

CANCELLATION No C 48 730 (REVOCACTION)

Tesco Stores Limited, Tesco House, Shire Park, Kestrel Way, AL7 1GA Welwyn Garden City, United Kingdom (applicant), represented by **HL Kempner Patentanwälte, Solicitors (England & Wales), Irish Patent Agents Partnerschaft mbB**, Bürkleinstraße 10, 80538 München, Germany (professional representative)

a g a i n s t

Lidl Stiftung & Co. KG, Stiftsbergstraße 1, 74172 Neckarsulm, Germany (EUTM proprietor), represented by **Harmsen Utescher**, Neuer Wall 80, 20354 Hamburg, Germany (professional representative).

On 29/11/2024, the Cancellation Division takes the following

DECISION

1. The application for revocation is partially upheld.
2. The EUTM proprietor's rights in respect of European Union trade mark No 2 936 185 are revoked as from 19/01/2021 for some of the contested goods and services, namely:

Class 1: *Sweeteners.*

Class 3: *Perfumery, dentifrices; deodorants and deodorising skin sprays.*

Class 5: *Dietetic foodstuffs, not for medical purposes, namely vitamin tablets, capsules and juices.*

Class 8: *Hand tools for use in agriculture and gardening (except ratchet secateurs); cutlery.*

Class 11: *Apparatus for steam generating.*

Class 16: *Paper, cardboard and goods made from these materials, namely babies' napkins and packaging containers; plastic materials for packaging, namely covers; artists' materials, namely goods for drawing, painting and modelling; pamphlets; advertising material, namely designs for advertisements in newspapers and periodicals.*

Class 18: *Goods of leather and imitations of leather, namely bags and small leather goods, in particular purses, pocket wallets, key wallets, trunks and travelling bags; umbrellas and parasols.*

Class 21: *Household or kitchen containers; combs; brushes (except paint brushes); glassware, porcelain and stoneware for the household and kitchen.*

Class 28: *Decorations for Christmas trees; games; gymnastic and sporting articles, included in class 28.*

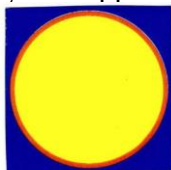
- Class 29: *Game; milk products, namely powdered milk for food; dietetic margarine, dietetic oils and fats; reduced calorie foods.*
- Class 30: *Tapioca, sago, artificial coffee; other wholemeal products, namely wholemeal pastries, wholemeal rice, wholemeal noodles; treacle; yeast and yeast extracts; glucose; low-calorie foods.*
- Class 31: *Seeds.*
- Class 32: *Beers.*
- Class 33: *Alcoholic beverages (except beers), in particular wine, spirits and liqueurs, and alcoholic mixed milk beverages, cocktails and apéritifs with a spirit or wine base; beverages containing wine.*
- Class 35: *Archiving of information material; advertising and marketing for retailers, including the devising of advertising initiatives and conducting of advertising campaigns, market research; inventory and payroll preparation; organisational, professional business and technical consultancy with regard to the establishment, design and construction of shops, including shop fitting and presentation of goods; market analysis; shop-window dressing; advertising and business consultancy; marketing; data processing, for others; recording the exact turnover of goods for retailers, further processing of this data in a disposition proposal, intercompany comparisons for retailers, business accounting, for others; organisational consultancy, professional business consultancy, employment consultancy, product range consultancy, all the aforesaid services for others.*
- Class 36: *Financial consultancy; delcredere services between manufacturers and retailers (factoring).*
- Class 39: *Packaging of goods.*
- Class 41: *Providing of training and further training, including management courses, sales training, product training and training of apprentices; organisation of exhibitions and trade fairs; publication of information material; training courses and awards ceremonies.*
- Class 42: *Computer programming and creating program systems, for others, in particular program systems for retailers for the ordering of goods, the warehousing thereof and inventory management; consumer consultancy, namely developing proposals for improving the nutritional and utility value of food products and everyday products; publication of recommendations for optimised cultivation, production, recycling, energy saving and handling-related transport methods; establishing criteria for assessing foodstuffs and everyday products; examining foodstuffs and everyday products in respect of their health-promoting, environmentally-friendly, energy-saving and recycling properties.*
- 3.** The European Union trade mark remains registered for all the remaining goods and services, namely:
- Class 3: *Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; cosmetics, hair lotions; disinfectants.*

- Class 5: *Sanitary articles, namely sanitary articles for women, including sanitary towels, panty-liners, tampons, sanitary pants.*
- Class 8: *Hand tools for use in agriculture and gardening, namely ratchet secateurs.*
- Class 11: *Apparatus for lighting, heating, cooking, refrigerating, drying.*
- Class 16: *Goods made from paper or cardboard, namely face towels of paper, table napkins of paper, filter paper, handkerchiefs, toilet paper and bags; plastic materials for packaging, namely bags, foils.*
- Class 21: *Hand-operated household or kitchen utensils; sponges; articles for cleaning purposes.*
- Class 28: *Playthings.*
- Class 29: *Meat, fish, poultry, including in frozen form; meat extracts; preserved, dried and cooked fruits and vegetables; jams and other sweet spreads, mainly consisting of nuts, nougat, honey and/or chocolate; eggs, milk and milk products, namely butter, cheese, fresh milk, long-life milk, cream, yoghurt, desserts of yoghurt, quark and cream; meat, sausage, fish, fruit and vegetable preserves; including the aforesaid goods being pickled; charcuterie; edible oils and fats; frozen food, including prepared meals, mainly consisting of meat, fish, poultry, game, vegetables, prepared fruit and potatoes; jams, herb and vegetable products being spreads, artificial sausage or soups; vegetable bouillon.*
- Class 30: *Coffee, tea, cocoa, sugar, rice; flour and preparations made from cereals, in particular oat flakes and other cereal flakes for food; muesli and other wholemeal products, namely wholemeal bread, baking mixes for making wholemeal products; bread, pastry and confectionery, chocolate, pastries, ices; honey; baking powder, table salt; mustard; vinegar, sauces (condiments), spices; prepared meals, mainly consisting of pasta and/or rice.*
- Class 31: *Fresh fruits and vegetables; foodstuffs for animals, natural plants and flowers.*
- Class 32: *Mineral and aerated waters and other non-alcoholic drinks; drinks, juices and fruit juices; syrups and other preparations for making beverages.*

4. Each party bears its own costs.

REASONS

On 19/01/2021, the applicant filed a request for revocation of European Union trade mark



No 2 936 185 (figurative mark) (the EUTM). The request is directed against all the goods and services covered by the EUTM, namely:

- Class 1: *Sweeteners.*
- Class 3: *Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, cosmetics, hair lotions; dentifrices; disinfectants; deodorants and deodorising skin sprays.*
- Class 5: *Dietetic foodstuffs, not for medical purposes, namely vitamin tablets, capsules and juices; sanitary articles, namely sanitary articles for women, including sanitary towels, panty-liners, tampons, sanitary pants.*
- Class 8: *Hand tools for use in agriculture and gardening; cutlery.*
- Class 11: *Apparatus for lighting, heating, steam generating, cooking, refrigerating, drying.*
- Class 16: *Paper, cardboard and goods made from these materials, namely face towels of paper, babies' napkins, table napkins of paper, filter paper, handkerchiefs, toilet paper, packaging containers and bags; plastic materials for packaging, namely covers, bags, foils; artists' materials, namely goods for drawing, painting and modelling; pamphlets; advertising material, namely designs for advertisements in newspapers and periodicals.*
- Class 18: *Goods of leather and imitations of leather, namely bags and small leather goods, in particular purses, pocket wallets, key wallets, trunks and travelling bags; umbrellas and parasols.*
- Class 21: *Hand-operated household or kitchen utensils and containers; combs and sponges; brushes (except paint brushes); articles for cleaning purposes; glassware, porcelain and stoneware for the household and kitchen.*
- Class 28: *Decorations for Christmas trees; games and playthings; gymnastic and sporting articles, included in class 28.*
- Class 29: *Meat, fish, poultry and game, including in frozen form; meat extracts; preserved, dried and cooked fruits and vegetables; jams and other sweet spreads, mainly consisting of nuts, nougat, honey and/or chocolate; eggs, milk and milk products, namely butter, cheese, fresh milk, long-life milk, cream, yoghurt, powdered milk for food, desserts of yoghurt, quark and cream; meat, sausage, fish, fruit and vegetable preserves; including the aforesaid goods being pickled; charcuterie; edible oils and fats; frozen food, including prepared meals, mainly consisting of meat, fish, poultry, game, vegetables, prepared fruit and potatoes; jams, herb and vegetable products being spreads, artificial sausage or soups; dietetic margarine, dietetic oils and fats; vegetable bouillon; reduced calorie foods.*
- Class 30: *Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, in particular oat flakes and other cereal flakes for food; muesli and other wholemeal products, namely wholemeal bread, wholemeal pastries, baking mixes for making wholemeal products, wholemeal rice, wholemeal noodles; bread, pastry and confectionery, chocolate, pastries, ices; honey, treacle; yeast and yeast extracts, baking powder, table salt; mustard; vinegar, sauces (condiments), spices, glucose; low-calorie foods; prepared meals, mainly consisting of pasta and/or rice.*

- Class 31: *Fresh fruits and vegetables; foodstuffs for animals, seeds, natural plants and flowers.*
- Class 32: *Beers; mineral and aerated waters and other non-alcoholic drinks; drinks, juices and fruit juices; syrups and other preparations for making beverages.*
- Class 33: *Alcoholic beverages (except beers), in particular wine, spirits and liqueurs, and alcoholic mixed milk beverages, cocktails and apéritifs with a spirit or wine base; beverages containing wine.*
- Class 35: *Archiving of information material; advertising and marketing for retailers, including the devising of advertising initiatives and conducting of advertising campaigns, market research; inventory and payroll preparation; organisational, professional business and technical consultancy with regard to the establishment, design and construction of shops, including shop fitting and presentation of goods; market analysis; shop-window dressing; advertising and business consultancy; marketing; data processing, for others; recording the exact turnover of goods for retailers, further processing of this data in a disposition proposal, intercompany comparisons for retailers, business accounting, for others; organisational consultancy, professional business consultancy, employment consultancy, product range consultancy, all the aforesaid services for others.*
- Class 36: *Financial consultancy; delcredere services between manufacturers and retailers (factoring).*
- Class 39: *Packaging of goods.*
- Class 41: *Providing of training and further training, including management courses, sales training, product training and training of apprentices; organisation of exhibitions and trade fairs; publication of information material; training courses and awards ceremonies.*
- Class 42: *Computer programming and creating program systems, for others, in particular program systems for retailers for the ordering of goods, the warehousing thereof and inventory management; consumer consultancy, namely developing proposals for improving the nutritional and utility value of food products and everyday products; publication of recommendations for optimised cultivation, production, recycling, energy saving and handling-related transport methods; establishing criteria for assessing foodstuffs and everyday products; examining foodstuffs and everyday products in respect of their health-promoting, environmentally-friendly, energy-saving and recycling properties.*

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

SUMMARY OF THE PARTIES' ARGUMENTS

The applicant's case


The applicant argues that the EUTM proprietor has not put the EUTM to genuine use for any of the goods and services for which it was registered (listed above) for a continuous period of five years. The applicant requests revocation of the EUTM as of 14/12/2009 (on the grounds that it was not put to genuine use during the five years immediately following registration, namely 14/12/2004 to 13/12/2009) or, alternatively, as of 15/09/2020 (on the grounds that it

has not been put to genuine use in the EU during the five-year period prior to that date) or, alternatively, as of the date of the application for revocation, namely 19/01/2021.


