

Der Grüne Punkt: CJEU says yes to genuine use of the collective “recycling packaging” trademark

Kluwer Trademark Blog

January 28, 2020

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Please refer to this post as: Sara Parrello, Fabio Angelini, ‘Der Grüne Punkt: CJEU says yes to genuine use of the collective “recycling packaging” trademark’, Kluwer Trademark Blog, January 28 2020, <http://trademarkblog.kluweriplaw.com/2020/01/28/der-grune-punkt-cjeu-says-yes-to-genuine-use-of-the-collective-recycling-packaging-trademark/>

The CJEU quite often agrees with its General Court, so when it does not it’s always interesting to see why. In the GC’s judgment (T-253/17, - [here previously commented](#)) the GC had considered unlikely that consumers purchase a product because it is contained in a recyclable packaging, so that the trademark Der Grüne Punkt, whose function is to enable consumers to recognise recyclable packaging from those not recyclable, would not be able to create or preserve an outlet for the various goods contained in the packaging, but only for the packaging themselves. The CJEU, with its decision C-143/19 P of 12 December 2019, disagreed, saying that albeit the GC had evaluated the particular function of the trademark “Der Grüne Punkt”, it had ignored a crucial factor, namely that in certain sectors (and for the relevant consumers), being environmentally friendly may be a quality that contributes to creating an outlet also for the goods contained in the packaging and not only for the packaging themselves.

Specifically, the CJEU held that before reaching any conclusion, the GC should have examined if the use of Der Grüne Punkt was apt to create a market share for the goods involved in each particular economic sector concerned. In its evaluation, the GC did not consider the different categories of goods involved and the different characteristics and peculiarities of the related markets but basically treated them as a whole. This was incorrect, held the CJEU, and the GC should have made a

more precise assessment, evaluating if the use of the Der Grüne Punkt was able to create a “clientele” for each different commercial sector involved.

The CJEU observed that some of the products concerned, such as food, beverages, personal care and housekeeping products, are everyday products that generate daily packaging waste that the consumers must dispose of. Therefore, it cannot be denied that the use of a collective trademark which inform consumers that the packaging of the products is recyclable, may influence consumers’ purchase decisions, as they might very well choose one product over another identical because its packaging is easily recyclable.

If thus the consumer’s choice may be so affected, then use of the mark in question would be able to contribute to create market shares also for the products themselves and not just for the packaging. After all products and packaging are sold together, and it may be difficult to exclude that an appealing quality of the packaging can influence consumer’s choice.

Therefore, the CJEU confirmed that a trademark function is not limited to identifying the origin of a certain product but, as we had surmised in commenting the GC decision there are other factors to be considered, among which, also those intangible values which, depending of the nature of the goods covered and the characteristic of their perspective markets, may have a role in creating or preserving an outlet for the goods in question.