OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET
(TRADE MARKS AND DESIGNS)

**Cancellation Division**

C491B

Alicante, 24/09/2010

**REVOCATION PROCEEDINGS: NOTIFICATION OF A DECISION TO THE CTM PROPRIETOR**

| | |
|---|---|
| Address of proprietor / representative: | FIELD FISHER WATERHOUSE LLP<br>35 Vine Street<br>London EC3N 2AA<br>UNITED KINGDOM |
| Fax number: | 00 44-2074880084 |
| Community trade mark concerned: | 001495100<br>LAMBRETTA |
| OHIM reference: | **000002560 C** |
| Language of the proceedings: | English |

Please see attached the decision terminating the revocation proceedings referred to above. It was delivered on 24/09/2010.

Agnieszka SADLON CHWASTEK
On behalf of
**Miriam SANCHEZ FUNES**

Attached: 22 pages including cover page

OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET
(TRADE MARKS AND DESIGNS)

**Cancellation Division**

# DECISION
# of the Cancellation Division
# of 24/09/2010

## IN THE PROCEEDINGS FOR A DECLARATION OF REVOCATION

| | |
|---|---|
| OHIM reference: | **2560 C** |
| Community trade mark concerned: | 1 495 100<br>LAMBRETTA |
| Language of the proceedings: | English |
| **APPLICANT:** | **Brandconcern BV**<br>c/o Walter Scheffran<br>Herengracht 23-II<br>1015 BA Amsterdam<br>The Netherlands |

against

| | |
|---|---|
| **COMMUNITY TRADE MARK PROPRIETOR:** | **Scooters India Limited**<br>Post Bag No 23<br>Saronjini Nagar<br>Lucknow 226 008<br>India |
| **REPRESENTATIVE:** | **Field Fisher Waterhouse LLP**<br>35 Vine Street<br>London EC3N 2AA<br>United Kingdom |

## THE CANCELLATION DIVISION

composed of: Alexandra Apostolakis, Magnus Ahlgren and Stephan Hanne has taken the following decision on 24/09/2010:

**(1) The rights of the proprietor of Community trade mark No 1 495 100 are partially revoked as of 19/11/2007 in respect of the following goods.**

**Class 3: *Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; dentifrices.***

**Class 12: *Vehicles; apparatus for locomotion by land, air or water.***

**Class 18: *Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery.***

**(2) The application for revocation is rejected and the mark stays in the register for the following goods:**

**Class 3** ***Perfumery, essential oils, cosmetics, hair lotions;***

**(3) The mark also remains registered for the uncontested goods, i.e. all the goods in classes 14 and 25.**

**(4) Each party bears its own costs**

## FACTS AND ARGUMENTS

(1) The Community trade mark No 1 495 100 "LAMBRETTA" (word mark) (hereafter "the CTM") was filed on 07/02/2000 and registered on 06/08/2002 for the following goods:

Class 3: *Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices.*

Class 12: *Vehicles; apparatus for locomotion by land, air or water.*

Class 14: *Precious metals and their alloys and goods in precious metals or coated therewith, not included in other classes; jewellery, precious stones; horological and chronometric instruments.*

Class 18: *Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery.*

Class 25: *Clothing, footwear, headgear.*

(2) On 19/11/2007, the applicant filed a request for revocation.

(3) The grounds for the request are those of Article 51(1)(a) of Council Regulation (EC) No 207/2009 on the Community trade mark (“CTMR”), i.e. the trade mark has not been put to genuine use in the Community in connection with the goods within a continuous period of five years.

(4) The applicant files its request for a declaration of revocation in respect of part of the goods covered by the trade mark, namely the following:

Class 3: *Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices.*

Class 12: *Vehicles; apparatus for locomotion by land, air or water.*

Class 18: *Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery.*

(5) On 03/12/2007, the CTM proprietor was notified of the request and was given a period of three months to submit its observations and file proof of use of its trade mark.

(6) Following an extension of the time limit, on 02/05/2008, the representative of the CTM proprietor’s licensee in the United Kingdom submitted observations and documents to prove the use of the contested mark. The evidence is presented and examined below under the heading “on the substance”.

(7) In its observations submitted on 27/06/2008, 31/07/2008 and 17/05/2009 the applicant questioned the veracity of the documentation submitted. This with a view to showing that the purported use was not carried out by the CTM proprietor or with its consent. In support of its position, the applicant submitted comprehensive excerpts from correspondence between itself and the CTM proprietor, suggesting that the correspondence showed that the CTM proprietor was in fact not even aware of the current proceedings.

(8) The CTM proprietor appointed a representative on 3 September 2008. On 12/06/2009 and on 15/06/2009, this representative submitted additional evidence of use on behalf of the CTM proprietor.

(9) On 08/06/2009, the applicant submitted observations in the form of translations of statements made before the IP Court of Milan, Italy in proceedings between the same parties as in the case at hand and allegedly relating to the same trade mark. The contents of these statements will be presented below under the heading “On the substance”.

(10) In reply to an invitation by the Office to the CTM proprietor's representative to file a signed authorisation from the CTM proprietor, a document was filed on 07/10/2009, relating to two cases between the same parties, namely 2555C and 2560C. The same document was thereafter re-faxed on the two following days.

(11) The applicant pointed out that the time limit set was 07/10/2009 and argued that the document in question had been submitted after the deadline and hence it should not be taken into account by the Office in accordance with Rule 76(4) CTMIR. As a consequence all documentation submitted by the representative in question should be disregarded according to the applicant.

(12) On 28/01/2010, the applicant was invited to comment upon the evidence filed by the CTM proprietor on 12/06/2009 and 15/06/2009.

(13) On 29/03/2010, the applicant submitted observations. The CTM proprietor replied on 25/05/2010. In essence, both parties reiterated their previous positions and arguments in these communications. To the extent that these observations are of relevance for the outcome of the case, they will be referred to below.

(14) On 05/07/2010, the parties were informed that the adversarial part of the procedure was closed and that a decision would be taken.