In **reply** to the observations and evidence submitted by the EUTM proprietor on 25/10/2021 and refiled on 16/12/2021 together with a request for continuation of proceedings, the applicant argues that the evidence does not show use of the EUTM as registered, nor in a form that constitutes an acceptable variation. Furthermore, the EUTM proprietor has failed to supply adequate evidence to demonstrate use for a significant range of the contested goods and services.

It emphasises that the EUTM effectively acts as a background for the LIDL word mark, enabling the latter to stand out. In its view, while the EUTM does not 'disappear', it is subsumed



into the sign  as a whole and will not be perceived as an independent mark by the relevant consumer. It argues that the sign, as used, is an unacceptable variation.




In the applicant's view, if use of the sign  were to qualify as an acceptable variation, the fact remains that the EUTM proprietor has failed to prove that the EUTM has been genuinely used in relation to a significant range of the contested goods and services. It argues that the evidence supports only a comparatively narrow range of goods and services at most. It submits, as 'Schedule 1', a list of the contested goods and services highlighting the goods that, in this scenario, should not be revoked.

In **reply** to the observations and evidence submitted by the EUTM proprietor on 30/11/2022, the applicant reiterates its previous arguments, that is, that there is no use of the EUTM or of an acceptable variation of it for a significant range of the contested goods and services. It criticises the newly submitted documents, pointing out that the evidence does not include documents confirming that actual sales have been made.

In **reply** to the observations and evidence submitted by the EUTM proprietor on 15/08/2023, the applicant argues that neither the decision of the Slovak Intellectual Property Office of 11/01/2023, nor the decision of the High Court of Justice of 19/04/2023 concerning, inter alia, a counterclaim for non-use of the UK trade mark registration No. 902 936 185, nor Mr D.U's witness statement (see the EUTM proprietor's Annexes XXII, XXIII and XXIV respectively) are relevant to the present case. As regards the aforementioned decisions, the applicant asserts that the Office is not bound by decisions of authorities in the EU Member States and, as regards specifically the decision of the Slovak Intellectual Property Office, that it incorrectly



interpreted the relevant EU case-law. It argues that the sign as used, that is,  is not an acceptable variation of the EUTM, because the EUTM will merely be perceived by the consumer as an empty box in the colours yellow, red and blue. Regarding the witness statement, the applicant argues that it makes very general assertions that the EUTM was used in the United Kingdom (UK), whilst the most essential information, namely to which mark the provided product listings and figures actually refer, cannot safely be concluded.

The EUTM proprietor's case

With its first observations filed on 25/10/2021, the EUTM proprietor submitted evidence of use, together with a request for continuation of proceedings, the EUTM proprietor resubmitted its evidence of use on 16/12/2021.


The EUTM proprietor contends that the parties are close competitors in the field of retail, inter alia, in the UK market. The EUTM proprietor explains that it has initiated an infringement action in the UK against the applicant who started using a logo in the UK in 2020 that is highly similar to the EUTM. Furthermore, the applicant has initiated, as a reaction, several revocation proceedings against the EUTM proprietor's rights, including the present proceedings. In this respect, the EUTM proprietor claims that the application for revocation has been filed in abuse of rights, pointing out that the applicant, as its close competitor, must have been aware of the use of the EUTM proprietor's logo and that the applicant has only filed the application for revocation to improve its position in the aforementioned infringement proceedings in the UK.

The EUTM proprietor claims that it has been using the EUTM for goods and services for decades in the EU. It states that it is part of the LIDL group, and further provides some background information on the group. It argues that the LIDL group is one of the largest retail companies in the world operating over 10 000 shops under the LIDL logos in more than 30 countries and has several online shops. It employs more than 100 000 people worldwide. The standard range of products in its shops includes more than 1 600 food products (including beverages) and near-food products (everyday products such as cosmetics, cleaning and washing products, batteries, disinfectants, paper goods, etc.). In addition, so the EUTM proprietor claims, non-food products are offered and sold by way of weekly sales campaigns with new offers twice a week, namely on Mondays and Thursdays. Many products in LIDL shops are produced by or exclusively for LIDL and are therefore branded as LIDL products. The EUTM proprietor adds that the well-known LIDL brand is also used in relation to a diverse range of additional non-retail services not directly linked to the supermarket business, such as travel services, photographic services, consumer consultancy, arranging of contracts for others for the provision of telecommunication services, etc.

With reference to Article 18(1)(a) EUTMR, which pertains to use in a form different from the one registered, the EUTM proprietor argues that the situation referred to in the 'Specsavers case' (18/07/2013, C-252/12, Specsavers, EU:C:2013:497) applies to the present case. It

argues that the figurative mark registered as EUTM No 6 460 588,  is a combination

of EUTM No 13 584 941 for the figurative mark  and the EUTM, .



It argues that the EUTM is distinctive at least to an average degree and that the sign  is placed within the central portion of the EUTM in such a way that its text does not obscure, interfere with or change any aspect of the distinctive character of the EUTM itself.

Therefore, in the sign as used, namely , all parts of the EUTM can be plainly seen and perceived without altering its inherent distinctive character.

The EUTM proprietor states that it has provided evidence that the EUTM has been and still is genuinely used for the contested goods and services.

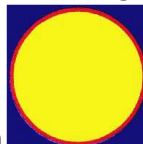
With its **second observations** (filed on 30/11/2022), the EUTM proprietor submitted additional evidence (listed and assessed below). It reiterates its argument based on the abovementioned 'Specsavers judgment' (18/07/2013, C-252/12, Specsavers, EU:C:2013:497). It adds that, contrary to the applicant's observations, the EUTM is a complex sign with a combination of three different geometric figures (square, circle and ring) and different colours (blue, yellow and red). In its opinion, the EUTM is not comparable to an extremely simple sign consisting only of one geometric figure without any colour. The EUTM proprietor argues that the EUTM is completely different from the logos of other supermarket

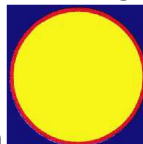


chains in the European Union (e.g.  and ) so that it serves to distinguish the goods and services offered, sold and provided under it from those of other undertakings in the same sector.

The EUTM proprietor argues that, contrary to the applicant's claims, it has submitted sufficient evidence of proof of genuine use of the EUTM within the relevant time period for the contested goods and services. It refers to the evidence submitted with its first observations and explains further how this evidence shows genuine use of the EUTM (in particular, why it can be concluded that certain evidence falls within the relevant period).

With its **third observations** (filed on 15/08/2023), the EUTM proprietor submits additional evidence (listed and assessed below). It refers to, and cites from (a partial translation of), a decision of the Slovak Intellectual Property Office of 11/01/2023 rendered in a parallel revocation action initiated by the applicant against the EUTM proprietor's international



registration covering Slovakia No 645 606 for the sign . It explains that genuine use of UK trade mark registration No 902 936 185, claimed to be the comparable UK trade mark based on the (pre-existing) EUTM, has been called into question before the High Court of Justice, Business and Property Courts of England & Wales. It responds to the applicant's arguments with respect to genuine use of the EUTM for several of the contested goods and services.

With its **fourth and final observations** (filed on 11/03/2024), the EUTM proprietor submits additional evidence (listed and assessed below). It stresses the relevance of the decision of the Slovak Intellectual Property Office of 11/01/2023, claiming that, inter alia, as it concerns a trade mark that is identical to the EUTM, it gives a strong indication of how the EUTM is perceived in Slovakia. The EUTM proprietor states that the position of the Slovak Intellectual Property Office has been further confirmed by a decision of the Czech Intellectual Property Office of 19/12/2023. It cites from (a partial translation of) the relevant decision.

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 European 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 / VITAFRUT*, 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 13/12/2004. The revocation request was filed on 19/01/2021. 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 19/01/2016 until 18/01/2021 inclusive**, for the contested goods and services listed in the section 'Reasons' above.

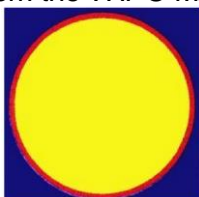
The EUTM proprietor submitted evidence as proof of use on 16/12/2021 (previously submitted in part on 25/10/2021), 30/11/2022, 15/08/2023 and 11/03/2024.

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.

The evidence to be taken into account is the following.

Evidence submitted on 16/12/2021 (previously submitted in part on 25/10/2021)

- Extract from the WIPO Madrid Monitor showing international registration No 645 606 for



the mark covering, inter alia, several EU Member States, such as the Czech Republic and Slovakia (Annex I).

- Screenshots showing use of the LIDL logo in and on shops, on online shops, on LIDL websites and on social media, as well as pictures of articles showing the LIDL logo and pictures showing their presentation in LIDL shops, and a copy of an advertising leaflet from Ireland in 2017 (Annexes II and III).
- Screenshots from www.lidl.de and www.lidl.fr (Annex IV).
- Wikipedia page on LIDL, undated, but indicating that it was last edited on 02/10/2021 (Annex V).
- Affidavits by Mr T.M., the EUTM proprietor's Head of Branding and Packaging Food & Near Food (Annex VI) (**Affidavit I**), and by Mr M.A., the EUTM proprietor's Head of Marketing INT (Annex VII) (**Affidavit II**), with English translations.

These affidavits are dated 25/10/2021 and have a similar content. They explain, inter alia, that the LIDL group has been active on the German market since 1973, on the French market since 1989, on the Spanish market since 1994, on the Polish market since 2002, on the Czech market since 2003 and on the Hungarian and Slovakian markets since 2004. They state that the LIDL group has approximately 3 200 shops throughout Germany, approximately 1 500 shops throughout France, over 140 shops in Slovakia, over 750 shops throughout Poland, approximately 630 shops throughout Spain, over 150 shops in Hungary and over 250 shops in the Czech Republic. Affidavit I relates to 'food and near-food' goods, whilst Affidavit II relates to 'non-food' goods.

They are submitted together with:

- screenshots of LIDL shops and online shops in several EU Member States, including Germany, Spain, France, Poland and Slovakia, for example:



- screenshots from www.lidl.de, each page consistently depicting the sign



, and showing pictures of products depicting several trade mark signs;

- consolidated financial statements, partly redacted, for several financial years of two companies explained to be from the LIDL group, namely Lidl Dienstleistung GmbH & Co. KG and Lidl Digital International GmbH & Co. KG, mainly redacted;



- pictures of products depicting the sign as Annexes 2 a-g;
- copies of advertising leaflets;

- screenshots from www.lidl.de, www.lidl.fr and www.lidl.pl obtained through the WayBack Machine from 2015 to 2020 and copies of advertising leaflets from Ireland from 2015 to 2020 (Annex VIII).
- An affidavit by Mr C.L. (**Affidavit III**), the EUTM proprietor's managing director, with an English translation (Annex IX), together with a Category Management country overview for the UK which is explained to be prepared for Lidl Great Britain Limited.

The affidavit explains that the EUTM proprietor has been providing market research services, among others, to the independent LIDL national companies for years, and conducts market research (e.g. through statistical surveys such as household panels, consumer surveys, press evaluations, market observations, etc.) and prepares reports (the 'CM-Country Overviews') for the independent LIDL country companies.

- An affidavit by Mr M.A. (**Affidavit IV**), the EUTM proprietor's Head of Marketing, with an English translation (Annex X), together with extracts from basic concepts for marketing campaigns and overviews of countries that ordered these campaigns.

