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OPERATIONS DEPARTMENT
Cancellation Division
C306A

Alicante, 10/03/2022

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

Notification of a decision to the applicant

Your reference:	**776/19/CE/AH**
Revocation number:	**000037948 C**
Contested trade mark:	**012775664**
	IMPOSSIBLE

Please find attached the decision terminating the proceedings referred to above. The decision was delivered on **10/03/2022**.

Please note that the decisions of the Cancellation Division are not signed by the officials responsible but only indicate their full name and bear a printed seal of the Office in accordance with Article 94(2) EUTMR.

Michaela SIMANDLOVA

Enclosures (excluding the cover letter): 16 pages.

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

Decision - 10/03/2022	https://euipo.europa.eu/copla/document/334QfM

CANCELLATION No C 37 948 (REVOCATION)

Société des Produits Nestlé S.A., 1800 Vevey, Switzerland (applicant), represented by **Harte-Bavendamm Rechtsanwälte Partnerschaftsgesellschaft mbB**, Am Sandtorkai 77, 20457 Hamburg, Germany (professional representative)

a g a i n s t

Impossible Foods Inc., 400 Saginaw Drive, CA 94063 Redwood City, United States of America (EUTM proprietor), represented by **Irenah Klink**, Claude Debussylaan 80, 1082 MD Amsterdam, Netherlands (professional representative).

On 10/03/2022, the Cancellation Division takes the following

DECISION

1. The application for revocation is upheld.

2. The EUTM proprietor's rights in respect of European Union trade mark No 12 775 664 are revoked in their entirety as from 04/09/2019.

3. The EUTM proprietor bears the costs, fixed at EUR 1 080.

REASONS

On 04/09/2019, the applicant filed a request for revocation of European Union trade mark No 12 775 664 'IMPOSSIBLE' (word mark) (the EUTM). The request is directed against all the goods covered by the EUTM, 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.*

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.*

The applicant invoked Article 58(1)(a) EUTMR.

SUMMARY OF THE PARTIES' ARGUMENTS

Both parties submitted their arguments and evidence in their support on multiple occasions. The contents of the individual communications overlap to a great extent. Therefore, below is the summary of the parties arguments as presented during the entire adversarial part of the proceedings.

The EUTM proprietor, in reaction to the application for revocation for non-use, explains that it has not begun using the contested mark in the European Union during the five year period after the mark's registration, but the mark should not be revoked as there are proper reasons for non-use. It filed a partial surrender in relation to the majority of the contested goods and acknowledged that the proper reasons for non-use apply only to a specific part of the registered goods, namely plant-based food products and meat substitutes. The EUTM proprietor describes the history of the company and its business model and the dispute history between the two parties. It puts forward that the core of the company is a plant-based meat substitute that tastes like meat and has also the same texture and that in order to achieve the specific quality of the product, an ingredient called soy leghemoglobin is crucial. This agent is, according to the EUTM proprietor, the result of considerable research efforts and steep investments by the EUTM proprietor and it is what sets the EUTM proprietor's product apart from those of its competitors. According to the EUTM proprietor, it would not make sense for it to market its products without this substance as it is what gives them the distinguishing feature. The EUTM proprietor contends that there is no viable alternative for the substance that would yield a product of sufficient quality and quantity. Since soy leghemoglobin is a substance that requires a regulatory approval before it can be used in the EU, the EUTM proprietor was unable to use the mark without the respective approval. The EUTM proprietor describes the steps it took to obtain the approvals in the USA, a process that started in 2014 and after additional tests for safety were required and carried out (between 2015 and 2017), it finalized in August 2019 when it obtained the approval to use soy leghemoglobin as a colour additive. The EUTM proprietor argues that it is a standard practice and best business option to obtain approvals first in a company's home country and only afterwards proceed with the applications elsewhere. It admits that it focused on the US market initially and only after the approval from US Food & Drug Administration (hereinafter FDA) it filed the application for approval in the EU. It claims that it undertook preparatory steps to obtain the approval in the EU, namely it hired consultants in 2016, it engaged in informal discussions with the European Food Safety Authority (EFSA) and it proceeded with obtaining the additional materials necessary for the EU application. In its later observations it describes in detail the actions itself or its consultants carried out and justifies the decisions that were made. It refutes the applicant's arguments that it filed incomplete applications which resulted in significant delays in the authorization process. It insists that it was diligent in the process of obtaining the necessary approvals in the EU and that the need of these approvals is an obstacle that arose independently of its will. It argues that this obstacle has a direct relationship with the trade mark as it would be unreasonable to use the mark for inferior products without soy leghemoglobin. Therefore, the use of the mark is dependent on overcoming the obstacles constituted by the need for the approvals. Since the need for a regulatory approval is directly connected to the trade mark, as use of the trade mark for a product without the substance in need of approval would be unreasonable, and since it is an obstacle arising independently of the EUTM proprietor's will, while regulatory approvals are a standard example of a proper reason for non-use, the EUTM proprietor concludes that there were proper reasons for non-use of contested mark, in relation to the indicated goods.

