Alicante, 21/03/2023
R0665/2022-5

HARTE-BAVENDAMM Rechtsanwälte Partnerschaftsgesellschaft mbB
Am Sandtorkai 77
D-20457 Hamburg
ALEMANIA

Subject: Appeal No. R0665/2022-5 IMPOSSIBLE
Your ref.: 776/19/AJ52 CE

Notification of a decision of the Boards of Appeal

Please find enclosed the decision of the Fifth Board of Appeal dated 17/03/2023 concerning the appeal R0665/2022-5.

Article 72 EUTMR provides that an action may be brought before the General Court against decisions of the Boards of Appeal. The action shall be brought within two months from the date of notification of the decision of the Board of Appeal.

Should you intend to challenge the legality of the Decision of the Board of Appeal, your attention is drawn to the Rules of Procedure of the General Court published on 25 September 2018 (OJ 2018 L 240, p. 68), and to the Decision of the General Court of 11 July 2018 on the lodging and service of procedural documents by means of e-Curia (OJ 2018 L 240, p. 72) *(https://curia.europa.eu/jcms/jcms/Jo2_7040/).*

Since 1 December 2018, the e-Curia application is the sole means of correspondence between the parties' representatives and the General Court Registry. It follows that all the procedural documents must be lodged and service will be made by the General Court Registry via the e-Curia application.

Information about the e-Curia application is to be found on the website of the Court of Justice of the European Union *(http://curia.europa.eu/jcms/jcms/P_78957).*

To the extent that you are adversely affected by the attached decision and you nonetheless decide not to challenge it, please inform us accordingly as soon as possible.

On behalf of Eleonora WAGNER
Registry

Enc.: 1

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You can download the attachments from your Office User Area by using the links below:

Decision - 17/03/2023	https://euipo.europa.eu/copla/document/337a6A

DECISION
of the Fifth Board of Appeal
of 17 March 2023

In case R 665/2022-5

Impossible Foods Inc.
400 Saginaw Drive
Redwood City California CA 94063
United States of America — EUTM Proprietor / Appellant

represented by Irenah Klink, De Brauw Blackstone Westbroek, Claude Debussylaan 80, 1082 MD, Amsterdam, Netherlands

v

Société des Produits Nestlé S.A.
Service des Marques
Case postale 353
1800 Vevey
Switzerland — Revocation applicant / Defendant

represented by Harte-Bavendamm Rechtsanwälte Partnerschaftsgesellschaft MBB, Am Sandtorkai 77, 20457 Hamburg, Germany

APPEAL relating to Cancellation Proceedings No 37 948 C (European Union trade mark registration No 12 775 664)

THE FIFTH BOARD OF APPEAL

composed of V. Melgar (Chairperson and Rapporteur), S. Rizzo (Member) and A. Pohlmann (Member)

Registrar: H. Dijkema

gives the following

Language of the case: English

Decision

Summary of the facts

1 By an application filed on 9 April 2014, Maraxi Inc, the predecessor-in-title of Impossible Foods Inc. ('the EUTM proprietor') claiming the priority of US trade mark No 86 102 158 with a filing date of 25 October 2013 sought to register the word mark

IMPOSSIBLE

as a European Union trade mark ('EUTM') for the following list of goods:

Class 1: Proteins as a raw material; protein products as a raw material; food proteins as a raw material; proteins for use in the manufacture of foodstuffs; preservatives for foodstuffs; flavor improvers for foodstuffs; flavor enhancers for foodstuffs; chemical additives for foodstuffs; enzymes for use in foodstuffs.

Class 5 - Dietetic food; baby food; dietary supplements; nutritional supplements.

Class 29 - Meat, fish, seafood, poultry and game; food products made from meat, fish, seafood, poultry or game; extracts for food made from meat, fish, seafood, poultry or game; preserved, frozen, dried and cooked fruits, vegetables, nuts, seeds, seaweed and algae; food products made from fruits, vegetables, nuts, seeds, seaweed or algae; extracts for food made from fruits, vegetables, nuts, seeds, seaweed or algae; eggs, egg whites, egg yolks, egg products, egg substitutes; milk, milk products, milk substitutes; protein milk and protein milk products; edible oils and fats; substitutes for foods made from animals or animal products; meat substitutes; fish substitutes; dairy substitutes; food products made from meat substitutes, fish substitutes, seafood substitutes or dairy substitutes.

2 The application was published on 26 May 2014 and the mark was registered on 3 September 2014.

3 On 4 September 2019, Société des Produits Nestlé S.A. ('the revocation applicant') filed a request for revocation of the registered mark for all the above goods.

4 The grounds of the request for revocation were those laid down in Article 58(1)(a) EUTMR.

5 On 11 November 2019, the EUTM proprietor requested a partial surrender of the contested mark which it reiterated on 3 December 2020. However, the Office did not implement the request for partial surrender but informed the EUTM proprietor on 18 December 2020 that the partial surrender was suspended until the present revocation proceedings were closed. Therefore, the contested mark still covered all the goods for which it had been registered.

6 Before the Cancellation Division, the EUTM proprietor submitted evidence in support of its arguments. As it requested that certain commercial data contained in

the evidence be kept confidential vis-à-vis third parties, the Cancellation Division described the evidence only in the most general terms without divulging any such data. In any event, most of the submitted documents were heavily redacted and no sensitive information could be retrieved from them. The EUTM proprietor submitted the following documents:

– Annex 1: excerpts from the EUTM proprietor's website where the nature of soy leghemoglobin is explained;

– Annex 2: an article from The Justice, dated 13 September 2016 entitled 'Impossible Burger CEO Lectures on Destructive Tech';

– Annex 3: 'No Question Letter' issued by the FDA, indicating that it had no questions with regard to the conclusion on the safety of soy leghemoglobin; the letter was signed on 23 July 2018 and refers to the notice filed by the EUTM proprietor on October 2017 and the amendments up to July 2018;

– Annex 4: the listing of colour additives exempt from certification, indicating inclusion of soy leghemoglobin, from the Federal Register, published on 1 August 2019, showing that soy leghemoglobin was approved as a colour additive;

– Annex 5: the EFSA statement, Update of the list of QPS-recommended biological agents, adopted on 5 June 2019;

– Annex 6: a letter from the EFSA dated 7 October 2019 acknowledging receipt of the application for approval of soy leghemoglobin under Regulation (EC) No 1334/2008, which was filed on 15 August 2019, and requesting additional information;

– Annex 7: the application for the authorisation of use of soy leghemoglobin produced from a genetically modified Pichia Pastoris for food use in the EU under Regulation (EC) No 1829/2003 submitted by the EUTM proprietor on 30 September 2019, including acknowledgment letter from the EFSA confirming that on 15 October 2019, the EFSA received the application from The Netherlands competent authority;

– Annexes 8 and 11: the judgment of The Hague District Court regarding the infringement proceedings involving the parties, its translation into English and a press article informing about the judgment;

– Annexes 9, 21 and 24b: redacted and less redacted versions of the consulting agreement between the EUTM proprietor and a consulting company, I. (hereinafter will be referred to as I.) dated 11 November 2016;

– Annex 10: statistics on social media activity containing the numbers of followers on Facebook and Instagram in European countries (amounting to less than 15 000 on both platforms for all the EU countries in total) and social media posts regarding queries about introducing Impossible products on the EU market;

- Annex 12: an overview of links to third party GRAS filings;

- Annex 13: India Food Safety and Standards regulation 2017;

- Annex 14: instances where the revocation applicant first asked for approvals in one country before pursuing the process in other territories;

- Annexes 15, 21 and 24c: a proposal of a Regulatory & Feasibility Assessment for soy leghemoglobin in X Jurisdictions (dated on 3 different dates between October 2016 and January 2017) and a Regulatory Assessment of soy leghemoglobin derived from genetically modified yeast as food ingredient in the EU dated 17 February 2017, both drafted by I. for the EUTM proprietor;

- Annexes 16 and 29: an overview of the revocation applicant's actions in proceedings against the EUTM proprietor's trade marks;

- Annex 17: an email from I. to the European Commission dated 27 September 2018;

- Annex 18: an email from the EFSA's applications desk to I. of 20 November 2018, informing the EUTM proprietor which applications will be necessary;

- Annex 19: an affidavit by the EUTM proprietor's directors, Mr. G. and Ms. Ch., in which they describe the different regulatory/approval processes for novel foods in the USA and Europe and acknowledge that the processes can be continuously delayed by requests for additional information. They also inform that there is a high sensitivity to genetically modified foods in Europe which results in additional hurdles. They described how the FDA required toxicity studies which the EUTM proprietor hoped would not be necessary. These studies were not finished until July 2017, after which the EUTM proprietor filed a new GRAS to the FDA, which the latter confirmed it would require toxicity studies and in July 2018, the EUTM proprietor started to make plans for other submissions. I. started to make enquiries about the requisites for authorisation in the EU and provided proposals for both flavour and GMO applications in January 2019. The applications were submitted in August and September 2019. They claim that the issues in the regulatory processes, in particular the request for the toxicity studies, prevented the EUTM proprietor from filing the EU applications sooner, because they decided not to pursue the EU regulatory filings until the US process was completed. They are accompanied by a selection of regulations and recommendations from the FDA, EFSA and internet sources regarding the procedure for the authorisation of novel substances and emails from I. to the European Commission and EFSA from September to November 2018 containing a query about the application process for soy leghemoglobin;

- Annex 20: pages from the GRAS notice filed by the EUTM proprietor in the US in 2017;

- Annex 22: an affidavit by I. dated 14 April 2021, in which the tasks carried out by I. for the EUTM proprietor are described;

- Annex 23: email correspondence between the parties;

- Annex 24: an overview of the preparatory acts before applying to the EFSA undertaken by the EUTM proprietor;

- Annex 24a: a mutual non-disclosure agreement between the EUTM proprietor and I. signed in August 2016;

- Annex 24d: an email from E. (another consultancy agency) to the EUTM proprietor, informing that it introduced Impossible Foods to two individuals who will be useful contacts as the EUTM proprietor's EU plans evolve, dated 1 December 2017;

- Annex 24e: a Memorandum from a Brussels law Office to the EUTM proprietor dated 1 December 2017 regarding regulatory status of leghemoglobin produced by a genetically modified strain of yeast in the EU;

- Annexes 24f and h: a proposal regarding the regulatory submission strategy for soy leghemoglobin derived from genetically modified yeast, by I. to the EUTM proprietor, dated 18 September 2018 and 9 January 2019;

- Annex 24g: an email from I. to the EUTM proprietor informing about a communication with a person from the Netherlands GMO Office, dated 25 October 2018;

- Annex 24i: an assessment of the EU market for the EUTM proprietor by E., dated 15 May 2019, providing information about the EU perspective on meat substitute products and genetically modified products, from the point of view of consumers and retailers;

- Annex 24j: a proposal for political consultancy services for the EUTM proprietor by another consultancy agency, dated July 2019;

- Annex 24k: a presentation entitled Public Affairs support proposal to Impossible Foods from a company B. for an initial engagement with EU decision-makers and the preparation for the launch of the Impossible Burger in Europe, dated in August 2019,

- Annex 25: a timeline of the EUTM proprietor's actions;

- Annex 26: postings for job positions by the EUTM proprietor for the management of its business in the EU, on its website printed on 28 October 2019;

- Annex 27: references to the EUTM proprietor's products in social media and in the EU press;

- Annex 28: an affidavit by a former science coordinator at the EFSA, stating that the EUTM proprietor is serious about obtaining a market authorisation and that there is an understandable rationale behind the approach chosen by it;

– Annex 30: affidavits by the EUTM proprietor's Directors written in response to the affidavit by Ms. P. submitted by the revocation applicant, in essence arguing that Ms. P. has limited knowledge of soy leghemoglobin and is not qualified to present informed opinions about the handling of the regulatory process;

– Annex 31: an email from I. dated 8 August 2019, in which it is answering the EUTM proprietor's query whether an application for colour additive would also be required. The answer is 'highly unlikely';

– Annex 32: a selection from articles in the press showing that soy leghemoglobin is crucial to taste the EUTM proprietor's product;

7 Before the Cancellation Division, the revocation applicant submitted the following documents in support of its arguments:

– Enclosure 1: an excerpt from Wikipedia regarding the EUTM proprietor;

– Enclosure 2: an article entitled 'Beyond Meat competitor Impossible Foods received FDA approval for bleeding plant burger', published on reuters.com in July 2019;

– Enclosure 3: an article 'FDA has no further questions over the safety of Impossible Foods' star ingredient', published on foodnavigator-usa.com in July 2018;

– Enclosure 4: an article entitled 'How our commitment to consumers and our planet led us to use GM soy' published on medium.com in May 2019;

– Enclosure 5: an article 'Triton woos plant-based meat makers with non-GMO source of heme, the secret sauce in the Impossible Burger', published in foodnavigator-usa.com in March 2019;

– Enclosure 6: a compilation of articles published online regarding the availability of Beyond Burger meat substitute on the European market;

– Enclosure 7: a printout from www.thevegetarianbutcher.co.uk;

– Enclosure 8: a notification from the District Court of Frankfurt in the preliminary injunction proceedings, dated 18 April 2019;

– Enclosure 9: a notice of appeal submitted to the District Court of Hague, translated into English;

– Enclosure 10: various rankings of meat substitute products on the American market, published online;

– Enclosure 11: an article published in The Guardian, in 2000, explaining that products of various brands taste differently around the world because big companies adapt their products to appeal to the individual national tastes and expectations;

– Enclosure 12: an affidavit of Ms. P., regulatory and scientific affairs manager for Nestlé, in which she explains the hurdles of the regulatory process of new substances in the EU and concludes that the EUTM proprietor's application under the GMO Regulation was woefully unprepared. She also lists a number of substances that are used to imitate meat flavours and that, in her view, could be used by the EUTM proprietor to substitute the soy leghemoglobin. She also claims that it should have been clear to the EUTM proprietor from the outset that the approval under the Additive Regulation was necessary. She also argues in detail regarding the need for conducting 90-day toxicity studies for its product to be approved in the EU, something that the EUTM proprietor's advisors must have pointed out, and yet the EUTM proprietor did not conduct these studies. The following enclosures are attached to the affidavit (in addition to some of the EUTM proprietor's evidence to which the affidavit refers):