The affidavit explains that the EUTM proprietor has been and continues to provide marketing and advertising services to the independent LIDL national companies for years. Among other things, it creates the basic concept for their advertising campaigns, which are then adopted, supplemented and rolled out in the market by the independent national companies.

- Screenshots of www.lidl-kochen.de claimed to show, by way of example, the nature, time, place and extent of use of the EUTM in relation to consumer consultancy (Annex XI).
- Screenshots of the corporate pages on the websites of www.lidl.de, www.lidl.fr, www.lidl.sk, www.lidl.pl, www.lidl.es, www.lidl.hu and www.lidl.cz (Annex XII).
- Press articles from Germany and France related to the LIDL group (Annex XIII).

Evidence submitted on 30/11/2022


- An affidavit by Mr M.H., head of the IT Checkout Systems Department of Lidl Dienstleistung GmbH & Co. KG, with an English translation (Annex XIV) (**Affidavit V**), together with copies of cash receipts from LIDL shops in Germany showing sales, as well as a table with product reference numbers (IAN numbers and NAN numbers), providing dates of cash receipts and addresses of LIDL shops, as well as screenshots from www.lidl.de showing addresses of LIDL shops (Annex XV).
- Documents (Annex XVI) explained to illustrate use for the contested goods in Classes 3, 5, 21, 29, 30 and 32 in the Czech Republic.
- Affidavits by Ms J.J., controlling director of LIDL Polska sp. z o.o., by Mr R.M., finance director of LIDL Polska sp. z o.o., and by Mr R.G., sales director of LIDL Polska sp. z o.o. respectively, with English translations (**Affidavits VI, VII and VIII**) (Annexes XVII,

XVIII and XIX), together with pictures of products depicting the sign  , referred


to in these affidavits (Annex XX) concerning use of the EUTM in Poland, with English translations.


- A table intended to refute the applicant's claim that the EUTM proprietor had not provided evidence of use for some goods and services. It refers to submitted evidence of use for goods and services that are 'terms for which according to the applicant's allegations, no use documents have been submitted' (Annex XXI).

Evidence submitted on 15/08/2023

- A copy of the decision of the Slovak Intellectual Property Office of 11/01/2023 rendered in a revocation action against the EUTM proprietor's international registration No 645 606 covering (inter alia) Slovakia (Annex XXII).
- A copy of the decision of the High Court of Justice, Business and Property Courts of England & Wales of 19/04/2023 (Annex XXIII).
- A witness statement by Mr D.U., Director of Legal and Compliance for Lidl Great Britain Limited (**Lidl GB**), United Kingdom (Annex XXIV), referring to Exhibits DU-15, DU-17 to DU-38.
 - A table, exported from company records, showing specific numbers of shops in Great Britain (Exhibit DU-15).
 - Lists of products depicting the LIDL logo and products depicting third-party brands (Exhibits DU-17 to DU-21), and of newspapers and magazines sold by Lidl GB (Exhibit DU-22).
 - Copies of Lidl GB's company accounts, exports of financial data and of sales data exported from Lidl GB's accounting systems (Exhibits DU-23 to DU-25).
 - Images from the iPhone App store, including screenshots obtained through the Wayback Machine, showing, inter alia, LIDL leaflets (Exhibit DU-26).
 - Screenshots from (subpages of) www.lidl.co.uk (Exhibit DU-27 and DU-32).
 - Screenshots from websites showing a range of products, such as 'Lidl Alesto Broth Mix', 'Lidl DIY Tie Dye', 'Lidl Silvercrest Mini Fridge' and 'Lidl Woodcote 12 Large Free Range Eggs', several of which depict the sign  (Exhibit DU-28).
 - Product label designs (Exhibit DU-29).
 - Screenshots from Lidl GB's Instagram and YouTube accounts (Exhibits DU-30 and DU-31).
 - Corporate press releases (Exhibit DU-33).
 - Information relating to partnerships and academies explained to be either launched or supported prior to 2020 (Exhibit DU-34).
 - Copies of Lidl GB's company policies (Exhibit DU-35).
 - Examples of online information, including third-party press coverage of Lidl GB's business, supermarket services, and other services (Exhibits DU-36 and DU-37).
 - A summary listing the documents submitted (Exhibit DU-38).

The statement explains, inter alia, that Lidl Netherlands and Lidl Ireland have released 'animated images ('GIFs') online in the style of emojis, which show people wearing Lidl uniforms reacting or emoting in various ways (such as, for example, giving a thumbs-

up sign or shaking their head)' claimed to feature the sign  as the background to every image (see more detailed information in the assessment below),

and refers to a hyperlink. It also argues that LIDL has used the sign  in connection with charity and sports events, and, making reference to Exhibit DU-37, refers explicitly to Lidl GB's 'Lidl Football Zones' (Exhibit DU-37) (see more detailed information in the assessment below).

- An extract of UK trade mark registration No 902 936 185 (Annex XXV).

Evidence submitted on 11/03/2024

- A copy of the decision of the Czech Intellectual Property Office of 19/12/2023 rendered in a revocation action against the EUTM proprietor's international registration No 645 606 covering (inter alia) the Czech Republic (Annex XXVI).
- A declaration by KOLOS s.r.o. dated 02/10/2023, providing the number of LIDL leaflets delivered to household mailboxes in the Slovak Republic per year from 2016 to 2022, with an English translation (Annex XXVII).
- Documents in Slovak, namely:
 - tables printed on the letterhead of Slovenská Grafia a.s. providing a summary overview of the number of LIDL leaflet printing orders between 2015 and 2021 (Annex XXVIII);
 - LIDL leaflet printing orders by Lidl Slovenská Republica v.o.s. to Slovenská Grafia a.s. between 2018 and 2019 (Annex XXIX);
 - documents explained to be orders by Lidl Slovenská Republica v.o.s. to KOLOS s.r.o., and invoices for leaflet distribution for 2016 to 2020 and market research dated 2017, with English translations (Annexes XXX, XXXI, XXXII, XXXIII and XXXIV).

PRELIMINARY REMARKS

On the admissibility of the cancellation application

Article 63(1)(a) EUTMR grants all natural and legal persons the right to file an application for revocation on the basis of Article 58 EUTMR, without making that right subject to the balancing of the applicant's possible personal interests in such a declaration with the general interests safeguarded by that provision. In the present case, the EUTM proprietor did not provide any evidence of abuse of law from the part of the applicant which could call upon application of higher principles of law and question the admissibility of the application for revocation.

It has to be taken into account that there is an inherent risk when owning a trade mark of being engaged in legal proceedings, whether opposition, cancellation or revocation proceedings or even infringement proceedings. A large trade mark portfolio inevitably entails a higher risk of being confronted with revocation requests.

The fact that a party starts several legal proceedings against the proprietor of various trade marks may not lead to the assumption that these proceedings were started as an abuse of law. This applies to the revocation actions brought by the applicant against (inter alia) the EUTM proprietor's comparable UK trade mark based on the (pre-existing) EUTM.

The Cancellation Division thus considers that the current request for revocation was not filed abusively, but as a legitimate means of defence (and in the public interest), as expressed in recital 24 EUTMR.

On the previous national decisions referred to by the EUTM proprietor

The EUTM proprietor refers to previous national decisions to support its arguments, namely to previous decisions of the Czech and Slovak Intellectual Property Offices and of the High Court of Justice. However, decisions of national courts and national offices regarding conflicts between identical or similar trade marks at national level have no binding effect on the Office since the European Union trade mark regime is an autonomous system which applies independently of any national system (13/09/2010, T-292/08, OFTEN / OLTEN et al., EU:T:2010:399).

Even though previous national decisions are not binding, their reasoning and outcome should be duly considered, particularly when the decision has been taken in the Member State that is relevant to the proceedings.

In the present case, the previous national decisions are relevant, at least to the extent that they deal with the same sign as the EUTM and relate to goods and services that are, at least in part, identical to the contested goods and services.

On the additional evidence

On 30/11/2022, 15/08/2023 and 11/03/2024, after expiry of the time limit, the EUTM proprietor submitted additional 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 additional.

The additional evidence is likely to be relevant to the outcome of the proceedings and the stage at which it was submitted does not preclude the evidence from being taken into account.

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-415/09, FISHBONE / FISHBONE Beachwear (fig.), EU:T:2011:550, § 30 and 33, upheld by judgment 18/07/2013, C-621/11 P, FISHBONE / FISHBONE Beachwear (fig.), EU:C:2013:484, § 36).

For the above reasons, and considering that the applicant was also given the opportunity to respond to all the additional evidence, the Cancellation Division therefore decides, in the

exercise of its discretion pursuant to Article 95(2) EUTMR, to take into account the additional evidence submitted on 30/11/2022, 15/08/2023 and 11/03/2024.

On the affidavits and witness statement

As far as Affidavits I-VIII, as well as Mr D.U.'s witness statement (Annex XXIV) are 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. As far as the probative value of this kind of evidence is concerned, statements drawn up by the interested parties themselves or their employees are generally given less weight than independent evidence. This is because the 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 declaration are supported by the other items of evidence.

On hyperlinks as a means of evidence

Mr D.U. of Lidl GB referred in his witness statement (Annex XXIV) to a suite of several emoji-style animated gif images that are available online, but only provided a direct link to the website.

The Cancellation Division can only rely on the evidence submitted by the parties, and a mere indication of a website through a hyperlink does not constitute evidence. It is clear that, by its very nature, a hyperlink to a website does not allow for the content and data to which it is meant to refer to be copied and transmitted as a document so that the other party could access that information. In addition, websites are easily updated, and most do not provide any archive of previously displayed material or display records that would enable members of the public to establish with precision when any particular piece of content was published. Therefore, the authenticity, reliability and stability of the evidence cannot be sufficiently guaranteed merely by submitting a hyperlink to a website.

Online evidence is admissible only in a limited number of cases, as provided in Article 7(3) EUTMDR, and in particular in relation to the substantiation of earlier national rights and proving the content of the national law pursuant to Article 8(4) EUTMR. In all other instances, such as in the present case, the evidence, even if available online, should be provided to the Office in the form of materials such as printouts/screenshots, recorded on a digital carrier or in another appropriate form.

Furthermore, the onus of providing proof of use of the mark is on the trade mark proprietor and not on the Office (or the other party). Therefore, a mere indication of the website where the Office can find further information is insufficient, as this does not provide the Office with sufficient indications as to the place, nature, time and/or extent of use of the mark. In addition,

it is not up to the Office decision-taking bodies to verify or to try and clarify the information submitted by accessing the respective websites with a view to verifying the claims put forward (04/10/2018, T-820/17, Alfrisa (fig.) / Frinsa F (fig.), EU:T:2018:647, § 61-63).

Therefore, the submission of direct links to websites cannot be considered as valid evidence and cannot be taken into account.

ASSESSMENT OF GENUINE USE – FACTORS

General considerations

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 proof of use requirements are cumulative (05/10/2010, T-92/09, STRATEGI / Stratégies, 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 regarding 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 (17/02/2011, T-324/09, Friboi (fig.) / FRIBO et al., EU:T:2011:47, § 31).

Use of the EUTM as registered has been subject to extensive debate in the present proceedings. Considering that the proof of use requirements are cumulative (05/10/2010, T-92/09, STRATEGI / Stratégies, EU:T:2010:424, § 43), there is no need to assess the other requirements if there has been no ‘use of the EUTM as registered’, or as ‘an acceptable variation’. Therefore, whilst generally the requirements of place and time of use are examined first, the Cancellation Division considers it appropriate to focus the assessment of the evidence first on the requirements of use of the mark as registered or in an acceptable variation.