The EUTM proprietor submitted evidence in support of its arguments. As the EUTM proprietor requested to keep certain commercial data contained in the evidence confidential vis-à-vis third parties, the Cancellation Division will describe the evidence only in the most general terms without divulging any such data. In any event, most of the submitted documents are

heavily redacted and no sensitive information can 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 13/09/2016 entitled 'Impossible Burger CEO Lectures on Destructive Tech'.

- Annex 3: 'No Question Letter' issued by the FDA, indicating that FDA had no questions with regard to the conclusion on the safety of soy leghemoglobin; the letter was signed on 23/07/2018 and refers to the notice filed by the EUTM proprietor in October 2017 and amendments up to July 2018.

- Annex 4: listing of color additives exempt from certification, indicating inclusion of soy leghemoglobin, from Federal Register, published on 01/08/2019, showing that soy leghemoglobin was approved as a color additive.

- Annex 5: EFSA Statement, Update of the list of QPS-recommended biological agents, adopted 05/06/2019.

- Annex 6: a letter from EFSA dated 07/10/2019 acknowledging receipt of application for approval of soy leghemoglobin under Regulation (EC) 1334/2008, which was filed on 15/08/2019, and requesting additional information.

- Annex 7: application for the authorization of use of soy leghemoglobin produced from a genetically modified Pichia Pastoris for food use in the EU under Regulation (EC) 1829/2003 submitted by the EUTM proprietor on 30/09/2019, including acknowledgment letter from EFSA confirming that on 15/10/2019 EFSA received the application from The Netherlands competent authority.

- Annexes 8 and 11: judgment of The Hague District Court regarding 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 11/11/2016.

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

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

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

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

- Annexes 15, 21 and 24c: Proposal of Regulatory & Feasibility Assessment for soy leghemoglobin in X Jurisdictions (dated on 3 different dates between October 2016 and January 2017) and of Regulatory Assessment of soy leghemoglobin derived from

genetically modified yeast as food ingredient in the EU dated 17/02/2017, both drafted by I. for the EUTM proprietor.

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

- Annex 17: email from I. to European Commission dated 27/09/2018.

- Annex 18: an email from EFSA's applications desk to I. of 20/11/2018, informing the EUTM proprietor which applications will be necessary.

- Annex 19: an affidavit by 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 high sensitivity to genetically modified foods in Europe which results in additional hurdles. They described how 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 FDA. After the affirmation by FDA in July 2018, the EUTM proprietor started to make plans for other submissions. I. started to make enquiries about the requisites for authorization in the EU and provided proposals for both flavor and GMO applications in January 2019 and 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 to not pursue the EU regulatory filings until the US process is completed.

  It is accompanied by a selection of regulations and recommendations from FDA, EFSA and internet sources regarding the procedure for authorization 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: some pages from GRAS notice filed by the EUTM proprietor in the US in 2017.

- Annex 22: affidavit by I. dated on 14/04/2021, in which the tasks carried out by I. for the EUTM proprietor are described.

- Annex 23: email correspondence between the parties.

- Annex 24: overview of preparatory acts before the application to EFSA undertaken by the EUTM proprietor.

- Annex 24a: 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 they introduced Impossible Foods to two individuals who will be useful contacts as the EUTM proprietor's EU plans evolve, dated 01/12/2017.

- Annex 24e: Memorandum from a Brussels law office to the EUTM proprietor dated 01/12/2017 regarding regulatory status of leghemoglobin produced by a genetically modified strain of yeast in the EU.

- Annex 24f and h: Proposal for regulatory submission strategy for soy leghemoglobin derived from genetically modified yeast, by I. to the EUTM proprietor, dated 18/09/2018 and 09/01/2019.

