

## CANCELLATION No C 55 391 (REVOCACTION)

**Wawelskie Alkohole Łukasz Bylica**, ul. Św. Barbary 59, 32020 Wieliczka, Poland (applicant), represented by **Kancelaria Prawno-Patentowa Anna Belz**, Północna 6/24, 20-064 Lublin, Poland (professional representative)

a g a i n s t

**Leithart AG Schweiz**, Weissbadstrasse 14, 9050 Appenzell, Switzerland (EUTM proprietor), represented by **KSB Intax**, Lürerstr. 10-12, 30175 Hannover, Germany (professional representative).

On 15/08/2023, 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 10 861 334 are revoked as from 15/07/2022 for all the contested goods and services, namely:

*Class 32: Beers; mineral water and gaseous water and other non-alcoholic beverages; fruit drinks and fruit juices; syrups and other ingredients for the preparation of beverages.*

*Class 35: Services of a retailer with regard to beers, mineral water and gaseous water and other non-alcoholic beverages, fruit drinks and fruit juices, syrups and other ingredients for the preparation of beverages.*

3. The European Union trade mark remains registered for all the uncontested goods and services, namely:

*Class 29: Extruded potato products for food (except potato flour) as far as contained in class 29, potato crisps, potato sticks; rasins, hazelnut, peanut, pistachio kernels and almonds, dried, roasted, salted and/or spiced; dried fruit, fruit snacks; milk and milk products.*

*Class 30: Coffee, tea, cocoa, coffee substitutes, pastry and confectionery, biscuits, cakes, chocolate, chocolate goods, pralines, sweet meats, sweets, marzipan, popcorn; cereal snacks, rice snacks, salted biscuits, salted sticks, salted pretzels.*

*Class 35: Advertising; business management; services of a franchisor, ie business consultancy, marketing consultancy; economic counselling regarding bakery products; services of a retailer with regard to Extruded potato products for food (except potato flour), potato crisps, potato sticks, raisins, hazelnut, peanut, pistachio kernels and almonds, dried, roasted, salted and/or spiced, dried fruit, fruit snacks, milk and milk products, coffee, tea, cocoa, coffee substitutes, pastry and confectionery, biscuits, cakes, chocolate, chocolate goods, pralines, sweet meats, sweets, marzipan, popcorn, cereal snacks, rice snacks, salted biscuits, salted sticks, salted pretzels.*

Class 43: *Services regarding catering and accomodation of guests.*

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

## REASONS

On 15/07/2022, the applicant filed a request for revocation of European Union trade mark No 10 861 334 'Piekarnia i Kawiarnia Lajkonik' (word mark), (the EUTM). The request is directed against some of the goods and services covered by the EUTM, namely:

Class 32: *Beers; mineral water and gaseous water and other non-alcoholic beverages; fruit drinks and fruit juices; syrups and other ingredients<sup>1</sup> for the preparation of beverages.*

Class 35: *Services of a retailer with regard to beers, mineral water and gaseous water and other non-alcoholic beverages, fruit drinks and fruit juices, syrups and other ingredients for the preparation of beverages.*

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

## SUMMARY OF THE PARTIES' ARGUMENTS

**The applicant** claims that the contested EUTM has not been put to genuine use in the European Union for the registered goods in Class 32 and for part of the registered services in Class 35. It explains that on 08/07/2020, the EUTM proprietor filed an opposition against the applicant's Polish trade mark application No Z.509 390 'Lajkonik'<sup>2</sup> (hereinafter the 'Polish Mark') based on the contested EUTM. In view of this, the applicant requests the revocation of the EUTM from the day before the filing of the Polish Mark, that is 23/01/2020. In support of its claims for an earlier date, the applicant filed the following documents:

**Attachment 1:** Notification from Polish Patent Office dated 30/07/2020 concerning the opposition filed by the EUTM proprietor against the Polish Mark.

**Attachment 2:** First page of the opposition filed by the proprietor on 08/07/2020 against the Polish Mark, on the basis of, inter alia, the contested EUTM.

**Attachment 3:** First page of the decision of the Polish Patent Office of 31/05/2022 dismissing in its entirety the proprietor's opposition.

**The EUTM proprietor** filed observations and evidence of use (**Annexes 1 to 13** which will be listed and assessed further down in the decision). The proprietor provides some background information on the creation of the 'Lajkonik' café<sup>3</sup> and explains that since 2012 the mark has been used in Poland in the cities of Krakow and Katowice, by its licensee, the Polish company Lajkonik. House of Bakery Sp. z o.o., with whom the proprietor concluded agreements on the use of the mark. It details the evidence of use, concludes that the documents sufficiently demonstrate the use of the contested EUTM for the contested goods and services and requests the Office to reject the revocation application in its entirety.

---

<sup>1</sup> The specification of the contested mark reads '*other ingredients for the preparations of beverages*'. It is clear that the term '*ingredients*' is an obvious misspelling of the English word '*ingredients*' and for this reason the Cancellation Division will refer in its further examination of the revocation application to the correct term '*ingredients*'.

<sup>2</sup> Filed on 24/01/2020.

<sup>3</sup> According to the proprietor, the idea to open a location offering fresh baked goods, aromatic coffee, tea as well as other beverages was born in 2012. Initially an establishment was opened in Krakow and another one in Katowice. Today, there are 20 cafes altogether, 16 in Krakow and 4 in Katowice.

