

JUDGMENT OF THE GENERAL COURT (Third Chamber)

5 March 2019 (*)

(EU trade mark — Revocation proceedings — European Union figurative trade mark
MEBLO — Genuine use of the trade mark — Article 58(1)(a) of Regulation (EU)
2017/1001 — Proof of genuine use)

In Case T-263/18,

Meblo Trade d.o.o., established in Zagreb (Croatia), represented by A. Ivanova,
lawyer,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by E. Markakis
and H. O'Neill, acting as Agents,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO, intervening
before the General Court, being

Meblo Int, proizvodnja izdelkov za spanje d.o.o., established in Nova Gorica
(Slovenia), represented by A. Plesničar, lawyer,

ACTION against the decision of the Fourth Board of Appeal of EUIPO of 27 February
2018 (Case R 883/2017-4), concerning revocation proceedings between Meblo Trade
and Meblo Int, proizvodnja izdelkov za spanje,

THE GENERAL COURT (Third Chamber),

composed of S. Frimodt Nielsen, President, V. Kreuzschitz and N. Póltorak
(Rapporteur), Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 26 April 2018,

having regard to the response of EUIPO lodged at the Court Registry on 7 August 2018,

having regard to the response of the intervener lodged at the Court Registry on 3 August
2018,

having regard to the fact that no request for a hearing was submitted by the parties
within three weeks of service of notification of the close of the written part of the

procedure, and having decided to rule on the action without an oral part of the procedure, pursuant to Article 106(3) of the Rules of Procedure of the General Court,

gives the following

Judgment

Background to the dispute

- 1 On 27 January 1999, Meblo Holding d.o.o., the intervener's predecessor in law, Meblo Int, proizvodnja izdelkov za spanje d.o.o., and the applicant, Meblo Trade d.o.o., entered into a licence agreement concerning the 'protected sign MEBLO' ('the licence agreement').
- 2 On 30 October 2003, the intervener's predecessor in law filed an application for registration of an EU trade mark with the European Union Intellectual Property Office (EUIPO) under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Council Regulation (EC) No 207/2009 of 26 February 2008 on the European union trade mark (OJ 2009 L 78, p. 1), as amended, itself replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1)).
- 3 The trade mark in respect of which registration was sought is the following figurative sign:
- 4 The goods and services in respect of which registration was sought are in Classes 16, 17, 19, 20, 22, 24 and 35 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following descriptions respectively:
 - Class 16 — 'Plastic film for wrapping; packaging material made of cardboard';
 - Class 17 — 'Stuffing of plastic materials';
 - Class 19 — 'Plates made of wood, chipboards, fiber plates, plywood plates, wainscotting (not of metal); wall and ceiling wainscot made of chipboards or plywood plates';
 - Class 20 — 'Furniture, including beds and bed frames; mirrors, frames; spring mattresses and protective covers for spring mattresses (sleeping equipment); articles (not included in other classes) made of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials or of plastics';
 - Class 22 — 'Stuffing made of natural fibers';

- Class 24 — ‘Protective spreads for spring mattresses’;
 - Class 35 — ‘Business management, services relating to the sale of furniture, beds, bed frames, spring mattresses and other articles of sleeping equipment; accounting; marketing research, marketing studies; advertising; organization of fairs and exhibitions for commercial or advertising purposes; middleman services relating to the purchase and selling of enterprises; business management assistance; professional business consultancy’.
- 5 The trade mark was registered on 29 March 2005 under No 3431731.
 - 6 On 4 September 2014, the intervener’s predecessor in law terminated its licence agreement with the applicant. By letter of 8 September 2014 to the applicant, the intervener’s predecessor in law formally confirmed the termination of the licence agreement. According to that letter, termination was to take effect on 4 March 2015.
 - 7 On 29 December 2015, EUIPO registered the transfer of the contested mark to the intervener.
 - 8 On 31 March 2016, the applicant filed an application for revocation, under Article 51(1)(a) of Regulation No 207/2009 (now Article 58(1)(a) of Regulation 2017/1001), in respect of the contested mark, claiming that the mark had not been put to genuine use within a continuous period of five years, namely between 31 March 2011 and 30 March 2016 (‘the relevant period’).
 - 9 On 5 July 2016, the intervener filed items of evidence, numbered 1 to 14, within the time limit set by EUIPO.
 - 10 On 23 August 2016, the applicant lodged its observations, within the time limit set by EUIPO, on the evidence submitted by the intervener. On 5 September 2016, EUIPO forwarded those observations to the intervener and set a time limit for submission of the latter’s observations.
 - 11 On 9 November 2016, that is, within the time limit set by EUIPO, the intervener submitted observations together with items of evidence, numbered 15 to 55, to the Cancellation Division.
 - 12 By decision of 23 March 2017, the Cancellation Division upheld the applicant’s application in part, revoking the contested mark in respect of all the goods and services covered by the registration, with the exception of the following goods and services in Classes 20 and 35 respectively:
 - Class 20 — ‘Furniture, including beds and bed frames; spring mattresses’;
 - Class 35 — ‘Services relating to the sale of furniture, beds, bed frames, spring mattresses and other articles of sleeping equipment’.
 - 13 On 3 May 2017, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009 (now Articles 66 to 71 of Regulation 2017/1001).

- 14 By decision of 27 February 2018 ('the contested decision'), the Fourth Board of Appeal of EUIPO dismissed the appeal. It found, in essence, that the evidence submitted by the proprietor of the EU trade mark was sufficient to prove genuine use of that mark in respect of the goods and services referred to in paragraph 12 above.

Forms of order sought

- 15 The applicant claims that the General Court should annul the contested decision in so far as the Board of Appeal found that EU trade mark No 3431731, MEBLO, had been used by the proprietor or by its predecessors in respect of the goods 'Furniture, including beds and bed frames' in Class 20 and 'services relating to the sale of furniture, beds, bed frames, spring mattresses and other articles of sleeping equipment' in Class 35.