- Annex 24g: an email from I. to the EUTM proprietor informing about a communication with a person from the Netherlands GMO Office, dated 25/10/2018.

- Annex 24i: an assessment of the EU market for the EUTM proprietor by E., dated 15/05/2019, 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 preparation for the launch of the Impossible Burger in Europe, dated in August 2019.

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

- Annex 26: postings for job positions by the EUTM proprietor for management of its business in the EU, on the EUTM proprietor's website printed on 28/10/2019.

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

- Annex 28: an affidavit by a former Science Coordinator at EFSA, stating that the EUTM proprietor is serious about obtaining a market authorization 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 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. from 08/08/2019, 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 press to show that soy leghemoglobin is crucial for the taste of the EUTM proprietor's product.

The applicant argues that the EUTM proprietor failed to show that there are proper reasons for non-use. It points out that there are several producers of meat substitutes that are marketed as tasting like meat, that entered the European market in the recent years. None of them uses the substance that the EUTM proprietor claims is essential to obtain the meat-like taste and structure. It also points out that it is not necessary to obtain soy leghemoglobin from a GMO. According to the applicant, this shows that it is not impossible nor unreasonable for the EUTM proprietor to use the mark for this type of product without the need of authorization. The applicant contends that the EUTM proprietor deliberately filed the contested trade mark long before the research on the product and its safety was concluded. It puts forward that the EUTM proprietor made a decision to first focus on getting the approvals in the USA and only afterwards it started the process of getting the authorization in the EU, filing the first EU

application only very shortly (21 days) before the expiry of the five year grace period. This was not something independent of the EUTM proprietor's will but its business decision. It points out that even the first application in the EU was missing crucial data, that the application for approval regarding the genetically modified ingredient was only filed after the end of the grace period and the last necessary application was only filed during the course of these revocation proceedings, in March 2021. It argues in detail that the EUTM proprietor or its consultants should have known that the third application, approval for a colour additive, would be necessary and that the EUTM proprietor chose to postpone its filing. It refutes the EUTM proprietor's argument that it is a standard practice to first get approval in the company's home country before proceeding with the process in other countries, and claims that it is equally common, in particular if a company plans a global rollout, to start the process simultaneously in various territories. It insists that the EUTM proprietor did not act sufficiently diligently in trying to overcome the obstacle and that it could have started the preparatory actions for authorizations and use of the mark much earlier. To the EUTM proprietor's argument that it hired consultants to investigate the authorization process in the EU already in 2016, the applicant answers that it remains completely obscure what these advisors did and why their work was relevant. The applicant quotes case law and argues that the mere existence of an obstacle does not suffice to justify non-use of a trade mark and that the fact that the EUTM proprietor could have started the approval process much earlier but deliberately decided to only do it at the very end of the grace period, shows that such obstacle in fact cannot constitute a proper reason for non-use.

The applicant submitted the following documents in support of its arguments:

- Enclosure 1: excerpt from Wikipedia regarding the EUTM proprietor.
- Enclosure 2: article entitled 'Beyond Meat competitor Impossible Foods received FDA approval for bleeding plant burger', published on reuters.com in July 2019.
- Enclosure 3: article 'FDA has no further questions over the safety of Impossible Foods' star ingredient', published on foodnavigator-usa.com in July 2018.
- Enclosure 4: article entitled 'How our commitment to consumers and out planet led us to use GM soy' published on medium.com in May 2019.
- Enclosure 5: 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: compilation of articles published online regarding the availability of Beyond Burger meat substitute on the European market.
- Enclosure 7: printout from www.thevegetarianbutcher.co.uk.
- Enclosure 8: notification from the District Court of Frankfurt in the preliminary injunction proceedings, dated 18/04/2019.
- Enclosure 9: 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: 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: 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 flavors 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 Additive Regulation would be necessary. She also argues in detail regarding the need of 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: EU Commission fact sheet published in 2015 regarding EU's policies on GMOs.
  - Enclosure 12B: 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: Article 'Several European countries move to rule out GMOs' published on www.ec.europe.eu/environment.
  - Enclosure 12E: Article 'How we got to now: why the US and Europe went different ways on GMOs', published on https://theconversation.com on 06/11/2015.
  - Enclosure 12F: a printout from European Commission websites showing the Register of GMOs.
  - Enclosure 12G: the EUTM proprietor's application for Authorisation of Soy Leghemoglobin under Regulation (EC) No 1829/2003.
  - Enclosure 12H: a table summarizing the duration of some applications (from application date to approval date) submitted under the GMO regulation by different companies – the duration ranges from 6 to 10 years.
  - Enclosure 12I: Summary Report of the Standing Committee on Plants, Animals, Food and Feed held in Brussels on 17/09/2018.
  - Enclosure 12J: Provisional patent application before the United States Patent and Trademark Office, filed in 2012, in which the colouring abilities of leghemoglobin are emphasized as one of the primary functions.
  - Enclosure 12K: Claims of, allegedly, PCT application WO 2013/010042.
  - Enclosure 12L: Memorandum of Meeting between FDA and the EUTM proprietor, which took place on 03/02/2016, in view of discussing the EUTM proprietor's potential approach to address FDA suggestions after withdrawal of GRN540. FDA employees suggested the EUTM proprietor enquires about the soy leghemoglobin being qualified as a colour additive.
  - Enclosure 12M: 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 at 5000 restaurants and soon will make their retail debut.
  - Enclosure 12N: Article 'Impossible Foods to launch plant-based meat in stores next week' published on www.vegnews.com in September 2019.
  - Enclosure 12O: EFSA's Guidance on the data required for the risk assessment of flavourings to be used in or on foods.
  - Enclosure 12P: EFSA's Guidance for submission for food additive evaluations.