**The applicant** argues that the mark is not put to genuine use. It individually assesses and challenges in great detail each item of evidence and highlights the aspects which in its view constitute essential flaws thereof. It claims, in the main, that most of the evidence consist of internal documents that do not confirm that the goods/services were actually traded and to what extent or that the use was public and to a degree that could objectively create or maintain a market share. The applicant also points out that part of the evidence in Annex 12 is in the form of graphic files with file properties attached to them where the date of their creation is included. It claims that the file creation date in the file properties is the date taken from the system clock, that the system clock can be freely set and includes an illustrative screenshot in this regard. Therefore, in its view, the evidence in the form of random photos and file creation dates should not be taken into account as it is unreliable. The applicant concludes that the proprietor failed to prove the use of the mark.

**The EUTM proprietor** deems that the applicant has acknowledged that the mark was '*indisputably used*' for *fruit drinks and juices* in Class 32 and *services of a retailer with regard to mineral water and gaseous water and other non-alcoholic beverages, fruit drinks and fruit juices* in Class 35. With respect to the remaining contested goods and services, it considers that the applicant failed to accurately assess the evidence and challenges the applicant's arguments as to the insufficiency of the evidence in proving the use of the mark. The proprietor also disputes the applicant's claims on Annex 12 which it considers '*completely unfounded and outrageous*'. It maintains that the mark has been genuinely used and refers back to the evidence submitted to support its claims.

The Cancellation Division will detail and assess further down in the decision the parties' arguments that are relevant for the outcome of the case.

## 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).

According to Article 19(1) EUTMDR in conjunction with Article 10(3) EUTMDR, the indications and evidence of use must establish the place, time, extent and nature of use of the contested trade mark for the goods and/or services for which it is registered.

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 04/10/2012. The revocation request was filed on 15/07/2022. 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 15/07/2017 until 14/07/2022 inclusive, for the contested goods and services listed in the section 'Reasons' above.

On 22/11/2022 and 23/11/2022 (within the time limit<sup>4</sup>), the EUTM proprietor submitted evidence as proof of use. 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. This does not apply however to that part of the evidence which is already in the public domain, such as for the screen captures from Facebook or Instagram.

The evidence to be taken into account is the following:

**Annex 1:** Printout of the website <https://lajkonikpik.pl/en/places/> retrieved on 11/11/2022 and listing the locations of the proprietor's 20 establishments (16 in Krakow and 4 in Katowice).

**Annex 2:** Undated photographs of the inside/outside of three establishments<sup>5</sup>. The following



signs are featured in the evidence:



**Annex 3:** Screenshots from the website <https://archive.org> showing captures of the website <https://lajkonikpik.pl/en/> on 01/07/2017, 29/08/2017, 29/10/2017, 29/11/2017, 02/03/2018, 25/06/2018, 30/12/2018, 21/02/2019, 24/10/2020, 24/01/2021, 16/04/2021, 19/06/2021, 07/12/2021, 26/01/2022 and 22/05/2022. The evidence features glasses of



maracuja/grapefruit lemonade ( ), describes 'LAJKONIK. HOUSE OF BAKERY' (



) as 'an extraordinary combination of a bakery and a coffee house where you can taste freshly baked bread, savour aromatic coffee and try delicious cakes', includes pictures of warming teas and warming coffees. The same exhibit further contains five extracts of menus<sup>6</sup> (the 'Beverages' section), featuring the following goods: **Coffee** (crema, crema with milk, latte, cappuccino, caramel macchiato, espresso, espresso macchiato, etc.), **Tea**

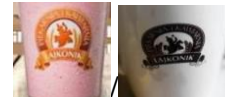
<sup>4</sup> The initial time limit for the EUTM proprietor to submit evidence of use was 23/09/2022. Upon the proprietor's request this time limit was extended until 23/11/2022.

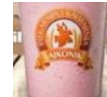
<sup>5</sup> Located at 15 Basztowa Street (Krakow), 2 Dominican Square (Krakow) and 8 Stawowa Street (Katowice), according to the proprietor.

<sup>6</sup> Captured on 24/01/2021, 16/04/2021, 19/06/2021, 26/01/2022 and 22/05/2022.

(classic, fruit, Earl Grey, mint, green, etc.), **Others** (cappuccino for children and milk), **Cocoa** (dairy and dessert), **Frappe** (frappe and frappe crema with milk), **Iced coffee** (iced coffee vanilla and iced coffee coconut), **Hot caramel chocolate** (hot caramel chocolate with whipped cream), **Lemonades** (lemon lemonade and passion fruit lemonade), **Cocktails** (passion fruit cocktail, spinach cocktail and raspberry cocktail), **Juices** (fresh orange juice, fresh apple juice, fresh grapefruit juice, fresh carrot juice, fresh fruit mix), **Winter coffee** (pistachio latte, gingerbread latte with white chocolate, inka raspberry chocolate, inka nut) and **Winter tea** (Health and Peace).

**Annex 4:** Undated screenshot showing an extract of a beverages menu, featuring in essence the same goods as those shown in the menus in Annex 3 above.



**Annex 5:** Photographs showing drinking vessels with the sign . The evidence bears internal indications of the years of alleged use (2013, 2014, 2016, 2017, 2018, 2019 and 2020) and, in some instances, of the goods shown (*winter tea*, *winter coffee*).

**Annex 6:** Undated and partly redacted recipes for the preparation *tea* (health and calm), *lemonade passion fruit* and *lemonade lemon*.

**Annex 7:** Affidavit given on 22/11/2022 by Mr P.P., General Manager of Lajkonik. House of Bakery Sp. z o.o. (hereinafter referred to as the 'PP Affidavit') wherein he provides, **for each of the years 2012 to 2022**, information on the **amount** and **net sales** (in Polish Zloti) generated from the sales of:

- (i) *non-alcoholic beverages, fruit drinks and fruit juices, syrups and beverages containing a variety of syrups (all self-prepared)*
- (ii) *tea flavoured*
- (iii) *cocoa*
- (iv) *coffee flavoured*
- (v) *cold beverages*
- (vi) *external non-alcoholic drinks.*

The PP Affidavit further gives the amount and net sales generated with *promotions in shop* for each of the years 2013 to 2021 for 16 items<sup>7</sup>.