Nature of use: use of the mark as registered

‘Nature of use’ in the context of Article 10(3) EUTMDR 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.

In addition to depicting signs that are irrelevant to the present proceedings because they do

not depict any of the elements of the EUTM (such as  and )



the evidence exclusively relates to the sign  (the LIDL logo), except for two items. Since these two exceptions have no material bearing on the outcome of the case for reasons that will become apparent below (see ‘extent of use and use in relation to the registered goods and services’), it is assessed whether use of the LIDL logo equates to use of the EUTM as registered, or of a variation of it which, pursuant to Article 18(1)(a) EUTMR, does not alter the distinctive character of the contested EUTM.

The evidence shows use of the mark under Article 18 EUTMR pursuant to 18/04/2013, C-12/12, Colloseum Holding, EU:C:2013:253, (**'the Colloseum judgment'**), which stated:

§ 35. (...) a registered trade mark that is **used only** as part of a composite mark or **in conjunction with another mark** must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term 'genuine use' within the meaning of Article 15(1).

§ 36. (...) the condition of genuine use of a trade mark, within the meaning of Article 15(1) of Regulation No 40/94, may be satisfied where a registered trade mark, which has become distinctive as a result of the use of another composite mark of which it constitutes one of the elements, is used only through that other composite mark, or where it is **used only in conjunction with another mark, and the combination of those two marks is, furthermore, itself registered as a trade mark.**


The Colloseum judgment provides two scenarios. Applied to the present case, the Cancellation Division would have to assess either whether the EUTM has become distinctive as a result of the use of the LIDL logo (which qualifies as the required composite mark of which the EUTM constitutes one of the elements) (the first scenario) or, once it is ascertained that

the EUTM is used in conjunction with the mark , whether the combination of these two marks itself is registered as a trade mark (the second scenario).

In the present case, the second scenario applies in full. The evidence proves use of the EUTM



'in conjunction with another mark' (see § 35 above), namely EUTM No 13 584 941

for the sign , while the 'combination of those two marks is, furthermore, itself registered as a trade mark' (see § 36 above), namely EUTM No 6 460 588 for the sign



. This in and of itself is sufficient for the EUTM to comply with the requirements of Article 18 EUTMR. As the second scenario is fully applicable, there is no need to verify whether the first scenario applies. It can therefore be left open whether the EUTM has become distinctive as a result of the use of the LIDL logo.

Trade marks are often used together with other marks, for example, to indicate a house mark and a sub-brand. This constitutes use of a mark in the same form as registered, in parallel with, but independently from, other marks (simultaneous use of independent marks). In the present case, much of the evidence does not only show the LIDL logo, but very often the LIDL logo in combination with product brands. In fact, the LIDL logo is often depicted on the back side of the good or its packaging, whilst the other brand is on its front side. This shows simultaneous use of the LIDL logo and the other mark, independently from each other. For example:

				
the LIDL logo in combination with 'W5'	the LIDL logo in combination with 'Freshona'	the LIDL logo in combination with 'Cien'	the LIDL logo in combination with 'Siempre'	the LIDL logo in combination with 'Bon Gelati'

Therefore, the evidence shows use of the EUTM – very often simultaneously with another mark – under Article 18 EUTMR.

Nature of use: use as a trade mark

Having established that use of the LIDL logo shows use of the EUTM under Article 18 EUTMR, it must be assessed whether the 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.

The evidence filed by the EUTM proprietor shows that the EUTM has been used as a trade mark to identify the EUTM proprietor's goods and services. The EUTM was displayed, inter alia, in the advertising leaflets submitted along with and referred to in Affidavits I and II and the advertising leaflets from Ireland from 2015 to 2020 submitted as part of Annex VIII (jointly referred to as '**the advertising leaflets**'), in the pictures of the products depicting the LIDL logo submitted along with and referred to in Affidavits I and II (as Annexes 2 a-g) and Affidavits



VI, VII and VIII, such as and ('**the product pictures**') and in the screenshots from all the different websites, including www.lidl.de, www.lidl.fr and www.lidl.pl (whether or not obtained through the WayBack Machine) in relation to some of the contested goods and services (as will be explained below).

Consequently, there is a sufficient link to prove that certain goods and services concerned are provided under the EUTM to indicate the commercial origin of the same.

Time and place of use

The evidence must show genuine use of the contested EUTM within the relevant period and in the European Union.

Most of the evidence, including a sizeable part of the advertising leaflets and the screenshots from the different websites (such as the screenshots submitted as Annex VIII) is dated within the relevant period and relates to several EU Member States (they are in different EU languages and show addresses in different EU Member States), including Germany, Spain, France, Poland and Slovakia.

Therefore, the evidence of use contains sufficient indications concerning the time of use and relevant territory of use.

Extent of use and use in relation to the registered goods and services

Concerning 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 (08/07/2004, T-334/01, HIPOVITON / HIPPOVIT, EU:T:2004:223, § 35).

The Court has held that 'use 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).

It is not possible to determine a priori, and in the abstract, what quantitative threshold should be chosen in order to determine whether use is genuine or not. A *de minimis* rule cannot therefore be laid down. When it serves a real commercial purpose, even minimal use of the mark can be sufficient to establish genuine use (27/01/2004, C-259/02, Laboratoire de la mer, EU:C:2004:50, § 25, 27).

The assessment of genuine use entails 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 nature of the services and the structure of the relevant market (30/04/2008, T-131/06, SONIA SONIA RYKIEL (fig.) / SONIA, EU:T:2008:135, § 53).

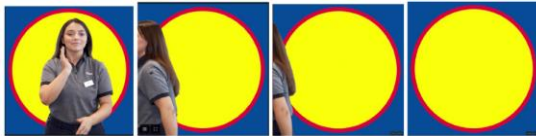
Under certain circumstances, even circumstantial evidence such as catalogues featuring the trade mark, while not providing direct information on turnover, can also be sufficient for proving extent of use in an overall assessment (08/07/2010, T-30/09, Peerstorm / PETER STORM, EU:T:2010:298, § 42 et seq.).

The condition relating to genuine use of the mark requires that the mark be used publicly and outwardly for the purpose of ensuring an outlet for the goods or services that it represents (12/03/2003, T-174/01, Silk Cocoon / COCOON, EU:T:2003:68, § 39).

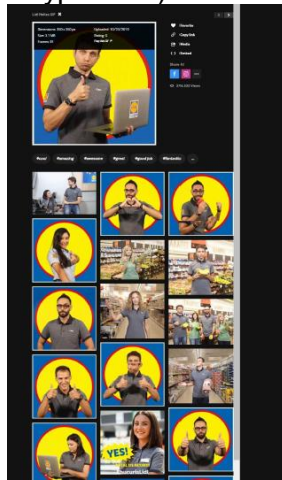
Article 58(1)(a) EUTMR and Article 10(3) EUTMDR require that the EUTM proprietor proves genuine use for the contested goods and services for which the European Union trade mark is registered.

As explained in the 'Nature of use: use of the mark as registered' section above, there are two occasions where the EUTM is depicted exactly as registered. They are found in Mr D.U.'s witness statement (Annex XXIV) where he refers to the following.

- Lidl Netherlands and Lidl Ireland releasing 'animated images ('GIFs') online in the style of emojis that show people wearing LIDL uniforms reacting or emoting in various ways (such as for example, giving a thumbs-up sign or shaking their head)' claimed to feature the EUTM as the background to every image. The example given is the following:



. There is also a hyperlink (however, see the preliminary remark on the use of hyperlinks). The screenshots from social media (Annex



III) also illustrate these emojis:



- Use of the sign in connection with charity and sports events, explicitly pointing to Lidl GB's 'Lidl Football Zones'. The witness statement states that use of this sign is shown in connection with football events that took place throughout the UK between March 2017 and August 2017. It explains that these sessions, run by Lidl GB, provide football coaching for children through partnerships with schools and community clubs, and that some of the Lidl Football Zones use props that are decorated with this sign, such as trolleys in the 'Trolley Chip Challenge'.

These two exceptions do **not** lead to the conclusion that the EUTM has been genuinely **used for the relevant goods and services**. The animated images are not used in relation to goods and services and there is no evidence (the hyperlink cannot be considered valid evidence; see the preliminary remark above) corroborating Mr D.U.'s statements that (i) these emojis were/are released on the 'gif' resource website 'giphy' from which they can be downloaded and used by people, (ii) there are 112 of these animations that were uploaded between 22/03/2019 and 07/01/2021, or (iii) these emojis have been widely shared, and viewed thousands, hundreds of thousands or even millions of times, do not prove use in relation to goods or services. As regards the 'Lidl Football Zones', Mr D.U. explains that the sign



is used on props used in the 'Lidl Football Zones'. However, the pictures in



Exhibit DU-37, clearly show that the aforementioned sign is **not**

used in relation to goods or services. It is affixed to shopping carts and depicts numbers that presumably stand for the points scored when a ball is kicked into them.

Even if it were considered that this evidence proves use of the EUTM in relation to goods and services, then it still fails to show that the goods/services for which the EUTM has been used fall **within any of the categories** for which the EUTM is registered. The EUTM does not cover any (goods or) services related to electronic communication, nor any services related to charity or sports events. Therefore, insofar as the evidence relates to these two exceptions, it is without material bearing on the outcome of the case.

As to the evidence that refers to the Lidl logo, it is true that some evidence is not conclusive in showing regular transactions for the contested goods and services throughout the relevant period. There are, for example, Affidavits I-VIII and the written statement of Mr D.U. (Annex XXIV), but these come from the sphere of the EUTM proprietor itself. There are sales and turnover numbers and consolidated financial statements, but these do not provide details on the exact nature of the goods and services rendered. Furthermore, as the applicant points out, the EUTM proprietor has not submitted any invoices confirming actual sales. However, in its assessment, the Cancellation Division weighs up the specific market in which the EUTM proprietor operates. The EUTM proprietor is a large supermarket chain, with many retail shops, also providing some services (see below). It is understandable for a company in the supermarket sector not to submit invoices to prove actual sales, as it is not common for supermarkets to emit invoices to their clients; instead, their customers receive cash receipts proving their purchases.

Even though the EUTM proprietor has submitted some cash receipts from LIDL shops in Germany, it can be inferred, based on the evidence submitted, that the EUTM proprietor decided to rely to a large extent on leaflets, in particular the advertising leaflets, to prove genuine use of the EUTM.

As explained above, evidence of use may be of an indirect/circumstantial nature, and this indirect evidence can play a decisive role in the overall assessment of the evidence, in line with the Peerstorm judgment (08/07/2010, T-30/09, Peerstorm / PETER STORM, EU:T:2010:298, § 42 et seq.). The Cancellation Division considers that the advertising leaflets, while not providing direct information on turnover, provide, in and of themselves, sufficient indications with regard to the extent of the EUTM's use for some of the contested goods and services, provided they are systematically, that is, not just once or sporadically, referred to therein (see below). The number of leaflets submitted is substantial. They are dated throughout a significant part of the relevant period and have been – as is proven by the languages used and the addresses mentioned therein – distributed in several Member States, including Germany, Spain, France and Poland, in respect of several goods and services. They are clearly intended for end consumers and contain specific information concerning the goods and services offered under the EUTM and their prices.