- Enclosure 12Q: Two slides of a presentation entitled 'Soy Leghemoglobin Toxicology Testing', dated 03/02/2016, showing that 90-day toxicity study was envisaged.

Preliminary remarks

On the closure of the adversarial part of the proceedings

After the EUTM proprietor's fourth round of observations filed on 29/10/2021, the Office closed the adversarial part of the proceedings, informing the parties by the letter of 01/12/2021. The applicant requested reopening of the adversarial part of the proceedings on the grounds that the EUTM proprietor's last observations contained new arguments and evidence. The EUTM proprietor requested that the adversarial part of the proceedings remain closed, as the applicant is merely trying to prolong the proceedings to delay the final decision. The Office did not reopen the adversarial part of the proceedings, of which the applicant was informed, as well as of the fact that no further observations should be submitted (letters of 07/12/2021 and of 16/12/2021). Finally, on 06/01/2022 the applicant filed another communication containing its observations accompanied by some documents. This communication was forwarded to the EUTM proprietor for information purposes but it will not be taken into account since it was filed after the closure of the adversarial part of the proceedings. According to Article 64(1) EUTMR, the Office will invite the parties, as often as necessary, to file observations, within a period to be fixed by the Office, on communications from the other parties or issued by itself. The Cancellation Division considers that both parties had abundant opportunities to expound their arguments and provide evidence in support of their claims and that it is not necessary to invite the parties to file more observations. The applicant's right to be heard is not violated as the latest observations of the EUTM proprietor merely elaborate on the previously presented arguments and the documents attached merely react to the documents submitted by the applicant in its previous observations.

On the other disputes between the parties

A non-negligible part of the parties' arguments involve their other disputes and communications between them. None of these circumstances are relevant for the present proceedings, in which the subject matter consists of assessing whether or not the EUTM proprietor genuinely used its trade mark or whether or not it had proper reasons for not using it. None of the disputes or events occurring between the parties had any influence on these matters.

On the partial surrender

The EUTM proprietor's partial surrender was forwarded to the applicant, who 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.

GROUNDS FOR THE DECISION

According to Article 58(1)(a) EUTMR, the rights of the proprietor of the European Union trade mark will be revoked on application to the Office, if, within a continuous period of five years, the trade mark has not been put to genuine use in the Union for the goods or services for which it is registered, and there are no proper reasons for non-use.

Genuine use of a trade mark exists where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services. Genuine use requires actual use on the market of the registered goods and services and does not include token use for the sole purpose of preserving the rights conferred by the mark, nor use which is solely internal (11/03/2003, C-40/01, Minimax, EU:C:2003:145, in particular § 35-37 and 43).

When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a market share for the goods or services protected by the mark (11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 38). However, the purpose of the provision requiring that the mark must have been genuinely used 'is not to assess commercial success or to review the economic strategy of an undertaking, nor is it intended to restrict trade-mark protection to the case where large-scale commercial use has been made of the marks' (08/07/2004, T-203/02, Vitafruit, EU:T:2004:225, § 38).

