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საქართველოსთვის
The European Union for Georgia



SURVEYS AS EVIDENCE BEFORE THE BOARDS OF APPEAL

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Are surveys obligatory?

- In the proceedings before the Boards of Appeal, a survey reflecting the recognition or knowledge of a mark among the relevant public is **NOT** obligatory;
- However, reliable surveys **are a very important type of evidence** of a well-known character of a TM.
- A well-known character of a TM can be proven by using **other types of evidence**, such as:
 - Evidence proving a very strong market position;
 - Evidence showing a regular, long-term advertising in major newspapers, TV channels, Internet, etc.;
 - Evidence including third party rankings of well-known brands confirming that the TM at issue is well-known;
 - News articles explicitly saying that a given TM is a leader in the economic sector.

General considerations - I

- **The strength of a market survey alone:** To be successful, it is usually necessary to **complement** survey evidence with other facts or evidence relevant for the claim. In principle, market survey results **cannot be the only decisive criterion** for establishing a well-known character. Nevertheless, surveys may be considered a **primary evidence** in relation to e.g. sales figures and advertising material, and cannot be rejected on the outset;
- **The relevant time-period:** The survey should concern the mark **as registered or applied for**, and it should reflect the relevant point in time at which well-known character is to be proven.

Nonetheless, surveys conducted before or after that date may still contain useful indications, although their evidential value is likely to vary depending on how close or distant they are to the relevant date at issue.

General considerations - II

- **Margin of error:** Ideally, survey reports will indicate a margin of error. The lower the margin of error, the greater the level of certainty that the survey is reliable and representative.
- **Assessment of the surveys' reliability:** The survey report must contain **sufficient information** to enable the Board to assess its reliability. The complete survey report including the questions and answers given, as well the instructions to the respondents **must therefore be submitted in full**.
- A survey report should in particular include information which allows the Board to assess:

<input type="checkbox"/> The origin and purpose of the survey (see section 2)	<input type="checkbox"/> The representativeness of the sample and the target audience (see section 3)	<input type="checkbox"/> the methodology of gathering responses (see section 4)	<input type="checkbox"/> the formulation of the questions asked (see section 5)
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(1) Origin and purpose of the survey

- Surveys should ideally be conducted by **independent and recognised research institutes**, companies or other independent and impartial experts, removed from any suspicion of conflict of interest.
- The **purpose** of a survey can impact its reliability since the purpose is likely to affect the sample selection, **formulation of questions** and thus the results of the survey. Accordingly, surveys created for a purpose other than that of the subject-matter of the case at hand should be treated with particular caution;
- Attention should also be had towards **the circumstances** under which the survey came into being and the **entity for whom it was addressed**;
- Whether, on the face of it, the survey appears sound and reliable.

(2) The representativeness of the sample - I

- A reliable market survey must contain **the information necessary to assess the representativeness** of the sample in relation to the relevant public.
- A reliable market survey must contain **the information necessary to assess the representativeness** of the sample in relation to the relevant public:
 - the public targeted,
 - the number of respondents,
 - the composition of the sample (age, gender, nationality, etc.); ideally, the sample should faithfully match the composition of the entire group to be investigated and be an exact miniature version of the relevant public;
 - the method of selecting the respondents (must be transparent).

(2) The representativeness of the sample - II

- The acceptable **sample size** will depend on the types of goods and services and the market sector; as a rule of a thumb:
 - For goods and services targeting the **general public** a sample of e.g. $\geq 1000 - 2000$ representative consumers should be considered as sufficient;
 - For goods and services targeting more concentrated markets, such a specialised public, the sample size **may be lower**;
 - In the absence of a reasonable explanation, the results of a sample size **below 300** respondents should be treated with caution;
 - In the absence of a reasonable explanation, the results of a sample size **below 100** respondents may be unreliable.


(3) Methodology of gathering responses

- When assessing the methodology of the survey must include the assessment of:
 - whether the survey is carried out in the **objective circumstances** in which the respective marks are present, or may be present, on the market. For example, where goods are sold over the counter and consumers generally say the name of the product instead of selecting it based on packaging or figurative elements, this needs to be reflected in the survey method;
 - whether **product images** used in the survey accurately portray the relevant characteristics of the goods.

(4) Formulation of survey questions - I

- The questions and questionnaire should be **simple and concise**;
- The survey questions should be **consistently understood** in the same way;
- Each question should focus **on one topic** and not include so-called ‘double-barrelled’ or compound questions;
- Survey questions should **not direct the respondent into a field of speculation** nor go **beyond** the respondents’ **capacity and experience**.

(4) Formulation of survey questions - II

- As a rule of thumb, the higher the degree of spontaneity when answering a question in a certain way, the higher the evidential value of the results:
 - Results of questions which are **'unaided' and 'open-ended'** such as 'What brands of cars come to mind (please write your answer below)?', where respondents are allowed to answer spontaneously **have high evidential value**.
 - The evidentiary value of **'Closed-ended' or 'aided' questions**, e.g. 'Please select which car brands come to mind from the following list' will vary depending on the framing of the question and the options offered to the respondents.
 - Results of questions that gives rise to false assumptions, influences, or cause unfamiliar speculation **may be unreliable**;
 - **Compound questions**, e.g. 'Does company X produce or market this mobile phone: YES/NO', which are unclear as to which of the components a relevant answer refers to, **are unreliable**.
 - Leading questions, 'Do you think of Audi when looking at this sign  ?' **are unreliable**.

Case-law - I:

- **(1) Origin and purpose of the survey:**

24/10/2018, T-261/17, SALOSPIR 500 mg (fig.) / Aspirin et al., EU:T:2018:710, § 60; 30/05/2013, T 172/12, Be light, EU:T:2013:286, § 27 ; 06/11/2014, T-463/12, MB, EU:T:2014:935, § 53 and the case-law cited; 24/02/2016, T-411/14, Shape of a bottle (3D), EU:T:2016:94, §16 and 74; 19/06/2019, T-307/17, DEVICE OF THREE PARALLEL STRIPES (fig.), EU:T:2019:427, § 135

- **(2) The representativeness of the sample:**

29/01/2013, T-25/11, Cortadora de cerámica, EU:T:2013:40, § 88; 09/09/2020, T-187/19, Colour Purple - 2587C (col.), EU:T:2020:405, § 100-101; 29/04/2020, T-37/19, cimpres / p impres (fig.) et al., EU:T:2020:164, § 69

Case-law - II:

- **(3) Methodology of gathering responses:**

12/07/2006, T-277/04, Vitacoat, EU:T:2006:202, § 38; 24/10/2018, T-261/17, SALOSPIR 500 mg (fig.) / Aspirin et al., EU:T:2018:710, § 63-65 ; 12/01/2006, T 147/03, Quantum, EU:T:2006:10, § 90; 15/12/2005, T 262/04, Briquet à Pierre, EU:T:2005:463, § 88; 24/10/2018, T-261/17, SALOSPIR 500 mg (fig.) / Aspirin et al., EU:T:2018:710.

- **(4) Formulation of survey questions:**

12/07/2006, T-277/04, Vitacoat, EU:T:2006:202, § 39; 15/12/2005, T-262/04, Briquet à Pierre, EU:T:2005:463, § 84-86 ; See 09/09/2020, T 187/19, Colour Purple - 2587C (col.), EU:T:2020:405, § 68; 15/12/2005, T-262/04, Briquet à Pierre, EU:T:2005:463, § 84-86 ; 10/06/2020, T-718/18, PHILIBON, EU:T:2020:257, § 87



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