## GROUNDS FOR THE DECISION

### *On the admissibility*

(15) The request complies with the formalities prescribed in the CTMR and the Commission Regulation (EC) No 2868/95 of 13 December 1995 (last amendment 1rst of May 2009) implementing CTMR ("CTMIR"), in particular in Article 56(1) CTMR and Rule 37 CTMIR and is, therefore, admissible.

(16) As far as the authorisation of the representative of the CTM proprietor is concerned, it is clear that the required document was submitted within the time limit set by the Office. The Office's records show that the power of attorney, designated to both the cases 2555C and 2560, was faxed by the CTM proprietor repeatedly and the first fax was received by the Office at 15:13 hours on 07/10/2009, which was the last day of the time limit. Consequently, the documents submitted by the CTM proprietor's representative are admissible in accordance with Rule 76(4) CTMIR.

(17) However, the admissibility of the supplementary evidence filed by the CTM proprietor on 15/06/2009 will also have to be considered in relation to Article 76(2) CTMR. The time limit set for submission of proof of use expired, including an extension, on 03/05/2008. On 01/04/2008 the Office had notified the licensee's representative that no further extensions were to be granted in this respect.

(18) Nevertheless, the Office will allow the evidence filed on 15/06/2009 under its discretion according to Article 76(2) CTMR.

(19) In the Arcol case, the Court indicated that taking belated facts or evidence into account is particularly likely to be justified where, first, the material which has been produced late is, on the face of it, likely to be relevant to the outcome of the opposition and, second, the stage of the proceedings at which that late submission

takes place and the circumstances surrounding it do not argue against such matters being taken into account (see judgment of 10 November 2004 in Case C-29/05 *Kaul GmbH and Bayer AG v OHIM* ('Arcol') [2004] ECR II-3807, at paragraph 44)

(20) Therefore, 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 the Regulation and the Office is in no way prohibited from taking account of facts and evidence which are submitted or produced late (see 'Arcol', at paragraph 42)

(21) However, it is equally apparent from that wording that a party has no unconditional right to have facts and evidence submitted out of time taken into consideration by OHIM ('Arcol', at paragraph 43).

(22) The Court of Justice has also ruled that the submission of facts and evidence remains possible after the expiry of a time-limit only if there is no provision to the contrary (i.e. 'unless otherwise specified', see ibid. 'Arcol'). It is only if that condition is met that the Office has the discretion to take into account facts and evidence submitted out of time.

(23) There is a provision to the contrary in relation to the time-limit to provide proof of use, namely Article 51(1)(a) CTMR, as implemented by Rule 40(5) CTMIR which provides that where, in the case of an application for revocation based on Article 51(1)(a) of the Regulation, the Office shall invite the proprietor of the Community trade mark to furnish proof of genuine use of the mark, within such period as it may specify. If the proof is not provided within the time limit set, the Community trade mark shall be revoked. Rule 22 (2), (3) and (4) CTMIR shall apply *mutatis mutandis*.

(24) It is apparent from the second sentence of Rule 40(5) CTMIR that submission of proof of use of the earlier mark after the expiry of the period specified for that purpose results, in principle, in the revocation of the CTM without the Office having discretion in that regard (see judgment of the General Court of 12 December 2007 in Case T-86/05 *K & L Ruppert Stiftung & Co. Handels-KG v OHIM* ('Corpo livre') [2007] ECR II-4923, at paragraph 49).

(25) The General Court however limits such a strict interpretation of the corresponding rules for the first submission of proof of use in opposition cases. Rule 22(1) CTMIR (now Rule 22(2) CTMIR) applies primarily to cases where the party adduces evidence of use for the first time after the expiry of the time-limit. As far as additional evidence of use is concerned, the Court upheld its previous case-law set out in judgment of the General Court of 8 July 2004 in Case T-334/01 *MFE Marienfelde GmbH v OHIM* ('Hipoviton') [2004] ECR II-2787, at paragraph 56, where it stated that the second sentence of Rule 22(1) CTMIR (now Rule 22(2) CTMIR) cannot be interpreted as precluding additional evidence from being taken into consideration where new factors emerge, even if such evidence is adduced after the expiry of that time-limit (see 'Corpo Livre', at paragraph 50).

(26) In the case at hand, the evidence filed on 15/06/2009 was supplementary to the first batch of evidence, filed on 02/05/2008. On a first view of the additional material contained in the evidence, it is clear that it may be of significance for the question of whether or not the CTM proprietor will be able to prove that its mark has been genuinely used or not. The applicant has had ample opportunity to submit

comments on its contents. Accordingly, the Office will allow the evidence filed on 15/06/2009 as admissible under Article 76(2) CTMR.

### *On the substance*

(27) Pursuant to Article 51(1)(a) CTMR the rights of the proprietor of the Community trade mark shall be declared revoked on application to the Office, if, within a continuous period of five years, the trade mark has not been put to genuine use in the Community in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use; however, no person may claim that the proprietors rights in a Community trade mark should be revoked where, during the interval between expiry of the five-year period and filing of the application, genuine use of the trade mark has been started or resumed; the commencement or resumption of use within a period of three months preceding the filing of the application which began at the earliest on expiry of the continuous period of five years of non-use shall, however, be disregarded where preparations for the commencement or resumption occur only after the proprietor becomes aware that the application may be filed.

(28) Pursuant to Article 55(1) CTMR, the Community trade mark shall be deemed not to have had, as from the date of the application for revocation, the effects specified in this Regulation, to the extent that the rights of the proprietor have been revoked. An earlier date, on which one of the grounds for revocation occurred, may be fixed in the decision at the request of one of the parties.

(29) Pursuant to Rule 40(5) in conjunction with Rule 22(3) CTMIR, the indications and evidence for the furnishing of proof of use shall consist of indications concerning the place, time, extent and nature of use of the opposing trade mark for the goods and services in respect of which it is registered and on which the opposition is based.

(30) The request for revocation was filed on 19/11/2007. The CTM was registered on 06/08/2002. Thus the CTM had been registered for more than five years at the date of the filing of the request and the relevant period for assessing use of the sign is between 19/11/2002 and 18/11/2007 inclusive.