In revocation proceedings based on the grounds of non-use, the burden of proof lies with the EUTM proprietor as the applicant cannot be expected to prove a negative fact, namely that the mark has not been used during a continuous period of five years. 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 03/09/2014. The revocation request was filed on 04/09/2019. 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 04/09/2014 until 03/09/2019 inclusive, for the contested goods listed in the section 'Reasons' above.

The EUTM proprietor argued that it has not started to use the mark in the European Union but that it had proper reasons which prevented it from the use. The EUTM proprietor's arguments and evidence provided to support them were listed above.

The EUTM proprietor 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.

Even though, according to Article 19(1) EUTMDR, the EUTM proprietor has to submit proof of use within a time limit set by the Office, Article 10(7) EUTMDR (applicable to cancellation proceeding by virtue of Article 19(1) EUTMDR) expressly invites the Office to exercise its discretionary power if relevant evidence was submitted in time and, after the expiry of the time limit, supplementary evidence was filed.

According to Article 10(7) EUTMDR, where, after the expiry of the time limit set by the Office, indications or evidence is filed that supplement prior relevant indications or evidence submitted within the time limit, the Office may take into account the evidence submitted out of time as a result of exercise of the discretion conferred on it by Article 95(2) EUTMR. When exercising its discretionary power, the Office must take into account, in particular, the stage of proceedings and whether the facts or evidence are, prima facie, likely to be relevant for the outcome of the case and whether there are valid reasons for the late submission of the facts or evidence.

In this regard, the Cancellation Division considers 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 applicant disputed the initial evidence submitted by the EUTM proprietor justifies the submission of additional evidence in reply to the objection (29/09/2011, T-15/09, Fishbone, EU:T:2011:550, § 30 and 33, upheld by judgment of 18/07/2013, C-621/11 P, Fishbone, EU:C:2013:484, § 36).

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

Reasons for non-use

In accordance with Article 58(1)(a) EUTMR, the EUTM proprietor may either prove genuine use of the contested EUTM or prove that there are justifiable reasons for non-use. These reasons cover circumstances arising independently of the EUTM proprietor's will which prevent use of the contested European Union trade mark.

'Bureaucratic obstacles' as such, that arise independently of the will of the trade mark proprietor, are not sufficient, unless they have a direct relationship with the mark, so much so that use of the trade mark depends on successful completion of the administrative action concerned. However, the criterion of a direct relationship does not necessarily imply that use of the trade mark is impossible; it might suffice that use is unreasonable. It must be assessed on a case-by-case basis whether a change in the undertaking's strategy to circumvent the obstacle under consideration would make use of the mark unreasonable. Thus, for example, the proprietor of a mark cannot reasonably be required to change its corporate strategy and sell its goods in its competitors' sales outlets (14/06/2007, C-246/05, Le Chef de Cuisine, EU:C:2007:340, § 52 and 53).

Therefore, in order for the non-use of a trade mark to be justified, an obstacle has to exist, that:

(i) arose independently of the will of the trade mark owner;
(ii) has a direct relationship with the trade mark and
(iii) the use of the trade mark without successfully overcoming the obstacle would be impossible or unreasonable.

The EUTM proprietor argues that it produces a specific food product that contains an ingredient for which administrative authorization 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 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, a feat that is perfectly achievable as shown by the numerous companies producing meat substitutes without the ingredient in question. According to the 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, and 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, 32, Enclosures 1, 10, 12M, 12N) that the EUTM proprietor specializes in one type of product, namely plant-

based meat substitute that, unlike the standard traditional vegetarian meat substitutes, mimics 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, 27A, Enclosures 10, 12M and 12N), that the EUTM proprietor's IMPOSSIBLE products were used to a significant extent in the USA and even may have gained 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 in the EU also the fact that it is produced from genetically modified yeast, is the reason why the products need specific authorizations before being available to end consumers.

The 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 authorization process in the US, and that the EUTM proprietor 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 there are EU based consumers who are already familiar with the EUTM proprietor's IMPOSSIBLE products marketed in the USA, and these consumers thus have very specific expectations from the IMPOSSIBLE products they would 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 make the use of that mark none the less possible (14/06/2007, C-246/05, Le Chef de Cuisine, EU:C:2007:340, § 53). The First Board of Appeal also came to a conclusion 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 does not appear to be reasonable.