**Annex 8:** Selection of cash register receipts dated 02/01/2015 (*caramel macchiato, cappuccino*), 03/01/2015 (*caffe crema, cacao*), 04/01/2015 (*classic tea, fruity tea, green tea*), 30/01/2015 (*caramel macchiato*), 18/03/2015 (*cacao*), 06/11/2015 (*gingerbread latte*), 13/02/2016 (*gingerbread latte*), 01/06/2016 (*iced coffee-vanilla, iced coffee-vanilla with caramel*), 09/06/2016 (*iced coffee - vanilla*), 21/08/2016 (*coffee latte, iced coffee - vanilla*), 09/06/2017 (*Malon cocktail*), 05/08/2017 (*fruity tea*), 02/10/2017 (*coffee latte, iced coffee - vanilla with caramel, tea Health*), 03/01/2018 (*caramel macchiato, cappuccino*), 15/01/2018 (*tea Health*), 12/01/2018 (*gingerbread latte*), 14/02/2018 (*fruity tea*), 22/03/2018 (*fruity tea, tea Health, tea Earl Grey*), 20/05/2018 (*lemonade maracuja - takeaway, Sprite, iced coffee - coconut takeaway*), 22/05/2018 (*Malon cocktail, iced coffee - salted caramel - takeaway*), 16/06/2018 (*iced coffee - coconut takeaway*), 24/08/2018 (*cacao*), 25/08/2018 (*iced coffee - vanilla, iced coffee - coconut takeaway*), 07/09/2018 (*Malon cocktail - takeaway*). The sign 'Lajkonik. Pierkarnia i Kawlarnia' is featured at the top left corner of each receipt.

**Annexes 9 and 9a:** Selection of partly redacted invoices (in Polish – **Annex 9** with partial English translations – **Annex 9a**) issued by Polish entities between 21/05/2014 and 02/09/2022 and addressed to LAJKONIK. House of Bakery Sp. z o.o. in relation to the sale of, inter alia, *syrups (ginger, vanilla, raspberry, caramel, almond, passion fruit, lemon tree, pink grapefruit, Mixybar salted caramel, Mixybar vanilla)*, *yoghurt frappe base, natural yoghurt pail, milk, nutty cream flavoured, Caravella crunch pistachio cream.*

<sup>7</sup> Inter alia, *second lemonade for -50%* in 2017 or *summer beverage and cake on stick* in 2020.

**Annexes 10 and 10a:** Screen captures from the Facebook page of ‘Lajkonik – Piekarnia i



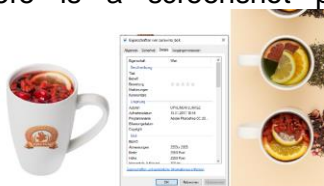
Kawiarnia’ ( ) (in Polish – **Annex 10** with partial English translations – **Annex 10a**). The page has 19.720 followers and 19.541 likes. The evidence shows posts dated between 07/06/2016 and 01/07<sup>8</sup>, featuring beverages (*lemonades, mango lassi, frappe, frozen coffees, cocktails – raspberry, spinach, maracuya, pina colada, Health black tea with mulled wine spice, syrup, orange, cloved and ditrite, Peace – fruit tea with rose syrup, goji fruit, orange and lemon, ice coffee, fruit smoothies – banana with pineapple, raspberry, spinach, oreo, spinach with chia, banana, strawberry, blueberry – banana, raspberry, frozen mascarpone coffee, iced coffee coconut, frape cream with milk, crema frappe, milkshakes, strawberry yoghurt cocktail*). The number of likes per post varies from 1, 4, 18 or 27 likes to 59, 89 or 112, with only one post attaining a number of 161 likes.

**Annexes 11 and 11a:** Screenshots from the Instagram page of ‘Lajkonik. House of Bakery’ (



) (in Polish – **Annex 11** with partial English translations – **Annex 11a**). The page has 728 publications and 2,860 followers. The evidence shows posts between April 2016 and September 2019, featuring beverages (*aromatic coffee, yoghurt-based cocktail smoothies, milkshakes, lemonades, cocktails – raspberry, oreo, spinach with chia, fruit smoothies – spinach, raspberry, banana with pineapple, fresh fruit juices, seasonal fruit cocktails – banana and pineapple, spinach, raspberry/all available with soya milk, iced coffees – in two flavours, coconut and vanilla, frappe, coffee*).

**Annexes 12 and 12a:** Selection of advertising/promotional materials (flyers, bus station advertisements, screen captures of what appears to be the Instagram page of ‘lajkonikpiekarniakawiarnia’, pictures of beverages, screen captures of third parties Facebook pages/accounts or images of what appear to be labels) (in Polish – **Annex 12** and partial English translations – **Annex 12a**). The evidence refers to the period 2013 to 2022 and features, inter alia, beverages (*frappe, iced coffee, smoothies, winter coffee specials, cocktails – banana, strawberry, raspberry, oreo, spinach with chia seeds, lemonades, tea, coffee, milkshakes – pina colada, raspberry, flavoured coffee, fruit juices, gingerbread latte, fruit smoothies – spinach, raspberry, banana with pineapple*). Next to some of the images there is a screenshot providing information on the author or date, for example



**Annex 13a:** Extract from The Free Encyclopedia Wikipedia about Poland. According to the evidence, Poland is the fifth-most populous Member State of the EU, with a population of over 38 million<sup>9</sup>.

**Annex 13b:** Extract from The Free Encyclopedia Wikipedia about Katowice. According to the evidence, Katowice is the 11<sup>th</sup> most populous city in Poland, with a population of 286,960 as of 31/12/2021.