### *On the proof of use – general remarks*

(31) The term ‘genuine use’ has been defined by the Court of Justice of the European Union in the Judgment of the Court, Case C-40/01 Ansul BV v Ajax Brandbeveiliging BV (‘Ansul’) [2003] ECR I-2439. At paragraphs 36-39, the Court mentioned the following:

(32) “Genuine use” must therefore be understood to denote use that is not merely token, serving solely to preserve the rights conferred by the mark. Such use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of goods or services to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin.

(33) It follows that 'genuine use' of the mark entails use of the mark on the market for the goods or services protected by that mark and not just internal use by the undertaking concerned. The protection the mark confers and the consequences of

registering it in terms of enforceability vis-à-vis third parties cannot continue to operate if the mark loses its commercial raison d'être, which is to create or preserve an outlet for the goods or services that bear the sign of which it is composed, as distinct from the goods or services of other undertakings. Use of the mark must therefore relate to goods or services already marketed or about to be marketed and for which preparations by the undertaking to secure customers are under way, particularly in the form of advertising campaigns.

(34) When assessing whether there has been genuine use of the trade mark, regard must be made to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, in particular whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark.

(35) Assessing the circumstances of the case may thus include giving consideration, *inter alia*, to the nature of the goods or service at issue, the characteristics of the market concerned and the scale and frequency of use of the mark. Use of the mark need not, therefore, always be quantitatively significant for it to be deemed genuine, as that depends on the characteristics of the goods or service concerned on the corresponding market.

***The evidence***

(36) In revocation proceedings on the grounds of non-use, the burden of proof lies with the proprietor because the applicant cannot be expected to prove a negative fact, namely that the mark has not been used during a continuous period of five years. It is thus the CTM proprietor which must prove actual and genuine use within the European Union, or present proper reasons for non-use.

(37) On 02/05/2008, the CTM proprietor submitted the following arguments and evidence of use:

- Witness statement by Steven David Filch, Finance Director of Fine White Line Limited (henceforth FWL), exclusive licensee in the United Kingdom of the registered CTM. In the statement, Mr Filch states that the license contract for use of the sign Lambretta in the United Kingdom was originally entered into by Mr Derry Kunman Limited in March 1997. Subsequently, FWL took over the license contract on 8 September 2006 with an effective date of 1 April 2006. With regard to the goods in class 3, Mr Filch stated that FWL had entered into a sub-licensing contract with Link Brand Solutions Limited (henceforth LBSL). The further statements by Mr Filch will be referred to in the context of the respective exhibits.

- Copy of a license contract between Scooters India Limited (SIL) and FWL. The contract is dated 28 January 2005 and gives FWL an exclusive right to use the trade mark LAMBRETTA in a number of countries. As far as is relevant for the case at hand, the contract indicates the right of the licensee to use the trade mark for goods in classes 3, 9, 12, 14, 18, 25 and 26 in the United Kingdom. With regard to its duration and scope, the contract refers to two previous license contracts; the first between SIL and Derry Kunman Limited and the second between SIL and FWL. These contracts were dated 12/06/1998 and 18/09/2001. Furthermore the exhibit contains a copy of a license contract, dated 8 September 2006 between Scooters India Limited and FWL. The annexed schedule, in addition to the previously mentioned goods for the United Kingdom, indicates that within the European Union, the license is based on the contested CTM and relates to use of the sign for goods in classes 6, 7 and 28 (Exhibit SDW1).

- Copy of a sub-licensing contract between FWL and LBSL. The contract is dated 17 February 2003 and indicates duration until 31 March 2006. The products defined by the contract are packaging and toiletries, cosmetics and fragrances within class 3 of the Nice classification. (Exhibit SDW2).

- Two copies of photographs of packaging for a deodorant, body wash, hair wax and body spray. The packaging is marked with the trade mark "Lambretta". The documents are undated. (Exhibit SDW3).

- Five invoices from the sub-licensee LBSL, dated December 2005 and March 2006. The invoices are addressed to companies in the United Kingdom. They specify sales of various "Lambretta" goods; body spray, body wash and hair wax. The quantities specified vary from a few dozen units to over 500 units and the order values vary between GBP 2 200 and GBP 8 100 . (Exhibit SDW4).

- Copy of a settlement agreement between the Lambretta Club of Great Britain on the one hand and Scooters India Limited, Derry Kunman and Derry Kunman Limited on the other hand. The agreement is dated 13/08/1999. In Chapter 1, Mr Walsh of the Lambretta Club of Great Britain undertakes not to interfere with the future use or registration of the mark in the United Kingdom by Scooters India Limited, by Mr Kunman himself or by Derry Kunman Limited. Moreover, the Club undertakes to use the Lambretta mark only in relation to goods offered by the club via mail order or at special scootering events; this restriction being without prejudice to the Club's freedom to provide services under the mark in the United Kingdom on a non-profit basis. (Exhibit SDW5).

- Copies from the magazine *Scootering*, showing a cover page, dated January 2004, showing a Lambretta scooter; advertising pages, partly dated January 2004, containing advertising for the Lambretta Club, first and foremost giving its contact details. There are also other advertisements, among others, for spare parts for Lambretta scooters, where the Lambretta trade mark is shown, however with reference to a multitude of dealers rather than any of the parties involved in the present case. A second front cover of "Scootering", dated October 2007, contains the text "Lambretta 60th anniversary". Two advertising pages, seemingly relating to this issue, contain advertising for Lambretta scooter spare parts offered for sale by Resurrection Scooters UK. Some of the spare parts dealers display a stamp "Lambretta Club Great Britain Super Dealer". Moreover, the exhibit contains printouts from the web page www.lambretta.co.uk. This web page contains information on workshops and has links to online sales of spare parts for scooters, to auction sites for second hand scooters, etc. Finally, the exhibit contains excerpts from a web page seemingly produced by an entity known as "Cambridge Lambretta". The web page excerpts are dated March 2008. (Exhibit SDW6).