- 16 EUIPO contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

- 17 The intervener claims that the Court should:

- dismiss the action;
- uphold the contested decision;
- order the applicant to pay the costs.

Law

- 18 In support of its action, the applicant relies on a single plea in law, divided into two parts, alleging infringement of Article 58(1)(a) of Regulation 2017/1001 and breach of the principle of equality of arms, respectively.

- 19 The Court considers it appropriate to examine, at the outset, the part relating to the breach of the principle of equality of arms.

Breach of the principle of equality of arms

- 20 As a preliminary point, it must be observed that on 9 November 2016, at the request of EUIPO, the intervener submitted observations together with items of evidence, numbered 15 to 22, to the Cancellation Division. Those items comprised English translations of evidence filed on 5 July 2016 (items 15 to 18 and 20 to 22), excerpts from the Romarin database of the World Intellectual Property Organization (WIPO), notices and invoices concerning the licence fee (item 15) and three screenshots showing buildings (item 19). By letter of 8 December 2016, EUIPO provided the applicant with the observations and evidence filed by the intervener. The letter contained, inter alia, the following: '[the] Office considers the adversarial part of the procedure closed. Unless further examination of the file reveals that the submission of additional observations or

evidence is needed, the Office will rule on the application on the basis of the evidence before it’.

- 21 In that connection, the applicant takes the view that it was for the Board of Appeal to determine whether the items of evidence filed on 9 November 2016 were admissible, since they had been produced at a later stage in the procedure, and, if they were admissible, to determine why they had not been forwarded to the applicant for its observations, particularly if they were indeed part of the evidence on which the Cancellation Division based its decision. It is argued that those flaws vitiate the proceedings before the Cancellation Division and the Board of Appeal. The applicant claims that it is clear from paragraph 26 of the contested decision that the Fourth Board of Appeal based its decision primarily on that ‘new’ evidence.
- 22 It must be concluded that, by the part of the plea alleging breach of the principle of equality of arms, the applicant in fact claims (i) infringement of Article 95(2) of Regulation 2017/1001, which provides that EUIPO may disregard facts or evidence which are not submitted in due time by the parties concerned; and (ii) infringement of Article 94(1) of Regulation 2017/1001, which provides that decisions of EUIPO are to be based only on reasons on which the parties concerned have had an opportunity to present their comments.
- 23 In the first place, it should be pointed out that it follows from the wording of Article 95(2) of Regulation 2017/1001 that, as a general rule and unless otherwise specified, the submission of facts and evidence by the parties remains possible after the expiry of the time limits to which such submission is subject under the provisions of Regulation 2017/1001 and that EUIPO is in no way prohibited from taking account of facts and evidence which are submitted or produced late (see, by analogy, judgment of 18 July 2013, *New Yorker SHK Jeans v OHIM*, C-621/11 P, EU:C:2013:484, paragraph 22).
- 24 It has previously been held that, where the evidence presented by the proprietor of the contested mark after expiry of the time limit set by the EUIPO division adjudicating on the matter at first instance was not the initial and only proof of use, but rather evidence additional to relevant proof which was submitted within the time limit, the fact that the applicant disputed that evidence was sufficient to justify production by the proprietor of additional evidence when it filed its observations (see, to that effect, judgment of 29 September 2011, *New Yorker SHK Jeans v OHIM — Vallis K.-Vallis A. (FISHBONE)*, T-415/09, not published, EU:T:2011:550, paragraph 33).
- 25 In the present case, it is common ground that the intervener presented relevant evidence within the time limit set by the Cancellation Division. Furthermore, it is clear from the observations lodged on 23 August 2016 that the applicant took the view that the evidence submitted by the intervener on 5 July 2016 was not sufficient to establish genuine use of the contested mark, which it confirms in paragraph 10 of the application. It was in response to those observations that, on 9 November 2016, the intervener produced additional evidence. Moreover, the applicant indicated before the Board of Appeal that it did not oppose that evidence being categorised as additional evidence.
- 26 In addition, as EUIPO rightly points out, it is not apparent from the information before the Court that the intervener abused the time limits set by knowingly employing

delaying tactics, or by demonstrating manifest negligence (see paragraphs 9 to 11 above).

- 27 In light of the foregoing, and since the evidence presented on 9 November 2016, as described in paragraph 20 above, was relevant, and the fact that the stage in the proceedings at which that additional evidence was submitted, together with the circumstances surrounding it, did not preclude that submission of additional evidence, it must be held that the Cancellation Division complied with the objective of Article 95(2) of Regulation 2017/1001 in taking that evidence into account (see, to that effect, judgment of 29 September 2011, *FISHBONE*, T-415/09, not published, EU:T:2011:550, paragraph 34).
- 28 It follows that the Board of Appeal was entitled, as it did, to rely on all of the evidence (items 1 to 22) filed by the intervener.
- 29 In the second place, it must be noted that the applicant claims, in essence, that the Cancellation Division breached Article 94(1) of Regulation 2017/1001 in so far as it failed to give the applicant the opportunity to submit observations on the evidence filed on 9 November 2016, which was forwarded to the applicant by the Cancellation Division on 8 December 2016.
- 30 In the present case, irrespective of the question of any breach, on the part of the Cancellation Division, of Article 94(1) of Regulation 2017/1001, it is clear that the applicant brought appeal proceedings before the Board of Appeal, inter alia, to make known its views as to the relevance of the evidence filed on 9 November 2016, and that it was in fact heard in that regard. Accordingly, the breach claimed would have no impact on the validity of the contested decision.
- 31 In accordance with Article 72(1) of Regulation 2017/1001, since actions before the European Union judicature may be brought only against decisions of the Boards of Appeal, it must be held that the applicant's complaint, alleging infringement of Article 94(1) of Regulation 2017/1001 in so far as the Cancellation Division failed to give it the opportunity to submit observations on the evidence filed on 9 November 2016, must be rejected (see, by analogy, judgment of 25 January 2018, *SilverTours v EUIPO (billiger-mietwagen.de)*, T-866/16, not published, EU:T:2018:32, paragraph 19 and the case-law cited).
- 32 In the light of the foregoing, the part of the plea alleging breach of the principle of equality of arms relied upon by the applicant must be rejected in its entirety.