**Annex 13c:** Extract from The Free Encyclopedia Wikipedia about Krakow. According to the evidence Krakow is the second largest and one of the oldest cities in Poland, with a population of 800,653 as of 2022 and with approximately 8 million additional people living with a 100km radius of its main square.

<sup>8</sup> No year mentioned. According to the translation in Annex 10a, the post dates from July 2022.

<sup>9</sup> There is no indication of the year and the extract is undated.



## PRELIMINARY REMARKS

### *(1) On the PP Affidavit*

As far as the PP Affidavit is concerned, Article 10(4) EUTMDR (applicable to cancellation proceedings by virtue of Article 19(1) EUTMDR) expressly mentions written statements referred to in Article 97(1)(f) EUTMR as admissible means of proof of use. Article 97(1)(f) EUTMR lists, as means of giving evidence, sworn or affirmed written statements or other statements that have a similar effect under the law of the State in which they were drawn up.

In order to assess the probative value of such documents, it is necessary to check the plausibility and truthfulness of the information which they contain. In that regard, account must be taken of, inter alia, the origin of the document, the circumstances of its preparation, the person to whom it was addressed, and whether it seems from the content to be sensible and reliable (07/06/2005, T-303/03, *Salvita*, EU:T:2005:200, § 42; 15/12/2005, T-262/04, *Briquet à Pierre*, EU:T:2005:463, § 78; 18/11/2015, T-813/14, *Cases for Portable computers*, EU:T:2015:868, § 26).

Bearing in mind the foregoing, as far as the probative value of the PP Affidavit is concerned, statements drawn up by the interested parties themselves, their employees or person within the sphere of influence of the proprietor or acting on its behalf are generally given less weight than independent evidence. This is because the perceptions of a party involved in a dispute may be more or less affected by its personal interests in the matter.

However, this does not mean that such statements do not have any probative value at all.

The final outcome depends on the overall assessment of the evidence in the particular case. The probative value of such statements depends on whether or not they are supported by other types of evidence (labels, packaging etc.) or evidence originating from independent sources.

In view of the foregoing, the remaining evidence must be assessed in order to see whether or not the contents of the PP Affidavit are supported by the other items of evidence.

### *(2) On the use by another entity than the EUTM proprietor*

According to Article 18(2) EUTMR, use of the European Union trade mark with the consent of the proprietor is deemed to constitute use by the proprietor.

The proprietor claimed that the contested EUTM has been in use since 2012 by its licensee, the Polish company *Lajkonik. House of Bakery Sp. z o.o.* It also claimed to have concluded license agreements with said entity, but it did not file any such documents.

It clearly follows from case-law that when the EUTM proprietor submits evidence of use of the mark by a third party, this implicitly shows that it consented to this use (08/07/2004, T-203/02, *Vitafruit*, EU:T:2004:225). Even without the license agreements, the EUTM proprietor's claim, together with the fact that it was able to submit documents such as invoices addressed to the Polish company or cash register receipts issued by the latter in connection with the use of the mark, sufficiently prove that the use was made with the consent of the EUTM proprietor. The EUTM proprietor would not have access to documents of such private nature as invoices or cash register receipts, if *Lajkonik* did not act in agreement with the EUTM proprietor.

To this extent, and in accordance with Article 18(2) EUTMR, the Cancellation Division considers that the use by Lajkonik. House of Bakery Sp. z o.o., was with the EUTM proprietor's consent and, therefore, is equivalent to use by the EUTM proprietor himself.

*(3) On the applicant's criticism of Annex 12*

The applicant argued that part of the evidence in Annex 12 is not reliable and should not be taken into account since the file creation dates are taken from the system clock which can be set freely. To support its claims it inserted in its observations a screenshot showing that the file with the letter of the proprietor's representative dated 22/11/2022 has been on the applicant's computer since 1997.

The Cancellation Division has however no reason to doubt, at least *prima facie*, the veracity of the proprietor's evidence. From a preliminary inspection the documents do not create the impression that they were fabricated only for the purposes of these proceedings or that they contain manipulated data. In any event, even if the file creation dates shown in the file properties were to be disregarded as 'unreliable', the evidence as such is still to be taken into account. Indeed, it clearly follows from case-law that images of products/their packaging (even if undated) may still serve to show how the mark was used in relation to the relevant goods and/or to provide information regarding the type of goods the proprietor manufactures, and therefore cannot be ignored in the overall evaluation of the evidence (13/02/2015, T-287/13, HUSKY, EU:T:2015:99, § 67-68).

The applicant's claims are therefore set aside.

*(4) On the applicant's alleged statement that the mark is partly used*

According to the proprietor, the applicant stated that the contested *fruit drinks and juices* in Class 32 and *services of a retailer with regard to mineral water and gaseous water and other non-alcoholic beverages, fruit drinks and fruit juices* in Class 35 are '*indisputably used*'. In view of this, the proprietor considered that only *beers; mineral water and gaseous water and other non-alcoholic beverages; syrups and other ingredients for the preparation of beverages* in Class 32 and *services of a retailer with regard to beers, syrups and other ingredients for the preparation of beverages* in Class 35 appear to still be the subject of the proceedings.

The Cancellation Division notes at the outset that the applicant's observations do not seem to include such statements. On the contrary, on page 12 the applicant claims that '*in summary the entire evidence provided by the Trademark Owner shows that in the period from 15/07/2017 to 14/07/2022, the word mark Piekarnia i Kawiarnia Lajkonik EUTM 010861334 in the scope covered by the application of 15/07/2022 was not in genuine use for registered goods in Class 32: fruit drinks (lemonades) and fruit juices*' (emphasis added).