  - Enclosure 12A: an EU Commission fact sheet published in 2015 regarding the EU's policies on GMOs;
  - Enclosure 12B: an article 'Restrictions on Genetically Modified Organism: European Union', published on www.loc.gov;
  - Enclosure 12C: a printout from www.intertek.com/agriculture/biotechnology;
  - Enclosure 12D: an article 'Several European countries move to rule out GMOs' published on www.ec.europe.eu/environment;
  - Enclosure 12E: an article 'How we got to now: why the US and Europe went different ways on GMOs', published on https://theconversation.com on 6 November 2015;
  - Enclosure 12F: a printout from the European Commission websites showing the Register of GMOs;
  - Enclosure 12G: the EUTM proprietor's application for the authorisation of Soy Leghemoglobin under Regulation (EC) No 1829/2003;
  - Enclosure 12H: a table summarising the duration of some applications (from the application date to the approval date) submitted under the GMO regulation by different companies – the duration ranges from 6 to 10 years;
  - Enclosure 12I: a summary report from the Standing Committee on Plants, Animals, Food and Feed held in Brussels on 17 September 2018;
  - Enclosure 12J: a provisional patent application before the United States Patent and Trade mark Office, filed in 2012, in which the colouring abilities of leghemoglobin are emphasised as one of the primary functions;
  - Enclosure 12K: PCT application WO 2013/010042;
  - Enclosure 12L: a Memorandum of the meeting between the FDA and the EUTM proprietor, which took place on 3 February 2016, in view of

discussing its potential approach to address the FDA's suggestions after the withdrawal of GRN540. The FDA's employees suggested that the EUTM proprietor enquired about the soy leghemoglobin qualifying as a colour additive;

- Enclosure 12M: an article entitled 'Plant-Based Impossible Burgers to launch in stores in 2019' published on www.vegnews.com in November 2018, mentioning that the popular patties are now available in 5 000 restaurants and soon will make their retail debut;

- Enclosure 12N: an article 'Impossible Foods to launch plant-based meat in stores next week' published on www.vegnews.com in September 2019;

- Enclosure 12O: the EFSA's guidance on the data required for the risk assessment of flavourings to be used in or on foods;

- Enclosure 12P: the EFSA's guidance regarding the submission of food additive evaluations;

- Enclosure 12Q: Two slides of a presentation entitled 'Soy Leghemoglobin Toxicology Testing', dated 3 February 2016, showing that the 90-day toxicity study was envisaged;

- Enclosure 13: a confirmation from the EFSA that the initial application for authorisation under the 'GMO Regulation' was incomplete and that the EUTM proprietor had to provide the three missing requirements. The application therefore was only accepted for further scientific review by the EFSA on 15 December 2021;

- Enclosure 14: the EUTM proprietor's denial to produce unredacted versions of the submitted Annexes;

- Enclosure 15: an overview of the EUTM proprietor's documents that it failed to properly disclose or explain vis-à-vis the EUIPO;

- Enclosure 16: an affidavit by an expert according to which the EUTM proprietor should have known that an authorisation under the "Food Additive Regulation" was necessary.

8 By decision of 10 March 2022 ('the contested decision'), the Cancellation Division upheld in its entirety the request for revocation. The EUTM proprietor's rights in respect of EUTM No 12 775 664 were revoked in their entirety as from 4 September 2019. It gave, in particular, the following grounds for its decision.

On the partial surrender

– The EUTM proprietor's partial surrender of 3 December 2020 was forwarded to the revocation applicant, which maintains the application for revocation. Therefore, pursuant to Article 57(2) EUTMR, this decision will concern the entire specification of the contested EUTM, regardless of the partial surrender.

– In relation to the surrendered goods, the EUTM proprietor acknowledged that the mark was not used for them and that the arguments regarding proper reasons for non-use do not apply to them.

Article 58(1)(a) EUTMR

– In revocation proceedings based on the grounds of non-use, the burden of proof lies with the EUTM proprietor as the revocation applicant cannot be expected to prove a negative fact, namely that the mark has not been used during a continuous period of five years. Therefore, it is the EUTM proprietor who must prove genuine use within the European Union, or submit proper reasons for non-use.

– In the present case, the EUTM was registered on 3 September 2014. The revocation request was filed on 4 September 2019. Therefore, the EUTM had been registered for more than five years at the date of the filing of the request. The EUTM proprietor had to prove genuine use of the contested EUTM during the five-year period preceding the date of the revocation request, that is, from 4 September 2014 until 3 September 2019 inclusive.

– The EUTM proprietor argued that it had not started to use the mark in the European Union but that it had proper reasons which prevented it from doing so.

– It kept submitting additional evidence to support its allegations of proper reasons for non-use, with each observations, three of which were after the expiry of the original time limit for submitting evidence of use.

– The Cancellation Division considered that the EUTM proprietor did submit relevant evidence within the time limit initially set by the Office and, therefore, the later evidence can be considered to be additional. The fact that the revocation applicant disputed the initial evidence submitted by the EUTM proprietor justifies the submission of additional evidence in reply to the objection.

– For the above reasons, and in the exercise of its discretion pursuant to Article 95(2) EUTMR, the Cancellation Division therefore decided to take into account all the evidence submitted by the EUTM proprietor.

Reasons for non-use

– The EUTM proprietor argues that it produces a specific food product that contains an ingredient for which administrative authorisation is needed before the product can be put on the market in the EU. It claims that use of the mark for a product without the ingredient would be unreasonable. The revocation applicant, on the contrary, puts forward that this obstacle could be easily overcome by the EUTM proprietor by using the mark for products which do not contain the ingredient, which is perfectly achievable as shown by numerous companies producing meat substitutes without the ingredient in

question. According to the revocation applicant, such use of the mark would not only be possible, but also not unreasonable.

– It is useful to clarify from the outset that (as also admitted by the EUTM proprietor) the claimed reasons for non-use only apply to certain goods, namely those that contain plant-based meat substitutes; they do not concern the rest of the goods for which the mark is registered, in relation to which it is clear that there was neither any use nor any proper reasons for the lack of it.

– It is clear from the various online press articles, excerpts from Wikipedia and other websites and social media extracts submitted by both parties (e.g. Annexes 1, 2, 27, and 32, and Enclosures 1, 10, 12M, and 12N) that the EUTM proprietor specialises in one type of product, namely plant-based meat substitutes that, unlike the standard traditional vegetarian meat substitutes, mimic the taste, texture and overall consumption experience of meat. It would appear from some of these articles, as well as from the social network extracts (Annexes 10, and 27A, Enclosures 10, 12M and 12N), that the EUTM proprietor's IMPOSSIBLE products were used to a significant extent in the US and may have even gained a certain popularity among the relevant public. The EUTM proprietor insists that the secret of the success of its products, their closeness to meat, lies in a specific ingredient, soy leghemoglobin. This substance, more precisely its novelty, and the fact that it is also produced from genetically modified yeast in the EU, is the reason why the products need specific authorisations before being available to end consumers.

– The revocation applicant is correct in that there are several other comparable products on the EU market, which are being successfully marketed as meat substitutes that taste like meat without using soy leghemoglobin. On the other hand, it is clear that the EUTM proprietor's business strategy relies heavily on this substance, as illustrated by some of the articles and also by the authorisation process in the US, and it is convinced that this substance is what sets its product apart from those of its competitors. Moreover, it is evident from the printouts from social networks that some EU-based consumers are already familiar with the EUTM proprietor's IMPOSSIBLE products marketed in the US; these consumers thus have very specific expectations from the IMPOSSIBLE products they will obtain in Europe. Overall, the Cancellation Division considers that in this particular case, where the taste of the products at stake is of crucial importance, and the EUTM proprietor invested significant efforts into developing a product of a specific taste, it would be unreasonable to demand that it change its formula and enter the EU market with goods that miss the one ingredient that, even if it was only in the EUTM proprietor's opinion, gives the product the qualities that set it apart from other similar products.

– If an obstacle is such as to jeopardise seriously the appropriate use of the mark, its proprietor cannot reasonably be required to use it none the less. Thus, for example, the proprietor of a trade mark cannot reasonably be required to sell its goods in the sales outlets of its competitors. In such cases, it does not appear reasonable to require the proprietor of a trade mark to change its corporate strategy in order to enable use of that mark. The First Board of Appeal also concluded that it would not be reasonable for a trade mark owner to apply a

trade mark to a product other than the one for which it was conceived or developed, only to comply with the use requirement (29/04/2010, R 920/2009-1, ZATAMIL, § 26).

– Considering the above, the Cancellation Division is of the opinion that in the present case, the required change in the corporate strategy of the EUTM proprietor, namely, to not include in its products the ingredient soy leghemoglobin, would alter its business model to such extent that use of the mark for the modified products would not be reasonable.

– The revocation applicant argues that the EUTM proprietor could obtain the same substance from a source that is not genetically modified. The latter counterargues saying that it would be impossible to obtain the scale of production necessary without the genetically modified yeast. As far as the Cancellation Division understands from the documents submitted by both parties, the EUTM proprietor would not be able, regardless of whether or not they contain a genetically modified source, to market the goods containing soy leghemoglobin in the EU without the authorisation under Regulation (EC) No 1334/2008. Therefore, even if the substance were not obtained via a GMO, the EUTM proprietor would still need at least an authorisation as a novel flavouring agent. The obstacle thus could not have been entirely overcome simply by obtaining soy leghemoglobin from a non-genetically modified source.

– However, it is not sufficient that the EUTM proprietor shows the existence of an obstacle that is directly connected to the trade mark and that would make the use of the trade mark impossible or unreasonable. It must also show that the obstacle exists independently of its will.

– The EUTM proprietor refers to the EUIPO's Guidelines and case-law to support its argument that the authorisation from a food safety authority, which the owner of a mark has to obtain before offering the relevant goods on the market, constitutes a proper reason for non-use.

– It is true that a necessary food safety authorisation may constitute an obstacle rising independently from the EUTM proprietor's will, and, thus, a proper reason for non-use. However, it has to be assessed whether or not the existence of such obstacle is indeed independent of the EUTM proprietor's will or whether the circumstances on which it relies were within its field of influence and area of responsibility.

– The contested trade mark was registered on 3 September 2014. The EUTM proprietor started the approval process in the US in 2015 (and it claims that the research and development of the product started even as early as in 2011). After the initial setback, when it became clear that more testing was needed, the FDA issued the 'no question letter' in 2018. In August 2019, the EUTM proprietor also obtained approval for soy leghemoglobin as colour additive in the US.

– Only afterwards, on 15 August 2019 (Annex 6), did the EUTM proprietor file its first application for authorisation as a new flavouring substance in the EU,

and then, on 30 September 2019, the application for authorisation under the GMO regulation (Annex 7). In the several rounds of exchanges of observations, the EUTM proprietor essentially tried to show that it undertook steps to prepare for the filing of the EU application during the five years following the registration of the trade mark. However, the revocation applicant argued that those steps were not sufficient and that the EUTM proprietor did not seriously attempt to overcome the obstacle to use the mark until the end of the five-year grace period.

– The EUTM proprietor repeatedly admits that it decided to first complete the authorisation process in the US before concentrating on the EU market. This is confirmed in the affidavits of Ms. Ch., who states that had the EUTM proprietor obtained the approval from the FDA after the first application in 2015, the EU application would have been filed in 2015. It is, therefore, rather clear that the decision as to when to start the authorisation process was entirely in the EUTM proprietor's sphere of influence. It consciously decided to wait with the EU applications until the US process was finalised.

– The EUTM proprietor argues that this is a standard business practice and that documents used in one authorisation process may be then used in the proceedings in other countries. First, it may well be that the decision to obtain approvals in one country before applying in other countries is a sound business decision, which is not up to the Cancellation Division to assess. The fact remains that it is a decision that depends totally on the will of a trade mark owner. Second, whilst it is true that some of the documents gathered (for example toxicity studies) for one authorisation process may be used in the authorisation proceedings in other countries, it is also true that the specific authorisation process is not the same in different territories; therefore, the same application file that served as a basis for an authorisation in one country, may not be sufficient in another.

– Therefore, the EUTM proprietor was not able to justify its waiting strategy by the fact that after obtaining the 'no question letter' from the FDA, it could merely recycle the documents used in the US application for the EU process and obtain the authorisation quickly (as is evident from Annex 6, indeed the EFSA required additional information from the EUTM proprietor upon receiving its first application). This could not, in any event, have been the EUTM proprietor's logic, as it did not file the EU application for new flavouring agent immediately after obtaining the 'no question letter' from the FDA, but instead waited for the approval of the substance as a colouring agent, an approval that it did not even intend to obtain in the EU (Annex 31) and that it ended up filing only during these revocation proceedings.

– Even more evidently, the EUTM proprietor was aware of the fact that it would also need an approval under the GMO Regulation in the EU, something that was not necessary in the US and which follows a different process requiring different documentation. The US proceedings could not have served as a basis for filing this application. Yet, the EUTM proprietor filed it more than five years after the registration of the contested trade mark, while nothing was preventing it to apply for it earlier as it knew that this is a process that would take years to finalise.

– The EUTM proprietor argues that it was taking preparatory steps to start the authorisation process in the EU during most of the time after the registration of the contested mark. It emphasises the hiring of a renowned consultancy company I. in 2016.

– However, the Cancellation Division concurs with the revocation applicant that it remains unclear how relevant the activities of this company were and what exactly were the EUTM proprietor's instructions. The consultants' two years of work culminated in an enquiry, to the EFSA, as to the categorisation of the soy leghemoglobin. It is hard to believe that it would take a renowned consultancy company two years to merely ask essentially for advice on which applications to file, to the regulatory body, which is, according to the EUTM proprietor itself, i.e. the very first step in any authorisation process.

– Moreover, I. started making enquiries about the requisites for authorisation in the EU when the EUTM proprietor started to make plans for other submissions, which occurred after the affirmation by the FDA in 2018. It hired more consultants, who seemingly tried to contact individuals whom they thought would be useful for the application process, and some of whom provided proposals for strategy. These activities, however, also seem to concentrate on the end of 2018 and 2019. All this, in any event, does not cast doubts on the fact that it was the EUTM proprietor's decision not to pursue the authorisation process in the EU, but to focus on the US approvals first, as it repeatedly stated. It was completely dependent of the EUTM proprietor's will when the applications would be filed; and they were filed only after the conclusion of the US proceedings, the first of them being filed only less than one month before the expiry of the five-year grace period. It was clearly within the field of influence and area of responsibility of the EUTM proprietor to overcome the obstacle to market its goods, and it chose to postpone it. Therefore, for the entire majority of the grace period, the obstacle existed and not independently of the EUTM proprietor's will but because of its deliberate decision.

– The EUTM proprietor filed an affidavit by a former science coordinator at the EFSA, in which it is stated that the EUTM proprietor is serious about obtaining a market authorisation and that there is an understandable rationale behind the approach chosen by it. It may be true that the EUTM proprietor is serious about obtaining the market authorisation, but again even from this affidavit it is clear that there were various approaches possible and amongst them, it chose, on its own will, the present one, namely to hold off the EU applications for five years after the registration of the contested mark. As mentioned above, it may be a rational approach from a business perspective; however, the EUTM proprietor decided to file the European trade mark in 2014, knowing that it had an obligation to use it. From that perspective, the relevant question is not whether that approach is rational, but whether or not it is independent of the EUTM proprietor's will.