The applicant argues that the EUTM proprietor could obtain the same substance from a source that is not genetically modified. The EUTM proprietor counterargues 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 authorization under Regulation (EC) No 1334/2008. Therefore, even if the substance was not obtained via a GMO, the EUTM proprietor would still need at least an authorization 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 an 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 the EUTM proprietor's will.

The EUTM proprietor refers to the EUIPO's Guidelines and to case-law to support its argument that the authorization of 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 authorization may constitute an obstacle rising independently of 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 the EUTM proprietor relies were within its field of influence and area of responsibility (03/07/2019, C-668/17 P, Boswellan, ECLI:EU:C:2019:557, § 68).

The contested trade mark was registered on 03/09/2014. The EUTM proprietor started the approval process in the USA in 2015 (and the EUTM proprietor 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 is 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 15/08/2019 (Annex 6), the EUTM proprietor filed its first application for authorization as a new flavouring substance in the EU. Still afterwards, on 30/09/2019, it filed the application for authorization under the GMO regulation (Annex 7). In the several rounds of exchanges of observations, the EUTM proprietor is essentially trying to show that it undertook steps to prepare for filing the EU application during the five years following the registration of the trade mark, whereas the applicant argues 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 authorization process in the USA 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 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 authorization process was entirely in the sphere of influence of the EUTM proprietor. It consciously decided to wait with the EU applications until the US process was finalized. The EUTM proprietor argues that this is a standard business practice and that documents used in one authorization 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, this 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 the toxicity studies) for one authorization process may be used in the authorization proceedings in other countries, it is also true that the specific authorization process is not the same in different territories and it is to be expected that the same application file that served as a basis for an authorization in one country, may not be sufficient in another. Therefore, the EUTM proprietor could not possibly 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 authorization fast (as is evident from Annex 6, indeed 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 waited still for the approval of the substance as a colouring agent, an approval that it did not even intend to get 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 need also 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. The US proceedings could not have served as a basis for filing this application, and yet, the EUTM proprietor filed it only more than five years after the registration of the contested trade mark, while nothing was preventing it to apply for it earlier and while it knew that this is a process that would take years to finalize.

The EUTM proprietor argues that it was taking preparatory steps to start the authorization process in the EU during most of the time after the registration of the contested mark. It emphasizes the hiring of a renowned consultancy company I. in 2016. However, the Cancellation Division concurs with the applicant that it remains unclear how relevant were the activities of this company and what exactly were the EUTM proprietor's instructions for it. It appears that the culmination of two years of work of these consultants was an enquiry, to EFSA, as to the categorization of the soy leghemoglobin. It is hard to believe that it would take a renowned consultancy company two years to merely pose a question asking essentially for an advice on which applications to file, to the regulatory body, which is, according to the EUTM proprietor itself, the very first step in any authorization process. Moreover, Ms Ch. in her affidavit admits that I. started making enquiries about the requisites for authorization in the EU when the EUTM proprietor started to make plans for other submissions, which occurred after the affirmation by the FDA in 2018. The EUTM proprietor 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, seem to be also concentrated at the end of 2018 and in 2019. All this, in any event, does not cast doubts on the fact that it was the EUTM proprietor's decision to not pursue the authorization process in the EU, but to focus on the US approvals first, as the EUTM proprietor itself as well as its Director of Regulatory Affairs, Ms Ch., repeatedly stated. It was completely dependent on the EUTM proprietor's will when the applications would be filed, they were filed only after the conclusion of the US proceedings and the first of them was filed only less than one month before the expiry of the five years 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 absolute majority of the grace period, the obstacle existed 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 EFSA, in which it is stated that the EUTM proprietor is serious about obtaining a market authorization 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 authorization, but again even from this affidavit it is clear that there were various approaches possible and from them, 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. As mentioned above, it may be a rational approach from the business perspective; however, the EUTM proprietor decided to file for the European trade mark in 2014, knowing that it has 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 finds many parallels between the situation in the present case and the situation in the judgment of the General Court 'Boswellan' (15/09/2017, T-276/16, Boswellan, ECLI:EU:T:2017:611, upheld by the ECJ in the judgment of 03/07/2019, C-668/17 P, Boswellan, ECLI: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 it was 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.