Moreover, if the advertising leaflets are not sufficient in and of themselves to prove a sufficient extent (for the reasons given in the previous paragraph), there is ample other evidence corroborating the widespread use of the EUTM. Furthermore, though it is admitted that the substantial number of shops referred to in several of the affidavits (attesting to LIDL having, inter alia, approximately 3 200 shops in Germany alone) is not corroborated by any other evidence, there can be no doubt that the LIDL group has at least several hundred LIDL shops in the EU Member States. This can be safely inferred from the information in the evidence on file. There is sufficient evidence attesting to the presence of LIDL shops in several Member States, including the Czech Republic, France, Germany, Ireland, Poland, Slovakia, Spain and the UK (prior to Brexit). There is, for example, also the fact that LIDL was elected 'Number 1 Supermarket in Ireland for Customer Experience in 2018' (



). Furthermore, there are also the timelines included in the corporate pages on the websites of www.lidl.de, www.lidl.fr, www.lidl.sk, www.lidl.pl, www.lidl.es, www.lidl.hu and www.lidl.cz (Annex XII), which explain, inter alia, that the Lidl group had more than 450 supermarkets in Germany in 1988 (see the corporate page of www.lidl.de) and that in Spain the 300th store was opened in 2000 and the 400th store in 2005 (see the corporate page of www.lidl.es).

This supports the conclusion, in the context of a global assessment, that the extent of use of the LIDL logo was fairly significant. In that regard, it must also be remembered that the purpose of the requirement to prove genuine use of the contested mark is not to assess the commercial success of the undertaking in question.

By submitting the advertising leaflets, the EUTM proprietor furnished sufficient information on the place, the duration, the nature and the extent of use of the EUTM, making it possible to rule out token use for the sole purpose of preserving the rights conferred by the EUTM. Therefore, the advertising leaflets are considered sufficient in and of themselves to prove use to a sufficient extent for some of the contested goods and services. The remaining evidence also needs to be taken into account to ascertain whether the owner has seriously tried to acquire a commercial position in the relevant market for the remaining goods and services.

As explained above (see the section 'Nature: use as a trade mark'), the Cancellation Division considers there to be proof of use each time a product (or service) depicts the LIDL logo. No matter how small the LIDL logo is that is affixed to the goods (or their packaging), it is considered to be used in such a way that a link is established between the EUTM and the goods and services.

However, very often, products are depicted that show brands that are different from the EUTM, without showing the EUTM at all. This is the case for instance for several pictures in the



advertising leaflets that only show a front view of the goods (e.g. [lidlours](#) and [Philips](#)). In these cases, where the advertising leaflets do not show the LIDL logo on the goods and where, upon cross-referencing the advertising leaflets with the other evidence, it cannot be established that the LIDL logo is indeed depicted on, or used in relation to, these goods, the Cancellation Division does not assume of its own motion that the goods (or their packaging) depict the LIDL logo (even if in reality they may). In other words, co-branding is not automatically assumed; it is for the EUTM proprietor to show it for each product individually.

This leads to the following conclusions.

- If a specific good clearly depicts a brand other than the LIDL logo or does not depict a (product) brand, use of the LIDL logo will be established only if the Lidl logo itself is also depicted or if there is other evidence corroborating that the LIDL logo is normally affixed to such a good. For example, there is no reason to assume that the LIDL logo is depicted on, or used in relation to, inter alia, the following goods which the LIDL group offered

online: Philips telephones, Fa shower gels





- Even though there is evidence corroborating that a certain product brand is used simultaneously with the LIDL logo on a specific good, use of the LIDL logo will not be assumed for any other good that also depicts that product brand without simultaneously depicting the LIDL logo. For example, there is no reason to assume that the LIDL logo is depicted on, or used in relation to, the following goods which show the product brand

'lupilu' but do not simultaneously show the Lidl logo, merely because the evidence also includes proof of co-branding of the product brand 'lupilu' with the LIDL



logo on another product,

The EUTM is registered for the goods and services in Classes 1, 3, 5, 8, 11, 16, 18, 21, 28, 29, 30, 31, 32, 33, 35, 36, 39, 41 and 42 listed in the 'Reasons' section above. However, the evidence filed by the EUTM proprietor does not show genuine use of the EUTM for all the goods and services for which it is registered, as will be explained below.

Before getting into the assessment of the evidence in relation to each and every contested good and service, here are some key principles, as well as additional info on the approach taken by the Cancellation Division.

- *On the 'Vogue' and 'efbet' judgments*

The importance of applying the **Vogue** judgment (18/01/2011, T-382/08, VOGUE / VOGUE portugal, EU:T:2011:9, § 22) in combination with the **efbet** judgment (01/02/2023, T-772/21, efbet (fig.), EU:T:2023:36, § 28-30) in the present case cannot be overemphasised. There is, first, the principle that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned. Secondly, there is the principle that it is the proprietor of the mark's responsibility to provide proof of genuine use in revocation proceedings and who should therefore clearly indicate, in response to the request for proof of use, the goods and/or services for which it has provided evidence before the Cancellation Division to show genuine use of the contested mark. As regards the goods and/or services not indicated by the proprietor of the mark, it is not the task of the Cancellation Division to examine of its own motion, within all the evidence provided, whether that evidence could establish genuine use. Essentially, the Office is prevented from making the case for one or other party and cannot take the place of the EUTM proprietor, or its counsel, by itself trying to

locate and identify among the documents on file the information that it might regard as supporting proof of use. This means that the Office should not seek to improve the presentation of any party's evidence.

- *On the Aladin judgment*

According to Article 58(2) EUTMR, where there are grounds for revocation in respect of only some of the goods or services for which the contested mark is registered, the proprietor's rights will be revoked for those goods and services only.

According to case-law, when applying the abovementioned provision, the following should be considered:

... if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of subcategories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the subcategory or subcategories to which the goods or services for which the trade mark has actually been used belong. However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition.

Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the earlier trade mark being stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. The Court observes in that regard that in practice it is impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods concerned by the registration. Consequently, the concept of 'part of the goods or services' cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or subcategories.

Furthermore, allowing an earlier trade mark to be deemed to be registered only in relation to the part of the goods or services in respect of which genuine use has been established ... must be reconciled with the legitimate interest of the proprietor in being able in the future to extend his range of goods or services, within the confines of the terms describing the goods or services for which the trade mark was registered, by using the protection which registration of the trade mark confers on him.

(14/07/2005, T-126/03, ALADIN / ALADDIN, EU:T:2005:288)

Since consumers are searching primarily for a product or service to meet their specific needs, the purpose of the product or service in question is vital for determining their choice. Consequently, it is of fundamental importance when defining a subcategory of goods or services (13/02/2007, T-256/04, RESPICUR / RESPICORT, EU:T:2007:46, § 29).

- On the way the evidence is displayed and the pictures are shown

The evidence submitted by the EUTM proprietor only shows genuine use for some of the goods and services as listed below. In the tables that follow, the contested goods and services are referred to by means of simplified overviews, which contain (i) an indication of the contested good/service, (ii) one (or more) thumbnail(s), that is, small picture(s) of the contested good/service, and (iii) the indication of the piece of evidence where the picture can be found with its page number as was given by the EUTM proprietor, for instance, as follows:

disinfectants		
disinfectant sprays		Annexure 2 b – pages 813 and 814

(¹).

The Cancellation Division is aware that, even though it specifically relies on the advertising leaflets to establish a sufficient extent of use in relation to the goods and services, most of the thumbnails have not been copied from the advertising leaflets themselves, but rather from the product pictures. This was necessary. Advertising leaflets understandably need to depict the promoted goods and services in a recognisable manner. By showing the part of the products' packaging that shows a



picture of the product (e.g.



) (or by showing the products themselves (e.g.

), consumers' attention is attracted to what is promoted. This would not be the case if the advertising leaflets merely showed the part of the packaging that depicts the LIDL logo, as this is normally affixed on the part of the packaging that contains additional information (such as the manufacturer's details, barcodes, ingredients, instructions, etc.; usually on the back or on one of the side panels of the packaging) and does not show the product. Some thumbnails only show the part of (the packaging of) the goods where the LIDL logo is normally affixed, while some also show the front side, for instance, to give a clearer impression of the goods in question. Occasionally, only a picture of the front is given, but in each case, even though this picture does not show

(¹) The Cancellation Division chose to show the goods and services concerned in the tables below to facilitate their verification, but also to keep the document sufficiently lightweight and easy to share by means of thumbnails rather than by expanded images. As the thumbnails are often too small to clearly show the depiction of the LIDL logo on the goods, the piece of evidence where the picture can be found is also indicated, inter alia (and mainly), for the parties to be able to identify what has been taken into account.

the Lidl logo, the Cancellation Division has verified – by means of cross-referencing with other evidence – whether the Lidl logo was affixed on the goods.

The tables evidently do not give an exhaustive overview of all the products bearing the EUTM. They merely serve to ascertain whether genuine use has been shown for the contested goods and services, as opposed to featuring all the goods in the assortment of the Lidl group.

- *On the use of the terms ‘in particular’ and ‘namely’*

An interpretation of the wording of the list of contested goods and services is required, as they include the terms ‘in particular’ and ‘namely’. The term ‘in particular’ indicates that the specific goods and services are only examples of items included in the category and that protection is not restricted to them. In other words, it introduces a non-exhaustive list of examples (09/04/2003, T-224/01, NU-TRIDE / TUFFTRIDE, EU:T:2003:107). In contrast, the term ‘namely’ shows the relationship of individual goods and services to a broader category, is exclusive and restricts the scope of protection only to the goods specifically listed.

Goods in Class 1

The contested goods in Class 1 are *sweeteners*.

The EUTM proprietor has submitted evidence proving use for sweeteners, such as



(Annex 2 b – pages 775 and 778 and Annex 2 e – page 2274 respectively). However, the goods for which use is shown do not belong to Class 1; they are not sweeteners for industrial purposes (i.e. for the food industry), that is, products to be used by the industry to make end products. Instead, they are sweeteners belonging to Class 30 (not listed in the EUTM's Class 30), that is, sweeteners for culinary purposes, being end products sold to consumers. Therefore, the evidence does not show use of the EUTM for *sweeteners* (belonging to Class 1).

Goods in Class 3

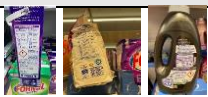



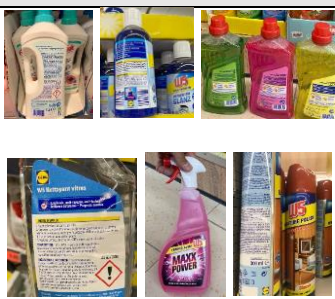
The contested goods in Class 3 are:

Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, cosmetics, hair lotions; dentifrices; disinfectants; deodorants and deodorising skin sprays.