In any event, even if the applicant were to have acknowledged the (partial) use of the mark, the Office makes its own evaluation of the evidence of use submitted. This means that the probative value of the evidence filed is evaluated independently of the observations submitted by the parties in this respect. Assessment of the relevance, pertinence, conclusiveness and efficacy of evidence lies within the discretion and power of judgment of the Office, not the parties, and falls outside the adversarial principle that governs inter partes proceedings (01/08/2007, R 201/2006-4, OCB (fig.) / O.C.B., OCB (fig.), § 19; 14/11/2000, R 823/1999-3, SIDOL / SIDOLIN).



A declaration by the applicant concluding that use has been (partly) proved<sup>10</sup> does not, therefore, have any effect on the Office's findings. Once the revocation application has been filed by the applicant, it is solely up to the Office to carry out the subsequent procedure and evaluate whether the evidence submitted by the EUTM proprietor is to be regarded as of sufficient probative value. However, the applicant does have the possibility of formally withdrawing the revocation application.

This is not contrary to Article 95(1) EUTMR, which stipulates that in inter partes proceedings the Office is restricted in its examination to the facts, evidence and arguments provided by the parties and the relief sought. However, although the Office is bound by the facts, evidence and arguments provided by the parties, it is not bound by the legal value that the parties may give thereto. Hence, the parties may agree as to which facts have been proved or not, but may not determine whether or not these facts are sufficient to establish genuine use (01/08/2007, R 201/2006-4, OCB (fig.) / O.C.B., OCB (fig.), § 19; 14/11/2000, R 823/1999-3, SIDOL / SIDOLIN, § 20; 13/03/2001, R 68/2000-2, MOBEC / NOVEX PHARMA).

The proprietor's claims are therefore set aside.

## **ASSESSMENT OF GENUINE USE – FACTORS**

### *General considerations*

As already mentioned above, the indications and evidence required in order to provide proof of use must consist of indications concerning the place, time, extent and nature of use of the trade mark for the relevant goods and/or services.

These requirements for proof of use are cumulative (05/10/2010, T-92/09, STRATEGI, EU:T:2010:424, § 43). This means that the EUTM proprietor is obliged not only to indicate but also to prove each of these requirements. However, the sufficiency of the indication and proof as to the place, time, extent and nature of use has to be considered in view of the entirety of the evidence submitted. A separate assessment of the various relevant factors, each considered in isolation, is not suitable (judgment of 17/02/2011, T-324/09, Friboi, EU:T:2011:47, § 31).

Concerning **the time and place of use**, the evidence must show that the contested EUTM has been genuinely used in the relevant period (from 15/07/2017 until 14/07/2022 inclusive) and in the European Union (see Article 18(1) EUTMR and Article 58(1)(a) EUTMR).

Concerning **the extent of use**, it is settled case-law that account must be taken, in particular, of the commercial volume of the overall use, as well as of the length of the period during which the mark was used and the frequency of use (e.g. 08/07/2004, T-334/01, Hipoviton, EU:T:2004:223, § 35). Furthermore, the Court has held that '[u]se of the mark need not ... always be quantitatively significant for it to be deemed genuine, as that depends on the characteristics of the goods or service concerned on the corresponding market' (11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 39). The assessment of genuine use entails therefore a degree of interdependence between the factors taken into account. Thus, the fact that commercial volume achieved under the mark was not high may be offset by the fact that use of the mark was extensive or very regular, and vice versa. Likewise, the territorial scope of the use is only one of several factors to be taken into account, so that a limited territorial scope of use can be counteracted by a more significant volume or duration of use. The evidence cannot be assessed in absolute terms but must be assessed in relation to other relevant factors. In this respect, the evidence should be viewed in relation to the

---

<sup>10</sup> Albeit no such statement appears to be found in the applicant's observations.

nature of the goods and services and the structure of the relevant market (30/04/2008, T-131/06, Sonia Sonia Rykiel, EU:T:2008:135, § 53).

Concerning **the nature of use**, Article 58(1)(a) EUTMR and Article 10(3) EUTMDR require that the EUTM proprietor proves genuine use for the contested goods and/or services for which the European Union trade mark is registered. Furthermore, nature of use requires that the contested EUTM is used as a trade mark, that is, for identifying origin, thus making it possible for the relevant public to distinguish between goods and services of different providers. Finally, in the context of Article 10(3) EUTMDR nature of use further requires evidence of use of the mark as registered, or of a variation thereof which, pursuant to Article 18(1)(a) EUTMR, does not alter the distinctive character of the contested EUTM.

#### *Assessment of the evidence*

The contested EUTM is registered for, inter alia, the contested goods and services in Classes 32 and 35 (see list in the 'Reasons' section).

The evidence filed by the proprietor with a view to prove the use of the mark has been described above. It consist in essence of **(i)** a selection of invoices, **(ii)** a selection of cash register receipts, **(iii)** an affidavit, **(iv)** a selection of photographs and recipes, **(v)** Internet screenshots/captures from the website of the proprietor's licensee and from the latter's Facebook/Instagram pages, **(vi)** a selection of promotional/advertising material (flyers, bus station advertisements, screen captures of what appears to be the Instagram page of 'lajkonikpierkarniakawiarnia', pictures of beverages, screen captures of third party Facebook pages/accounts or images of what appear to be labels) and **(vii)** Wikipedia printouts.

Nevertheless, when considered in detail and then viewed as a whole, the documents on file do not allow the Cancellation Division to reach a conclusion that the mark was genuinely used, as these materials do not contain sufficient indications (if at all) as regards, at least, the extent of use of the mark and/or the nature of use: use in relation to the registered goods and services.

#### **Contested goods in Class 32** (*Beers; mineral water and gaseous water and other non-alcoholic beverages; fruit drinks and fruit juices; syrups and other ingredients for the preparation of beverages*)

It is noted at the outset that part of the evidence concerns goods which are not contested in the present proceedings (such as *tea, coffee or tea-/coffee-/milk-based beverages*) and as such these documents will not be further considered in the present assessment.