– The Cancellation Division found many parallels between the situation in the present case and the situation in the 'Boswellan' judgment of the General Court (15/09/2017, T-276/16, Boswellan, EU:T:2017:611; 03/07/2019,

C-668/17 P, Boswellan, EU:C:2019:557), where the Court found that the difficulties during the clinical trial and other events described by the trade mark owner such as that the trial only started three years after the registration of the mark, related to the insufficient investment by the trade mark owner, and were within its field of influence and area of responsibility and could not be regarded as obstacles independent of its will. Similarly, the events described by the EUTM proprietor in this case, that resulted in filing the two of the necessary applications five years after the registration of the mark, cannot be viewed as independent of its will but well within its sphere of influence to decide when these applications would be filed.

– The EUTM proprietor refers to previous Office decisions to support its arguments. However, the Office is not bound by its previous decisions as each case has to be dealt with separately and with regard to its particularities.

– Most of the decisions referred to by the EUTM proprietor are different in their circumstances than the present one. In the abovementioned 'ZATAMIL' decision, the products were to be exported from Australia and needed an authorisation from Australian authorities. The applications were submitted even before the trade mark was filed. In the 'Hemicell' decision (20/09/2010, R 155/2010-2, Hemicell), the obstacle lasted for two years out of the five-year relevant period. As regards the 'AmBil' decision (30/01/2017, 9 733 C), the Cancellation Division stated that as shown by the case-law quoted by both parties, the date of the filing of the authorisation request is a very relevant issue in the assessment of the existence of proper reasons for non-use. The EUTM proprietor is not allowed to use the EUTM before the authorisation is requested, but, up to that point in time, the responsibility for taking the necessary steps for use to be allowed, bearing in mind the requirement of genuine use, is in its hands. In that case, the Cancellation Division was satisfied with the trade mark owner's explanations as to why it filed the authorisation request only five years after the registration of the trade mark.

Conclusion

– It follows from the above that the EUTM proprietor has not proven genuine use of the contested mark for any of the goods for which it is registered. It also did not demonstrate that there were proper reasons for not using the trade mark. As a result, the application for revocation is wholly successful and the contested European Union trade mark must be revoked in its entirety.

– According to Article 62(1) EUTMR, the revocation will take effect from the date of the application for revocation, that is, as of 4 September 2019.

9 On 21 April 2022, the EUTM proprietor filed an appeal against the contested decision, requesting that the decision be entirely set aside. The statement of grounds of the appeal was received on 9 July 2022.

10 In its response received on 14 September 2022, the revocation applicant requested that the appeal be dismissed.

11 The Board granted a second round to file observations to the parties as requested on 23 September 2022 by the EUTM proprietor.

12 The EUTM proprietor filed its reply on 28 October 2022.

13 The revocation applicant filed its rejoinder on 8 December 2022.

Submissions and arguments of the parties

14 The arguments raised in the statement of grounds by the EUTM proprietor may be summarised as follows.

The EUTM proprietor has proper reasons for non-use

– A pending food regulatory approval procedure, as in the present case, is an obstacle that has a direct link with the ability of the EUTM proprietor to use the contested trade mark in the EU.

The obstacle is independent of the EUTM proprietor's will

– In the present case, the fact that the regulatory approval is still pending is independent of the EUTM proprietor's will as it has actively pursued all necessary steps to obtain EU regulatory approval within the relevant period and also afterwards.

– The 'Boswelan' judgment (03/07/2019, C-668/17 P, Boswelan, EU:C:2019:557) is different to the present case since the situation in the pharmaceutical sector is different, and also the timelines in that judgment are very different from the ones in the present case.

– Therefore, the Cancellation Division should have taken a much more nuanced approach when comparing the present case to the aforesaid judgment. At the same time, it overlooked the striking parallels to its previous decision-making practice according to which the EUTM proprietor had a proper reason for non-use.

No legal requirement on the date of submitting an application for regulatory approval

– Generally, there are no requirements as to when an application for regulatory approval should be submitted (24/02/2020, 12 497 C, Nocdurna).

– It is well established that a proper reason for non-use must be assessed on a case-by-case basis. As explained above, the 'Boswelan' judgment was decided on its specific facts, and there is a significant body of other case-law involving different facts and which supports the EUTM proprietor's position.

– For example, the below mentioned overview shows there are no hard and fast rules and there can be a 'proper reason for non-use' under Article 58(a)

EUTMR, even if regulatory approval procedures were only started at the very end of, or after, the five-year period, depending on the other facts and circumstances applicable in a particular case.

	IMPOSSIBLE	Nocdurna[20]	AmBiL[21]	Hicell/Hemicell[22]
Proper reason	Yes	Yes	Yes	Yes
EUTM Application	9/04/2014	28/4/2010	13/03/2009	Several trademarks between 06/10/1992 05/05/1995
Date of filing for regulatory approval	15/08/2019	10/04/2015	28/05/2014	30/11/2005
Information regarding start of preparations	2016	No	No	No
Relevant period (in which use must be proven)	04/09/2014 - 03/09/2019	08/02/2011 - 07/02/2016	22/08/2009 - 21/08/2014	21/05/2002 - 20/05/2007
Application for regulatory approval submitted before end of five years after EUTM registration	Yes	Yes (18 days before)	No	No
Status of regulatory approval	Pending on date of application for revocation	Pending on date of application for revocation	Pending on date of application for revocation	issued on 04/07/2007 (after period when use must be proven)
Date of application for revocation	04/09/2019	08/02/2016	22/08/2014	EUTM application: 21/05/2007

Obstacle is not attributable to the EUTM proprietor

– To assess this, account should be taken of whether the EUTM proprietor actively pursued all necessary steps to obtain EU regulatory approval. Therefore, in the present case, the obstacle cannot be attributed to the EUTM proprietor. The evidence it submitted clearly shows that it had taken all necessary steps to obtain its regulatory approval.

– As the Boards of Appeal is aware, the EUTM proprietor is a relatively new and innovative company that was founded in the US. Before it could market its products in its home jurisdiction, the US, it had to obtain regulatory authorisation for its Soy LegH ingredient there.

– To prepare the global launch, including the launch in the EU, of its products, the EUTM proprietor submitted a so-called GRAS notice in its home jurisdiction to the US Food and Drug Administration (‘FDA’) for its Soy LegH ingredient, in September 2014.

The EUTM proprietor's preparations for the EU launch started in 2016

– The EU regulatory landscape pertaining to innovative foods and food ingredients is very fragmented and subject to continuous legislative and regulatory revisions and amendments. This results in highly complex and time-consuming approval procedures when approval is sought for food products, especially when, as in this case, an innovative ingredient is derived from a genetically modified organism.

– As part of a request for EU approval, the first step is a determination of the status of the food product that is to be launched on the EU market according

to the regulatory classification so that the applicable regulatory process can be followed. It is important to be able to identify the applicable regulatory requirements since particular supporting documents (data and studies) for the regulatory approval may differ for each classification.

– Although a determination of the status of the food product is the first critical step in each approval process, this task is not straightforward and involves many uncertainties.

– This is why, as early as August 2016, the EUTM proprietor signed an NDA with a professional regulatory consultancy firm, to facilitate the exchange of confidential information between itself and I. on the possibility of regulatory approval (Annex 24a; see also for an overview of examples of activities performed by I., Annex 24).

– As also explained in the witness statement in Annex 33, food regulatory proceedings are rather unpredictable at the start, in particular if it concerns a new product and a new ingredient.

– Consequently, the duration of these procedures is uncertain. In accordance with established case-law, this fact cannot be held against the EUTM proprietor.

– In early 2016, the EUTM proprietor started conducting the required 28-day toxicity studies in the US with the aim of also using the data from these studies for its other regulatory applications, including its EU regulatory applications. The complete data from these studies were available in July 2017.

> ‘Therefore, Impossible Foods conducted toxicity studies, knowing it could also use the data in the EU. Toxicity studies were started in early 2016. In October 2016, Impossible Foods requested a Regulatory and Feasibility Assessment for various international markets, including the EU, with the expectation that the toxicity studies would also be used for the safety assessment for submissions in other countries. Three months later, in Feb. 2017, a more specific I. proposal was requested for the EU.’ (Annex 19).

– Using data from toxicity studies for authorisation purposes in different jurisdictions is not only common market practice, but also the most (cost-) efficient way to manage these types of regulatory applications. Even the revocation applicant acknowledged this in the Dutch proceedings between the same parties (Annex 28).

– This is particularly true given that in the present case, the regulatory requirements in the EU are difficult to distil beforehand and a 28-day toxicity study, could be expected to be sufficient in the EU (Annex 33).

– The Cancellation Division correctly did not question this sound business practise of re-using data from similar foreign regulatory applications for approval procedures in the EU. At the same time, the Cancellation Division's

findings that ‘the US proceedings could not have served as a basis for filing this application’ are incorrect and unfounded in light of the foregoing.

– The evidence also shows that I., upon request from the EUTM proprietor, provided additional reports to latter in 2017 (Annexes 24c and 21b).

– The relevance of these preparatory activities by the EUTM proprietor and I. is also clear. The rationale behind I.'s reports was to clarify the regulatory requirements in the EU for an authorisation of its Soy LegH ingredient. Therefore, the Cancellation Division seems to have missed the clear relevance of I.'s activities to obtain regulatory approval and the EUTM proprietor's instructions to I. in this regard.

– In 2018, the EUTM proprietor requested I. once again to take further steps towards its application for regulatory approval in the EU. I. approached representatives of the European Union Commission's Directorate-General for Health and Food Safety (‘EC DG Health and Food Safety’) with a request for advice on which regulatory procedures would apply in relation to the market authorisation of Soy LegH.

– In November 2018, after several follow-up e-mails by I., it was informed by representatives of the European Food Safety Authority (‘EFSA’) that the EUTM proprietor would need to file two separate applications for the authorisation of Soy LegH: (i) one under Regulation (EC) No 1829/2003 (‘GMO Food Regulation’), and (ii) one under Regulation (EC) No 1334/2008 (‘Flavouring Regulation’) (Annex 18). This is all well within the 5-year period.

– After having received this information on the applicable regulatory procedures for the authorisation of Soy LegH from the EFSA, the EUTM proprietor proceeded with the preparation of the respective dossiers for both regulatory applications. Subsequently, on 15 August 2019 (still within the 5-year period), the EUTM proprietor filed the application under the Flavouring Regulation, and on 30 September 2019, it filed its application under the GMO Food Regulation.

– The fact that the filing date of the EUTM proprietor's application under the GMO Regulation is after the relevant period does not affect the finding that there is a proper reason for non-use of the IMPOSSIBLE trade mark in the present case. Previous decision-making practice of the EUIPO confirms that even if the application date was many years after the registration date of a contested trade mark, a proper reason for non-use may still be established.

– Furthermore, on 20 July 2020, almost one year after the EUTM proprietor's application under the Flavouring Regulation, I. received a letter via e-mail from the EC DG Health and Food Safety with questions regarding the EUTM proprietor's application.

– On behalf of the EUTM proprietor, I. replied to this e-mail on 6 August 2020. It took the EC DG Health and Food Safety almost six months to get back to I., even after numerous follow-up e-mails by I. (see Annex 35).

- It was then almost two months later, on 24 March 2021, that the EC DG Health and Food Safety informed I. that, after consultation with representatives of EU Member States, an application under Regulation (EC) No 1333/2008 (‘Food Additives Regulation’) would (also) be required for the authorisation of Soy LegH.

- Swiftly after having received this information, the EUTM proprietor, on 26 March 2021, also filed an application under the Food Additives Regulation. Unfortunately, it is not clear as of yet when the EUTM proprietor can expect to receive a substantive response to its applications. This could very well take several more years as illustrated by Prof. Dr. Purnhagen in his statement (Annex 33).

- It is therefore clear that the EUTM proprietor did not wait and do nothing as the Cancellation Division seems to suggest. A primary focus on the home jurisdiction does not mean that there were no legitimate (and costly) preparatory efforts by the EUTM proprietor concerning the EU regulatory approval procedures. The Cancellation Division failed to appreciate the evidence in this respect. Moreover, the Cancellation Division's findings (for example ‘the EUTM proprietor chose, by its own will, the present one, namely, to wait with the EU applications for five years after the registration of the contested mark.’) show a lack of understanding of the EU food regulatory process.

- Consequently, the evidence shows that the regulatory approval context in which the EUTM proprietor operates is complex, costly and, most of all, time-consuming. The long duration of the obstacle due to the pending EU regulatory approval is certainly not attributable to the EUTM proprietor's conduct in the present case. The EUTM proprietor's conduct, and promptness in the overall procedure, is also dependent on (the responsiveness, or lack thereof) other stakeholders involved in the regulatory approval procedures, such as the European Commission.

- The witness statement in Annex 33 confirms that the European Commission took ‘longer than usual to determine the applicable authorisation procedure’ which also confirms the complexity of the EUTM proprietor's EU regulatory approval application in this ground-breaking area of food technology. Furthermore, it is said that the EUTM proprietor was diligent in the whole preparation of the approval process.

The pending EU regulatory approval makes the use of the IMPOSSIBLE trade mark impossible or unreasonable

- The Cancellation Division correctly held that given the EUTM proprietor's efforts and the EU consumer's expectations, it would be unreasonable to request it to alter the recipe of its burgers imitating red meat. It is exactly this product which the EUTM proprietor researched for many years, and it is because of this formula that it requested regulatory approval in the EU.

– For this reason, as well as the reasons set out in the EUTM proprietor's previous observations, removing the Soy LegH ingredient would result in a different product to the EUTM proprietor's other products sold under the IMPOSSIBLE trade mark outside the EU (where the EUTM proprietor does already have regulatory approval for Soy LegH) in the relevant period. In accordance with established case-law, this would place an unreasonable burden on the EUTM proprietor.

Proper reason for all registered goods

– The proper reason for non-use relates to all the goods registered under the IMPOSSIBLE trade mark. Essentially:

  • the goods covered by the IMPOSSIBLE trade mark cannot be 'subdivided into independent sub-categories according to the function of the goods concerned and their intended purpose'.

  • In the 'Hemicell/Hicell' decision (20/09/2010, R 155/2010-2, Hemicell/Hicell), the Boards of Appeal ruled that the subdivision was reasonable because the market of the proprietor was restricted to additives for animal feed. Conversely, the EUTM proprietor's market is clearly not restricted to the production of Soy LegH. In fact, it does not even market the Soy LegH it produces, as this is merely used as an ingredient in its products.

– The Cancellation Division did not touch upon this question and the revocation applicant has failed to explain why the goods covered by the IMPOSSIBLE trade mark could be somehow subdivided.

Earlier decision-making practice confirms proper reason

– Taking into account the circumstances as described above, the Cancellation Division should have followed its earlier decision-making practice.

