



## 2019 Study Question

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**Consumer survey evidence**

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### I. Current law and practice

***Please answer the below questions with regard to your Group's current law and practice.***

**1.a** Is consumer survey evidence in principle admissible in trademark proceedings? Please answer YES or NO.

Yes

Please Explain

**1.b** Are there specific statutory provisions in your law governing consumer survey evidence?

If YES, what do they state and do they specifically concern trademark matters or do they have a more general nature?

No

Please Explain

***If you have answered NO to Q1)a), please skip Q2)-Q5) and proceed to Q6); If you have answered YES to Q1)a), please proceed to Q2).***

**2.a** Is consumer survey evidence admitted in all types of trademark proceedings (see also para. 13 in the full text of the Study Guidelines which can be found at the top of this webpage)?

Yes

Please Explain

Can be submitted in basically all proceedings (it is up to the claimant to evidence a circumstance by any evidence it sees as relevant). In practice most relevant in assessing repute and distinctiveness from the viewpoint of the consumer (incl. acquired distinctiveness). Less relevant and less used in likelihood of confusion cases.

**2.b** If consumer survey evidence is not admitted in all types of trademark proceedings, in which types is it admitted and in which types is it not (e.g. opposition proceedings, revocation, proceedings, infringement proceedings)?

See above.

**3.a** What can consumer survey evidence prove or help prove (e.g. confusion, acquired distinctiveness; see also para. 14 in the full text of the Study Guidelines which can be found at the top of this webpage)?

Most relevant in evidencing distinctiveness and repute among consumers. Less relevant for confusion cases. For details see above 2) a .

**3.b** What is consumer survey evidence most used for in practice to prove or help prove (e.g. confusion, acquired distinctiveness; see also para. 14 in the full text of the Study Guidelines which can be found at the top of this webpage)?

See above a. and 2) a.

**4.a** Are there specific requirements for surveys, e.g. as to the way of conducting the survey (e.g. internet or email survey, telephone survey, shopping mall interrupt surveys), the number and selection of respondents, the appropriate form and order of survey questions and the use or nature of controls? If so, which?

No

Please Explain

Not any specific requirements by law, but most filed surveys conducted by professional survey companies in order to ensure valid, usable and hard to refute results.

**4.b** If your answer to Q4a) is NO, what characteristics do surveys generally have, e.g. as to the way of conducting the survey, the number and selection of respondents, the appropriate form and order of survey questions and the use or nature of controls?

See above.

**5.a** Are specific percentages of respondents answering certain questions required or sufficient to prove certain items? If so, which?

No

Please Explain

No such percentages set in stone.

**5.b** What percentages of respondents answering certain questions are typically deemed insufficient?

Single digit percentages may prove insufficient, but again, no such substantial law provision to rule any concrete percentage as insufficient. Depends on the circumstances of the case.

**6** Is the court or IP office involved in the set-up of the survey, or can it be, and, if so, to what extent?

No

Please Explain

i.e. has not been thus far in our case or those we are aware of.

**7** What weight or value is generally given by the court or IP office to consumer survey evidence, if such is admitted, and which factors are relevant in considering the extent of such weight or value?

Depends on the circumstance(s) it is set to evidence. In case of acquired distinctiveness, it is generally considered as very relevant evidence. (Presumes that the survey is carried out professionally and correctly and provides credible results.) In case of likelihood of confusion its value may be lower but can still be used as one evidence, if not entirely conclusive. (Likelihood of confusion is a question of law, not a strict question of fact.)

## II. Policy considerations and proposals for improvements of your Group's current law

**8** Could any of the following aspects of your Group's current law or practice relating to consumer survey evidence be improved? If YES, please explain.

**8.a** Types of trademark proceedings in which survey evidence is admissible;

No

Please Explain

N/A NO (there are no set rules as to in which proceedings survey's may be presented as evidence).

**8.b** What survey evidence can prove or help prove;

No

Please Explain

N/A NO

**8.c Requirements of surveys;**

No

Please Explain

N/A NO, at best certain non-binding guidelines to the way surveys are conducted would be helpful for those not in the know about the subject.