This practice has been fully supported by the Court, which stated that it is settled case-law that the legality of decisions is to be assessed purely by reference to the EUTMR, and not Office practice in earlier decisions (30/06/2004, T-281/02, Mehr für Ihr Geld, EU:T:2004:198). Even though previous decisions of the Office are not binding, their reasoning and outcome should still be duly considered when deciding upon a particular case.

Most of the decisions referred to by the EUTM proprietor are different in their circumstances than the present one. In the ZATAMIL decision (29/04/2010, R 920/2009-1, ZATAMIL), the products were to be exported from Australia and needed an authorization from Australian authorities. The applications were submitted even before the trade mark was filed. In the Hemicell case (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 case (30/01/2017, 9733 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 authorization request only five years after the registration of the trade mark.

While the Office does have a duty to exercise its powers in accordance with the general principles of European Union law, such as the principle of equal treatment and the principle of sound administration, the way in which these principles are applied must be consistent with respect to legality. It must also be emphasised that each case must be examined on its own individual merits. The outcome of any particular case will depend on specific criteria applicable to the facts of that particular case, including, for example, the parties' assertions, arguments and submissions. Finally, a party in proceedings before the Office may not rely on, or use to its own advantage, a possible unlawful act committed for the benefit of some third party in order to secure an identical decision.

In view of the above, it follows that, even if some of the previous decisions submitted to the Cancellation Division are to some extent factually similar to the present case (24/02/2020, 12497 C, Nocturna), the outcome may not be the same.

For the sake of completeness, the EUTM proprietor also argued that it already made certain marketing preparatory efforts. It submitted printouts from social media, where European based consumers make enquiries about the EUTM proprietor's products, several articles in the EU press referring to the EUTM proprietor's products (Annex 27) and excerpts from its website where job offers are posted for positions meant for the EU market (Annex 26).

Use of the mark must relate to goods or services already marketed or about to be marketed and for which preparations by the undertaking to secure customers are under way. Mere preparation to use the mark — such as the printing of labels, producing of containers, etc. — is internal use and, therefore, not use in the course of trade for the present purposes (11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 37). In addition, the use must be public, that is to say it must be external and apparent to actual or potential customers of the goods or services. Use in the private sphere or purely internal use within a company or a group of

companies does not amount to genuine use (09/12/2008, C-442/07, Radetzky, EU:C:2008:696, § 22; 11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 37; 09/09/2015, T-584/14, ZARA, EU:T:2015:604, § 33).

The job offers published on the EUTM proprietor's website can hardly be considered to be preparations to secure customers, but rather fall within the internal processes of the company. As regards the social media printouts and online articles, for this type of activity alone, without the goods being actually available on the market, to be considered genuine use, the marketing of the products would have to be imminent (15/09/2017, T-276/16, Boswellan, ECLI:EU:T:2017:611, § 37, upheld by the ECJ in the judgment of 03/07/2019, C-668/17 P, Boswellan, ECLI:EU:C:2019:557). In the present case, the marketing of the goods was clearly not imminent as it cannot happen without the necessary authorizations, which the EUTM proprietor has not obtained up to date. The EUTM proprietor's responses on the social media confirm this, when to the queries as when the IMPOSSIBLE products will be available in Europe, it answers that there is no public timeline but that 'they would love to bring the Impossible Burger to Europe in the coming years' (a post from 2018). Therefore, these activities of the EUTM proprietor cannot be considered to constitute genuine use of the contested 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 04/09/2019.

COSTS

According to Article 109(1) EUTMR, the losing party in cancellation proceedings must bear the fees and costs incurred by the other party.

Since the EUTM proprietor is the losing party, it must bear the cancellation fee as well as the costs incurred by the applicant in the course of these proceedings.

According to Article 109(7) EUTMR and Article 18(1)(c)(ii) EUTMIR, the costs to be paid to the applicant are the cancellation fee and the representation costs, which are to be fixed on the basis of the maximum rate set therein.

The Cancellation Division

Denitza STOYANOVA-VALCHANOVA	Michaela SIMANDLOVA	Oana-Alina STURZA

According to Article 67 EUTMR, any party adversely affected by this decision has a right to appeal against this decision. According to Article 68 EUTMR, notice of appeal must be filed in

writing at the Office within two months of the date of notification of this decision. It must be filed in the language of the proceedings in which the decision subject to appeal was taken. Furthermore, a written statement of the grounds of appeal must be filed within four months of the same date. The notice of appeal will be deemed to be filed only when the appeal fee of EUR 720 has been paid.