- In the witness statement by Mr Filch, he refers to the settlement agreement in Exhibit SDW5. Mr Filch states that the use of the sign "Lambretta" in Exhibit SDW6 was carried out by members of or persons authorised by the

Lambretta Club Great Britain during the relevant time. The CTM proprietor's licensee argued that the settlement agreement proves that the use of the sign Lambretta carried out by members of the Lambretta Club, or persons having been authorised by the club, falls under Article 15(2) CTMR and hence should be regarded as genuine use by the CTM proprietor.

- With regard to goods in class 12, the CTM proprietor's licensee argued that it had been difficult to find a sub-licensee to manufacture and distribute vehicles. It claimed to have negotiated with a number of possible sub-licensees since 2005 and that in May 2008, it was close to concluding such agreements for bicycles, electric bicycles and petrol scooters. In support of these allegations, Mr Filch referred to excerpts from communications between FWL and interested parties, allegedly showing that preparations were taken for the re-commencement of use of the contested mark for goods in class 12 at least three months before the filing of the application. The documents in question are copies of e-mails between Derry Kunman and third parties. The major part of the evidence consists of a general prospect of a project and a presentation of purported business partners. The remainder consists of three e-mails of tentative discussions regarding the possible target group, preferences of style, etc. of the group in question and of possible scooter dealers (Exhibit SDW7).

- A statement by Mr Richard Allmark, CEO of Fisher Outdoor leisure, dated 2 May 2008. Mr Allmark stated that his company was negotiating with FWL with a view to launching a range of bicycles under the Lambretta trade mark in the UK and Europe "within the next few months". (Exhibit SDW8).

- Copy of a sub-license contract between FWL and Capella Industries AB (henceforth CIAB), dated 3 April 2006 concerning use of the Lambretta trade mark in the European Union for watches and jewellery in class 14. (Exhibit SDW9).

- Excerpts from a web page, partly empty, partly containing text relating to "The Lambretta Concept" and mentioning a planned release of a range of watches under the Lambretta trade mark (dated 30/08/2005). In a second page it is stated that "the Lambretta brand was reborn in 1997. Not the scooters but clothes, shoes and accessories." The official release of Lambretta Watches took place in April 2000. Furthermore, the exhibit contains a copy of a promotional advertisement from Capella Industries, showing a watch marked "Lambretta". The watch is being referred to as the Luna edition 2002, planned for a limited release of 300 units on the market in Italy, Sweden and the United Kingdom. Two further pages relate to editions 2002 and 2003, respectively. Finally, one page, promotes the release in the year 2006 of the "Lambretta jewellery". (Exhibit SDW10).

- Copies from a promotional web site for a range of watches and jewellery sold by the sub-licensee CIAB. The printouts were made on 15/02/2008. The heading of the first page reads "Welcome to Lambretta" and further pages contain images of a range of watches marked with the sign "Lambretta". There are also a handful of pages promoting jewelleries such as pendants, "dog tags" and rings. The trade mark "Lambretta" features in some of these pages. (Exhibit SDW11).

- Invoices from CIAB to Chrono UK Limited for watches and jewellery. The invoices are dated December 2002, December 2003, March 2004 and one invoice is dated July 2006. This last invoice comprises sales of 26 "units" at a total cost of USD 912. It is however not indicated whether these units are watches, jewellery or other goods. One of the items is marked "Lambro Scooter" whereas the other items are not indicated as relating to "Lambretta" products. (Exhibit SDW12).

- A copy of a sub-license contract between FWL and Lambretta Clothing Limited (LCL). The contract is dated 17/03/2006. Under heading 2; "Commencement and duration", it is indicated that the agreement shall come into force on 1 April 2006. The license relates to use of the "Lambretta" trade mark in the United Kingdom and the European Union. The licensed goods are identified as "clothing, excluding clothing and accessories pertaining to goods in class 12, including hand wear, underwear, nightwear, socks, belts, travel bags, luggage, wallets, purses and related personal accessory leather goods. (Exhibit SDW13).

- Copies from web pages where clothes and shoes of various brands are marketed. A so-called web-archive printout from February 2003 shows promotion of a t-shirt and a cap with the printed text "Lambretta Club Great Britain". An excerpt from "Original Shoe Co" indicates that Lambretta is among the brands promoted via the site; however the excerpt is not dated. A copy from "Lambretta Clothing", dated "summer 2007" shows the "Lambretta" trade mark together with a scooter in the heading. Further down on the page are links to clothing and watches. The following page contains a reference to a review of a retail site, carried out in September 2003. Further down on this page it is stated that "Lambretta" is one of the brands featured on the site. Finally a set of pages from the web archive, indicating the date 17/04/2007, show the "Lambretta" trade mark on a promotional site by Lambretta Clothing, featuring clothes. (Exhibit SDW14).

- A set of invoices, allegedly showing sales of goods in classes 18 and 25. There are several invoices which indicate receivers in the United Kingdom but without any indication as to the sender. Furthermore, the specifications of these invoices are unclear or incomprehensible. Four invoices emanate from "Derry Kunman, Lambretta Licensing". They are dated 2005, 2006, 2007 and 2008 and seem to refer to sales of clothing to clients in the United Kingdom. Except the invoice dated 2007, which refers to "720 pairs", the quantities are small, ranging from less than ten to eighty. (Exhibit SDW15).

(38) In reply to the submitted evidence, the applicant pointed out that none of the license contracts referred to by the CTM proprietor have been registered with the Office. In accordance with Articles 22 and 23(1) CTMR, the applicant argued that since a license only has effect vis-à-vis third parties after entry in the register, the contracts submitted by FWL should be disregarded by the Office. Furthermore, it questioned whether the CTM proprietor was really aware of, or interested in, the use referred to by the licensee and accordingly expressed its doubts as to the claimed consent.

(39) The applicant also pointed out that much of the evidence seems to stem from parties not at all involved in the proceedings. In this respect, the CTM proprietor had only very vaguely claimed that the use had been carried out with its authorisation or

with the authorisation of a sub-licensee, without corroborating these statements with any documentation, according to the applicant. In order to show that some of the evidence was derived from parties totally unrelated to the CTM proprietor or its licensee, the applicant submitted five excerpts from the *whois* database, providing information about the holders of the respective web sites from which the evidence had been collected (Annexes 1-5).