**8.d The application, or lack thereof, of bench-mark percentages;**

No

Please Explain

N/A NO, percentages are a very slippery slope and may not provide enough flexibility as a rule

**8.e The weight or value given to consumer survey evidence.**

No

Please Explain

N/A NO, consumer surveys are already regarded as rather useful evidence in Estonia

**9 Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?**

No

Please Explain

All in all no, substantive law, ECJ case-law and EUIPO practice provide sufficient basis on which to conduct surveys (e.g. in acquired distinctiveness cases)

**III. Proposals for harmonisation**

***Please consult with relevant in-house / industry members of your Group in responding to Part III.***

**10 Do you believe that there should be harmonisation in relation to consumer survey evidence?**

Yes

Please Explain

In the form of non-binding guidelines or other soft-law instruments, may be helpful, in the form of new substantive law, do not see the necessity.

***If YES, please respond to the following questions without regard to your Group's current law or practice.  
Even if NO, please address the following questions to the extent your Group considers your Group's***

**current law or practice could be improved.**

**11** Should consumer survey evidence in principle be admissible in trademark proceedings? Please answer YES or NO.

Yes

Please Explain

**2.a** Should consumer survey evidence be admitted in all types of trademark proceedings (see also para. 13 in the full text of the Study Guidelines which can be found at the top of this webpage)?

Yes

Please Explain

YES, could be submitted in all. Whether or not they are relevant in ALL is another question.

**2.b** If consumer survey evidence should not be admitted in all types of trademark proceedings, in which types should it be admitted and in which types should it not be admitted (e.g. opposition proceedings, revocation, proceedings, infringement proceedings)?

Most relevant in acquired distinctiveness and other such cases. Less relevant in likelihood of confusion cases, as likelihood of confusion is rather a question of law, not fact.

**13** What should consumer survey evidence be allowed to prove or help prove (e.g. confusion, acquired distinctiveness; see also para. 14 in the full text of the Study Guidelines which can be found at the top of this webpage)?

See above 12 b.

**14** Should there be specific requirements for surveys, e.g. as to the way of conducting the survey (e.g. internet or email survey, telephone survey, shopping mall interrupt surveys), the number and selection of respondents, the appropriate form and order of survey questions and the use or nature of controls? If so, which?

Yes

Please Explain

A survey should be conducted by a reputable survey company who can ensure that the results are valid and represent the views of the actual consumers/those being questioned. They are also trustworthy in selecting the respondents and providing the appropriate form and questions (in co-operation with the client).

**5.a** Should specific percentages of respondents answering certain questions be required or deemed sufficient to prove certain items? If so, which?

No

Please Explain

Specific percentages are a slippery slope. Some percentages may be used as guidance, but not as set rules. This wouldn't allow for flexibility and may make an impracticable rule not applicable to all cases.

**5.1** What percentages of respondents answering certain questions should be deemed insufficient?

Again, depends on the case. Single digit percentages *may* prove insufficient, depending on the topic and question.

**16** Should the court or IP office be involved in the set-up of the survey and, if so, to what extent?

No

Please Explain

As each party is accountable for providing evidence which confirms their claims, courts or offices may not need to be involved in setting up surveys. This basically sort of counts as collecting evidence on the courts or office's part. (Although, it must be said that as per European case-law, IP offices may also conduct consumer surveys to as proof of their claims.)

**17** What weight or value should be given by the court or IP office to consumer survey evidence, if such is admitted, and which factors should be relevant in considering the extent of such weight or value?

Provided that the survey is carried out by a reputable survey company in a professional and trustworthy manner, consumer surveys may provide relevant evidence in supporting a claim. In comparison, when the survey is some dodgy online survey only put forth to some irrelevant persons, the results need not be viewed as relevant. It all depends on the exact case at hand and the professionalism of the survey carried out.

**18** Please comment on any additional issues concerning any aspect of consumer survey evidence you consider relevant to this Study Question.

As said before, not sure if new substantive law is required for consumer surveys in relation to trademark cases. Nevertheless, some soft law guidelines (on the basis of ECJ case-law, EUIPO practice/guidelines and those of relevant national authorities) may provide some useful insights for cases forward.

**19** Please indicate which industry sector views provided by in-house counsel are included in your Group's answers to Part III.