– In the 'AmBil' decision (30/01/2017, 9 733 C), for example, the Cancellation Division concluded that there was a proper reason for non-use. The considerations which were crucial for the outcome in 'AmBil' are also to be found in the present case:

  • the authorisation which the EUTM proprietor seeks is required by law (Annex 18);

  • preparations were already underway from 2016, and the authorisation requested for use of Soy LegH as a flavouring substance was filed a month prior to the end of the five-year period and is still pending before the EFSA (Annex 6);

  • case-law from the Boards of Appeal indicates that the fact that authorisation is pending may constitute a proper reason for non-use;

- the EUTM proprietor has a satisfactory explanation as to why its regulatory authorisation request was filed a month before the end of the five-year trade mark period, as this was due to the fact that its products contain a complex and novel ingredient, Soy LegH, which required the EUTM proprietor to prepare a complex, and time-consuming regulatory approval application (Annexes 19, 28, and 30);

- the EUTM proprietor remained pro-active during the relevant five-year period by seeking and maintaining contact with different regulatory bodies such as the European Commission and EFSA and other third parties involved in the regulatory approval procedures such as I., and by performing several other significant preparatory acts as listed in the previous observations (Annex 24).

– The Cancellation Division failed to even address these striking similarities. It merely argued that 'As regards the 'AmBil' decision, the Cancellation Division stated that as shown by the case-law quoted by both parties, the date of the filing of the authorisation request is a very relevant issue in the assessment of the existence of proper reasons for non-use. The EUTM proprietor is not allowed to use the EUTM before the authorisation is requested, but, up to that point in time, the responsibility for taking the necessary steps for use to be allowed, bearing in mind the requirement of genuine use, is in its hands. In that case, the Cancellation Division was satisfied with the trade mark owner's explanations as to why it filed the autorisation request only five years after the registration of the trade mark.' While this may be true, in the present case, the evidence clearly shows that the EUTM proprietor took all the necessary steps to obtain EU regulatory approval. Moreover, the Cancellation Division ignored the most crucial considerations which had actually led it to its conclusion in the 'AmBil' case.

Conclusion

– The application for revocation is unfounded. In accordance with established case-law, the pending regulatory approval for Soy LegH constitutes a proper reason for non-use of the IMPOSSIBLE trade mark.

– In the present case, all criteria for a proper reason for non-use are fulfilled; (i) the pending regulatory approval is an obstacle arising independently of the EUTM proprietor's will, and (ii) it has a sufficiently direct relationship with the trade mark, making its use impossible or unreasonably burdensome on the EUTM proprietor.

– The contested decision is flawed as it failed to appreciate (i) the context of food regulatory requirements, (ii) the correct Office practise and case-law, and (iii) the evidence submitted by the EUTM proprietor which clearly show that the obstacle was outside of its field of influence.

– Consequently, the EUTM proprietor respectfully requests that the Boards of Appeal uphold the appeal, annul the contested decision and order the costs of the proceedings to be borne by the revocation applicant.

15 The arguments raised in reply to the appeal by the revocation applicant may be summarised as follows.

The EUTM proprietor has failed to provide valid reasons for non-use

– If it really had been a priority for the EUTM proprietor to complete its preparations as soon as possible or at least within the five-year grace period, it should have:

  • not waited for the outcome of the US approval, because the probative value of the FDA's view is limited for approval in the EU and awaiting that outcome causes significant delays;

  • filed for approval under the GMO Regulation as soon as possible submitting all necessary data, because it was always clear that an approval under the GMO Regulation would be required and that it would be very difficult to obtain the said approval due to the hostile perception of GMOs in the European Union;

  • filed for approval under the Additive Regulation as soon as possible submitting all necessary data, because it was always foreseeable that the Commission would require so;

  • conducted a 90-day study and further necessary studies as soon as possible, because the EFSA would require so;

  • diligently pursued the application procedures by submitting further (unforeseeable) information required by the Commission and/or EFSA in due time.

– Moreover, it was clearly never impossible or unreasonable for the EUTM proprietor to enter the market with products that did not contain Soy LegH and which were therefore not subject to regulatory approval. With its recent market entry in the UK, the EUTM proprietor clearly proved that it was more than capable of using the sign 'IMPOSSIBLE' even in countries where it had not obtained market approval. At least, the EUTM proprietor could have used Soy LegH from non-GMO sources or purified Soy LegH as this would have drastically reduced regulatory hurdles.

Preliminary remarks

Request to provide unredacted versions of evidence submitted by the EUTM proprietor

– Despite bearing the burden of proof, the EUTM proprietor has failed to properly disclose crucial information with regard to its regulatory approval process in the EU. Most importantly, it has submitted hundreds of pages of redacted documents, which make it impossible to verify the EUTM proprietor's statements. A request by the revocation applicant to provide its

attorneys and the EUIPO with unredacted versions of the relevant Annexes has been denied by the EUTM proprietor (see Enclosure 14).

– Given that the EUTM proprietor has been hiding relevant information from the revocation applicant and the EUIPO in relation to the regulatory approval requests, the revocation applicant filed a request for access to documents under Regulation (EC) No. 1049/2001 with the European Commission in December 2021. The Commission meanwhile granted access to various documents in July 2022 (see Enclosure 18).

– The documents provided by the Commission clearly prove that the EUTM proprietor has withheld documents of crucial importance from the EUIPO, e.g. documents evidencing that its initial Flavouring application was incomplete, leading to two revised versions submitted in November 2019 and February 2021 or that the Commission informed the EUTM proprietor much earlier than 24 March 2021 that an application under the Additive Regulation would be necessary.

Legal framework

– Article 58(1)(a) EUTMR provides that the rights of the proprietor of an EUTM will be declared revoked 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.

– As an exception to the obligation of use, the concept of proper reasons for non-use is to be interpreted narrowly (14/06/ 2007, C-246/05, Le Chef de Cuisine, EU:C:2007:340, § 51).

– It must be assessed on a case-by-case basis whether a change in the strategy of the undertaking to circumvent the obstacle under consideration would make use of that mark unreasonable (14/06/2007, C- 246/05, Le Chef de Cuisine, EU:C:2007:340, § 54; 17/03/2016, C-252/15 P, SMART WATER, EU:C:2016:178, § 96).

– The concept of proper reasons must be considered to refer to circumstances arising independently of the will of the owner that make use of the mark impossible or unreasonable, rather than to circumstances associated with commercial difficulties it is experiencing (14/05/2008, R 855/2007-4, PAN AM, § 27; 09/07/2003, T-156/01, Giorgio Aire, EU:T:2003:198, § 41; 18/03/2015,T-250/13, SMART WATER, EU:T:2015:160, § 67-69).

– Finally, the existence of justified reasons does not mean that non-use during the period concerned is treated as an equivalent to actual use, which would result in a new grace period beginning after the end of the period of justified non-use. Rather, non-use during such period merely stops the 5-year period from running. This means that the period of justified non-use is not taken into account in calculating the grace period of 5 years (see EUIPO Guidelines, Part C, Section 7, Point 9.5).

Seeking food regulatory approval is not automatically a proper reason for non-use

– Seeking food regulatory approval is not automatically a proper reason for non-use.

– In general, complying with the law is within the EUTM proprietor's sphere of influence and responsibility. It cannot be assumed that any legal constraint which constitutes an obstacle would automatically have to be categorised as a legitimate reason for non-use. Any business activity must be carried out in accordance with certain legislation (21/04/2021, 42 161 C).

– Accordingly, the CJEU and the Boards of Appeal confirmed that a regulatory approval process may only serve as a valid reason for non-use once the revocation applicant has 'completed all necessary preparation' for a regulatory approval (03/07/2019, C-668/17 P, Boswelan, EU:C:2019:557, § 72).

– The EUTM proprietor tries to distinguish the present case from the 'Boswelan' judgment by arguing that the ruling is 'specific to […] the pharmaceutical context', that the 'timelines' in that case were 'very different', and that in the present case 'it was reasonable for the EUTM proprietor to rely on the information' provided by the EFSA.

– But the CJEU explicitly ruled that the grace period applies equally across industries, including the pharmaceutical industry (03/07/2019, C-668/17 P, Boswelan, EU:C:2019:557, § 49). As for the 'timelines', the proprietor in 'Boswelan' registered the mark in 2007, started initial preparations for authorisation in 2008 and initiated clinical trials within the grace period. Thus, the proprietor in 'Boswelan' was more, not less, diligent than the EUTM proprietor in this case. Indeed, here, there is no indication of anything happening at all for almost three years after the registration of the mark and the relevant toxicity studies have not even been started. This will be further addressed below, as will the false suggestion by the EUTM proprietor that the EFSA or the Commission made relevant representations as to the proper qualification of Soy LegH.

– It is not sufficient to have 'started efforts to comply' with the applicable EU legislation (08/06/2017, T-294/16, GOLD MOUNT (fig.), EU:T:2017:382, § 42). It is also not enough for the EUTM proprietor to start relevant proceedings or efforts at the very end of the five-year grace period (08/06/2017, R 1857/2015-4, GOLD-MOUNT, § 22).

– Thus, in all cases, in which a regulatory approval process was considered a valid reason for non-use, the respective applicants had submitted (i) all necessary documents for regulatory approval and (ii) within the five-years grace period, as also shown by the first three cases listed in the table below (24/02/2020, 12 497 C, Nocdurna; 30/01/2017, 9 733 C, AmBil, § 69; 20/09/2010, R-155/2010-2, Hicell/Hemicell, §25 set seq.). In the present case, the EUTM proprietor did neither of those things.

– The EUTM proprietor clearly misrepresents the 'Nocdurna' decision when stating that it filed for regulatory approval after the end of the relevant period.

in the 'Nocdurna' case, it filed the application for regulatory approval still within the relevant five-year period, in fact almost a year ahead of the expiry of the relevant period:

	Relevant period (in which use must be proven)	Filing of **all necessary** documents for market place approval	Within relevant period	Time btw filing and end of relevant period	Proper reasons for non-use
Nocdurna	08/02/2011 - 07/02/2016	10/04/2015	Yes	~ 10 months	Yes
AmBiL	22/08/2009 - 21/08/2014	28/05/2014	Yes	~ 3 months	Yes
Hicel/ Hemicell	21/05/2002 - 20/05/2007	30/11/2005	Yes	~ 18 months	Yes
Impossible	04/09/2014 - 03/09/2019	Not yet	No	Too late	No

– Even once a regulatory approval process has been started, the EUTM proprietor is under further obligations. It shall show that the authorisation procedure is being seriously pursued without unnecessary delaying an ongoing registration procedure.

– Finally, note should be taken of the fact that once regulatory approval has been granted, the trade mark owner must be able to put the mark to use. Thus, any additional preparatory steps must be completed in parallel while pursuing the regulatory approval ((03/07/2019, C-668/17 P, Boswelan, EU:C:2019:557, § 72).

No valid reasons for non-use

– Bearing in mind the above depicted legal framework, the Cancellation Division correctly concluded that the EUTM proprietor did not have a proper reason for non-use of the contested EUTM.

– The EUTM proprietor did not act diligently in the EU approval process. It argued that the EU approval process can be very complex and time-consuming. However, if at all, this clearly shows that the onus was on the EUTM proprietor to be clear on the precise legal requirements for administrative approval as soon as possible and to then, on this basis, immediately prepare a full and complete dossier for regulatory approval. Although the existence of a regulatory approval procedure may constitute a proper reason for non-use of a trade mark, the acts and events to which the EUTM proprietor refers in this instance were within its sphere of influence and area of responsibility, so that they could not be regarded as being obstacles independent of its will.

– Moreover, the regulatory approval requirements do render use of the contested EUTM impossible or unreasonable.

Obstacles were dependent upon the EUTM proprietor's will

– It is clear that Soy LegH is subject to regulatory approval under:

  • Regulation (EC) No 1829/2003 on genetically modified food and feed ("GMO Regulation"); and

  • Regulation (EC) No 1333/2008 on food additives ("Additive Regulation").

– The European Commission informed the EUTM proprietor that the described use of Soy LegH may fall under the Additive Regulation and not under Regulation (EC) No 1334/2008 on flavourings ('Flavouring Regulation') as early as 2019 and confirmed in an e-mail dated 24 March 2021 (see Enclosure 18, document 15, p. 11).

– Both relevant applications were filed after the expiry of the five-year grace period. The EUTM proprietor failed to provide a sufficient explanation as to the extensive delay. In fact, it still has not provided all information that is necessary to grant a final approval to market Soy LegH in the European Union. Therefore, the Cancellation Division's was entirely correct to conclude:

– Because the crucial point is whether the EUTM proprietor has acted sufficiently diligent in view of the fact that it already applied for trade mark protection in 2014 as the contested decision correctly noted.

– According to the case law of the European Courts, it is not sufficient to have started efforts to comply with the applicable EU legislation. Such a finding would be in direct conflict with the GOLD MOUNT judgment (§ 42).

– If it were up to the EUTM proprietor to decide what may constitute proper reasons for non- use, any effort, no matter how trivial, would suffice to evade the five-year grace period. The EUTM proprietor argues that by sharing initial information with a consultancy firm, it sought to engage already constitute 'serious steps for seeking approval in the EU'. This is hard to take seriously and is indicative of the weakness of its overall argumentation on the point of proper reasons or alleged diligence.

– Also, it is irrelevant that the overall duration of the regulatory approval procedures is uncertain. Most importantly, this uncertainty does not release the EUTM proprietor from its obligation to do everything within its sphere of influence to successfully advance the application procedures by filing the applications as soon as possible and at the very least within the five year grace period and by diligently pursuing the applications once filed.

The EUTM proprietor should not have waited for the outcome of the US approval proceedings

– First of all, to the extent that the EUTM proprietor refers to regulatory applications elsewhere in the world, it should be stressed that these proceedings have no relevance to this case since they do not relate to

authorisations for commercialisation of the products in the EU. To the extent that the EUTM proprietor wanted to secure approval in other jurisdictions before proceeding in the EU, this must be considered a commercial preference entirely within its own control.

– From its own admission, it is clear that the EUTM proprietor decided to prioritise regulatory approval in the US. We refer to the affidavit provided by Teresa Chan and Rick Green, Directors Regulatory Affairs (see EUTM Proprietor's Annex 19):

– This was a mere business decision, apparently motivated by economic reasons to save costs. The revocation applicant refers to the EUTM Proprietor's observations submitted on 18 April 2021:

– First of all, contrary to what the EUTM proprietor insinuates, it is by no means a small start-up with scarce funding. In fact, it is a hedge fund backed multimillion- dollar company, which received millions in funding. Thus, the EUTM proprietor could have easily used this money to pursue the regulatory approval process in Europe if it had been a priority.

– Secondly, it is neither uncommon, nor unreasonable to start regulatory approval processes in various jurisdictions simultaneously. The EUTM proprietor does not dispute this fact. In fact, if a company plans a world-wide rollout, it is just as common to obtain the necessary regulatory approval in various countries at the same time.

– Thirdly, financial considerations, such as the consideration to streamline regulatory approval processes, are not considered to constitute proper reasons for non-use, as these kinds of circumstances do not arise independently of the will of the owner (09/07/2003, T 156/01, Giorgio Aire, EU:T:2003:198, § 41 and 18/03/2015, T 250/13, SMART WATER, EU:T:2015:160, § 67-69).