(40) With regard to the “active plans for resumption of use” referred to by the CTM proprietor, the applicant stated that mere plans of use do not amount to use of a trade mark in the legal sense. Finally, the applicant also questioned whether a couple of invoices to companies in the United Kingdom suffice to show genuine use at Community level and whether the extent of use would amount to the commercial level required to surpass mere token use.

(41) On 17/05/2009, the applicant submitted a set of copies from e-mail correspondence between itself and the CTM proprietor suggesting that, in March 2009, the CTM proprietor was not aware of the current proceedings, nor did it support the filing of evidence of use by its licensee FWL.

(42) On 08/06/2009, the applicant submitted observations in the form of translations of statements made before the IP Court of Milan, Italy, in proceedings between the same parties as in the case at hand and allegedly relating to the same trade mark.

- Translation of the protocol by the Court of Milan in proceedings between Brandconcern BV et al. on the one hand and Fine White Line (in its capacity as the licensee of SIL) et al. on the other. The object of the proceedings appears to be a precautional plea *ante causam* raised by FWL et al. The translation covers the argumentation of the Brandconcern BV party as presented before the Court at second instance. Moreover, the protocol also refers to declarations made by some of the witnesses. Mr Leone Schiavo, President of the Lambretta Club in Italy and Mr Vittorio Tessera, owner of the Lambretta Spareparts Historic Archive. Both stated that, to their knowledge, since 1991 no motorcycles nor scooters have been sold or distributed in Italy by SIL, FWL, by Derry Kunman or any other organisation related to these persons. (Annexes 1-4).

(43) Following two extensions of the deadline set by the Office, on 12 June 2009, Fisher Field Waterhouse Coopers, new representatives of the CTM proprietor, filed observations on behalf of the CTM proprietor.

(44) Firstly, the representative indicated that since the application for a declaration of invalidity only concerned goods in classes 3, 12 and 18; it was not going to comment further upon the arguments put forth by the applicant in this respect. In addition however it stated that the contested mark had been used also for the goods in classes 14 and 25,

(45) Secondly, as far as the sub-license agreement in classes 3 and 18 is concerned, the representative referred to Clause 17.1 of the license agreement between SIL and FWL where it is stated that the licensee is entitled to appoint sub-licensees. The sub-licenses of LBS in class 3 and Lambretta Clothing Limited in classes 18 and 25 were set up in accordance with this provision and therefore, the use of the contested trade mark should be duly considered, according to the representative.

(46) With regard to the settlement agreement between FWL and the Lambretta Club of Great Britain, the representative argued that the sales of spare parts for scooters by members of or persons authorised by LCGB should be considered as genuine use with the consent of the CTM proprietor in accordance with the interpretation given by the GC in the Vitafruit case.

(47) The new representative also submitted additional evidence of use on behalf of the CTM proprietor, requesting the Office to take it into account as admissible. The evidence is the following:

- Declaration by Daniela de Pascale of La Scala & Associati, where she states that FWL is the exclusive licensee for the "Lambretta" trade mark within the European Union. (Exhibit DDP-1).

- Copy of an e-mail, also referred to by Ms de Pascale. The e-mail was sent from SIL to FWL on 31 October 2008. The text relates to legal proceedings before an Italian Court, in which FWL represented the interests of SIL. (Exhibit DDP-2).

- Statement made by Harry Willits of FWL in which he refuted the allegations made by the applicant, that SIL was unaware of the current proceedings. (Exhibit 2).

- A declaration by Steve David Wilch, Finance director of FWL, dated June 2009. In the declaration, Mr Wilch stated that, at that time, SIL had been selling spare parts to "Lambretta" motorcycles in Italy for more than fifteen years. To further corroborate the statement, he also referred to the following documents: (Exhibit 3).

- A declaration dated 8 October 2008 from Ernesto Sacci, owner of the website www.lambretta.it, a web site specialised in information on the history and on events for owners, collectors and fans of the "Lambretta" scooter. Mr Sacci stated that SIL has sold spare parts for "Lambretta" scooters in Italy for at least fifteen years. The statement is accompanied by a number of copies from the web site, featuring among others a page where spare parts are offered for sale, at a fixed price or by auction by external users of the web site. The copies are dated 08/10/2008 (Exhibit SDW 2-1).

- A copy of SIL's catalogue for spare parts for "Lambretta" scooters. (Exhibit SDW 2-2). The first page contains the name and logo of the CTM proprietor. In the heading, the words "spares catalogue" appear in English, Italian, French and German. The trade mark "Lambretta" features together with cutaway drawings showing the various spare parts. (Exhibit SDW 2-2).

- Copy of a letter from Gianluca Giombolini, Director of Brade S.r.L., based in Cesena, Italy. The Director states that, since the winter season 2002, his company had marketed and sold clothing, accessories and underwear in Italy under the Lambretta trade mark in outlets of Brade S.r.L., totalling more than one hundred and fifty sales outlets in Italy. (Exhibit SDW 2-3).

- A set of 100 invoices sent to (what can be concluded from their names) clothes shops in Italy. They are dated February 2006 and February 2007. The sender company is not indicated; however delivery seems to have taken place from an address in Cesena. The goods are specified with codes. Some of these codes indicate clothes sizes, such as 34”. The amounts vary between a couple of hundred Euro up to more than EUR 7 000. (Exhibit SDW 2-4)

- A list of catalogue amendments with “Lambretta Accessories” dated 2004, 2005 and spring/summer 2007 with eight pages dedicated to accessories such as bags, travel bags, scarves, hats etc. Some of the codes from the invoices appear in the catalogue. The trade mark “Lambretta” appears in a figurative version in the catalogue pages and on most of the depicted clothes (Exhibit SDW 2-5).

***Assessment***

(48) The CTM proprietor has shown genuine use for part of the goods for which the contested CTM is registered. Firstly, the Cancellation Division confirms that even if during parts of the proceedings the parties argued as if the revocation action were directed against all the goods, the application filed on 19/11/2007 is explicitly limited to the registered goods in classes 3, 12 and 18. Accordingly, the examination of the case will be limited to these goods.

