

A matter of allure

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Is being environmentally friendly a quality which matters for consumers? And if it does, what it is “allure”?

On the judgment of the General Court of 12 December 2018 in case T-253/17 regarding genuine use of the sign of Der Grüne Punkt

Der Grüne Punkt – Duales System Deutschland GmbH is the owner of a collective EUTM registration for various goods and services in classes 1 to 35, 39, 40 and 42 for the following sign:



The particular function of this mark, placed on external packaging of different goods, was to enable consumers and traders to recognise packaging as part of a system of recycling and to distinguish them from other packaging and products not part of this system.

Haltston Properties s.r.o., filed a revocation action which was upheld for all the contested goods, except for some goods related to packaging. The Board of Appeal (BOA) confirmed, holding that Der Grüne Punkt had failed to prove that it had used the mark in accordance with its main function, namely to guarantee the identity of the origin of the goods. According to the BOA, consumers would only consider the mark as an indicator of the manufacturer’s heightened sensitivity to ecology and

not a reference to the commercial origin of the products.

Der Grüne Punkt therefore filed an action before the General Court (GC) claiming, among others, that the function to communicate to consumers the 'ecological' image of the manufacturer and the ecological quality of such products did not only relate to the packaging but to the products themselves and hence could attract consumers' attention and influence their choices. Thus, use on the packaging could be considered as genuine use with regard to the products inside the packaging.

The GC disagreed. It held that consumers clearly distinguish trademarks that indicate the commercial origin of products from those that indicate an ecological quality of packaging. In addition, the GC held that that the mark would not create or preserve an outlet for the goods at issue, but only for their packaging, even in the "unlikely" case where all things being equal, price included, a consumer's final choice might be influenced by whether or not the external packaging of one product would be recycled when another would become a (more or less) permanent feature of a landfill.

However, this conclusion is puzzling. If the choice is influenced, would this be enough to recognize such function as equally important than the essential function of the trade mark, which is to guarantee to consumers the origin of the goods or services? After all, the CJEU (cf. C-487/07, L'Oreal v Bellure), recognized that there are other functions, in particular that of guaranteeing the quality of the goods or services in question and those of communication, investment or advertising which deserve protection. And in Copad (case C-59/08) the CJEU held that the quality of certain goods "*is not just the result of their material characteristics, but also of the allure and prestigious image which bestows on them an aura of luxury*", as "*the aura of luxury emanating from them is essential in that it enables consumers to distinguish them from similar goods*".

Thus, when the GC albeit reluctantly, recognized that it is possible that consumers might choose one product, among other identical products, only for the ecological characteristic of its packaging, the GC also implicitly admitted that consumers' choices may be indeed influenced by the intangible value of being "environmentally friendly", for "*it enables consumers to distinguish them from similar goods*". And it is also difficult to deny that in such a case the transfer of the "environmental allure" is to the product itself and not only the packaging, as "that" product is ultimately sold (not just the packaging!). Should we thus now recognize

an environmental allure? The GC judgment is in line with its findings in the TEFLON case (T-660/11 of 16 June 2015), where the Court also denied genuine use of TEFLON for the final products despite the use of the sign for those and its potentially decisive impact on the purchase decision. This seems to be an unfortunate development for the protection of brands for goods or services that serve to improve the quality of a range of products.