– Finally, the EU regime for approval of food products is different and much stricter than the US regime. In the above cited affidavit, Ms. Chan explicitly stated that it was clear that EU authorities would not accept the US argumentation. Also, the EUTM proprietor was aware of the fact that it would also need an approval under the GMO Regulation in the EU, something that was not necessary in the US and something that is a different process requiring different documentation (see EUTM Proprietor's own explanations in Annex 19).

– Even if one were to assume that some of the documents gathered for one authorisation process could be used for another, there was of course nothing that barred the EUTM proprietor to, at the very least, initiate the EU approval process as early as 2014 in parallel by determining the correct classification and additional data needed for it.

The EUTM proprietor delayed its GMO Application

– It has always been absolutely clear that an application under the GMO Regulation was necessary, but still, the EUTM proprietor has only submitted the respective application on 7 October 2019 (and not on the 30 September 2019, as the EUTM proprietor misrepresents to the Boards of Appeal) and thus, over a month after the five-year grace period expired.

– The EUTM proprietor insinuates that the regulatory approval process for Soy LegH and for new food substances is, in general, highly complex, that it was very difficult to determine the correct authorisation procedure and that it could not have acted faster. As a general matter, any substance that requires regulatory approval is by definition new (or used in a new way).

– The EUTM proprietor's suggestion that Soy LegH somehow presents unique regulatory challenges is therefore unconvincing, not least because it provided no evidence whatsoever for it. If anything, the fact that approval procedures are ‘highly complex and time-consuming’ should be a clear indication that they should be initiated as soon as possible. The alleged complexity of the authorisation procedure for Soy LegH therefore cannot support a finding of proper reasons:

– First of all, it is absolutely undisputed that the EUTM proprietor has done nothing for the first two years. So even though, the EUTM proprietor claims that the regulatory approval process is highly complex and time-consuming, it decided to spend almost half of the grace period without pursuing the regulatory approval process in any way.

– Secondly, the EUTM proprietor was fully aware and never questioned the fact that it would at least need approval under the GMO Regulation (see Annex 19). Even its own experts do not claim that it was particularly difficult to determine that Soy LegH falls under the GMO Regulation (see Annex 33). Still, the EUTM proprietor only filed the relevant application after the expiry of the grace period.

– Thirdly, the EUTM proprietor claims that it had engaged various third-party external advisors as early as August 2016 to ‘clarify the regulatory requirements in the EU’. However, it remains completely obscure what these advisors did or why their work was relevant for the delay in the application proceedings. The documents submitted in this respect are almost completely redacted and are not apt to support the EUTM proprietor’s claims (see Enclosure 17). Thus, the Cancellation Division was entirely correct to conclude:

– Fourthly, the EUTM proprietor insinuates that it took various third-party advisors more than 27 months, i.e., from August 2016 (initial NDA signed with I., see Annex 24a) to January 2019 (final proposal by I. to prepare applications, see Annex 24h), to categorise the product.

– Fifthly, the EUTM proprietor’s allegation that the regulatory approval process is highly complex and that is very difficult to correctly classify dual use

substances, is contradicted by the fact that it allegedly relied on a single e-mail from EFSA to determine the applicable regulatory approval procedures (see the EUTM proprietor's observations dated 30 April 2021; it 'strictly followed EFSA's advice and did not submit an application under Regulation 1333/2008').

– Additionally, the EUTM proprietor also refers to the 28-days toxicity studies it first commissioned in early 2016 suggesting that these studies are required and that these studies were somehow what caused the delay. However, the revocation applicant must disagree:

– First of all, as will be discussed further below, for the EU approval process a 90-days toxicity study instead of a 28-days toxicity study is a compulsory requirement. Even the EUTM proprietor's own expert must admit that, in general, EFSA requires 90- days toxicity studies. Its expert, at no point, confirms that the EUTM proprietor could reasonably expect that a 28-day toxicity study would be sufficient (see Annex 33).

– Secondly, the EUTM proprietor fails to mention that the 28-days toxicity studies were conducted with a different Soy LegH preparation (see Enclosure 18, Document 5, p. 32 and p. 37) from the one that the EUTM proprietor now intends to use in its final product as some modifications to the P. pastoris production strain were introduced. Thus, the revocation applicant must dispute that the result of the study are relevant at all for the present application proceedings.

– Thirdly, even while the 28-day studies (which were per se not sufficient) were on- going, there was of course nothing that barred the EUTM proprietor to already determine the correct classification and additional data needed for the EU approval process. The EUTM proprietor could have started working on the application dossiers but decided to not do this. Thus, just like in the Boswelan judgment, the mere conduction of safety studies (let alone the wrong ones) does not constitute proper reasons for non-use.

– The fact that the EUTM proprietor filed its application under the GMO Regulation after the expiry of the five-year grace period on 7 October 2019 is of course of high relevance. There is not a single case in which the EUIPO confirmed that even if the application date was many years after the relevant period, a proper reason for non-use may still be established. The EUTM proprietor clearly misconstrues the relevant case law.

– According to the relevant case law and legal literature, the grace period is clearly intended for the preparation and submission of the application for authorisation, and such preparations must be completed 'in good time […] to be able to put the mark to genuine use once that period has expired' (see Boswelan judgment, § 72).

– Additionally, after submitting the GMO application, EFSA apparently had to ask the EUTM proprietor three times to provide missing information. Thus, the application has only been accepted for further scientific review by EFSA

on 15 December 2021, so over two years after the five-year grace period lapsed (see Enclosure 13).

– In case it is readily foreseeable that the omitted information is mandatory (and thus will be requested if not initially submitted), the omission of the such information and the subsequently delay caused by the omission is obviously not an obstacle which arose independently of the will of the EUTM proprietor. The burden of proof is on the EUTM proprietor to show that none of the additional data request could have been expected.

– However, as proven by the documents now made available to the revocation applicant by the Commission, this statement is outright wrong and once again shows that the EUTM proprietor is clearly not fully transparent with the Boards of Appeal.

– According to the first official communication from the Commission following the Flavoring application on 7 October 2019, the initial application dated 15 August 2019 was indeed incomplete as it was missing crucial information. The application was, inter alia, missing important data as name and address (see Enclosure 18, Document 35, p. 5 et seq.; Enclosure 18, Document 34, p. 2 et seq.).

– According to the OpenEFSA database, the EUTM proprietor has not yet responded to any of these requests (see https://open.efsa.europa.eu/questions/EFSA-Q-2019-00651). Again, it would have been on the EUTM proprietor to disclose to what exactly the additional data request by EFSA in relation to the GMO application referred to, why they were not foreseeable and why it has not yet responded to the data request. As long as the EUTM proprietor does not provide a proper explanation, it cannot rely on valid reasons for non-use.

– Thus, in summary, the EUTM proprietor has failed to prove that the obstacles it met in relation to the GMO application arose independently of its will and were outside its sphere of influence.

The EUTM proprietor delayed its Additive application

– Moreover, the EUTM proprietor has failed to act sufficiently diligently in the EU approval process as it submitted the mandatory application under the Additive Regulation almost seven years after applying for the earlier EUTM and 1,5 years after the five-year grace period expired.

– It was clearly not reasonable for it to rely on the correspondence with EFSA as per Annexes 17 and 18, to justify it did not apply under the Additive Regulation.

– First of all, the EFSA does not issue classifications of a substance as a flavouring or an additive. Any advice it provided is done without prejudice and non-committal as to any subsequent assessment of applications or notifications

by the Scientific Panels (see Article 32a sentence 2 of Regulation (EC) No 178/2002).

– Secondly, the initial e-mail as sent by I. on behalf of the EUTM proprietor as per Annex 17 is highly redacted. Thus, it is unclear what I. told the EFSA about Soy LegH and what exact questions were asked.

– Thirdly, from what is still visible in Annex 17, I. clearly misrepresented Soy LegH to the EFSA as a 'GM Flavour' (see header of the e mail).

– In its appeal, the EUTM proprietor insinuated that the European Commission informed it on 24 March 2021 that an application under the Food Additive Regulation would be required (see statement of grounds and Ms. Chan's second affidavit as per Annex 30, p. 3). The EUTM proprietor's own expert even states that it was not until 24 March 2021 when the Commission asserted that an application according to the Additive Regulation would be necessary (see Annex 33, p. 5-6). However, this is again outrightly wrong and the EUTM proprietor is grossly misrepresenting the facts.

– First of all, according to the mail correspondence with I., as per Annex 31, the EUTM proprietor was well aware that the EFSA could request an Additive application at least as of 2019.

– Secondly, already in its very first letter to the EUTM proprietor dated 7 October 2019, the Commission informed it that there might be the need to submit an application under the Food Additive Regulation (see Enclosure 18, Document 35, p. 5 and Enclosure 18, Document 34, p. 5).

– As becomes evident from the above, the EUTM proprietor omitted crucial information on the colouring properties of Soy LegH. Therefore, the Commission was not yet in a position to render a definite decision on the necessity of the Additive application. The EUTM proprietor should have been aware of the necessity to submit an Additive application at least as of October 2019, especially as it had hired qualified consultants.

– Finally, it was by letter dated 16 July 2020, forwarded to I. on 20 July 2020, that the Commission asserted that an application under the Food Additive Regulation was necessary (see Enclosure 18, Document 26, Annex 1, p. 1).

– The fact that Soy LegH needed approval under the Additive Regulation must have been apparent to the EUTM proprietor from the outset.

– Given that the EUTM proprietor sought advice from various specialised consultants, it can be assumed that at least one would have informed the EUTM proprietor about the need to file an application under the Additive Regulation. Possibly, the EUTM proprietor tried to avoid this by instead filing an application under the Flavouring Regulation, the reason being that it most likely wanted to avoid stricter labelling requirements under the Additive Regulation in order to be able to better market its final product in the EU.

– The EUTM proprietor has not disputed these statements, though the revocation applicant already raised them before the Cancellation Division, thereby effectively admitting that the latter is right.

The EUTM proprietor also delayed its Flavouring application

– As mentioned above, by e-mail dated 24 March 2021 (see Enclosure 18, Document 15, p. 11), the EFSA informed the EUTM proprietor that the described use of Soy LegH is regulated by the Additive Regulation and not by the Flavouring Regulation.

– However, even if one were to assume that the Flavouring Regulation applies to Soy LegH, the fact remains that, for more than five years (which is the time of the grace period), the EUTM proprietor was responsible for the fact that the approval process according to the Flavouring application could not advance.

– In its appeal, the EUTM proprietor argues that it filed the Flavouring application on 15 August 2019, which is still (one month) within the five-year grace period that expired on 6 September 2019.

– Apart from the lack of reason for such a late application, the EUTM proprietor withholds from the Board of Appeal the fact that it had to submit revised or new applications twice. First, it submitted a revised application on 6 November 2019 and then it submitted a revised application on 4 February 2021 (see Enclosure 18, Document 34 and Enclosure 18, Document 22, Annex 2, p. 1).

– The initial application filed on 15 August 2019 was clearly incomplete, missing crucial information such as the revocation applicant’s name and address or information on the colouring function of Soy LegH. Likewise, the revised application filed on 6 November 2019 was still missing crucial information that the EFSA needed to proceed with the application (see Enclosure 18, Document 29, p. 2 et seq. and Enclosure 18, Document 26). This further illustrates the lack of diligence on the EUTM proprietor’s part.

Delay caused by the EUTM proprietor through omitting crucial data, such as a 90-days toxicity study

– Finally, the fact remains that the applications submitted by the EUTM proprietor are still incomplete, in particular as it failed to submit a 90-days toxicity study.

– It is clear from the applicable guidance documents that the EFSA will require a 90-days toxicity study. As proof, the statement submitted by Dr. Orth is once again referred to (see Enclosure 16).

Conclusion: case-law confirms that the obstacle was dependent upon the EUTM proprietor's will

– Taking into account the circumstances as described above, throughout the grace period, the obstacle existed not independently of the EUTM proprietor's will but because of its deliberate decisions. This is also in line with earlier case-law.

– The present case is clearly not comparable with the 'AmBil' decision (30/01/2017, 9 733 C, AmBil). First of all, in the 'AmBil' decision, the respective authorisation request was filed three months before the application for revocation was filed, so still within the relevant time period during which use had to be proven. Therefore, the revocation applicant had valid reasons to explain why it was only able to submit all necessary documents for regulatory approval by the end of the grace period.

– Thus, the 'AmBil' decision rather supports the revocation applicant's position. The 'AmBil' case, in line with further case-law from the CJEU and various Boards of Appeal, confirms that the regulatory approval process could perhaps serve as a valid reason for non-use once the revocation applicant has completed all necessary preparations and once all necessary applications for a regulatory approval have been filed; even then, diligence on the proprietor's part is expected and unjustifiably waiting until the end of the grace period (let alone thereafter) to submit a complete dossier will not suffice to establish proper reasons. The reason is that prior to this, the respective applicant may, of course speed up the process, e.g., by investing more time and resources into the preparation of the applications for the regulatory approval.

– As opposed to the 'AmBil' decision, in the present matter, it is clear that the two relevant applications were filed after the expiry of the five-year grace period, the GMO application a month after the expiry of the grace period and the Additive application even a year in a half after the expiry of the grace period.

– This will obviously significantly delay any possible market approval. Even if one of its applications should be approved in due course (which will not be the case because the EUTM proprietor refuses to submit default safety tests), the EUTM proprietor would still have to wait for the other application to be approved. Even if one were to assume that the EUTM proprietor would also have to file a Flavouring application, account must be taken of the fact that it initially submitted an incomplete application missing crucial data, which led it to file two revised versions of the Flavouring application in November 2019 and February 2021. Again, due to the EUTM proprietor's own fault, the revised versions of the Flavouring application were filed well after the expiry of the grace period.

– Insufficient investment is also an issue in the present case. In its observations submitted on 18 April 2021 as well as in its affidavit as per Annex 19, the EUTM proprietor itself disclosed that the reason why it initially remained completely inactive in the European regulatory approval process was because 'resources were focused on the US' and because 'start-ups like the Proprietor'

want to ‘to spend resources efficiently and avoid duplicating work unnecessarily’.

– Thus, the EUTM proprietor admitted that money was the reason why it did not diligently pursue the European approval process. It also cites its NDA with I. which confirms that the EUTM proprietor would ‘select […] on a case-by-case basis’ in which jurisdictions applications for authorisation should be made. This is another clear indication that the EUTM proprietor followed a conscious waiting strategy that could just as well have focused efforts and resources on the EU at a (much) earlier stage.

– Finally, the timelines in the ‘Boswelan’ case and in the present case are not that different. If at all, the EUTM proprietor took even more time to obtain the necessary regulatory approvals. In the ‘Boswelan’ case, the contested trade mark was registered in April 2007. In 2008, so just one year after the registration (and not five years as the EUTM proprietor insinuates), initial preparations were allegedly made for obtaining market authorisation. In 2010, so three years later, the EUTM proprietor applied to have clinical studies conducted, which were necessary pre-conditions for obtaining authorisation to put the product on the market. In 2015, the clinical trials were still ongoing.