Infringement of Article 58(1)(a) of Regulation 2017/1001

- 33 Under Article 58(1)(a) of Regulation 2017/1001, the rights of the proprietor of the EU trade mark are to be declared to be revoked on application to EUIPO or on the basis of a counterclaim in infringement proceedings if, within a continuous period of five years, the trade mark has not been put to genuine use in the Union in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use.

- 34 Pursuant to Article 10(3) and (4) of Commission Delegated Regulation (EU) 2017/1430 of 18 May 2017 supplementing Regulation No 207/2009 and repealing Regulations No 2868/95 and (EC) No 216/96 (OJ 2017 L 205, p. 1), applicable to revocation proceedings pursuant to Article 19(1) of that regulation, evidence of use must establish the place, time, extent and nature of use of the trade mark and is to be limited, in principle, to the submission of supporting documents and items such as packages, labels, price lists, catalogues, invoices, photographs, newspaper advertisements, and statements in writing as referred to in Article 97(1)(f) of Regulation 2017/1001.
- 35 In the interpretation of the concept of genuine use, account should be taken of the fact that the rationale for the requirement that the earlier mark must have been put to genuine use is not to assess commercial success or to review the economic strategy of an undertaking, nor is it intended to restrict trade-mark protection solely to the case where large-scale commercial use has been made of the marks (see judgments of 8 July 2004, *MFE Marienfelde v OHIM — Vétoquinol (HIPOVITON)*, T-334/01, EU:T:2004:223, paragraph 32 and the case-law cited, and of 27 September 2007, *La Mer Technology v OHIM — Laboratoires Goëmar (LA MER)*, T-418/03, not published, EU:T:2007:299, paragraph 53 and the case-law cited).
- 36 As is clear from case-law, there is genuine use of a mark where it is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods and services for which it is registered, in order to create or preserve an outlet for those goods and services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark (see, by analogy, judgment of 11 March 2003, *Ansul*, C-40/01, EU:C:2003:145, paragraph 43). Moreover, the condition relating to genuine use of the trade mark requires that the mark, as protected on the relevant territory, be used publicly and outwardly (see judgments of 6 October 2004, *Vitakraft-Werke Wührmann v OHIM — Krafft (VITAKRAFT)*, T-356/02, EU:T:2004:292, paragraph 26 and the case-law cited, and of 4 July 2014, *Construcción, Promociones e Instalaciones v OHIM — Copisa Proyectos y Mantenimientos Industriales (CPI COPISA INDUSTRIAL)*, T-345/13, not published, EU:T:2014:614, paragraph 21 and the case-law cited).
- 37 In the assessment of whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned as a means of maintaining or creating a share in the market for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark (see judgment of 10 September 2008, *Boston Scientific v OHIM — Terumo (CAPIO)*, T-325/06, not published, EU:T:2008:338, paragraph 30 and the case-law cited).
- 38 Genuine use of a trade mark cannot be demonstrated by probabilities or suppositions, but must be based on solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (see judgment of 23 September 2009, *Cohausz v OHIM — Izquierdo Faces (acopat)*, T-409/07, not published, EU:T:2009:354, paragraph 36 and the case-law cited). An overall assessment must be made taking account of all the relevant factors in the particular case, and entails a degree of interdependence of the factors taken into account (see judgment of 18 January 2011,

Advance Magazine Publishers v OHIM — Capela & Irmãos (VOGUE), T-382/08, not published, EU:T:2011:9, paragraph 30 and the case-law cited).

- 39 Furthermore, Article 58(1)(a) of Regulation 2017/1001 does not require continuous and uninterrupted use of the contested mark within the relevant period, but rather only genuine use over the course of that period (see, by analogy, judgment of 5 October 2017, *Versace 19.69 Abbigliamento Sportivo v EUIPO — Gianni Versace (VERSACCINO)*, T-337/16, not published, EU:T:2017:692, paragraph 51).
- 40 The arguments raised by the applicant in the first part of its single plea in law will be examined in the light of the foregoing considerations.
- 41 In the present case, the contested mark, as set out in paragraph 3 above, is a composite mark composed, as stated by the Board of Appeal in paragraph 36 of the contested decision, of the word element ‘meblo’ and figurative elements, namely a wood plane and a line.
- 42 In order to prove genuine use of the contested mark, the intervener submitted the following evidence (paragraphs 4 and 5 of the contested decision):
- a contract between the intervener’s predecessor in law and the applicant, dated 27 January 1999. The signatures of the intervener’s predecessor in law and the applicant are accompanied by the stamp of their respective undertakings. As the Board of Appeal noted, the two stamps in question are composed of the same drawing of a wood plane and the word element ‘meblo’ (item 1);
 - a letter dated 4 June 2014 sent on behalf of the applicant to the company *Furnitura spletna trgovina d.o.o.* (item 2);
 - a letter dated 8 September 2014 sent on behalf of the intervener’s predecessor in law to the applicant giving notice of the termination of the licence agreement (item 3);
 - screenshots taken, in particular, from the applicant’s Facebook page and the websites ‘www.meblo.hr’, ‘www.shop.meblo.hr’ and ‘www.meblo-jogi.eu’ (items 4, 5, and 7 to 9);
 - a screenshot of the applicant’s Facebook page containing the photograph of a building on which a variant of the contested mark is depicted (item 6);
 - 9 invoices issued by the company *Furnitura*, evidencing the sale of mattresses to customers in Croatia (item 10);
 - 4 pages containing variants of the contested mark, representing the front pages of the annual reports of the intervener’s predecessor in law and of the company *MEBLO Kovinoplastika storitve d.o.o.* (item 11);
 - 5 letters containing the contested mark or a variant thereof, all signed by the intervener’s predecessor in law (item 12);