Even though the following catalogue samples may not show all the contested goods depicted below,

		
<p>Annex 4 a – page 3572</p>	<p>Annex 4 a – page 3722</p>	<p>Annex 4 b – page 4009</p>


the evidence shows use to a sufficient extent of the EUTM for the following goods:

<p>bleaching preparations and other substances for laundry use</p>		
<p>bleaching preparations and other substances for laundry use</p>		<p>Annex 2 a – pages 177, 179 and 181</p>
<p>pre-wash spray</p>		<p>Annex 2 b – page 795</p>
<p>fabric softener</p>		<p>Annex 2 e – page 2288</p>
<p>sanitary preparations for laundry</p>		<p>Annex 2 c – page 1571</p>
<p>cleaning, polishing, scouring and abrasive preparations</p>		
<p>cleaning, polishing, scouring and abrasive preparations</p>		<p>Annex 2 a – pages 175 and 183</p> <p>Annex 2 b – pages 793 and 811</p> <p>Annex 2 c – page 1533</p> <p>Annex 2 d – page 1568 and 1609</p>

		Annex 2 e – page 2289 Annex 2 f – page 2547
soaps		
soaps		Annex 2 c – pages 1561 and 1572
cosmetics, hair lotions		
cosmetics, such as		
<ul style="list-style-type: none"> cosmetic oils 		Annex 2 e – page 2284
<ul style="list-style-type: none"> facial masks 		Annex 2 d – page 1556
hair lotions		Annex 2 b – page 788
disinfectants		
disinfectant sprays		Annex 2 b – pages 813 and 814

The evidence does not show use (to a sufficient extent) of the EUTM for the remaining goods in this Class, namely:

- perfumery;

- dentifrices; there is evidence showing use of the product brand 'dentalux' (e.g. ) on dentifrices, but none of it shows the Lidl logo and there is no other evidence corroborating that the Lidl logo was indeed depicted on, or used in relation to, such goods;

- deodorants and deodorising skin sprays; there is evidence showing use of the product



brand 'CIEN' on deodorants and deodorising skin sprays (e.g. and



, Annex 4 d – page 6007 and Annex 2 e – page 2304 respectively), but none of it shows the Lidl logo and there is no other evidence corroborating that the Lidl logo was indeed depicted on, or used in relation to, such goods.

Goods in Class 5

The contested goods in Class 5 are *dietetic foodstuffs, not for medical purposes, namely vitamin tablets, capsules and juices; sanitary articles, namely sanitary articles for women, including sanitary towels, panty-liners, tampons, sanitary pants.*



Even though the catalogue sample (Annex 4 d – page 5891) may not show all the contested goods depicted below, the evidence shows use to a sufficient extent of the EUTM for the following goods:

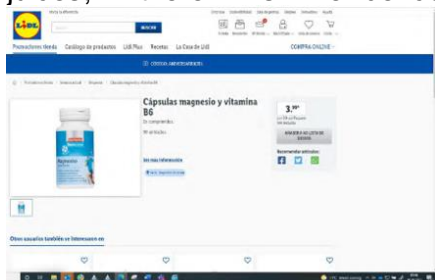
sanitary articles for women, including sanitary towels, panty-liners, tampons, sanitary pants ⁽²⁾		
sanitary towels		Annex 2 b – pages 820 and 821
panty liners		Annex 2 b – page 817

⁽²⁾ Considering that genuine use is proven for a sufficient variety of goods falling within the category of *sanitary articles for women*, all listed examples remain in the list when genuine use is proven for a sufficient variety of goods falling within that category.

tampons		Annex 2 f – page 2556
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The evidence does not show use (to a sufficient extent) of the EUTM for the remaining goods in this Class, namely:

- dietetic foodstuffs, not for medical purposes, namely vitamin tablets, capsules and juices; there is evidence showing use for such tablets (e.g.



, Annex 2 d – page 2485), but none of it shows the Lidl logo and there is no other evidence corroborating that the Lidl logo was indeed depicted on, or used in relation to, such goods.

Goods in Class 8

The contested goods in Class 8 are *hand tools for use in agriculture and gardening; cutlery*.

The evidence shows use to a sufficient extent of the EUTM for the following goods:

hand tools for use in agriculture and gardening		
ratchet secateurs		Annex 2 d – page 10370

Considering that ratchet secateurs are one example of rather specific goods among a broad spectrum of this category, the Cancellation Division considers that the evidence shows genuine use of the EUTM only for these specific goods, that is, for *hand tools for use in agriculture and gardening, namely ratchet secateurs*, where the term 'namely' is exclusive and restricts the scope of protection only to the goods specifically listed thereafter.

The evidence does not show use (to a sufficient extent) of the EUTM for the remaining goods in this Class, namely:

- hand tools for use in agriculture and gardening, *except* ratchet secateurs;

- cutlery; there is evidence showing use of the product brand ‘ernesto’ for cutlery (e.g.



), but none of it shows the Lidl logo and there is no other evidence corroborating that the Lidl logo was indeed used for such goods.

Goods in Class 11





The contested goods in Class 11 are *apparatus for lighting, heating, steam generating, cooking, refrigerating, drying.*

Even though the following catalogue samples may not show all the contested goods depicted below,

<p>Annex 4 a – page 3495</p>	<p>Annex 4 a – page 3728</p>	<p>Annex 4 c – page 4929</p>

the evidence shows use to a sufficient extent of the EUTM for the following goods:

<p>apparatus for lighting, heating, cooking, refrigerating, drying</p>		
<p>apparatus for lighting, such as:</p>		
<ul style="list-style-type: none"> LED desk lamps and table lamps 		<p>Annex 2 a – page 9680</p> <p>Annex 2 d – page 10416</p>
<p>apparatus for heating, such as:</p>		

<ul style="list-style-type: none"> • kettles 		Annex 2 a – page 9674
apparatus for cooking, such as:		
<ul style="list-style-type: none"> • hot air fryers 		Annex 2 a – page 9669
apparatus for refrigerating, such as:		
<ul style="list-style-type: none"> • ice cream makers 		Annex 2 a – page 9671
apparatus for drying, such as:		
<ul style="list-style-type: none"> • hair dryers 		Annex 2 a – page 9672

The evidence does not show use (to a sufficient extent) of the EUTM for the remaining goods in this Class, namely:

- apparatus for steam generating.







Goods in Class 16

The contested goods in Class 16 are *paper, cardboard and goods made from these materials, namely face towels of paper, babies' napkins, table napkins of paper, filter paper, handkerchiefs, toilet paper, packaging containers and bags; plastic materials for packaging, namely covers, bags, foils; artists' materials, namely goods for drawing, painting and modelling; pamphlets; advertising material, namely designs for advertisements in newspapers and periodicals.*

Even though the following catalogue samples may not show all the contested goods depicted below,

		
<p>Annex 4 b – page 4184</p>	<p>Annex 4 c - page 4788</p>	<p>Annex 4 c – page 4869</p>

the evidence shows use to a sufficient extent of the EUTM for the following goods:


<p>goods made from these materials [paper, cardboard], namely face towels of paper, table napkins of paper, filter paper, handkerchiefs, toilet paper and bags</p>		
<p>face towels of paper</p>		<p>Annex 2 a – pages 200 and 204 Annex 2 e – pages 2305 and 2308</p>
<p>table napkins of paper</p>		<p>Annex 2 c – page 1385</p>
<p>filter paper</p>		<p>Annex 2 b – pages 823 and 824</p>
<p>handkerchiefs</p>		<p>Annex 2 a – page 202 Annex 2 f – page 2739</p>
<p>toilet paper</p>		<p>Annex 2 a – page 212 Annex 2 f – page 2562</p>
<p>paper bags</p>		<p>Annex 2 a – page 206</p>

plastic materials for packaging, namely bags, foil		
bags, such as breakfast plastic bags		Annex 2 a – page 198
foil, such as plastic film for food packaging		Annex 2 a – page 208

The evidence does not show use (to a sufficient extent) of the EUTM for the remaining goods in this Class, namely:

- paper;
- cardboard;
- babies' napkins, there is evidence showing use of the product brand 'lupilu' on babies'



napkins (e.g. , but none of it shows the Lidl logo and there is no other evidence corroborating that the Lidl logo was indeed depicted on, or used in relation to, such goods;

- packaging containers;
- plastic materials for packaging, namely covers;
- artists' materials, namely goods for drawing, painting and modelling;
- pamphlets;
- advertising material, namely designs for advertisements in newspapers and periodicals.

Goods in Class 18

The evidence does not show use (to a sufficient extent) of the EUTM for any of the contested goods in Class 18, which are *goods of leather and imitations of leather, namely bags and small leather goods, in particular purses, pocket wallets, key wallets, trunks and travelling bags; umbrellas and parasols.*

The EUTM proprietor refers to Annex XXI, which is a table intended to refute the applicant's claim that the EUTM proprietor had not provided evidence of use for some goods and services, and to several annexes referred to therein. The EUTM proprietor more precisely draws the attention to its 'foldable bags – 283196', which it qualifies as travelling bags. These folding



bags, which are depicted as follows:

(i.e. Annex 2 a –

page 9292), are not made of leather, nor of imitations of leather, and therefore do not show use for any of the contested goods in Class 18.

Goods in Class 21




The contested goods in Class 21 are *hand-operated household or kitchen utensils and containers; combs and sponges; brushes (except paint brushes); articles for cleaning purposes; glassware, porcelain and stoneware for the household and kitchen.*

Even though the following catalogue samples may not show all the contested goods depicted below,

<p>Annex 4 a – page 3410</p>	<p>Annex 4 a – page 3647</p>	<p>Annex 4 c – page 4933</p>

the evidence shows use to a sufficient extent of the EUTM for the following goods:

<p style="text-align: center;">hand-operated household or kitchen utensils</p>		
<p>hand-operated household or kitchen utensils, such as</p>		
<ul style="list-style-type: none"> • water-fed broom set with brushes 		<p>Annex 2 b – page 10054</p>
<ul style="list-style-type: none"> • steel wool 		<p>Annex 2 a – page 222</p>
<ul style="list-style-type: none"> • the sponges, the dusting cloths and the scouring pads depicted below in this table 		
<p style="text-align: center;">sponges</p>		
<p>sponges</p>		<p>Annex 2 a – page 218 Annex 2 b – page 837</p>

articles for cleaning purposes, such as		
<ul style="list-style-type: none"> dusting cloths 		Annex 2 e – page 2316
<ul style="list-style-type: none"> household gloves for cleaning 		Annex 2 d – page 1619
<ul style="list-style-type: none"> scouring pads for household purposes 		Annex 2 d – page 1621

The evidence does not show use (to a sufficient extent) of the EUTM for the remaining goods in this Class, namely:

- household or kitchen containers;
- combs;
- brushes (except paint brushes) – the EUTM proprietor cannot be followed where it claims that the above-depicted water-fed broom set qualifies as a brush (a broom is a cleaning tool with a long handle and bristles for sweeping large surfaces like floors, while a brush is a smaller cleaning tool with bristles attached to a short or medium handle usually used for cleaning smaller surfaces);
- glassware, porcelain and stoneware for the household and kitchen.

Goods in Class 28

The contested goods in Class 28 are *decorations for Christmas trees; games and playthings; gymnastic and sporting articles, included in class 28.*

Even though the following catalogue samples may not show all the contested goods depicted below,

	
Annex 4 a – page 3317	Annex 4 c – page 4861

the evidence shows use to a sufficient extent of the EUTM for the following goods:

playthings		
playthings		Annex 4 a – page 3317

The evidence does not show use (to a sufficient extent) of the EUTM for the remaining goods in this Class, namely:

- decorations for Christmas trees; there is evidence showing use for decorations for



Christmas trees (e.g. , Annex 4 b – page 4021), but none of it shows the Lidl logo and there is no other evidence corroborating that the Lidl logo was indeed depicted on, or used in relation to, such goods;

- games;
- gymnastic and sporting articles included in Class 28; there is evidence showing use for



gymnastic and sporting articles (e.g. , Annex 4 b – page 1642 and



, Annex 2 a – page 8355), but none of it shows the Lidl logo and there is no other evidence corroborating that the Lidl logo was indeed depicted on, or used in relation to, such goods.