– In the present case, undisputedly, it took the EUTM proprietor longer than a year to do anything at all. Likewise, it took it longer than three years to initiate approval proceedings but even then, it wilfully initiated the wrong proceedings. Moreover, unlike the ‘Boswelan’ case, there is no indication that the relevant safety study (a 90-day study) was initiated even now, more than eight years after the mark was registered. If anything, the EUTM proprietor is thus even less diligent than the proprietor in the ‘Boswelan’ case.

– Thus, in summary, the EUTM proprietor has failed to prove that it had valid reasons for non-use.

Use of the sign is neither impossible nor unreasonable: The EUTM proprietor could have commercialised ‘IMPOSSIBLE’ products without Soy LegH

– There is of course nothing that has prevented the EUTM proprietor from commercialising ‘substitutes for foods made from animals or animal products; meat substitutes; food products made from meat substitutes’ without Soy LegH under the name ‘IMPOSSIBLE’.

– The Cancellation Division’s assumption that the use of the contested mark with a different ingredient would be unreasonable is wrong: the EUTM proprietor is not specialised only in products containing Soy LegH and its business strategy does not solely focus on Soy LegH.

– This is clearly proven by the fact that the EUTM proprietor recently made its debut in the UK in May 2022 with the launch of the IMPOSSIBLE Sausage Patties and the IMPOSSIBLE Chicken Nuggets both of which are formulated completely without Soy LegH. Just like in the EU, the EUTM proprietor does not yet have regulatory approval to sell products containing Soy LegH in the

UK. Still, this has not prevented it from using the ‘IMPOSSIBLE’ sign on the UK market (see Enclosure 22).

– The IMPOSSIBLE Sausage Patties have been on the market in the US already since January 2020 and the IMPOSSIBLE Chicken Nuggets since September 2021 (see Enclosure 23).

Conclusion

– In summary, it must therefore be held that the EUTM proprietor has failed to prove sufficient reasons for non-use of the contested EUTM.

– The fact that the EUTM proprietor has not yet obtained regulatory approval to market Soy LegH in the European Union was well within its sphere of influence for more than five years. Therefore, this does not constitute a fact independent of its will within the meaning of Article 58(1) (a) EUTMR.

– If it really had been a priority for the EUTM proprietor to complete its preparations as soon as possible or at least within the five-year grace period, it would have:

  • not waited for the outcome of the US approval, because the probative value of the FDA’s view is limited and will cause delays;

  • filed for approval under the GMO Regulation as soon as possible submitting all necessary data, because it was always clear that an approval under the GMO Regulation would be required and that it would be very difficult to obtain the said approval due to the hostile perception of GMOs in the EU;

  • filed for approval under the Additive Regulation as soon as possible submitting all necessary data, because it was always foreseeable that the European Commission would require this; (alternatively, even if the Board were to believe that an application under the Flavouring Regulation were necessary, it should have filed for approval under the Flavouring Regulation as soon as possible submitting all necessary data instead of submitting an incomplete dossier);

  • conducted a 90-day study and further necessary studies as soon as possible, because the EFSA would require it;

  • diligently pursued the application procedures by submitting further (unforeseeable) information required by the European Commission and/or EFSA in due time.

– Finally, it was feasible for the EUTM proprietor to enter the market with products that did not contain Soy LegH and which were therefore not subject to regulatory approval. With its recent market entry in the UK, the EUTM proprietor clearly proved that it was more than capable to use the sign ‘IMPOSSIBLE’ even in countries where it had not obtained market approval.

– Consequently, the revocation applicant respectfully requests that the Boards of Appeal dismiss the appeal, uphold the contested decision and order the costs of the proceedings to be borne by the EUTM proprietor.

16 The EUTM proprietor stated the following in reply:

– It has no reason to delay the regulatory proceedings. On the contrary, it has a clear commercial interest in recouping its investments in the product launch on the EU market and any delay harms the commercial interests. The affidavits submitted (Annexes 28 and 33) also explicitly confirm that it has acted diligently and in accordance with commercial reality.

– It is very common that the EFSA, may require additional data during the process of regulatory approval, in particular in view of new and innovative products such as the 'Soy LegH'.

– It is reiterated that it is normal to ask for an approval in one jurisdiction and then later on in other ones, as happened in the case at hand.

– Recently – after the relevant period – the EUTM proprietor started to expand its product range to new products, namely 'white meat' substitutes. It determined through its research and development work that 'white meat' substitutes, such as light sausage and chicken for a specific market formulation, did not require the Soy LegH ingredient.

– The launch of this new product is irrelevant for the case at hand, as it did not occur during the relevant period and does not change the EUTM proprietor's business strategy during the relevant period.

– The proper reasons for non-use refer to all the goods covered by the contested mark.

17 In its rejoinder, the revocation applicant stated the following.

– The EUTM proprietor should not have waited for the finalisation of the approval in the US.

– The EUTM proprietor has delayed the approval processes by failing to give all the necessary information to the competent authorities and even by omitting important data when filing the corresponding applications for the necessary authorisations.

– With regard to the 90-days toxicity study, the EFSA required such a study.

– It is reiterated that the EUTM proprietor could have used a different ingredient as the one actually used in the UK.

Reasons

18 All references made in this decision should be seen as references to the EUTMR (EU) No 2017/1001 (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended, unless specifically stated otherwise in this decision.

19 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

Scope of the appeal

20 The contested decision declared the contested mark as revoked for all the goods covered by it.

21 The EUTM proprietor filed its appeal against the contested decision in its entirety stating and reasoning that it should be annulled because there were proper reasons for non-use of the contested mark with the result that it should not be declared as revoked.

22 The revocation applicant puts forward that by requesting a partial surrender before the Cancellation Division (see above paragraph 5), the EUTM proprietor does not challenge anymore the request for declaration of revocation with regard to the goods that have been included in the request for partial surrender.

23 However, the Office did not implement the request for partial surrender but suspended it until the present revocation proceedings were closed. Therefore, the contested mark still covers all the goods for which it has been registered and this partial surrender cannot be interpreted in the sense that the contested decision has become final with regard to the goods for which the contested mark has been surrendered.

24 Moreover, at the appeal stage, the EUTM proprietor argued and reasoned that there exists proper reasons for non-use with regard to all goods covered by the contested mark.

25 Consequently, the scope of the present proceedings before the Board involves all the goods covered by the contested mark and relates to the issue whether there have been proper reasons not to use the contested mark with the result that the contested mark should not have been declared as revoked.

Confidentiality

26 Both parties requested that the information contained in the documents and evidence submitted at the appeal stage be treated as confidential because it contained sensitive data.

27 In accordance with Article 114(4) EUTMR, files may contain certain documents which are excluded from public inspection, e.g., parts of the file which the party concerned showed a special interest in keeping confidential (see also Article 6 of the Rules of Procedure of the Boards of Appeal).

28 In the event that a special interest in keeping a document confidential, in accordance with this provision, is invoked, the Office must check whether that special interest is sufficiently shown. Such special interest exists because of the confidential nature of the document or its status as a trade or business secret.

29 The Board confirms that the data submitted by both parties contain details which must be kept confidential. Therefore, the Board will treat the documents with the appropriate standard of care and will refer to the evidence without divulging data that is not otherwise available from publicly accessible sources.

Admissibility of the evidence filed before the Board

30 Together with the statement of grounds of the appeal, the EUTM proprietor filed the following additional evidence:

- Annex 33: a witness statement from an expert;
- Annex 34: a notice of appeal from the EUTM proprietor against a decision of the District Court of The Hague rendered on 27 May 2020 under case number / docket number C/09/581242 HA ZA 19-1062;
- Annex 35: an e-mail communication between I. and the Commission concerning the EU regulatory proceedings.

31 The revocation applicant has also submitted the following additional evidence on appeal:

- Enclosure 17: an overview of the documents that the EUTM proprietor has failed to properly disclose or explain vis-à-vis the EUIPO;
- Enclosure 18: documents provided by the European Commission to the revocation applicant in July 2022 following a request for information with regard to exchange of information between I. and the European Commission;
- Enclosure 19: correspondence between the GMO Office in the Netherlands and the EFSA regarding the submission date of the GMO application;
- Enclosure 20: the requests by the EFSA to the EUTM proprietor regarding additional information for the application of authorisation of 'Soy LegH' under the 'GMO Food Regulation';
- Enclosure 21: the requests by the EFSA to the EUTM proprietor regarding additional information for the application of authorisation of 'Soy LegH' under the 'Food Additive Regulation';
- Enclosure 22: screenshots from an article on www.foodnavigator-usa.com regarding the UK debut of Impossible Foods in May 2022;
- Enclosure 23: screenshots from an article on www.meatpoultry.com regarding the launch of the IMPOSSIBLE sausage patties in January 2022;

- Enclosure 24: the EUTM proprietor's mission statemen;

- Enclosure 25: the revised version of the EUTM proprietor's applications for authorisation of the 'Soy LegH' under the 'GMO Food Regulation' and the 'Food Additive Regulation'.

32 As the Court has held, it results from the wording of Article 95(2) EUTMR 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 the EUTMR. Moreover, the Office is in no way prohibited from taking account of facts and evidence that are submitted or produced late, that is to say, after the time limit provided by the Regulation and, as the case may be, for the first time before the Board of Appeal (13/03/2007, C-29/05 P, Arcol, EU:C:2007:162, § 42; 18/07/2013, C-621/11 P, Fishbone, EU:C:2013:484, § 22).

33 In stating that the latter 'may', in such a case, decide to disregard evidence, Article 95(2) EUTMR grants the Office broad discretion to decide, while giving reasons for its decision in that regard, whether or not to take such evidence into account (13/03/2007, C-29/05 P, Arcol, EU:C:2007:162, § 43; 18/07/2013, C-621/11 P, Fishbone, EU:C:2013:484, § 23).

34 According to Article 27(4) EUTMDR, the Board may accept facts or evidence submitted for the first time before it only where those facts and evidence meet two requirements. Firstly, it must be established that they are prima facie relevant for the outcome of the case. Secondly, it must be established that these facts and arguments have not been produced in due time for valid reasons, in particular where they are merely supplementing relevant facts and evidence that had already been submitted in due time or are filed to contest the findings made or examined by the first instance of its own motion in the decision subject to appeal.

35 It follows that although Article 95(2) EUTMR and Article 27(4) EUTMDR grant the Board broad discretion to decide, while giving reasons for its decision, whether or not to take into account evidence submitted for the first time before it, there are clear limits to this discretion, which will be duly taken into account in the examination below.

36 The Board notes that the evidence submitted at the appeal stage is prima facie relevant to the outcome of the present case. Moreover, the information contained in these documents partially has been already produced before the Cancellation Division and partially is complementary and supplementary to the submissions before the Cancellation Division. Furthermore, there is nothing to suggest negligence or delaying tactics in the present case (18/07/2013, C-621/11 P, Fishbone, EU:C:2013:484, § 36).

37 Taking into account all the facts surrounding the late submission of the evidence, the Board deems it equitable to exercise its discretion pursuant to Article 95(2) EUTMR and Article 27(4) EUTMDR and concludes that the additional evidence filed by both parties at the appeal stage is admissible.

38 Nevertheless, the Board stresses that the prima facie relevance of the evidence filed before the Board does not imply that it is conclusive for the outcome of the present case.

The existence of proper reasons for non-use of the mark at issue

39 Following the case-law, in order to justify the non-use of a mark, three conditions must be met cumulatively. Firstly, the obstacle must be independent of the intention of the owner of that mark, secondly, it must have a sufficiently direct link with the mark and, thirdly, it must be such as to make the use of that mark impossible or unreasonable (14/06/2007, C-246/05, Häupl, EU:C:2007:340, § 54, 55).

40 It is also apparent from the case-law that the concept of 'proper reasons' refers to circumstances unconnected with the trade mark proprietor rather than to circumstances associated with its commercial difficulties (18/03/2015, T-250/13, SMART WATER, EU:T:2015:160, § 66 and the case-law cited therein).

41 In addition, it should be noted that Article 47(2) and Article 64(2) EUTMR state specifically that it is for the proprietor of the mark to furnish proof of genuine use or proper reasons for non-use.

42 According to the case-law, the fact that, unlike Article 47(2) and Article 64(2) EUTMR, Article 58(1) of that regulation does not specify that it is for the proprietor to furnish proof of genuine use or of the presence of proper reasons for non-use cannot be interpreted as meaning that the EU legislature intended that the principle of the burden of proof should not apply in revocation proceedings.

43 The absence of specific provision regarding the burden of proof in Article 58(1) of EUTMR can, moreover, be explained easily given that the purpose of paragraph 1 of Article 58, which is entitled 'Grounds for revocation', is to set out the grounds for revocation of the mark, which does not require specific provision to be made regarding the issue of the burden of proof (26/09/2013, C-610/11 P, Centrotherm, EU:C:2013:912, § 55-57). It is, thus, for the EUTM proprietor to submit to the EUIPO sufficiently probative evidence of the existence of proper reasons for non-use of the contested EUTM (13/12/2018, T-672/16, C=commodore (fig.), EU:T:2018:926, § 21).

44 The Court reiterated the case-law, according to which only obstacles which have a sufficiently direct relationship with a trade mark, making its use impossible or unreasonable, and which arise independently of the will of the proprietor of that mark, may be described as 'proper reasons' for non-use of that mark (13/12/2018, T-672/16, C=commodore (fig.), EU:T:2018:926, § 18 and the jurisprudence cited therein). The Court further recalled that, as regards the concept of unreasonable use, that if an obstacle is such as to jeopardise seriously the appropriate use of the mark, its proprietor cannot reasonably be required to use it nonetheless. The Court also stressed that the burden of proof is on the EUTM proprietor (13/12/2018, T-672/16, C=commodore (fig.), EU:T:2018:926, § 21).

45 Finally, it has to be emphasised that it would be contrary to the logic of Article 58 (1)(a) EUTMR to confer too broad a scope on the concept of 'proper

reasons for non-use of a mark' (14/06/2007, C-246/05, Le Chef de Cuisine, EU:C:2007:340, § 51; 03/07/2019, C-668/17 P, Boswelan, EU:C:2019:557, § 73).

46 The contested mark was registered on 3 September 2014. The request for declaration of the revocation was filed on 4 September 2019. Therefore, in lack of any use of the contested mark, the EUTM proprietor had to show that there were proper reasons for non-use during the five years preceding the date of the revocation request, that is from 4 September 2014 until 3 September 2019.

47 As proper reason for non-use of the contested mark, the EUTM proprietor indicated that its goods would have a new ingredient, namely, 'soy leghaemoglobin' (Soy LegH), which is a protein responsible for giving to meat substitutes the taste of meat and which require an approval by the competent authority which is the European Food Safety Authority ('EFSA').

48 Following the case-law (see above under paragraphs 39 to 43), an administrative process of the approval of a new nutritional substance, as in the present case, the 'Soy LegH', can in principle be a proper reason for non-use, if all the pertinent conditions and requirements are met, which are:

- direct relationship between the obstacle and the contested mark;
- the use of the trade mark without successfully overcoming the obstacle would be impossible or unreasonable;
- the obstacle arose independently of the will of the trade mark owner.