- the photograph of a van bearing the contested mark, together with 8 photographs of different objects (fire extinguishers, etc.) on which the contested mark or a variant thereof is displayed (items 13 and 14);
- 2 excerpts from the WIPO Romarin database relating to the word sign MEBLO and the figurative sign MEBLO, a translation of the contract submitted as item of evidence No 1, together with notices and invoices concerning the licence fee (item 15);
- translations of items 2 to 4 and 9 to 11 (items 16 to 18 and 20 to 22);
- 4 screenshots, one of which is identical to item of evidence No 6, while 3 show buildings on which variants of the contested mark are displayed (item 19).

43 In the light of those items of evidence, the Board of Appeal found that, in the present case, genuine use of the contested mark had been established in respect of ‘furniture, including beds and bed frames; spring mattresses’ in Class 20 and ‘services relating to the sale of furniture, beds, bed frames, spring mattresses and other articles of sleeping equipment’ in Class 35.

44 In particular, the Board of Appeal considered that, since the application for revocation had been lodged on 31 March 2016, the intervener had to prove genuine use of its mark between 31 March 2011 and 30 March 2016. The Board of Appeal found that the evidence submitted demonstrated genuine use of the contested mark by the intervener’s predecessor in law; by the applicant as the intervener’s licensee until 4 March 2015; and by the company *Furnitura d.o.o.* The majority of the relevant items of evidence date from and refer to the relevant period. Altogether, the evidence establishes genuine use of the contested mark in Slovenia and Croatia, after the latter’s accession to the European Union. The contested mark can be seen on the majority of the invoices, the screenshots of the websites presenting the goods, in advertisements on the goods and as shop names. The Board of Appeal stated that some of the evidence demonstrated use of the mark in different variants or with additional elements, which did not alter the distinctive character of the mark. As regards the goods concerned, the evidence refers to mattresses and furniture such as beds, chairs, tables, sofas, pillows, etc. The Board of Appeal found that, according to the evidence, mattresses and furniture had been sold in retail outlets in various towns and cities in Croatia, and online on the websites ‘www.meblo.hr’, ‘www.shop.meblo.hr’ and ‘www.meblo-jogi.eu’. The existence of those markets indicates use for retail services associated with the sale of the goods concerned. The Board of Appeal concluded that the evidence substantiated the claim of genuine commercial use of the mark in respect of the goods and services referred to in paragraph 43 above.

45 In that connection, the applicant disputes the Board of Appeal’s assessment with regard to genuine use of the contested mark in respect of the goods and services concerned. It puts forward eight complaints. First, since the contested mark is an EU trade mark, any use occurring in Croatia or relating to Croatia is relevant only inasmuch as it occurred after 1 July 2013. Second, since the content of the documents filed on 5 July 2016 was not self-explanatory, the fact that they were submitted without a translation justified, in the applicant’s view, their withdrawal from the case file. Third, the evidence does not demonstrate genuine use of the contested mark, but rather use of modified versions of

the mark. Fourth, the licence agreement, signed on 27 January 1999 — prior to the application for registration of the contested mark — does not concern the contested mark. The applicant argues that it did not make use of the contested mark but used the company name only, which was similarly protected as a trade mark in Croatia. Fifth, the Board of Appeal wrongly stated that the company Furnitura had used the contested mark. Sixth, bearing in mind the changes to the management of the applicant in 2015, there are doubts as to the validity of the evidence relating to it, inasmuch as those items of evidence do not bear the signature of the current members of its management board. Seventh, the evidence submitted by the intervener is not sufficient to prove genuine use of the contested mark. Eighth, the word ‘meblo’ means ‘furniture’, in particular in Esperanto, and is commonly used to designate furniture.

- 46 In the first place, so far as concerns the use of the contested mark in Croatia, it is clear from Article 18(1)(b) of Regulation 2017/1001 that ‘the affixing of the EU trade mark to goods or to the packaging thereof in the Union solely for export purposes’ also constitutes use.
- 47 It must be noted, as observed by EUIPO, that the exporting of goods under the contested mark from Slovenia — a Member State of the European Union since 1 May 2004 — to Croatia, prior to its accession to the EU on 1 July 2013, may be regarded as use of the contested mark in accordance with Article 18(1)(a) of Regulation 2017/1001. The evidence relating to those exports is examined in particular in paragraph 88 below.
- 48 Accordingly, the Board of Appeal did not err in finding, in paragraph 32 of the contested decision, that use of the contested mark in Slovenia and Croatia, immediately after the latter’s accession to the European Union, could prove genuine use of the contested mark within the European Union. The applicant’s argument in that connection must therefore be rejected.
- 49 In the second place, first, so far as concerns the content of the documents lodged on 5 July 2016, it must be borne in mind that, in accordance with Article 10(6) of Delegated Regulation 2017/1430, EUIPO may request a party which has submitted documents as proof of use that have not been submitted in the language of the case, that it produce a translation of those documents (judgments of 27 September 2012, *El Corte Inglés v OHIM — Pucci International (Emidio Tucci)*, T-373/09, not published, EU:T:2012:500, paragraph 24, and of 24 January 2017, *Rath v EUIPO — Portela & Ca. (Diacor)*, T-258/08, not published, EU:T:2017:22, paragraph 19).
- 50 In the present case, it should be observed that part of the evidence consists in screenshots containing photographs or advertisements (items 4 to 9 and 19). In those images, the contested mark or variants of that mark are, inter alia, used in relation to mattresses, furniture or shops. So far as concerns the remaining evidence, such as for example the licence agreement, the letter of 4 June 2014, the letter of 8 September 2014 or the invoices issued by the company Furnitura (items 1 to 3 and 10), it must be noted that, in its letter of 5 July 2016, the intervener described those documents in the language of the procedure before EUIPO, supplied a translation of the relevant excerpts from the documents and indicated the probative value that it attached to those documents. As the intervener rightly points out, it should be observed in that connection that the information necessary for the purpose of assessing the place, time, extent and nature of the evidence submitted had all been supplied in the language of the case.

