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## CJEU finds genuine use of EU collective mark for packaging waste system

European Union - [BOEHMERT & BOEHMERT Anwaltspartnerschaft mbB](#)

- The EUIPO revoked a collective mark concerning a system of collection and recovery of packaging waste on the ground that it had not been put to genuine use
- The General Court agreed, finding, among other things, that use of the mark was not intended to create or preserve an outlet for the goods
- The CJEU found that the General Court had misinterpreted the scope of the concept of 'genuine use' under Article 15(1) of Regulation 207/2009

In [Der Grüne Punkt - Duales System Deutschland GmbH v European Union Intellectual Property Office](#) (EUIPO) (C-143/19 P, 12 December 2019), the Court of Justice of the European Union (CJEU) (Fifth Chamber), overruling the judgment of the General Court, has given guidance on the genuine use of a collective mark.

### Background

In June 1996 Der Grüne Punkt - Duales System Deutschland GmbH (DGP), a German company specialised in the collection and recovery of packaging waste, filed an application for the registration of a logo as an EU collective mark for services in Classes 35, 39, 40 and 42, and also for a wide range of goods in Classes 1 to 34, including everyday consumer goods such as beverages, foodstuff and clothing. The EUIPO registered the collective mark ("representation of a circle with two arrows" on 19 July 1999:



Following an application for revocation by a Slovak company in November 2012, the EUIPO revoked the mark for all goods, with the exception of goods consisting of packaging. Both the Board of Appeal of the

EUIPO and the General Court (Case T-253/17, 12 September 2018) dismissed DGP's appeal, holding that the German company had not proved genuine use of the logo for the claimed goods, as the mark had not been used to show the origin of those goods.

In particular, the General Court stated that it was true that the mark, in accordance with its function as a collective mark, referred to the fact that the producer or distributor of the goods was part of DGP's licensing system. Therefore, it indicated a degree of environmentally-sound conduct on the part of that undertaking. However, the relevant public was capable of distinguishing between a mark indicating the commercial origin of the product and a mark indicating that packaging waste may be recovered. The use of the mark as a collective mark which identified goods of the members of the association by distinguishing them from goods originating from undertakings which did not belong to the association would be perceived by the relevant public as a use in respect of packaging. The use of the mark was also not intended to create or preserve an outlet for the goods. That mark was recognised by consumers solely as an indication that packaging would be disposed of and recovered if that consumer took that packaging to a local collection point. In the unlikely event that the consumer decided to purchase the product on the basis of the quality of the packaging alone, the fact remained that that mark did not create or preserve an outlet for that product, but only for its packaging.

### **Appeal to the CJEU**

DGP relied on a single ground of appeal, alleging infringement of Article 15(1) of Regulation 207/2009, read in conjunction with Article 66 (now Articles 18(1) and 74 of Regulation 2017/1001). DGP claimed use of the mark not only for the services for which the mark was registered, but also for the goods covered by the registration. According to DGP, the General Court had disregarded the essential function of EU collective marks, which also related to the marketing of goods; goods and their packaging must be assessed together, since they belong together and are sold as one unit. The goods on whose packaging the relevant mark was affixed all originated from undertakings affiliated with the DGP system, with such use reflecting an environmentally-sound conduct common to those undertakings. Furthermore, DGP underlined that a collective mark is usually used for goods of different undertakings and that it was clear that those undertakings affixed individual marks to their goods or to the packaging of their goods. Simultaneous use of the collective mark and individual marks did not in any way constitute an indication that there was no genuine use of the collective mark.

### **CJEU decision**

The CJEU, giving a final decision, annulled the General Court's decision (and that of the Board of Appeal) due to a misinterpretation of the scope of the concept of 'genuine use' within the meaning of Article 15(1). In particular, the court stated as follows:

- An EU collective mark is put to genuine use where it is used in accordance with its essential function, which is to distinguish the goods or services of members of the association which is the proprietor of the mark from those of other undertakings, in order to create or preserve an outlet for those goods or services. This is different from the function of an individual mark, which is indicate to the consumer the identity of origin of goods or services (Paragraphs 53 and 57).
- While the General Court had acknowledged that the relevant public recognised the producer or distributor of the goods on whose packaging the collective mark was affixed as being part of the common system of environmentally-sound disposal established by DGP, it had failed to examine the use of the collective mark on the market. The General Court had erred in failing to assess whether the affixing of the mark to the packaging of the goods of undertakings

affiliated with the DGP system was viewed, in the economic sector concerned, as warranted to maintain or create a share in the market for the *goods* (Paragraphs 59, 65 and 67).

- With regard to the everyday consumer goods covered by the mark, it could not be excluded that the indication on the packaging of the affiliation with a local collection system and of environmentally-sound disposal of packaging waste might influence consumers' purchasing decisions and, thus, contribute to the maintenance or creation of a share in the market relating to those goods (Paragraph 70).

## Comment

The decision is surprising in that it overruled the General Court, whose conclusions were shared by the previous instances. Relying on the essential function of collective marks and differentiating them from individual marks, the CJEU took a broad approach to the genuine use of collective marks. Consequently, the court fundamentally strengthened this type of EU mark.

In the specific context of collection systems for packaging waste, genuine use - and, thus, the monopoly afforded by a collective mark - was extended to the range of goods whose packaging bears the collective mark. The decision is based on the zeitgeisty and - presumably - accurate reasoning that the environmentally-sound disposal of *packaging* waste might influence the consumers' purchasing decision for the relevant *goods*. Greta Thunberg would arguably agree with this conclusion.

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## TAGS

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