I) Direct relationship with the contested mark

49 With regard to the following goods, it is not apparent that the specific ingredient or protein at issue, namely 'Soy LegH', which is intended to be used in meat substitutes that taste like meat, would be relevant or included therein:

- *Class 5 - Dietetic food; baby food; dietary supplements; nutritional supplements;*
- *Class 29 - Meat, fish, seafood, poultry and game; food products made from meat, fish, seafood, poultry or game; extracts for food made from meat, fish, seafood, poultry or game; preserved, frozen, dried and cooked fruits, vegetables, nuts, seeds, seaweed and algae; extracts for food made from fruits, vegetables, nuts, seeds, seaweed or algae; eggs, egg whites, egg yolks, egg products, egg substitutes; milk, milk products, milk substitutes; protein milk and protein milk products; edible oils and fats; fish substitutes; dairy substitutes;, fish substitutes, seafood substitutes or dairy substitutes.*

50 In its submissions of 11 November 2019, the EUTM proprietor itself expressly stated before the Cancellation Division that for these goods there was no immediate link between them and the protein, called 'Soy LegH'.

51 Consequently, with regard to the goods in Classes 5 and 29 as mentioned above in paragraph 47, the approval process of the ingredient, 'Soy LegH' has no relevance

for the use of the contested mark and consequently with regard to those goods there is no reason for non-use.

II) The use of the trade mark without successfully overcoming the obstacle would be impossible or unreasonable

52 The EUTM proprietor contends that its business strategy relies mostly on the 'Soy LegH' as an ingredient for its products which are mainly meat substitutes. This fact is illustrated by some of the articles and also by the authorisation process in the US. Therefore, it would be unreasonable to demand that the EUTM proprietor change its formula substituting the 'Soy LegH' with a different ingredient.

53 In this regard, it must be stated that in relation to the goods in Class 1, which may cover the specific molecule called 'Soy LegH', namely:

• *Class 1 - Proteins as a raw material; protein products as a raw material; food proteins as a raw material; proteins for use in the manufacture of foodstuffs; preservatives for foodstuffs; flavor improvers for foodstuffs; flavor enhancers for foodstuffs; chemical additives for foodstuffs; enzymes for use in foodstuffs;*

the EUTM proprietor does not commercialise them as such on the relevant markets. It indicated that its main products are food products as in particular burgers which do not contain meat but taste like meat. Consequently, the proteins and chemicals, as mentioned above, are not aimed at the EUTM proprietor's business or market strategy. This means that with regard to the goods in Class 1, the approval process of the ingredient, 'Soy LegH', has no encumbrance or relevance for the use of the contested mark and consequently with regard to those goods there is no reason for non-use.

54 Further on, with regard to the remaining goods covered by the contested mark, namely:

• *Class 29 - food products made from fruits, vegetables, nuts, seeds, seaweed or algae; substitutes for foods made from animals or animal products; meat substitutes; food products made from meat*

the following may be stated.

55 The goods mentioned in the previous paragraph contain the substance or ingredient, called 'Soy LegH', which is subject to the approval by the competent authority, namely the 'EFSA'; it also refers to the main business activity of the EUTM proprietor, i.e., an ingredient of food products which are different meat substitutes tasting like meat.

56 The contested decision agreed with the EUTM proprietor to the extent that it would be unreasonable to demand from it to use a different ingredient in its food products to use the contested mark for those very same goods.

57 Following the case-law, it must be assessed on a case-by-case basis whether a change in the strategy of the undertaking to circumvent the obstacle under consideration would make the use of that mark unreasonable (14/06/2007,

C-246/05, Le Chef de Cuisine, EU:C:2007:340, § 54). This means that a trade mark owner must strive to overcome potential obstacles to the limit of reasonableness, which may even include a change in the corporate strategy.

58 First of all, it has to be considered that the EUTM proprietor is not the first company on the specific market sector of food as meat substitutes which however taste as meat. As the revocation applicant has explained before the Cancellation Division, there are many alternatives on the market that can be used instead of the substance, 'Soy LegH' in order to produce a meat substitute tasting as meat (see the list of European companies present on the market of meat substitutes enclosed in paragraph 5 of the revocation applicant's observation of 11 November 2019 and in Enclosures 5, 6 and 7).

59 Consequently, from the outset there are alternatives available on the market to produce food without any meat that taste as meat. Therefore, it would not be too difficult or complicated for the EUTM proprietor to use in its food products those alternatives in order to comply with its obligation to use the contested mark, in view of the obstacles which refer to 'Soy LegH'.

60 The revocation applicant has even shown in a printout from the Internet dated May 2022 (Enclosure 22) that the EUTM proprietor launched a plant-based chicken nugget and sausage patties in around 300 UK restaurants without the ingredient called 'Soy LegH' because in the UK that substance was still involved in the corresponding approval process. According to this information, these plant-based meat products have been very successful in the US in the previous year.

61 In order to oppose the revocation applicant's arguments on the fact that the EUTM proprietor could substitute the ingredient, called 'Soy LegH' by another one, the EUTM proprietor contends that it has invested considerable resources in the development of this ingredient. Leaving it out would simply result in a different, inferior product to its other products sold under the IMPOSSIBLE trade mark outside the EU, where there is a regulatory approval.

62 In relation to the EUTM proprietor's argument, it has to be observed that with regard to the UK it has been shown that it entered the respective market of food products as meat substitutes tasting like meat with a different ingredient because the protein, called 'Soy LegH' has not been yet approved. Therefore, having regard to the fact that the necessary authorisation of the substance, 'Soy LegH' before the EFSA has been requested late and that the corresponding proceedings are still ongoing and it can be foreseen that they will still take a long time, it was and is not unreasonable to expect that it will undertake the same measure as in the UK and substitute the substance, 'Soy LegH', for another ingredient in order to use the contested mark.

63 This applies even if the EUTM proprietor entered the market in the UK after the date of request for revocation because it shows that it is able to market its food products without the substance 'Soy LegH'.

64 Therefore, the further argument submitted by the EUTM proprietor and accepted in the contested decision that there are already consumers within the EU who know the burgers sold in the US containing the ingredient, 'Soy LegH,' and hence they

would expect that these food products, once they are sold within the EU, have the same taste produced by that substance, cannot alter the aforesaid finding. The substance ‘Soy LegH’ is not on the market in the EU and the vast majority of consumers do not know it and have therefore no specific expectations. The sample of followers in Facebook and Instagram submitted by the EUTM proprietor in Annex 10 do not reach the number of 30 000 within the whole EU which, having regard to the population of almost 500 million within the EU, is negligible.

65 The EUTM proprietor also states that applying the revocation applicant's irrational argument, any pharmaceutical product that is subject to regulatory approval should either alter its product to avoid having to seek authorisation or the pharmaceutical company should launch a completely different medicine under the trade mark. In other words, the recipe of a pharmaceutical product subject to an approval process would have to be adjusted to an alternative active ingredient that is not subject to any regulatory approval. This would be completely unreasonable and therefore ruled out in case-law (29/04/2010, R 920/2009-1, ZATAMIL, § 26).

66 In this regard, the Board notes that the situation in the case of pharmaceuticals is different to that of the foodstuff sector. A new medicine that is subject to the corresponding approval is normally developed in order to combat a new illness or to improve the results compared to the available medicines or similar. Therefore, the investments in the development of a new drug are very important and it may therefore not be demanded to that company to use an alternative to this medicine, which probably does not even exist. On the contrary, in the foodstuff sector, it is much easier to find an appropriate substitute that can be used and moreover, in the case at hand, as mentioned above in paragraph 58, the EUTM proprietor was able to substitute in the UK the ingredient, ‘Soy LegH’, for another substance because of the ongoing approval process.

67 Consequently, and contrary to the contested decision’s findings and the EUTM proprietor’s view who without any success relies on the ‘Le Chef de Cuisine’ judgment (14/06/2007, C-246/05, Le Chef de Cuisine, EU:C:2007:340), the Board finds that in view of the ongoing approval proceedings, which presumably will still go on for a long time, it is not unreasonable to conclude that the EUTM proprietor could reasonably have substituted the substance, called ‘Soy LegH’, for another ingredient in order to comply with its obligation to use the contested mark.

III) The obstacle arose independently of the trade mark owner’s will

68 With regard to the condition that the obstacle or reason why the contested mark could not have been used must not be in the sphere of the EUTM proprietor, the main arguments produced by it are the following:

- before launching the approval process, the EUTM proprietor wanted to await for the final approval of the corresponding approval process in the US in order to use the results of these proceedings. This would be a common practice;

- as part of a request for EU approval, the first step is a determination of the status of the food product that is to be launched on the EU market according to the regulatory classification so that the applicable regulatory process can be followed.

- This is why, as early as August 2016, the EUTM proprietor signed a 'Non Diclosure Agreement' with a professional regulatory consultancy firm, I., to facilitate the exchange of confidential information between its company and I. regarding consultancy to be provided by I. on the possibility of regulatory approval. Further on, the EUTM proprietor engaged also other experts such as Keller & Heckmann LLP and Epsilon Advisory Partners in order to get further pertinent advice.

- as a further preparatory step, on 2016 the EUTM proprietor conducted the required 28-day toxicity study in the US in order to use the corresponding results in other jurisdictions such as in the EU;

- I. provided the EUTM proprietor in 2017 with additional reports in order to clarify the regulatory requirements in the EU for the authorisation of the substance, 'Soy LegH';

- in 2018, the EUTM proprietor requested I. once again to take further steps towards its application for regulatory approval in the EU. I. approached representatives of the EC DG Health and Food Safety with a request for advice on which regulatory procedures would apply in relation to the market authorisation of 'Soy LegH';

- in November 2018, after several follow-up e-mails by I., the latter was informed by representatives of the EFSA that the EUTM proprietor would need to file two separate applications for the authorisation of Soy LegH: (i) one under Regulation (EC) No 1829/2003 ("GMO Food Regulation"), and (ii) one under Regulation (EC) No 1334/2008 ("Flavouring Regulation");

- after having received this information on the applicable regulatory procedures for the authorisation of Soy LegH from the EFSA, the EUTM proprietor proceeded with the preparation of the respective dossiers for both regulatory applications. Subsequently, on 15 August 2019 (still within the five-year period), and on 30 September 2019, it filed the application under the Flavouring Regulation and the GMO Food Regulation respectively;

- on 20 July 2020, almost one year after the EUTM proprietor's application under the Flavouring Regulation, I. received a letter via e-mail from the EC DG Health and Food Safety with questions regarding the EUTM Proprietor's application. On its behalf, I. replied on 6 August 2020;

- on 24 March 2021, the EC DG Health and Food Safety informed I. that, after consultation with representatives of EU Member States, an application under Regulation (EC) No 1333/2008 ("Food Additives Regulation") would (also) be necessary. This application was then filed on 26 March 2021;

- it is therefore clear that the EUTM proprietor did not just wait and do nothing as the contested decision seems to suggest. A primary focus on the home jurisdiction does not mean that there were no legitimate (and costly) preparatory efforts by the EUTM proprietor concerning the EU regulatory approval procedures;

- the evidence shows that the regulatory approval context in which the EUTM proprietor operates is complex, costly and, most of all, time-consuming. The long duration of the obstacle due to the pending EU regulatory approval is certainly not attributable to the EUTM proprietor's conduct in the present case. Its conduct, and promptness with regard the overall procedure, is also dependent on (the responsiveness, or lack thereof, of) other stakeholders involved in the regulatory approval procedures, such as the European Commission;

- the affidavits of two experts in the field (Annexes 28 and 33) submitted by the EUTM proprietor prove that it took all the necessary steps and acted diligently.

Filing of the contested mark in connection with the EUTM proprietor's strategy for the purpose of approval of the substance, 'Soy LegH'

69 The contested decision found that the EUTM proprietor's conduct and acts taken as a whole do not allow to conclude that the delays and slowness of the approval procedures of the substance, 'Soy LegH', would be independent of its will resulting in there being no proper reasons for the non-use of the contested mark.

70 In the case at hand, the EUTM proprietor filed the contested mark on 9 April 2014. On 3 September 2014, it was registered.

71 The EUTM proprietor as an important company in the food sector must have known that the innovative and new substance, 'Soy LegH', which contains genetically modified substances would need an approval by the competent authority in the EU (EFSA) before being used as an ingredient in any food product. This conclusion is even more so having regard to the fact that the EUTM proprietor has chosen the company, 'I.', which is a specialist in the corresponding field, in order to advise on and arrange all the necessary steps for the purpose of authorising the 'Soy LegH' at the European level. Therefore, all the acts and procedural steps done by I. in the framework of the approval proceedings of 'Soy LegH' and the corresponding preparation are deemed to have been done by the EUTM proprietor.

72 As also confirmed by the EUTM proprietor, these proceedings are very complex, long and difficult and they might last for several years.

73 Still, under these circumstances, the EUTM proprietor filed the contested mark in April 2014, which was registered five months later and decided to first start the approval process of the substance 'Soy LegH' in the US, in 2015, and wait for the corresponding results before starting the necessary approval process in the EU.

74 Even if it were common practice to start an approval process of a new substance in one jurisdiction, wait for the results and then proceed with other approval proceedings in other jurisdictions, such a practice has no relevance in the presence case.

75 After having filed the contested mark and after its registration, the EUTM proprietor decided to start the approval process of the 'Soy LegH' in the US, wait for it to finalise and only then launch the application(s) for authorisation of 'Soy LegH' before the EFSA.

76 Such a conduct and strategy cannot be considered as diligent and striving to overcome the possible obstacles in a fast and consistent manner. To the contrary, if the EUTM proprietor wanted to first have an approval of the substance, 'Soy LegH' in the US, before filing the corresponding application for authorisation of that substance within the EU, it should have also waited to file the application for registration of the contested mark before the Office, because the probabilities of obtaining the approval at the EU level before the end of the five-year grace period were very little. Therefore, this decision automatically means that the obstacle surrounding the use the contested mark with the ingredient 'Soy LegH' would last for a long time after the end of the five-year grace period.

77 In the alternative, the EUTM proprietor could also have started the approval proceedings simultaneously before the US and the EU authorities, taking into consideration particularly that the conditions and requirements in Europe are stricter and require different documents than in the US, fact which was also known to the EUTM proprietor, as correctly stated in the contested decision. Moreover, it has to be recalled that any financial considerations, in the sense that waiting for the approval in the US would result in less expenses with regard to the approval before the EFSA, are not considered a proper reason for non-use (18/03/2015, T-250/13, SMART WATER, EU:T:2015:160, § 67-69).

78 The further 'preparatory acts', which according to the EUTM proprietor would justify its diligent conduct and justify that the existence of the obstacle to use the contested mark is independent of its will, are not convincing.