*On the evidentiary value of statements*

(49) As far as the multitude of testimonies, sworn statements, certificates, etc., from both parties are concerned, Rule 22(3) CTMIR expressly mentions written statements referred to in Article 78(1)(f) CTMR as admissible means of proof of use. Article 78(1)(f) CTMR cites the means of giving evidence, amongst which are sworn or affirmed written statements or other statements that have a similar effect according to the law of the State in which they have been drawn up. As far as the probative value of this kind of evidence is concerned, statements drawn up by the interested parties themselves or their employees are generally given less weight than independent evidence. This is because the perception of the party involved in the dispute may be more or less affected by its personal interests in the matter.

(50) This does not mean however, that such statements do not have any probative value at all.

(51) The final outcome depends, on the overall assessment of the evidence in this particular case; this is because, in general, further material is necessary for establishing evidence of use, since such statements have to be considered as having less probative value in comparison to physical evidence (labels, packaging, etc.) or to evidence originating from independent sources.

*The evidence submitted by FWL relating to consent*

(52) Article 15(2) CTMR states that use of the Community trade mark with the consent of the proprietor shall be deemed to constitute use by the proprietor. This means that the owner must have given his consent prior to the use of the mark by the third party. A later acceptance is insufficient.

(53) A typical case of use by third parties is the use made by licensees. Use by companies economically related to the trade mark proprietor, such as members of the same group of companies (affiliates, subsidiaries, etc.) is similarly to be considered as authorised use. Where the goods are produced by the trade mark proprietor (or with his consent), but subsequently placed on the market by distributors at the wholesale or retail level, this is also to be considered as use of the mark.

(54) At the evidence stage it is prima facie sufficient that the CTM proprietor only submits evidence that a third party has used the mark. The Office normally infers from such use, combined with the CTM proprietor's ability to present proof of it; that the use has been made with the CTM proprietor's prior consent.

(55) This practice of the Office was confirmed by the General Court in *Vitafruit*, (see judgment of 8 July 2004 in Case T-203/02 *The Sunrider Corporation v OHIM* ('Vitafruit') [2004] ECR II-2811, at paragraphs 25-26). The Court stated that it is unlikely that the proprietor of a trade mark would be in a position to submit proof that the mark had been used against his wishes. There was all the more reason to rely on that presumption, given that the applicant did not dispute the opponent's consent.

(56) However, if there are doubts on the part of the Office or, in general, in cases where the applicant explicitly contests the alleged consent, the burden is on the adversary, in the case at hand on the part of the CTM proprietor and its licensee, to submit further evidence that it gave its consent prior to the use of the mark.

(57) In subsequent practice, the Boards of Appeal has interpreted the above ruling from the General Court as a requirement for a business relationship between a CTM proprietor and the third party from which the evidence of the purported use emanates (see R 561/2007-1 at paragraph 25, R 982/2008-2 at paragraph 21 and R 25/2009-4 at paragraph 22).

(58) Furthermore the Cancellation Division wants to clarify that the formalistic approach and argumentation by the applicant regarding the signing, registration and the civil law relationship and distribution of responsibilities between the contracting parties etc. of the licenses have very little impact on the Cancellation Division's assessment of use of the contested mark with or without the consent by the CTM proprietor. There is no conditional link between Articles 22 and 23 CTMR and the use with the consent of the CTM proprietor pursuant to Article 15(2) CTMR, as suggested by the applicant. In fact, a valid license contract is not even a necessary precondition for consent. As correctly pointed out by the CTM proprietor and its licensee, a *de facto* consent is equally valid.

(59) In spite of the doubts cast by the applicant on the license relationship between SIL and FWL, the totality of the evidence clearly shows that these two companies have an established business relationship under which FWL is entitled to use the contested mark in the United Kingdom and the European Union, including the authorisation of sub-licensees. In particular, the supplementary evidence filed by the CTM proprietor on 15/06/2009 clearly shows that there is such a relationship between the companies.

(60) This having been said, the Cancellation Division would like to clarify that such *de facto* consent does not apply to the settlement agreement involving the "Lambretta Club of Great Britain".

(61) The reasoning by the GC in the Vitafruit case that where a third party has filed evidence of use, *prima facie* it can be taken that there is consent of use, does not apply to the current situation. Firstly, the applicant has disputed the consent. Secondly, the submitted evidence of use consists of copies from a magazine. Since magazines are normally accessible to the public, the presumption of access to proof of use being limited to consenting parties does not apply. In situations like this, the onus is on the CTM proprietor, or effectively its licensee, to prove the consent in question.

(62) Moreover, the practice established by the Boards of Appeal is that consent in accordance with Article 15(2) CTMR requires some kind of business relationship between the third party using the mark and the proprietor, who is subject to the use obligation. The settlement agreement from 1999 indeed involves the CTM proprietor as well as its licensee and the Lambretta Club of Great Britain. However, it is equally clear that the agreement aims at limiting the use of the sign to situations where it will not infringe the rights of the CTM proprietor. Thus it restricts the tolerated use of the sign Lambretta to specific contexts, namely mail sales and at scootering events where the club has a sales outlet. The agreement is one of conditioned coexistence rather than mutual cooperation. In the Cancellation Division's view, this does not constitute a business relation in the sense that it is understood by the Boards of Appeal. Hence, Article 15(2) CTMR does not apply. In the absence of the necessary consent, no use of the sign Lambretta carried out by the Lambretta Club Great Britain could possibly be considered genuine use of the contested CTM.

(63) Finally, as has been explained by the Boards of Appeal in the case R1168/2005-4, the acts of use must serve as a link between the CTM proprietor and the target public at which the goods and services as registered are addressed. If A organises a trade fair at which B displays shoes for sale, this is use for exhibition and trade fair services on behalf of A and for shoes on behalf of B, but not vice-versa. This means that the fact that some of the spare parts dealers in their advertising affiliate themselves with the Lambretta Club Great Britain does not mean that the Lambretta mark is used by the Lambretta Club for the goods in question.