Goods in Class 29

The contested goods in Class 29 are *meat, fish, poultry and game, including in frozen form; meat extracts; preserved, dried and cooked fruits and vegetables; jams and other sweet spreads, mainly consisting of nuts, nougat, honey and/or chocolate; eggs, milk and milk products, namely butter, cheese, fresh milk, long-life milk, cream, yoghurt, powdered milk for food, desserts of yoghurt, quark and cream; meat, sausage, fish, fruit and vegetable preserves; including the aforesaid goods being pickled; charcuterie; edible oils and fats; frozen food, including prepared meals, mainly consisting of meat, fish, poultry, game, vegetables, prepared fruit and potatoes; jams, herb and vegetable products being spreads, artificial*

sausage or soups; dietetic margarine, dietetic oils and fats; vegetable bouillon; reduced calorie foods.














Even though the following catalogue samples may not show all the contested goods depicted below,











<p>Annex 4 a – page 3396</p>	<p>Annex 4 a – page 3629</p>	<p>Annex 4 a – page 3876</p>

the evidence shows use to a sufficient extent of the EUTM for the following goods:











meat, fish, poultry, including in frozen form		
meat, including in frozen form, such as:		
<ul style="list-style-type: none"> sausages, bavarian sausages and chorizo 		<p>Annex 2 a – pages 384, 386 and 387</p>
<ul style="list-style-type: none"> beef rolls (in frozen form) 		<p>Annex 2 a – page 228</p>
fish, including in frozen form, such as		
<ul style="list-style-type: none"> smoked salmon 		<p>Annex 2 b – page 1006</p>
<ul style="list-style-type: none"> rainbow trout (smoked) 		<p>Annex 2 d – page 1676</p>
<ul style="list-style-type: none"> fish (hale slices) (in frozen form) 		<p>Annex 2 e – page 2338</p>

poultry, including in frozen form, such as		
<ul style="list-style-type: none"> chicken liver 		Annex 2 b – page 890
<ul style="list-style-type: none"> chicken nuggets 		Annex 2 b – page 893
<ul style="list-style-type: none"> chicken breast (in frozen form) 		Annex 2 a – pages 351, 352, 355 and 357
meat extracts		
broth (chicken)		Annex 2 e – pages 2323 and 2324
preserved, dried and cooked fruits and vegetables		
preserved, dried and cooked fruits, such as:		
<ul style="list-style-type: none"> sour cherries (dried) 		Annex 2 a – pages 300 and 301
<ul style="list-style-type: none"> preserved sour cherries 		Annex 2 a – page 303
<ul style="list-style-type: none"> tinned pineapple 		Annex 2 a – page 304
<ul style="list-style-type: none"> preserved mandarine orange 		Annex 2 a – page 307
<ul style="list-style-type: none"> plums (dried) 		Annex 2 e – pages 2361 and 2362
<ul style="list-style-type: none"> shredded coconut 		Annex 2 a – page 397
preserved, dried and cooked vegetables, such as:		
<ul style="list-style-type: none"> roasted onions 		Annex 2 a – page 380
<ul style="list-style-type: none"> ginger (pickled) 		Annex 2 a – page 312

• gherkins		Annex 2 a – page 311
• tomatoes (dried)		Annex 2 a – page 404
• chopped tomatoes, peeled tomatos		Annex 2 a – pages 409 and 415
• frozen cream spinach		Annex 2 a – page 411
• frozen vegetables		Annex 2 a – page 412
• preserved peppers		Annex 2 a – page 419
• tinned corn		Annex 2 a – page 423
• tinned pees		Annex 2 a – page 425
jams (listed twice) and other sweet spreads, mainly consisting of nuts, nougat, honey and/or chocolate		
jams		Annex 2 a – pages 315 and 317 Annex 4 b – page 3912
jellies		Annex 2 d – page 1743
peanut butter		Annex 2 a – page 403 Annex 2 d – page 1774
chocolate spread		Annex 2 a – page 496
nougat creme		Annex 2 e – page 2422

eggs, milk and milk products, namely butter, cheese, fresh milk, long-life milk, cream, yoghurt, powdered milk for food, desserts of yoghurt, quark and cream		
eggs		Annex 2 a – page 280
milk		Annex 2 a – pages 321, 323, 324, 328 and 329
milk products, namely		
<ul style="list-style-type: none"> • butter 		Annex 2 a – page 234 Annex 2 e – page 2325
<ul style="list-style-type: none"> • cheese 		Annex 2 a – pages 247, 249, 251, 253 and 267
<ul style="list-style-type: none"> • fresh milk 		Annex 2 c – page 1387
<ul style="list-style-type: none"> • long-life milk 		Annex 2 a – pages 321, 323, 324, 328 and 329
<ul style="list-style-type: none"> • cream 		Annex 2 a – pages 271 and 274
<ul style="list-style-type: none"> • yoghurt 		Annex 2 a – pages 429 and 430 Annex 2 e – page 2370
<ul style="list-style-type: none"> • desserts of yoghurt, quark and cream 		Annex 2 a – pages 276 and 278 Annex 2 d – page 1702
meat, sausage, fish, fruit and vegetable preserves		
meat preserves		Annex 2 d – page 1808

sausage preserves		Annex 2 a – page 384
fish preserves		Annex 2 c – page 1388 Annex 2 d – page 1689
fruit preserves		Annex 2 d – pages 1741, 1773 and 1794
vegetable preserves		Annex 2 d – pages 1791 and 1792
charcuterie		
boiled ham		Annex 2 a – page 241
poultry salami		Annex 2 a – page 242
raw cured ham		Annex 2 a – page 245
edible oils and fats		
coconut oil		Annex 2 a – page 270
frying oil		Annex 2 a – page 308
rapeseed oil		Annex 2 a – pages 377 and 378
olive oil		Annex 2 e – page 2357
vegetable fat		Annex 2 a – page 407
vegetable fat cream		Annex 2 a – page 408

frozen food, including prepared meals, mainly consisting of meat, fish, poultry, game, vegetables, prepared fruit and potatoes, such as:		
cabbage rolls with meat		Annex 2 a – page 237
Asian style		Annex 2 a – pages 362 and 363
fish		Annex 2 d – page 1785
vegetable pans		Annex 2 a – page 371
duck parmentier		Annex 2 b – page 911
meat filled tomatoes		Annex 2 b – page 948
jams (listed twice), herb and vegetable products being spreads, artificial sausage or soups		
jams		Annex 2 a – pages 315 and 317
herb and vegetable products being spreads		Annex 2 b – page 907 Annex 2 e – page 2399 Annex 4 a – page 3515
artificial sausage		Annex 2 a – pages 384 and 386
soups		Annex 2 a – page 398 Annex 2 d - page 1738

vegetable bouillon		
broth		Annex 2 a – page 229

As regards the wording *including the aforesaid goods being pickled*, the EUTM can remain registered for them. Not only does the evidence include references to pickled goods, mainly vegetable preserves, the Cancellation Division also weighs up the legitimate interest of the EUTM proprietor to be able to extend its range of goods or services in the future, within the confines of the terms describing the goods or services for which the EUTM was registered, by using the protection which registration of the trade mark confers on it (see the Aladin judgment above).

The evidence does not show use (to a sufficient extent) of the EUTM for the remaining goods in this Class, namely:

- game;
- milk products, namely powdered milk for food;
- dietetic margarine;
- dietetic oils and fats;
- reduced calorie foods, though there are admittedly references to goods falling in Classes 29 and 30 (see below) that are lactose-free, biological or gluten-free (e.g.



in Class 29 and in Class 30 respectively), but this does not equate to these goods being reduced calorie foods.

Goods in Class 30









The contested goods in Class 30 are *coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, in particular oat flakes and other cereal flakes for food; muesli and other wholemeal products, namely wholemeal bread, wholemeal pastries, baking mixes for making wholemeal products, wholemeal rice, wholemeal noodles; bread, pastry and confectionery, chocolate, pastries, ices; honey, treacle; yeast and yeast extracts, baking powder, table salt; mustard; vinegar, sauces (condiments), spices, glucose; low-calorie foods; prepared meals, mainly consisting of pasta and/or rice.*









Even though the following catalogue samples may not show all the contested goods depicted below,







<p>Haribo Milchbonbons Die Süßigkeit-Plus-Bella-Freizeit ab 1.10 € / 100g MO. 16.1. bis SA. 21.1. -31% -65% JEDE WOCHE 5 SUPER-KNALLER BellaCrema -25% 8.88 € AUCH ONLINE</p>	<p>Wunderbar! Little Finger 1.89 € Ausschmeißelbar 1.99 € Skyr 1.79 € Cookie 1.99 € UP 1.89 €</p>	<p>MISCHREIHE 11 MICH EHMERE 4.89 € Mini panettone 0.99 € Maccaroni 1.49 € Assortiment de Biscuits 4.49 €</p>
<p>Annex 4 a – page 3373</p>	<p>Annex 4 a – page 3395</p>	<p>Annex 4 b – page 4002</p>

the evidence shows use to a sufficient extent of the EUTM for the following goods:

<p>coffee, tea, cocoa, sugar, rice</p>		
<p>coffee</p>		<p>Annex 2 a – pages 501 and 502; Annex 2 c – page 1457</p>
<p>tea</p>		<p>Annex 2 a – pages 550, 631 and 635</p>
<p>cocoa</p>		<p>Annex 2 c – page 1468; Annex 2 e – page 2390</p>
<p>sugar</p>		<p>Annex 2 a – pages 625 and 627 Annex 2 e – page 2452</p>
<p>rice</p>		<p>Annex 2 a – pages 599 and 600 Annex 2 e – page 2439</p>
<p>flour and preparations made from cereals, in particular oat flakes and other cereal flakes for food</p>		
<p>flour</p>		<p>Annex 2 a – pages 523 and 525</p>

preparations made from cereals, such as:		
<ul style="list-style-type: none"> cereals 		Annex 2 a – pages 484, 500 and 510
<ul style="list-style-type: none"> muesli 		Annex 2 a – page 557
<ul style="list-style-type: none"> whole-wheat products 		Annex 2 a – pages 482 and 649 Annex 2 b – pages 1039 and 1125
muesli and other wholemeal products, namely wholemeal bread, baking mixes for making wholemeal products		
muesli		Annex 2 a – page 557
wholemeal products, namely:		
<ul style="list-style-type: none"> wholemeal bread 		Annex 2 b – page 1199 Annex 2 g – page 2822
<ul style="list-style-type: none"> baking mixes for making wholemeal products 		Annex 2 a – page 594
bread, pastry and confectionery, chocolate, pastries, ices		
bread		Annex 2 a – pages 453 and 454
pastry		Annex 2 a – pages 468 and 593

confectionery		Annex 2 a – pages 474, 477, 491, 494, 527 and 529
chocolate		Annex 2 b – page 1128 Annex 2 d – page 1903
pastries		Annex 2 a – pages 470, 471 and 628
ices		Annex 2 a – pages 537, 539 and 542
honey		
honey		Annex 2 a – page 535; Annex 2 e – page 2398
baking powder, table salt		
baking powder		Annex 2 e – page 2377
table salt		Annex 2 a – page 609; Annex 2 e – page 2443
mustard		
mustard		Annex 2 a – page 559; Annex 2 e – page 2419

vinegar, sauces (condiments), spices		
vinegar		Annex 2 a – pages 644
sauces (condiments)		Annex 2 a – pages 616 and 617 and 619 Annex 2 b – page 1157
spices		Annex 2 a – pages 621 and 623 Annex 2 e – page 2391
prepared meals, mainly consisting of pasta and/or rice		
fried noodles		Annex 2 a – pages 578 and 579
pasta		Annex 2 a – pages 580 and 581
paella		Annex 2 b – page 1140

The evidence does not show use (to a sufficient extent) of the EUTM for the remaining goods in this Class, namely:

- tapioca;
- sago;

- artificial coffee, considering that instant coffee, which features frequently in the evidence



on file (e.g. (Annex 2 b – page 1097), is made from real coffee beans;

- wholemeal products, namely wholemeal pastries, wholemeal rice, wholemeal noodles;
- treacle;
- yeast;
- yeast extracts;
- glucose;
- low-calorie foods, though there are admittedly references to goods falling in Classes 29

(see above) and 30 that are lactose-free, biological or gluten-free (e.g.



in Class 29 and in Class 30 respectively), but this does not equate to these goods being low-calorie foods.