The PP Affidavit (**Annex 7**) provides certain information on the extent of use of the mark insofar as it specifies the amount and net sales generated from **(i)** *non-alcoholic beverages; fruit drinks and fruit juices; syrups and beverages containing a variety of syrups (all self-prepared)* and **(ii)** *cold beverages*, allegedly sold in the proprietor's establishments from 2012 and 2022. However, the figures are given globally without any reference to a particular good and therefore it is impossible to determine what share of the turnover was generated by the sale of the specific goods in Class 32. Furthermore, the data given in connection with the goods listed under (i) above appears to also relate to goods that are not contested in the present proceedings, as can be inferred from the mention in the Affidavit that '*the drinks can be divided into the following groups: tea, cocoa, coffee, iced tea, cocktails, lemonades and freshly squeezed juices*'. More importantly, the PP Affidavit comes from the proprietor's licensee and as such it must be treated as merely indicative and needs to be corroborated by other evidence (21/11/2012, T-338/11, PHOTOS.COM, EU:T:2012:614, § 51).

In the present case, however, the probative value of the PP Affidavit is not supported by the remaining evidence on file. Admittedly, the screenshots from the website

<https://lajkonikpik.pl/en/> (**Annex 3**) feature, inter alia, some of the contested goods in Class 32 (**lemonades, fruit juices, (fruit) cocktails, fruit smoothies**). *Lemonades, cocktails and fresh juices* are also displayed in the extracts of menus (**Annex 3**) available on the website <https://lajkonikpik.pl/en/> on 24/01/2021, 16/04/2021, 19/06/2021, 26/01/2022 and 22/05/2022. Finally, there are four cash register receipts (**Annex 8**) that itemise the sale of *lemonade maracuja* (20/05/2018) and *Malon cocktails* (09/06/2017, 22/05/2018 and 07/09/2018).

The presence of a trade mark on websites can show, inter alia, the nature of its use or the fact that goods or services bearing the mark have been offered to the public. However, the mere presence of the mark on a website is, in and of itself, not sufficient to prove genuine use unless the website also shows the place, time and extent of use or unless this information is otherwise provided. In particular, the value of the internet extracts in terms of evidence can be strengthened by proof that the specific website has been visited and/or that orders for the relevant goods have been made through the website by a certain number of customers in the relevant period and in the relevant territory (for example, records relating to internet traffic and hits attained at various points in time and/or the countries from which the web page has been accessed). The proprietor however did not make available any further complementary evidence as regards the actual use of the website <https://lajkonikpik.pl/en/> by potential and relevant consumers.

Turning to the 4 cash register receipts, the number of items sold and the corresponding amounts are too insignificant to qualify as real and genuine commercial exploitation of the mark for *cocktails* and/or *lemonades*. They are also clearly insufficient to support the figures given in the PP Affidavit.

The Cancellation Division acknowledges that a *de minimis* rule cannot be laid down, that use need not always be quantitatively significant for it to be deemed genuine and that territorial borders of the Member States should be disregarded when considering evidence of use of an EUTM. Nevertheless, the very low number of goods sold, coupled with the absence of any specific information on the actual use of the website (such as for example the number of visits/views of the menus) provide very little information on the commercial volume, the duration and/or the frequency of use that could support the data in the PP Affidavit and safely allow for a conclusion that the proprietor has made real efforts to try and carve out a portion of the relevant market in the European Union in relation to the respective goods in Class 32. The very low quantity of the goods is therefore not compensated by the length, regularity and/or frequency of use and, therefore, such use as shown cannot be accepted as being genuine use and not merely token.

The Cancellation Division further acknowledges that there is no obligation to present specific types of evidence, but rather a comprehensive assessment of the evidence as a whole has to be made (16/11/2011, T-308/06, Buffalo Milke, EU:T:2011:675, § 61; 24/05/2012, T-152/11, Mad, EU:T:2012:263, § 33-34), in the sense that use on the market not only appears credible or likely, but is positively established (12/12/2002, T-39/01, Hiwatt, EU:T:2002:316, § 47). It also accepts that the market in question is for the production and sale of *bakery and coffee house* food/beverages items that are intended for normal, everyday use. It is well known that such market is often characterised by relatively high demand and by the sale of a high number of goods to the public at large. Therefore, the provision of traditional sales evidence, such as paper invoices, is not necessarily functional when it comes to trade in the relevant market sector. However, the proprietor could have provided other types of evidence, such as for example cash register receipts or even full cash records for the relevant period showing sales of the goods concerned, annual reports or advertising expenditure. While Annex 8 does contain a selection of cash register receipts, only 4 of them refer to some of the contested goods and are thus relevant for the present assessment, whereas the

remaining ones (aside from being partly dated outside of the relevant period) concern goods which are not contested in the current proceedings.

The remaining evidence does very little to alter the picture in favour of the EUTM proprietor.