(64) With regard to the sub-license contracts, the situation is partly different. First, the contract between FWL and CIAB will not be examined since it relates exclusively to goods in class 14, which were uncontested.

(65) The contract between FWL and LBSL appoints the latter as sub-licensee for use of the trade mark Lambretta in the United Kingdom for goods in class 3. The evidence of use submitted with reference to the sub-license emanates from LBSL in its entirety. Hence, the Cancellation Division will consider the use in question as use with the consent of the CTM proprietor in accordance with Article 15(2) CTMR.

(66) The sub-license contract between FWL and LCL and the evidence of use submitted with a reference thereto feature a number of ambiguities. Firstly, the sub-license covers goods in class 25 and some goods, like belts, travel bags, wallets, purses and related personal accessory goods which rightfully belong to class 18. Since class 25 was not contested, it is only the evidence relating to class 18 which is of interest. However, the specifications of the invoices allegedly showing sales of goods in class 18 are so unclear that it is not possible to assess which kind of goods they cover.

(67) Furthermore, with regard to goods in class 12, FWL explained that it had had difficulties finding a sub-licensee to manufacture and distribute vehicles. In Exhibit

SDW 7, it submitted excerpts from e-mail communications with a number of third parties and in SDW 8, it submitted a statement by the CEO of an outdoor leisure company, who testified that his company had been negotiating with FWL with a view to producing bicycles for the UK market under the trade mark “Lambretta”. Referring to paragraph 38 of the Ansul case, the Office would like to point out that when assessing whether there has been genuine use of the trade mark, regard must be made to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, in particular whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark. In class 12, real commercial exploitation of a mark requires relatively substantive preparatory measures. In the case at hand, measures for the production, or purchase of bicycles had been essential, advertising would have been necessary. In the absence of any supporting documentation showing that the plans were turned into actual trade mark use, the submitted evidence relating to use of the contested CTM for goods in class 12 by a sub-licensee are far from being sufficiently substantiated.

(68) Accordingly, the only evidence submitted by FWL where it is possible to safely conclude that there has been use with the consent of the CTM proprietor concern goods in class 3. This evidence will be examined in the next section.

*On the time of use*

(69) Since the request for revocation was filed on 19/11/2007, the CTM proprietor needs to prove genuine use for the goods at issue during the five year period preceding that date, i.e. from 19/11/2002 until 18/11/2007 inclusive (see the Office’s Manual for the time period to be considered, Part D, Section2: Cancellation Proceedings, Substantive Provisions).

(70) It is sufficient that a trade mark should have been put to genuine use during a part of the relevant period for it not to be subject to the sanctions (see judgment of the General Court of 25 March 2009 in Case T-191/07 *Anheuser-Busch, Inc. v OHIM* (‘Budweiser’) [2009] ECR publication pending, at paragraph 108).

(71) The evidence for examination consists of the documents submitted by the CTM proprietor and the documents relating to class 3 submitted by FWL. As far as the latter is concerned, the sublicensing contract indicates that the duration is from February 2003 to March 2006. The invoices are all dated and pertain to December 2005 and March 2006.

(72) With regard to the former, even though the statements by Mr Filch (Exhibit 3) and by Mr Sacci (Exhibit SDW 2-1), are dated in June 2009, they relate to the time period of “the past fifteen years”. The spare parts catalogue is undated. The “Lambretta accessories” catalogue printouts are dated 2004, 2005 and spring/summer 2007. The evidence relating to goods in class 18 clearly falls within the relevant time period whereas the dating of the evidence relating to motorcycle spare parts in class 12 is vague.

(73) Strictly speaking, the statements suggest that spare parts have been sold before and throughout the period. The Cancellation Division also takes note that in the statements made by Messrs Schiavio and Tessera, referred to in the submission by the applicant on 08/06/2009, neither of the persons in question denied that the CTM proprietor had sold spare parts under the Lambretta trade mark in Italy since

1991. Their statements only referred to the non-use of the mark for such motorcycles. Even so, the brevity with which the duration of the marketing and sales of spare parts have been described in the submitted evidence will have to be given due attention at the assessment of the extent of the use of the contested mark.

*On the place of use*

(74) As stipulated by Article 15(1) CTMR, the CTM must have been put to genuine use in the Community. Use in only a part of the Community can be sufficient as reflected in the Joint Statements by the Council and the Commission entered in the minutes of the Council meeting at which the CTMR was adopted (Joint Statements by the Council and the Commission of 20.10.1995, No B. 10 to 15, OJ OHIM 1996, 615). According to these statements, "The Council and the Commission consider that use which is genuine within the meaning of Article 15 in one country constitutes genuine use in the Community".

(75) The sub-licensing contracts and the invoices relating to the goods in class 3 show that the contested mark has been used with the consent of the CTM proprietor in the United Kingdom. With regard to the use of the mark for motorcycle spare parts in class 12, it is equally clear that the evidence relates to the territory of Italy. With regard to the goods in class 18, the issue is more complex. The catalogue excerpts are in English and have no other geographical references. The invoices in Exhibit SDW 2-4 pertain to Italy and allegedly contain references to goods in class 18. However a closer examination of the invoices reveal that there is not a single reference to the product codes used for the bags, rucksacks and other accessories in class 18 that are featured in the catalogue.

(76) In conclusion, the Cancellation Division therefore finds that the territorial prerequisites were fulfilled for the use of the contested mark in classes 3 and 12 whereas the CTM proprietor failed to fulfil such requirements in respect of class 18.

*On the nature of use*

(77) The required nature of the use concerns first the form of use. According to Article 15(2)(a) CTMR, which is applicable for all proceedings concerning the required genuine use, use of the CTM in a form differing from its registered form and altering its distinctive character does not constitute genuine use.

(78) As shown by the evidence, the sign Lambretta appears on the product presentations in the catalogues and on some of the products themselves.

