

## EUIPO considers genuine use of 3D bottle shape mark

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### EUROPEAN UNION

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- The applicant sought the cancellation of a 3D mark for goods in Classes 29 and 30 on the ground of lack of genuine use
- The EUIPO emphasised that the assessment of genuine use must consider the evidence as a whole, rather than as isolated items
- The evidence demonstrated genuine use only for balsamic vinegar in Class 30

In [Vetroelite Srl v Agricultural Due Vitostori Srl](#) (Case R 961/2023-2), the Second Board of Appeal of the EUIPO has confirmed the decision of the Cancellation Division in [Case C 48 626](#).

The applicant for cancellation contested the genuine use of an EU trademark (EUTM) by arguing that the submitted proof did not sufficiently demonstrate its use in terms of time, place, extent and nature. However, the Cancellation Division emphasised that the assessment of genuine use must consider the evidence as a whole, rather than as isolated items, and the Board of Appeal confirmed the decision in its entirety.

## Background

At issue was EUTM Registration No 12878989, depicted below:



Cancellation was sought on the ground of a lack of genuine use.

The cancellation applicant's challenge was based on the premise that each piece of evidence should be scrutinised individually. The Cancellation Division, however, reiterated the necessity of applying a holistic approach. It acknowledged that, while individual pieces of evidence might lack certain relevant factors, the evidence, taken collectively, could substantiate genuine use.

## Decision

The key to the Board of Appeal's decision was considering the evidence as a whole, and not as individual or partial items. In this regard, the board stated as follows:

“ It is necessary to reiterate the principle that individual pieces of evidence should not be analysed in isolation, but together, in order to identify their most probable and coherent significance ([T-598/18, BROWNIE/BROWNIE, Brownie (series mark)], § 51).

From the above principle, it follows that if the probative value of a piece of evidence is limited and, therefore, when considered individually, does not conclusively demonstrate whether and how the products in question were placed on the market, and thus is not decisive on its own, it can nevertheless be considered in the overall assessment of the actual use of the mark in question. This occurs when, as in the case at hand, such an element is added to other pieces of evidence ([T-278/12, PROFLEX], §§ 64-69; [T-204/14, VICTOR/VICTORIA], § 74).

”

The Board of Appeal confirmed that the documentation provided by the owner, when evaluated as a whole, was sufficient to establish that the use of the contested EU trademark for the products in question was genuine, considering the high number of invoices presented and the substantial amounts indicated therein. This was confirmed by, among other things, excerpts from nationally circulated magazines, photographs of the products on display stands in retail outlets and at trade fairs, and documents relating to the position of the mark in question in the ranking of the best-selling 250ml bottles of balsamic vinegar in Italy.

In light of the above, the evidence examined as a whole proved the actual use of the contested shape mark in relation to balsamic vinegar, pursuant to Article 18 of of [Regulation 2017/1001](#).

The Board of Appeal – confirming the Cancellation Division's findings – concluded that the evidence submitted demonstrated genuine use only for balsamic vinegar in Class 30. The documentation was insufficient to prove use for the other contested goods, leading to the partial revocation of the trademark.

## Comment

This case underscores the importance of providing comprehensive and corroborative evidence when seeking to prove the genuine use of a trademark. Trademark owners must maintain detailed and consistent records of trademark use across different goods and services to safeguard their rights within the European Union.

In a fast-changing commercial world where companies are running out of word marks, there is an increasing number of applications for 3D trademarks; consequently, animosity and conflicts among their owners are rising exponentially. 3D marks have been proven to be an effective branding tool, but face greater risks. However, well-informed companies could easily avoid such risks by being prepared and taking the necessary steps throughout the years.



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