79 Two years after the start of the grace period, from August 2016 onwards, the EUTM proprietor contacted I., in order that the latter provide assessment on the regulatory situation. It was not until September 2018 that the EUTM proprietor finally authorised I. to start with the preparation of the necessary applications. On January 2019, I. submitted a proposal for the substance 'Soy LegH' in the context of Food flavouring and Genetically modified food (Annexes 22 and 24h).

80 However, from the e-mail exchange and the agreements signed between the EUTM proprietor and I., it may not be inferred to which extent and even in which capacity this contract and business relation may be considered a serious step or preparation to overcome the obstacle in the case at hand. The relevant contents and clauses are blacked out for reasons of confidentiality, and it may not be verified if these 'preparatory acts' were carried out with the required accuracy and diligence.

81 In any event, the delay between the first contact with I. (August 2016) and the final proposal by I. (January 2019, see Annex 24h), cannot be only explained by the misleading or incomplete advice received by the European Commission and the EFSA, as the EUTM proprietor contends.

28-days toxicity study

82 The EUTM proprietor undertook in 2016 a 28-days toxicity study, which was necessary in the framework of the approval of 'Soy LegH' in the US. It has been submitted that the results of these studies were also intended to be used for the approval before the EFSA at European level.

83 The Board however agrees with the revocation applicant who explained and has shown that for the authorisation of the substance, 'Soy LegH', at European level there is, in general, the need for a 90-days toxicity study, fact which is even confirmed by the EUTM proprietor itself as well as the witness statement it submitted in Annex 33.

84 Consequently, and contrary to the EUTM proprietor's view, the 28-days toxicity study carried out in 2016 complies with the requirements and conditions in the framework of the approval process of 'Soy LegH' in the US; it may not be considered as a preparatory act for the purpose of applying for the corresponding approval at European level or even as an equivalent of 'clinical trials' in the framework of the approval of a pharmaceutical product, which according to case-law, under certain circumstances, might be considered as a proper reason for non-use of a mark (03/07/2019, C-668/17 P, Boswelan, EU:C:2019:557, § 70).

85 The EUTM proprietor's argument that the 90-days toxicity study is not compulsory for the approval at European level and therefore the 28-days toxicity study might be considered as a preparatory act for the approval by the EFSA (Annex 33) has to be rejected.

86 The EFSA Guidelines indicate clearly, that in general there is a need to carry out a 90-days toxicity study as acknowledged by the EUTM proprietor's expert statement (Annex 33). Consequently, a diligent company that wants to make all the necessary steps to ensure the approval of a substance before the EFSA would carry out such a 90-days toxicity study and not one that lasts only 28 days and hope that there would be some exceptional circumstances that would apply in order that the 28-days toxicity study be accepted by the EFSA. In any event, the EUTM proprietor did not submit any facts or circumstances which might explain why the EFSA would in the case at hand accept the 28-days toxicity study instead of the standard 90-days toxicity study.

Applications for the authorisation of Soy LegH: (i) under Regulation (EC) No 1829/2003 ("GMO Food Regulation"), and (ii) under Regulation (EC) No 1333/2008 ("Food Additive Regulation")

87 Finally, with regard to the final applications for the authorisation of 'soy LegH' the following may be stated.

a) Regulation (EC) No 1333/2008 ("Food Additive Regulation")

88 On 15 August 2019, one month before the end of the 5-year grace period, the EUTM proprietor filed an application for authorisation of 'Soy LegH' according to Regulation (EC) No 1334/2008 ("Flavouring Regulation") because it thought that an authoriSation under this Regulation would be required.

89 With regard to the 'application' for approval under the 'Flavouring Regulation', which is not the correct Regulation, the EUTM proprietor committed errors which gave rise to important deficiencies being notified to it, such as for example the missing revocation applicant's name and address or the list of figures and documents and other particulars which should appear on separated pages (Enclosure 18, Documents 34 and 35).

90 Due to these deficiencies and omissions in the EUTM proprietor's application, it had to submit two further revised applications, namely on 6 November 2019 and finally on 4 February 2021 (Enclosure 18, Documents 22 and 34 of the revocation applicant's response).

91 With regard to the correct authorisation under the 'Food additive Regulation', the EUTM proprietor justified its confusion with the allegedly wrong advice given by the EFSA which informed I. in November 2018 that there was a need for two authorisations, namely one under Regulation (EC) No 1829/2003 ("GMO Food Regulation"), and (ii) one under Regulation (EC) No 1334/2008 ("Flavouring Regulation").

92 However, as the revocation applicant correctly held, when the EUTM proprietor started to contact the EFSA in order to clarify which authorisations were needed for the substance, 'Soy LegH', it indicated that this new substance is a genetically modified flavouring substance (see Annex 17). It therefore gave misleading indications or omitted the fact that the substance 'Soy LegH' is also a colouring substance, which must be authorised under the 'Food additive Regulation'.

93 Moreover, as it has been shown by the revocation applicant, during the approval process in the US since 2016, it was clear that the substance, 'Soy LegH' has *inter alia* the function of a colouring substance, which is also disclosed in the EUTM proprietor's patent for 'Soy LegH' (see Enclosure 12). This means that, contrary to the EUTM proprietor's submissions, it is not something surprising nor completely unexpected that an authorisation under the 'Food Additives Regulation' will eventually be necessary.

94 However, the EUTM proprietor maintains that only in March 2021 and very surprisingly too, it received the information that an authorisation under the 'Food additive Regulation' would be required.

95 In this context the EC DG Health and Food Safety informed the EUTM proprietor in November 2019 that the 'Soy LegH' might be a food additive which would need the authorisation under the 'Food additive Regulation' (Enclosure 18, Documents 26 and 35).

96 After this long and complex procedure, the EUTM proprietor finally filed on 26 March 2021 an application under the Food Additive Regulation, which is applicable to the substance, 'Soy LegH'.

b) Regulation (EC) No 1829/2003 ("GMO Food Regulation")

97 Similarly, with regard to the application corresponding to the authorisation under the "GMO Food Regulation", the EUTM proprietor contends that it was filed on 19 September 2019. However, as it has been shown by the revocation applicant (Enclosure 13), there have also been in this application omissions and mistakes attributable to the EUTM proprietor.

98 The EFSA had to ask the EUTM proprietor three times (on 27 November 2019, 3 February 2020 and on 29 October 2021) that it complete the missing information to consider the application as valid. The deficiencies raised on 3 February 2020

were completed by the EUTM proprietor one year and a half later only on 8 October 2021.

Conclusion

99 In light of the above, the Board concludes that the reason for not being able to use the contested mark is strongly related to the EUTM proprietor's decision-making and its conduct.

100 First of all, the mere fact that an obstacle to use a trade mark exists, such as the requirement of compliance with EU legislation in order to market the goods covered by that mark, does not suffice to justify non-use of that mark. Nor can the mere fact of having started efforts to comply with that legislation suffice to justify non-use of the mark at issue (12/01/2022, T-160/21, Apiretal, EU:T:2022:2 § 32; 08/06/2017, T-294/16, GOLD MOUNT (fig.), EU:T:2017:382, § 42).

101 It must be further recalled that according to case-law, the EUTM proprietor, when faced with an obstacle that could be a reason for non-use is under the obligation to act in a diligent and efficient manner in order to overcome the obstacle as soon as possible to be in the position to comply with its obligation to use the mark concerned (15/09/2017, T-276/16, Boswelan, EU:T:2017:611, § 62; 03/07/2019, C-668/17 P, Boswelan, EU:C:2019:557, § 72).

102 In the present case, the EUTM proprietor filed the contested mark knowing that with regard its main ingredient, 'Soy LegH', an approval before the competent authorities of the EU was necessary and that this process is very complex and long.

103 But even under these circumstances, it decided to start and conclude the corresponding approval process of the substance, 'Soy LegH' in the US and only then launch the approval process before the EFSA.

104 The EUTM proprietor's strategy and decision-making does not meet the requirements of diligence and efforts to overcome as quickly as possible the obstacle to use the contested mark which, in the case at hand, was the approval of the ingredient, 'Soy LegH', before the EFSA.

105 The whole preparatory process, which started in 2016 with the contracting in particular of I. in order to start contacting the competent European authorities to grasp the necessary information which was slow and burdensome does not constitute as such a proper reason for not using the contested mark.

106 Moreover, in the evidence submitted by the EUTM proprietor, the important parts are blacked out and consequently it is very difficult to understand if it was striving to overcome all the obstacles in order to use the contested mark.

107 In any event, the preparatory acts may, if at all, be considered as preparatory acts and potentially qualify as "genuine use" of an earlier mark if the applicable requirements for a genuine use are fulfilled, which are not met in the present case (03/07/2019, C-668/17 P, Boswelan, EU:C:2019:557, § 42 and 44).

108 Moreover, it must be observed that the whole process of the filings of the applications for authorisation of 'Soy LegH' as described above under paragraphs 84 to 95, was negligent, with plenty of omissions and mistakes on the EUTM proprietor's side, which finally resulted in the corresponding applications for authorisation of the substance 'Soy LegH' under Regulation (EC) No 1829/2003 ("GMO Food Regulation"), and Regulation (EC) No 1333/2008 ("Food Additive Regulation") being finalised long after the end of the five-year grace period.

109 In view of all the relevant circumstances and applying the applicable case-law, it must be concluded that the third condition for the establishment of proper reasons for non-use, namely that the obstacle arose independently of the will of the trade mark owner, is not met.

110 The EUTM proprietor's view to the contrary cannot be upheld. All the preparatory acts it performed for the purpose of authorising a new substance, and its opinion that the corresponding proceedings for authorisation are undertaken first in one jurisdiction before applying in others, remains with the EUTM proprietor. So does the decision to first file the contested mark, and after its registration start with the approval process in the US

111 A and once it is completed, launch the approval in the EU. Such a decision leads to the contested mark not being used after the end of the five-year grace period. Therefore, on that basis the EUTM proprietor failed to do everything in order to overcome the obstacles to use the contested mark.

Final conclusion on the proper reasons for non-use

112 With regard to the following goods, the specific ingredient 'Soy LegH' intended for meat substitutes is not included therein and therefore there is no direct relation between the obstacle and the trade mark and consequently there are no proper reasons for non-use:

- Class 5 - *Dietetic food; baby food; dietary supplements; nutritional supplements*.

- Class 29 - *Meat, fish, seafood, poultry and game; food products made from meat, fish, seafood, poultry or game; extracts for food made from meat, fish, seafood, poultry or game; preserved, frozen, dried and cooked fruits, vegetables, nuts, seeds, seaweed and algae; extracts for food made from fruits, vegetables, nuts, seeds, seaweed or algae; eggs, egg whites, egg yolks, egg products, egg substitutes; milk, milk products, milk substitutes; protein milk and protein milk products; edible oils and fats; fish substitutes; dairy substitutes;, fish substitutes, seafood substitutes or dairy substitutes.*

113 With regard to the following goods in Class 1, namely:

• Class 1 - *Proteins as a raw material; protein products as a raw material; food proteins as a raw material; proteins for use in the manufacture of foodstuffs; preservatives for foodstuffs; flavor improvers for foodstuffs; flavor enhancers for foodstuffs; chemical additives for foodstuffs; enzymes for use in foodstuffs;*

the EUTM proprietor does not commercialise them as such on the relevant markets and therefore does not have any business strategy with regard to those goods. Consequently, it would not be reasonable and feasible that the EUTM proprietor

use the contested mark for such proteins, preservatives or chemical additives other than ‘Soy LegH’ with the result that there are no proper reasons for non-use.

114 With regard to the remaining goods, namely:

- Class 29 - *food products made from fruits, vegetables, nuts, seeds, seaweed or algae; substitutes for foods made from animals or animal products; meat substitutes; food products made from meat substitutes;*

it has been established by the revocation applicant that, although for these food products the substance subject to authorisation, namely ‘Soy LegH’, is an ingredient and also essential for the EUTM proprietor’s business strategy, the EUTM proprietor could have substituted that substance for another ingredient, as it actually did in the UK. Additionally, it has also been established that the obstacle to use the contested mark was and is strongly connected with the EUTM proprietor’s decision-making and conduct, which did not strive to overcome it as required by the case-law. Therefore, with regard to those aforesaid goods, there is also no proper reason for non-use.

Case-law on which the EUTM proprietor relies

115 The EUTM proprietor relies on the following case-law claiming that in the case at hand there are proper reasons for non-use of the contested mark. However, these judgments and decisions do not cast any doubts on the findings and conclusions in the resent decision but rather confirm them.

116 In the ‘HICELL’ decision (20/09/2010, R 155/2010-2, HICELL (FIG. MARK) / HEMICELL), the difference with the present case lies in the fact that the opponent filed the corresponding application for authorisation of the substance three years after the beginning of the five-year grace period and not outside it.

117 In the ‘Nocdurna’ decision (24/02/2020, 12 497 C, Nocdurna), the EUTM proprietor launched the application for approval ten months before the end of the grace period. In any event, this decision is a first instance decision which has not been examined by the Boards. Consequently, this decision has no binding effects for the Boards (25/01/2018, T-367/16, H HOLY HAFERL HAFERL SHOE COUTURE (fig.) / HOLY et al., EU:T:2018:28, § 103).

118 In the ‘ZATAMIL’ decision (29/04/2010, R 920/2009-1, ZATAMIL), the EUTM proprietor filed the corresponding applications for authorisation even before the date of registration of the contested mark or in other words before the beginning of the grace period. Further on, the administrative proceedings became very complex. However, contrary to the case at hand, the EUTM proprietor did not file and register its EUTM and launch applications for authorisation only after the five-year grace period.

119 In the ‘AmBil’ decision (30/01/2017, 9 733 C, AmBil), the corresponding authorisation has been indeed filed three months after the end of the grace period. However, the Cancellation Division found that the EUTM proprietor explained the special circumstances which led to this late filing, in particular the complex issues in the procedure beforehand which were independent of its will. Contrary to the

present case, the EUTM proprietor deliberately decided to file the contested EUTM, but to postpone the application before the EFSA after finalising the approval process in the US instead of initialising them simultaneously.

Costs

120 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the EUTM proprietor, as the losing party, must bear the revocation applicant's costs of the cancellation and appeal proceedings

121 As to the appeal proceedings, these consist of the revocation applicant's costs of professional representation of EUR 550.

122 As to the proceedings before Cancellation Division, the EUTM proprietor has been ordered to bear the revocation applicant's representation costs which were fixed at EUR 450 and the fee for the request for declaration of revocation of EUR 630. This decision remains unaffected. The total amount for both proceedings is, therefore, EUR 1 630.

Order

On those grounds,

THE BOARD

hereby:

1. **Dismisses the appeal;**

2. **Orders the EUTM proprietor to bear the revocation applicant's costs in the appeal proceedings, which are fixed at EUR 550. The total amount to be paid by the EUTM proprietor in the appeal and cancellation proceedings is EUR 1 630.**

Signed	Signed	Signed
V. Melgar	S. Rizzo	A. Pohlmann

Registrar:

Signed

H. Dijkema