(79) The contested CTM is a word mark, "Lambretta". As can be seen above in paragraph 78, the mark has been used in stylised letters of a bold, easily legible script. According to the Opposition Guidelines, part 2, chapter 6.2, word marks are considered used as registered when they are used in a type face which does not change the overall appearance of the mark. This also applies to changes between upper and lowercase letters, as well as where word marks are used in colour. The sign is used in a typeface which is dominated by bold rectangular structures, not very remote from a standard typeface. The Cancellation Division therefore finds that the distinctiveness of the mark is not altered. In conclusion, the mark is used as registered.

*On the extent of use*

(80) As regards the extent of the use made of the CTM, account must first be taken of, inter alia, the commercial volume of all the acts of use and, second, the duration of the period over which the acts of use were carried out and the frequency of those acts.

(81) Given the shifting character of the evidence relating to the various goods, the Cancellation Division will examine the extent of use class by class.

(82) The sub-licensing contract, corroborated by the invoices by LBSL, indicate that the contested mark has been used for goods in class 3 at a relatively low commercial scale. In spite of the fact that the invoices only span four months, the Cancellation Division cannot find that hundreds of units of cosmetic products at a value of GBP 2 200 to GBP 8 100 is merely token use. Therefore, the extent suffices to constitute genuine use of the contested CTM for goods in class 3.

(83) With regard to the goods in class 12, it is only the spare parts marketed and sold in Italy that need to be considered. The statements by Messrs Filch and Sacci on behalf of the CTM proprietor, that SIL has marketed and sold motorcycle spare parts under the trade mark Lambretta in Italy for fifteen years were not refuted by the testimonies of Messrs Schiavio and Tessera made before the IP Court in the Milan proceedings. Yet, there is no evidence whatsoever regarding the extent of the alleged use of the trade mark. In view of the inconclusive evidence in this respect, the Cancellation Division finds that the CTM proprietor failed to fulfil this necessary aspect for a finding of genuine use.

*Use in relation to the goods and services as registered*

(84) Pursuant to Article 51(2) CTMR, where the grounds for revocation of rights exist in respect of only some of the goods or services for which it is registered, the rights of the proprietor shall be declared to be revoked in respect of those goods or services only.

(85) Furthermore, according to the principle of partial use, if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection only for the sub-category or sub-categories to which the goods or services for which the trade mark has actually been used belong. However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition (see judgment of the General Court of 14 July 2005 in Case T-126/03 Reckitt Benckiser (España), SL v OHIM ('Aladin') [2005] ECR II-2861, at paragraph 45 et seq.). This applies also to revocation proceedings.

(86) Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the trade mark being

stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. In that regard, it is in practice impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods concerned by the registration. Consequently, the concept of ‘part of the goods or services’ cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or sub-categories (ALADIN, paragraph 46).

(87) Summarising all the prerequisites, the Cancellation Division only has to examine whether the CTM was genuinely used for all goods and services as contained in the specification in class 3, namely:

> Class 3 *Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices.*

(88) The evidentiary basis for which a finding of genuine use of the goods in class 3 must be the products specified in the invoices and photographs as opposed to those defined by the sub-license contract, since the latter reflects the actual use. The individual products contained in said evidence are *deodorants, body spray, body wax, hair wax*.

(89) Firstly, there is no evidence at all showing use of any products which would fit under the headings *bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; or dentifrices*.

(90) Secondly, the heading *perfumery, essential oils, cosmetics, hair lotions*, which covers all the goods for which the CTM proprietor has submitted evidence of use, is indeed broad enough to be divided into its four subcategories. However the goods contained in the evidence fall within at least three of the subcategories, namely perfumery, cosmetics, hair lotions and are not in essence different from the fourth one, essential oils, a product which may well be a component in for instance hair wax. Therefore, the Cancellation Division holds that the CTM proprietor has proven that the contested CTM has been genuinely used for *perfumery, essential oils, cosmetics, hair lotions* in class 3.

(91) Genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (Case T-356/02 *Vitakraft-Werke Wührmann* v *OHIM – Krafft(VITAKRAFT)* [2004] ECR II-3445, paragraph 28).

(92) The requirements set by Rule 22(3) CTMIR relating to the evidence of use consist of cumulative indications concerning the place, time, extent and nature of use of the trade mark for the goods and services in respect of which it is registered. The requirements relative to the proof of use were clearly not fulfilled.

(93) The Cancellation Division therefore concludes that use of the contested trade mark has not been sufficiently proven for the goods *bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; dentifrices* in class 3 as well as for the goods in classes 12 and 18 for which the mark is registered.

### *Conclusion*

Bearing in mind the above considerations, the Office deems that the CTM proprietor did not prove genuine use of the mark No 1 618 982 "LAMBRETTA" in the European Union in relation to the following contested goods:

Class 3 *Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; dentifrices.*

Class 12 *Vehicles; apparatus for locomotion by land, air or water.*

Class 18 *Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery.*

(94) Consequently, the trade mark No 1 618 982 shall be revoked for all these goods as of 19/11/2007.

(95) The application for revocation is rejected for the following goods:

Class 3 *perfumery, essential oils, cosmetics, hair lotions;*

(96) The mark shall remain in the register for these goods. Moreover, the mark shall also remain registered for all the uncontested goods, i.e. all goods in classes 14 and 25.

## COSTS

(97) Pursuant to Article 85(1) CTMR and Rule 94 CTMIR, the party losing revocation proceedings shall bear the fees and costs of the other party. However, where a party fails in some elements, a different apportionment shall be decided, Article 81(2) CTMR. Since the request is successful only in part, both parties have succeed on some heads and failed on others. Consequently, each party has to bear their own costs.

**THE CANCELLATION DIVISION**

| | | |
|---|---|---|
| Alexandra Apostolakis | Magnus Ahlgren | Stephan Hanne |

**Notice on the availability of an appeal:**

Under Article 59 CTMR any party adversely affected by this decision has a right to appeal against this decision. Under Article 60 CTMR notice of appeal must be filed in writing at the Office within two months from the date of notification of this decision and within four months from the same date a written statement of the grounds of appeal must be filed. The notice of appeal will be deemed to be filed only when the appeal fee of 800 euro has been paid.