- 51 Admittedly, as the applicant rightly asserts, it is necessary for it to be able to understand the content of the evidence of use submitted by the intervener before EUIPO. However, as the intervener described the documents in question in the language of the case before EUIPO and supplied a translation of the relevant excerpts from those documents, it is clear that a person with knowledge of the language of the case would have been able to identify and understand the relevant aspects of the documents submitted as evidence of use.
- 52 Second, so far as concerns the translation of the documents filed on 5 July 2016, it should be noted, as the applicant accepts in paragraph 27 of the application, that the translations of the documents in question were sent to EUIPO by the intervener on 9 November 2016, then forwarded to the applicant by EUIPO on 8 December 2016.
- 53 Accordingly, the applicant's assertions as to the content and translation of the documents lodged on 5 July 2016 have no basis in fact and must be rejected.
- 54 In the third place, so far as concerns the variants of the contested mark, it should be pointed out that, under Article 18(1)(a) of Regulation 2017/1001, proof of genuine use of an EU trade mark also includes proof of its use in a form differing in elements which do not alter the distinctive character of that mark in the form in which it was registered. The distinctive character of a mark within the meaning of Regulation 2017/1001 means that that trade mark must serve to identify the product or service in respect of which registration has been sought as originating from a particular undertaking, and thus to distinguish that product or service from those of other undertakings (see, by analogy, judgment of 18 July 2013, *Specsavers International Healthcare and Others*, C-252/12, EU:C:2013:497, paragraph 22 and the case-law cited). In that regard, it is settled case-law that if the differences between the sign as it is used and the sign as it was registered are only negligible, strict compliance is not necessary; it is sufficient that the form in which the signs are used is broadly equivalent (see judgment of 30 November 2016, *K&K Group v EUIPO — Pret A Manger (Europe) (Pret A Diner)*, T-2/16, not published, EU:T:2016:690, paragraph 48 and the case-law cited).
- 55 On that point, the Board of Appeal noted that some of the evidence submitted showed that there were differences between the sign as it was registered and those which were in fact used on the market. With the exception of two invoices which contain the sign MEBLOJOGI only, which will not be taken into account in assessing genuine use of the contested mark, the variants in question take the forms, inter alia, reproduced below:

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- 56 First, it should be noted that the word element 'meblo' together with the figurative elements — the wood plane and the line — are present in each of the variants relied upon by the intervener.
- 57 Second, the elements 'meblojogi madraci od 1962', 'trade' or 'www.meblo.hr' are descriptive either of the type of goods and services concerned, or of the date of establishment of the undertaking responsible for the production or distribution of those goods and services, or of the method of their distribution, and do not alter the distinctive character of the contested mark. Furthermore, bearing in mind their position in the configuration of the signs used, those elements and the additional figurative elements must be regarded as decorative. Nor, moreover, do the colour variations affect the

distinctive character of the contested mark, as they are unlikely in the present case to be considered by consumers as having the function of distinguishing the goods and services concerned from those of other undertakings.

- 58 It follows that the Board of Appeal was entitled to find that the differences between the contested mark as registered and as used in the course of trade to designate the goods and services concerned did not alter the distinctive character of the contested mark. Accordingly, the applicant's argument concerning variants of the contested mark which have been used, taken as a whole, must be rejected.
- 59 In the fourth place, the applicant maintains that the licence agreement does not concern the contested mark, as it was signed on 27 January 1999, that is, prior to the application for registration of the contested mark. The applicant also asserts that it did not use the contested mark, but rather the company name only, which is also protected as a trade mark in Croatia.
- 60 It should be stated at the outset that, as the Board of Appeal rightly found in paragraph 24 of the contested decision, the fact that the licence agreement predated the registration of the contested mark is irrelevant provided that the use of that mark by the applicant, after the date on which that agreement was concluded, is in fact covered by that agreement and has the consent of the parties to the agreement. It is appropriate to examine whether, in the light of the evidence produced by the intervener, that is indeed so in the present case.
- 61 In that connection, in order to prove that the previous proprietor of the contested mark had consented to the applicant using the contested mark, or a variant of that mark until 4 March 2015 (the date of expiry of that licence agreement; see paragraph 6 above), the intervener submitted the licence agreement, 2 excerpts from the WIPO Romarin database, notices and invoices concerning the licence fee, and evidence of use of the contested mark or a variant thereof by the applicant (items 1, 4 to 7 and 15).
- 62 Under the terms of the licence agreement, the intervener's predecessor in law authorised the applicant to use 'the protected sign MEBLO'. The agreement was concluded for an unlimited period and could be terminated by either party following a notice period of six months. The applicant was to pay a monthly fee for the use of the sign MEBLO, based on the invoiced value of the goods imported into Croatia by the applicant. The stamps of the previous proprietor of the contested mark and the applicant affixed to the licence agreement, along with their respective signatures, both comprise the same design of a wood plane and the word element 'meblo'.
- 63 Admittedly, as the applicant points out in paragraph 28 of the application, at the time the licence agreement was signed, the contested mark had not yet been registered by EUIPO. However, as the Board of Appeal rightly noted, it is apparent from the excerpts from the WIPO Romarin database that, in 1996, the word mark MEBLO was the subject of an international registration under number 658087, together with the figurative mark MEBLO under number 657785, the form of which is reproduced below:

- 64 It is also apparent from those two excerpts that the marks in question were registered by the previous proprietor of the contested mark and were then transferred to the intervener. Thus, prior to the date on which the licence agreement was signed and prior to the registration of the contested mark, the word and figurative marks MEBLO were protected in Slovenia and Croatia in respect of the goods and services concerned, pursuant to those international registrations.
- 65 In that connection, as previously noted in paragraph 54 above, proof of genuine use of an EU trade mark also includes proof of its use in a form differing in elements which do not alter the distinctive character of that mark in the form in which it was registered, notwithstanding the fact that that different form is itself registered as a trade mark. The essential condition for genuine use is that, as a consequence of that use, the mark may serve to identify, in the minds of the relevant class of persons, the goods or services to which it relates as originating from a particular undertaking (see, by analogy, judgment of 29 March 2017, *Alcohol Countermeasure Systems (International) v EUIPO — Lion Laboratories (ALCOLOCK)*, T-638/15, not published, EU:T:2017:229, paragraphs 22 and 23).
- 66 In the present case, as EUIPO rightly points out in paragraph 39 of the response, the most distinctive element of the contested mark is the word element ‘meblo’. When a mark comprises word and figurative elements, the former are, in principle, more distinctive than the latter, as the average consumer in the relevant public will more easily refer to the goods or services in question by quoting the name of the mark than by describing the figurative elements of that mark (see judgment of 14 December 2016, *PAL-Bullermann v EUIPO — Symaga (PAL)*, T-397/15, not published, EU:T:2016:730, paragraph 33 and the case-law cited). In the present case, the figurative elements of the contested mark are not sufficiently distinctive, compared to the word elements, to be remembered.
- 67 Accordingly, international registration Nos 658087 and 657785 must be regarded, in accordance with the case-law cited in paragraph 65 above, as a form of the contested mark. Furthermore, the international registrations designated goods in Class 20 and services in Class 35 which are identical to those designated by the contested mark. Thus the goods and services designated by the sign MEBLO in the abovementioned forms will be perceived by the relevant class of persons as originating from the same undertaking (see, to that effect, judgment of 29 March 2017, *ALCOLOCK*, T-638/15, not published, EU:T:2017:229, paragraphs 24 and 25).
- 68 It follows from the foregoing that, contrary to the applicant’s assertions in paragraph 28 of the application, the licence agreement, taken together with the other evidence submitted, provides sufficient proof that, from 1 January 1999 to 4 March 2015, the previous proprietor of the contested mark authorised the applicant to use its trade mark MEBLO, in its different forms, in Croatia.
- 69 As regards the other items of evidence, the applicant argues, in paragraph 34 of the application, that items 4 to 7 show that it used its own company name and its trade mark registered in Croatia under number Z20130973 and did not use the contested mark.
- 70 However, it should be noted that Croatian trade mark No Z20130973 was registered on 23 March 2014 and corresponds to the sign MEBLO TRADE D.O. O. As the Board of

Appeal observed, the signs visible in items 4 to 7, which actually cover a period running from 2011 to 2015, do not correspond to the mark relied upon by the applicant but rather to the following signs, which are sometimes in different colours:

- 71 As regards the signs referred to in paragraph 70 and the variants of those signs, it has already been established that, for the reasons set out in paragraphs 54 to 58 above, the differences between the contested mark as registered and as used in items 4 to 7 to designate the goods and services concerned did not alter the distinctive character of the contested mark. Consequently, the use of those signs which encompass the contested mark must be found, in the present case, to constitute genuine use of the contested mark (see, to that effect, judgment of 23 January 2014, *Coppenrath-Verlag v OHIM — Sembella (Rebella)*, T-551/12, not published, EU:T:2014:30, paragraph 42).
- 72 In the present case, it is clear that the applicant has failed to establish to a sufficient degree that it has indeed used Croatian mark No Z20130973 and not the contested mark. The same finding must be made so far as concerns the applicant's claims that it used its company name as a trade mark or Croatian mark No Z20140792 registered on 25 January 2015.
- 73 Furthermore, it is clear from item 15 submitted by the intervener that, in accordance with the licence agreement, a monthly fee was indeed charged to the applicant for use of the protected sign pursuant to that agreement. It is also apparent from that evidence that, over the course of the relevant period, the applicant issued fee notices containing the details necessary for drawing up the invoices. Those invoices and notices concerning the licence fee contain, moreover, the stamp of the intervener's predecessor in law and that of the applicant, as they appear on the licence agreement signed in 1999 (item 15).
- 74 Bearing in mind all of the foregoing considerations, the applicant is unconvincing when it argues, as it does in the application, that the licence agreement is irrelevant in the present case and that it did not make use of the contested mark.
- 75 Consequently, the Board of Appeal rightly found that the contested mark had been used by the applicant with the consent of the previous proprietor of the mark from the beginning of the relevant period until 4 March 2015 and that, in accordance with Article 18(2) of Regulation 2017/1001, such use must be regarded as use by the proprietor. Accordingly, the applicant's arguments in that regard must be rejected.
- 76 In the fifth place, so far as concerns the use of the contested mark by the company Furnitura, it should be noted that when the proprietor of an EU trade mark maintains that the use of that trade mark by a third party constitutes genuine use, for the purposes of Article 18 of Regulation 2017/1001, he claims, by implication, that he consented to that use (see, by analogy, judgment of 30 January 2015, *Now Wireless v OHIM — Starbucks (HK) (now)*, T-278/13, not published, EU:T:2015:57, paragraph 36 and the case-law cited).
- 77 As to the truth of what that implies, it is evident that if the use of the contested mark — as is shown in particular by the invoices produced before EUIPO (item 10) — was without the proprietor's consent and, accordingly, in breach of the proprietor's trade mark right, it would not have been in the interests of that proprietor — that is, the

intervener — to rely on those invoices as evidence demonstrating legitimate use of its trade mark. Consequently, it seems unlikely that the proprietor of a trade mark would be in a position to submit proof that the mark had been used against its wishes (see, to that effect, judgment of 8 July 2004, *Sunrider v OHIM — Espadafor Caba (VITAFRUIT)*, T-203/02, EU:T:2004:225, paragraph 25), as the intervener confirms in paragraph 16 of its response.

