57.

27 – Order of 27 January 2004 in Case C-259/02 *La Mer Technology* [2004] ECR I-1159, paragraph 27. See also Case C-40/01 *Ansul* [2003] ECR I-2439, paragraphs 36 to 43; Case C-416/04 P *Sunrider v OHIM* [2006] ECR I-4237, paragraph 70; and Case C-149/11 *Leno Merken* [2012] ECR, paragraph 29.

28 – See, for example, Articles 42(2) and 57(2) of Regulation No 207/2009 and Rule 22(2) of the Implementing Regulation. See also points 115 to 118 below.

29 – Article 42(1) of Regulation No 207/2009 provides for the same rule in the context of opposition proceedings. Article 57(1) applies also to the examination of the application for a declaration of invalidity.

30 – Case C-29/05 P [2007] ECR I-2213, paragraph 42.

31 – That issue is being considered in the context of the appeal in Case C-621/11 P *New YorkerSHK Jeans v OHIM*.

32 – Cited in footnote 27 above, paragraph 29.