The screen captures from the Facebook and Instagram pages of the proprietor's licensee (**Annexes 10, 10a, 11 and 11a**) and the selection of promotional materials (**Annexes 12 and 12a**) feature, inter alia, *lemonades*, *fruit cocktails*, *fruit smoothies* and *fresh fruit juices*. In addition the PP Affidavit further gives the amount and net sales generated with *promotions* in the proprietor's establishment from 2012 to 2021. In this regard, the Cancellation Division agrees that genuine use 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, particularly in the form of advertising campaigns. Advertising in advance of the actual marketing of goods or services — if it is with a view to establishing a market for the goods or services — will generally be considered to constitute genuine use. It follows from case-law that a body of evidence consisting of advertising material is capable of establishing use of a mark to identify the source of the goods/services covered by that mark and, therefore, to guarantee the identity of the origin of the goods/services for which that mark is registered, which is the essential function of a mark. More specifically, the Court has held that the use of a reproduction of the contested mark in advertising carried out by means of the specialist press, on banners and in the context of a trade fair may be capable of demonstrating that it has been used outwardly (15/07/2015, T-215/13, LAMBADA (A), EU:T:2015:518, §40 and 41). Furthermore, in certain circumstances, even (online) promotional activities or extensive marketing activities, although not providing direct information as to the quantity of goods actually sold may, by itself, suffice to show the extent of use in the context of an overall assessment (15/07/2015, T-398/13, TVR Italy, EU:T:2015:503, § 57-58). In the present case, however, the figures given in the PP Affidavit that relate to *lemonade* or *summer beverages* (aside from the fact that the latter term is not sufficiently clear and precise enough as to determine the precise goods encompassed thereunder) are too low to qualify as genuine use of the mark. Furthermore, the number of likes for the Facebook/Instagram posts in Annexes 10 and 11 that feature the goods at issue is not particularly high. The same is valid as regards the posts from the Instagram account of 'lajkonikpierzakarniakawiarinia' in Annex 12. Furthermore, the respective screen captures originate from the proprietor's licensee and as such this kind of evidence owing to its nature has a more limited probative value than independent evidence of use. In addition, aside from the figures given in the PP Affidavit, the proprietor did not make available any information or evidence on the advertising expenditure relating to the promotion of the mark and consequently the pictures of two bus advertisements in Annex 12 cannot on their own and without further information and supporting documentation be deemed as particularly conclusive. More specifically, there is no further information as to where the respective advertisements were displayed and for how long and/or how many people came in contact with them or if they resulted in any sales and, if so, to what extent. Moreover, as is apparent from Annex 12, they are dated in July 2014, that is 3 years before the start of the relevant period. There is also no information on how the promotional material in the form of flyers in Annex 12 was distributed by the EUTM proprietor and whether it led to potential or actual purchases. It is admittedly true that Annex 12 includes a number of about 7 screen captures from third party Facebook/Instagram pages showing the inside or outside of the proprietor's establishment and featuring, inter alia, beverage vessels, some of which could potentially contain some of the goods at issue (for example *lemonade*). It is also true that the number of likes for these posts are in the range of 304, 467, 638, 748, 852 and, for one, even 6299. There is also one post of July 11 (no year mentioned) for which 16,099 people reacted. However, it cannot be determined with the required degree of certainty to which goods the respective posts actually refer. In addition, they are not particularly numerous and are either dated in the very beginning of the relevant period or shortly before its start or no year is mentioned. Furthermore, for the post of July 11, the evidence also shows that there were

135 reactions, comments & shares and in these circumstances it is unclear where the figure of 16,099 people who reacted to the post comes from or to what it refers. Against this background, it must be concluded that this evidence is not particularly persuasive or conclusive in demonstrating that the EUTM proprietor would have advertised or promoted its goods under the contested mark to a sufficient degree and/or that such activities would have been carried out to a volume sufficient to constitute genuine use in relation to the goods concerned.

Finally, the printout in Annex 1, the undated photographs in Annex 2, the undated extract from a menu in Annex 4, the photographs of drinking vessels in Annex 5, the undated recipes in Annex 6 and the Wikipedia printouts in Annexes 13a, b and c do not provide the Cancellation Division with information as regards the extent of use of the mark in relation to *lemonades, fruit juices, (fruit) cocktails* and/or *fruit smoothies* in Class 32. Therefore, the proprietor's rights have to be revoked insofar as *other non-alcoholic beverages; fruit drinks and fruit juices* are concerned.

The mark is also not in use and must therefore be revoked for ***syrups and other ingredients for the preparation of beverages***. It is true that *syrups* appear to be ingredients/flavourings for some of the proprietor's beverages. It is also true that the latter filed some exemplary invoices (**Annex 9**) showing that it purchased *syrups* or other ingredients. This is not in itself sufficient to allow a conclusion of genuine use, since there is no evidence on file that *syrups* or *other ingredients for making beverages* were also available separately under the contested EUTM. Even if an EUTM is used for a particular final product (for example *coffee flavoured with vanilla syrup*), this does not automatically show use for its particular ingredients (e.g. *syrup*) (03/05/2004, R 68/2003-2, SWEETIE/SWEETY, § 20), as genuine use of a mark can be established only where that mark is used to guarantee the identity of origin of the goods for which it was registered (03/05/2012, T-270/10, KARRA / KARA et al., EU:T:2012:212, § 53-54, 58). There is nothing in the file to show that the general public identifies particular ingredients/flavourings of the proprietor's beverages, such as *syrups*, with the EUTM proprietor as the source of their origin. There is also nothing to show that any of these goods is a separate product that could be found on menus or independently ordered by customers.

For the remaining goods in this class (***beers; mineral water and gaseous water***) there is no evidence in terms of extent and/or nature showing that the contested EUTM has been commercially active in the relevant territory and within the relevant time frame.

Against this background, the proprietor's rights have to be revoked for all of the contested goods in Class 32.

**Contested services in Class 35** (*Services of a retailer with regard to beers, mineral water and gaseous water and other non-alcoholic beverages, fruit drinks and fruit juices, syrups and other ingredients for the preparation of beverages*)

*Retail services* in Class 35 are defined in the explanatory note of the Nice Classification as ... *the bringing together, for the benefit of others, of a variety of goods (excluding the transport thereof), enabling customers to conveniently view and purchase those goods*. Such services may be provided by retail stores, wholesale outlets, through vending machines, mail order catalogues or by means of electronic media, for example, through web sites or television shopping programmes.