- 78 In the present case, it should be noted, as observed by the Board of Appeal in paragraph 27 of the contested decision, that a number of circumstantial factors indicate the existence of business relations between the previous proprietor of the contested mark and the company Furnitura. It should in fact be observed that on each of the invoices 3 to 8, submitted as item 10, the contested mark is affixed in the form reproduced below:
- 79 Those invoices make reference to mattresses sold to customers in Croatia. It is clear, in that connection, that the representation of the sign referred to in paragraph 78 above features in the top left-hand corner of the invoices and is particularly visible on account of its large size. The prices are given in Croatian kuna (HRK). Furthermore, four screenshots of the website ‘www.meblo-jogi.eu’, dating from 2014 and 2015, show that sign being used for marketing mattresses (item 8). Some of the screenshots contain prices in HRK. Two further screenshots from the same website, also dating from 2014 and 2015, show that that sign is associated with a catalogue called ‘miran san’ (item 9). Undated screenshots of three pages of that catalogue show that the contested mark is used in connection with mattresses and a pillow. Taken together, that evidence confirms that the company Furnitura, established in Slovenia, was using the contested mark and distributing, inter alia, mattresses in Croatia, as is apparent from invoices 3 to 8.
- 80 That evidence therefore corroborates the assertion made by the intervener, in paragraph 16 of its response, that it supplies its goods to the company Furnitura and allows it to use the contested mark. According to case-law, the use of the mark of a production company by a distribution company which is economically linked to it is presumed to be use of that mark with the consent of the proprietor and is therefore to be deemed to constitute use by the proprietor, in accordance with Article 18(2) of Regulation 2017/1001 (see, to that effect, judgment of 17 February 2011, *J & F Participações v OHIM — Plusfood Wrexham (Friboi)*, T-324/09, not published, EU:T:2011:47, paragraph 32).
- 81 Furthermore, contrary to the applicant’s argument, the intervener cannot be criticised for failing to provide the agreements that it may have concluded with the company Furnitura or submit evidence that the goods distributed were indeed manufactured by the intervener’s predecessor in law. As is clear from paragraphs 76 and 77 above, and as EUIPO rightly observes, such documents are not necessarily required in order to establish consent on the part of the proprietor of the contested mark for the use of its mark.
- 82 In the light of the foregoing, it is established to a sufficient degree that the company Furnitura was using the contested mark with the consent of the previous proprietor of

that mark. Consequently, the Board of Appeal did not err in that regard. The applicant's argument must therefore be rejected.

- 83 In the sixth place, so far as concerns the applicant's change of management, it is clear that, as EUIPO contends, the mere fact that the persons managing or administering the applicant have changed over time is not such as to render automatically null and void any agreements or documents concluded and drafted by or for the applicant in the past. Consequently, the applicant cannot validly cast doubt on the validity of all the evidence relating to it on the basis of that fact alone.
- 84 In the seventh place, so far as concerns proof of genuine use of the contested mark, it should be noted that Article 10 of Delegated Regulation 2017/1430 does not state that each piece of evidence must necessarily give information about all four elements to which proof of genuine use must relate, namely the place, time, extent and nature of use (see, by analogy, judgment of 16 November 2011, *Buffalo Milke Automotive Polishing Products v OHIM — Werner & Mertz (BUFFALO MILKE Automotive Polishing Products)*, T-308/06, EU:T:2011:675, paragraph 61). An accumulation of evidence may allow the necessary facts to be established, even though each of those pieces of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (judgment of 17 April 2008, *Ferrero Deutschland v OHIM*, C-108/07 P, not published, EU:C:2008:234, paragraph 36).
- 85 It is therefore necessary to determine, taking into consideration all the evidence assessed by the Board of Appeal, whether that evidence establishes genuine use of the contested mark.
- 86 It must be recalled at the outset that the relevant period over which the intervener had to establish that the contested mark had been put to genuine use was from 31 March 2011 to 30 March 2016.
- 87 In the present case, as regards the time of use, the Board of Appeal rightly found that the majority of the relevant items of evidence dated back to the relevant period and referred to it, with the exception of invoice 9 issued by Furnitura in April 2016 (item 10) and the translation thereof (item 15). The evidence submitted by the intervener covers the whole period, in particular the posts on the applicant's Facebook page promoting furniture (item 4), the advertisements (item 5), the screenshots of the websites 'www.meblo.hr' and 'www.meblo-jogi.eu' (items 7 and 8) and invoices 3 to 8 (item 10).
- 88 Moreover, as regards the place of use, it may be inferred from the evidence concerning the applicant — particularly from the licence agreement and the invoices and notices relating to the licence fee, which are from the relevant period (items 1 and 15) — that goods bearing the contested mark were exported from Slovenia to Croatia during that period. For the period following Croatia's accession to the European Union — that is, after 1 July 2013 — it is clear from the advertisements submitted as item 5 and the screenshots submitted as items 6 and 19 that there were retail outlets using the contested mark in the Croatian cities of Zagreb, Zadar and Pula. The invoices also show that mattresses were sold to various customers in different Croatian towns (invoices 3 to 8, item 10).

- 89 As the Board of Appeal rightly observed, the contested mark is visible on the majority of the invoices (item 10), the screenshots of the websites presenting the goods (items 4 and 7 to 9), the advertisements (item 5) and as shop names (items 6 and 19). It is clear from that evidence that the contested mark was used as a mark to identify the commercial origins of the goods sold in the retail outlets which bore the contested mark as a name and those sold online on the ‘www.meblo.hr’ and ‘www.meblo-jogi.eu’ websites.
- 90 With regard to the goods concerned, the Board of Appeal rightly observed that the invoices, screenshots and advertisements referred to mattresses as well as furniture such as beds, chairs, tables, sofas, and pillows (items 4, 5, and 7 to 10). As regards the services concerned, referred to in paragraph 43 above, it should be observed that those services are, by their nature, meant to be provided when the goods concerned are sold. In that connection, it should be noted that the objective of retail trade is to sell goods to consumers. That trade includes, in addition to the legal sales transaction, all activity carried out by the trader for the purpose of encouraging the conclusion of such a transaction. That activity consists, inter alia, in selecting an assortment of goods offered for sale and in offering a variety of services aimed at inducing the consumer to conclude the abovementioned transaction with the trader in question rather than with a competitor (see, to that effect, judgment of 7 July 2005, *Praktiker Bau- und Heimwerkermärkte*, C-418/02, EU:C:2005:425, paragraph 34). Consequently, in the light of the evidence, the Board of Appeal was entitled to infer, as it did in paragraph 38 of the contested decision, that the contested mark had been used in respect of the services concerned on account of the fact that the goods concerned had been sold in retail outlets and online, on the ‘www.meblo.hr’ and ‘www.meblo-jogi.eu’ websites.
- 91 Moreover, as regards the extent of use, the applicant criticises items 8 and 9 in particular, inasmuch as the screenshots of the ‘www.meblo.hr’ and ‘www.meblo-jogi.eu’ websites ‘fail to establish how long the images have been presented [on its sites] and how many consumers have actually visited [those] page[s]’. In that regard, it is important to recall that those items of evidence of use of the contested mark must be assessed together with the other items of evidence, as part of the body of evidence, in accordance with the case-law cited in paragraph 84 above.
- 92 In the present case, it is apparent from items 1 and 15, namely the licence agreement and the notices and invoices relating to the licence fee, that the value of the goods exported from Slovenia to Croatia amounted, for example between April and June 2012, to several thousands of euros per month. It is also apparent from the screenshots of the applicant’s Facebook page, submitted as item 4, that, over a significant part of the relevant period, the contested mark was used to market mattresses and furniture which could be seen or purchased in certain shops in Croatia as well as online. Those posts on the applicant’s Facebook page, which were intended for end consumers, contained specific information on the goods offered for sale under the contested mark, the prices and marketing thereof in Croatia. Although, admittedly, those posts do not provide any information on the quantity of goods actually sold, account must be taken, in that connection, of the fact that the goods were available in at least three shops in Croatia, as well as online, during a significant part of the relevant period (items 6, 7 and 19). Taken together, those factors support the conclusion, in the context of a global assessment of whether the use to which the earlier mark was put was genuine, that the extent of its use was fairly significant. In that regard, it must also be remembered that the purpose of the

requirement for genuine use is not to assess the commercial success of the undertaking in question (see, to that effect, judgment of 8 July 2010, *Engelhorn v OHIM — The Outdoor Group (peerstorm)*, T-30/09, EU:T:2010:298, paragraph 43).

- 93 As for the invoices, they are limited in number. However, they are all made out to different persons, which shows that in the present case the trade mark was used publicly and outwardly (judgment of 27 September 2007, *LA MER*, T-418/03, not published, EU:T:2007:299, paragraph 87) and that, bearing in mind the type of goods concerned, it is not a case of a mere attempt to simulate genuine use by always using the same customers (see, to that effect, judgment of 16 November 2011, *BUFFALO MILKE Automotive Polishing Products*, T-308/06, EU:T:2011:675, paragraph 71).
- 94 In that connection, it should be observed that, according to invoices 3 to 8 submitted by the intervener, the goods were sold for amounts ranging from HRK 973 (approximately EUR 130) to HRK 15 056 (approximately EUR 2 026). It must be concluded in the present case that the sales made, even if they are not high volume, constitute use which, objectively, is such as to create or preserve an outlet for the goods in question and entails a volume of sales which, in relation to the period and frequency of use, is not so low that it may be concluded that the use is merely token, minimal or notional for the sole purpose of preserving the rights conferred by the mark (see judgments of 8 July 2004, *VITAFRUIT*, T-203/02, EU:T:2004:225, paragraph 49, and of 27 September 2007, *LA MER*, T-418/03, not published, EU:T:2007:299, paragraphs 87 to 90).
- 95 It follows from all the foregoing that, contrary to the applicant's arguments, there is no need in the present case to call into question the Board of Appeal's finding that the evidence submitted by the intervener provides sufficient proof of genuine commercial exploitation of the contested mark.
- 96 In the eighth place, so far as concerns the applicant's argument that the word 'meblo' means 'furniture', in particular in Esperanto, it must be observed, as noted by EUIPO, that that argument is irrelevant in the context of revocation proceedings for lack of genuine use of the contested mark brought pursuant to Article 58(1)(a) of Regulation 2017/1001.
- 97 It follows that the part of the plea alleging infringement of Article 58(1)(a) of Regulation 2017/1001 must be rejected in its entirety.
- 98 It follows from all the foregoing that the action must be dismissed.

Costs

- 99 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 100 Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by EUIPO and the intervener.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

- 1. Dismisses the action;**

- 2. Orders Meblo Trade d.o.o. to pay the costs.**

Frimodt Nielsen

Kreuschitz

Pótorak

Delivered in open court in Luxembourg on 5 March 2019.

E. Coulon

S. Frimodt Nielsen

Registrar

President

* Language of the case: English.