The PP Affidavit gives the amount and net sales generated with ***(external) non-alcoholic beverages*** sold from 2012 to 2022. Furthermore, according to this document, '*the drinks can be divided into the following types: Coca-Cola, Sprite, Fanta Orange, Sparkling water, Still water, different juices, Smoothies, lemonades, etc.*'. As already mentioned above, it is well-established in the case-law that a declaration, even if sworn or affirmed in accordance with

the law under which it is rendered, it cannot in and by itself suffice to prove the genuine use of the mark and it must be corroborated by independent evidence. In the present case, however, the only evidence submitted to support the contents of the PP Affidavit and/or to prove the figures given therein is a cash register receipt dated 25/08/2018 that mentions the sale of a bottle of 'Sprite'. Such a symbolic quantity is obviously not enough to allow for a conclusion of genuine use.

Aside from the above, there is no other evidence that the EUTM proprietor would sell (bring together), in addition to the goods it itself manufactures, also goods offered by third parties. Genuine use must be consistent with the essential function of a trade mark. The trade mark used in relation to an outlet for the manufacturer's own goods serves to distinguish those goods from goods of other manufacturers but not to distinguish the services provided through that outlet from those provided through other outlets. Manufacturers selling their own goods from their own shops compete on the market of the goods they are selling but do not compete on the retail services market, which targets third-party manufacturers. Operating a shop exclusively for the purpose of selling the manufacturer's own goods excludes offering competing goods from third party manufacturers.

Furthermore, the EUTM proprietor did not advance and prove that there are proper reasons for non-use. Therefore, the mark must also be revoked for all the contested services in Class 35.

Genuine use requires actual presence of the goods or services on the market to the customers so that the mark can exercise its essential function, which is to identify the commercial origin of the goods or services, thus enabling the consumer who acquired them to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent purchase (12/12/2002, T-39/01, Hiwatt, EU:T:2002:316, § 37).

In order to examine, in a given case, whether use of the mark is genuine, an overall assessment must be made taking account of all the relevant factors in the particular case. That assessment implies a certain interdependence between the factors taken into account. Thus, a low volume of goods marketed under that trade mark may be compensated for by high intensity of use or a certain constancy regarding the time of use of that trade mark or vice versa (08/07/2004, T-334/01, Hipoviton / HIPPOVIT, EU:T:2004:223, § 36).

The methods and means of proving genuine use of a mark are unlimited. The finding that genuine use has not been proven in the present case is due not to an excessively high standard of proof, but to the fact that the EUTM proprietor chose to restrict the evidence submitted (15/09/2011, T-427/09, Centrotherm, EU:T:2011:480, § 46).

The Cancellation Division does not judge the commercial success of a business; however, it cannot make its assessment based on assumptions. In this regard, it must be held that genuine use of a trade mark cannot be proven by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (18/01/2011, T-382/08, Vogue, EU:T:2011:9, § 22).

The factors of time, place, extent and nature of use are cumulative (05/10/2010, T-92/09, STRATEGI / Stratégies, EU:T:2010:424, § 43). This means that the evidence must provide sufficient indications of all of these factors to prove genuine use. As, at least, the extent of use and/or nature of use: use in relation to the registered goods and services have not been established, it is not necessary to enter into the other requisites.



## Conclusion

It follows from the above that the EUTM proprietor has not proven genuine use of the EUTM for any of the contested goods and services. As a result, the application for revocation is wholly successful and the EUTM must be revoked for all the contested goods and services, namely:

*Class 32: Beers; mineral water and gaseous water and other non-alcoholic beverages; fruit drinks and fruit juices; syrups and other ingredients for the preparation of beverages.*

*Class 35: services of a retailer with regard to beers, mineral water and gaseous water and other non-alcoholic beverages, fruit drinks and fruit juices, syrups and other ingredients for the preparation of beverages.*

The EUTM remains on the register for all the uncontested goods and services.

According to Article 62(1) EUTMR, the revocation will take effect from the date of the application for revocation, that is, as of 15/07/2022. An earlier date, on which one of the grounds for revocation occurred, may be fixed at the request of one of the parties. In the present case, the applicant has requested an earlier date, namely 23/01/2020. It cited as justification an opposition filed by the EUTM proprietor against the registration of the applicant's Polish Mark, on the basis of, inter alia, the contested EUTM. However, the applicant did not submit sufficient evidence to prove a specific and individual legal interest in having the contested mark revoked as of 23/01/2020. The legitimate interest invoked by the applicant must be real, direct and present. The applicant merely claimed such an interest in view of the proprietor's opposition. However, as is apparent from Attachment 3, on 31/05/2022 the Polish Patent Office issued a decision rejecting the opposition in its entirety. The applicant did not argue or prove that the respective national proceedings are still ongoing (because, for example, the proprietor filed an appeal against the decision of the Polish Patent Office). Nor did it prove that according to the Polish legislation or case-law and practice an earlier date of revocation of the EUTM proprietor's rights to the contested EUTM would be necessary and/or advantageous in the respective opposition proceedings. At this point the Cancellation Division finds it useful to clarify that as a matter of principle there could be no potential of harm for a cancellation applicant out of opposition proceedings entered into on the basis of a trade mark that has ceased to exist. In other words, the simple fact that at the time of taking the decision, an earlier mark ceased to exist regardless of the reason (surrender, revocation, invalidity etc.) might be sufficient by itself to disregard/not take into account that mark as an earlier right in that decision. Therefore, in exercising its discretion in this regard, the Cancellation Division considers that it is not expedient in this case to grant this request, since the applicant has not shown sufficient legal interest to justify it.

## 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**

Nicole CLARKE

Oana-Alina STURZA

Ana MUÑIZ RODRIGUEZ

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.