Goods in Class 31

The contested goods in Class 31 are *fresh fruits and vegetables; foodstuffs for animals, seeds, natural plants and flowers*.

Even though the following catalogue samples may not show all the contested goods depicted below,



the evidence shows use to a sufficient extent of the EUTM for the following goods:

fresh fruits and vegetables
fresh fruits ⁽³⁾ , such as:

⁽³⁾ Whilst several advertising leaflets show prepacked vegetables depicting the EUTM, the EUTM proprietor seemingly markets most fresh fruit in bulk. Most pictures in the advertising leaflets show only the fresh fruits (for











instance as follows, (), but not their packaging, nor any cardboard boxes containing them. However, there is sufficient evidence on file to show that the consumer will establish a link between the EUTM and fresh fruits. One of the Slovak catalogues contains a picture of the top side of one of the boxes containing mandarins



and this features the sign 'Lidl stánok' , which makes it safe to infer that the LIDL logo will, as is the case with most of the other packaging, be depicted on any of its other sides. Moreover, one of advertising



leaflets (Annex 4 c – pages 5052 and 5053) only/mainly depicts fruit:

























<ul style="list-style-type: none"> apples and pomegranates 		Annex 4 a – page 3672
<ul style="list-style-type: none"> mandarins 		Annex 4 c – page 5014
fresh vegetables, such as:		
<ul style="list-style-type: none"> cocktail tomatoes 		Annex 2 c – page 1487
<ul style="list-style-type: none"> onions 		Annex 2 d – page 2162
<ul style="list-style-type: none"> stalk celery 		Annex 2 d – page 2166
foodstuffs for animals, natural plants and flowers		
foodstuffs for animals		Annex 2 a – pages 652, 653, 656 and 657 Annex 2 d – page 2160
natural plants		Annex 2 b – page 1233 Annex 4 a – page 3428
flowers		Annex 4 a – page 3837 Annex 4 b – page 4179

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The evidence does not show use (to a sufficient extent) of the EUTM for the remaining goods in this Class, namely:

- seeds; there admittedly is evidence showing use for seeds (e.g.



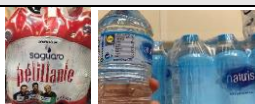




Annex 4 a – page 3328 and                        

Goods in Class 32

The contested goods in Class 32 are *beers; mineral and aerated waters and other non-alcoholic drinks; drinks, juices and fruit juices; syrups and other preparations for making beverages.*




Even though the following catalogue samples may not show all the contested goods depicted below,

--

mineral and aerated waters and other non-alcoholic drinks		
mineral waters		Annex 2 b – page 1257 Annex 2 e – page 2464
aerated waters with flavours		Annex 2 d – page 2169
other non-alcoholic drinks, such as:		
<ul style="list-style-type: none"> coconut water 		Annex 2 d – page 2181
<ul style="list-style-type: none"> lemonade 		Annex 2 e – page 2460
<ul style="list-style-type: none"> beer-lemon mix (non-alcoholic) 		Annex 2 a – page 667
<ul style="list-style-type: none"> bitter beverages (bitter lemon) 		Annex 2 a – page 669
<ul style="list-style-type: none"> cola 		Annex 2 a – page 671
drinks, juices and fruit juices		
smoothies		Annex 2 a – page 681
fruit juices	 	Annex 2 a – page 665, 672, 675 Annex 2 d – page 2179

syrops and other preparations for making beverages		
syrops for making beverages		Annex 2 a – pages 686 and 687 Annex 2 b – page 1240
other preparations for making beverages		Annex 2 a – pages 690 and 691

The evidence does not show use (to a sufficient extent) of the EUTM for the remaining goods in this Class, namely:

- beers; there is evidence showing use for beers (e.g.  ,  and ), but none of it shows the Lidl logo and there is no other evidence corroborating that the Lidl logo was indeed used on such goods.

Goods in Class 33

The evidence does not show use (to a sufficient extent) of the EUTM for any of the contested goods in Class 33, which are *alcoholic beverages (except beers), in particular wine, spirits and liqueurs, and alcoholic mixed milk beverages, cocktails and apéritifs with a spirit or wine base; beverages containing wine.*



The evidence only refers to goods not showing the Lidl logo, for example:



and . The occasions where the Lidl logo is somehow connected with the



contested goods in Class 33, for example selling (retailing) such goods, however, without showing that the Lidl logo has been affixed on the goods themselves.

The contested services (services in Classes 35, 36, 39, 41 and 42)

The evidence assessed as a whole, that is, not only the advertising but also the remaining evidence, does not show use (to a sufficient extent) of the EUTM for any of the contested services, which are the following:

- Class 35: *Archiving of information material; advertising and marketing for retailers, including the devising of advertising initiatives and conducting of advertising campaigns, market research; inventory and payroll preparation; organisational, professional business and technical consultancy with regard to the establishment, design and construction of shops, including shop fitting and presentation of goods; market analysis; shop-window dressing; advertising and business consultancy; marketing; Data processing, for others; recording the exact turnover of goods for retailers, further processing of this data in a disposition proposal, intercompany comparisons for retailers, business accounting, for others; organisational consultancy, professional business consultancy, employment consultancy, product range consultancy, all the aforesaid services for others.*
- Class 36: *Financial consultancy; delcredere services between manufacturers and retailers (factoring).*
- Class 39: *Packaging of goods.*

Class 41: *Providing of training and further training, including management courses, sales training, product training and training of apprentices; organisation of exhibitions and trade fairs; publication of information material; training courses and awards ceremonies.*

Class 42: *Computer programming and creating program systems, for others, in particular program systems for retailers for the ordering of goods, the warehousing thereof and inventory management; consumer consultancy, namely developing proposals for improving the nutritional and utility value of food products and everyday products; publication of recommendations for optimised cultivation, production, recycling, energy saving and handling-related transport methods; establishing criteria for assessing foodstuffs and everyday products; examining foodstuffs and everyday products in respect of their health-promoting, environmentally-friendly, energy-saving and recycling properties.*

The evidence shows use of the EUTM for some services, such as retailing and even arranging of contracts, for others, for the provision of services (for instance, arranging mobile radio contracts and contracts for supplying ringtones for mobile telephones), but these services are not listed among the contested services. In contrast, there is no evidence showing any, or at least sufficient, use for any of the contested services. Taking for instance the contested *advertising and business consultancy*, these services comprise providing others with assistance in the sale of their goods and services by promoting their launch and/or sale, or reinforcing the client's position in the market and enabling them to acquire a competitive advantage through publicity (advertising) or providing consultancy to companies to manage their business, for instance, by helping with strategy and/or the direction of the company (business consultancy). Even though the EUTM proprietor has been advertising its own goods and running its own business, and even though it has been providing marketing and advertising services to the independent LIDL national companies (as attested to in Affidavit IV), these activities do not qualify as any of the above services, as they do not comprise economic activities provided to third parties. In this respect, as regards the services offered by the EUTM proprietor to other members of the Lidl group, it is emphasised that 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). Finally, it goes without saying that the screenshots of www.lidl-kochen.de (showing recipes and the like) do not, as the EUTM proprietor contends, show use of the Lidl logo for consumer consultancy. These are merely marketing tools, offered for free, to promote the goods the EUTM proprietor offers for sale, and not services whereby tailor-made expert advice within a particular field is given.

These findings are confirmed upon assessing the evidence that the EUTM proprietor submitted to rebut the applicant's allegations in this respect, namely Annex XXI, which is a table intended to refute the applicant's claim that the EUTM proprietor had not provided evidence of use for some goods and services, and Affidavits III and IV (pages 10889-10892 and 10914-10917), pages 10893-10913 and 10918-10987 referred to therein.

The same holds true for the other contested services.

The evidence therefore does not show use for any of the contested services and the rights in respect of the EUTM must be revoked for all the contested services in Classes 35, 36, 39, 41 and 42.

Overall assessment and conclusion

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).

In the present case, the Cancellation Division, having applied the **Vogue** judgment (18/01/2011, T-382/08, VOGUE / VOGUE portugal, EU:T:2011:9, § 22) in combination with the **efbet** judgment (01/02/2023, T-772/21, efbet (fig.), EU:T:2023:36, § 28-30) as explained above, considers that genuine use of the contested mark has been sufficiently demonstrated for the relevant factors in relation to some of the contested goods and services, namely the following:

- Class 3: *Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; cosmetics, hair lotions; disinfectants.*
- Class 5: *Sanitary articles, namely sanitary articles for women, including sanitary towels, panty-liners, tampons, sanitary pants.*
- Class 8: *Hand tools for use in agriculture and gardening, namely ratchet secateurs.*
- Class 11: *Apparatus for lighting, heating, cooking, refrigerating, drying.*
- Class 16: *Goods made from paper or cardboard, namely face towels of paper, babies' napkins, table napkins of paper, filter paper, handkerchiefs, toilet paper, and bags; plastic materials for packaging, namely bags, foils.*
- Class 21: *Hand-operated household or kitchen utensils; sponges; articles for cleaning purposes.*
- Class 28: *Playthings.*
- Class 29: *Meat, fish, poultry, including in frozen form; meat extracts; preserved, dried and cooked fruits and vegetables; jams and other sweet spreads, mainly consisting of nuts, nougat, honey and/or chocolate; eggs, milk and milk products, namely butter, cheese, fresh milk, long-life milk, cream, yoghurt, desserts of yoghurt, quark and cream; meat, sausage, fish, fruit and vegetable preserves; including the aforesaid goods being pickled; charcuterie; edible oils and fats; frozen food, including prepared meals, mainly consisting of meat, fish, poultry, game, vegetables, prepared fruit and potatoes; jams, herb and vegetable products being spreads, artificial sausage or soups; vegetable bouillon.*
- Class 30: *Coffee, tea, cocoa, sugar, rice; flour and preparations made from cereals, in particular oat flakes and other cereal flakes for food; muesli and other wholemeal products, namely wholemeal bread, baking mixes for making wholemeal products; bread, pastry and confectionery, chocolate, pastries, ices; honey; baking powder, table salt; mustard; vinegar, sauces (condiments), spices; prepared meals, mainly consisting of pasta and/or rice.*
- Class 31: *Fresh fruits and vegetables; foodstuffs for animals, natural plants and flowers.*

Class 32: *Mineral and aerated waters and other non-alcoholic drinks; drinks, juices and fruit juices; syrups and other preparations for making beverages.*

There are sufficient indications concerning the place, time, extent and nature of use to show genuine use of the contested mark for the abovementioned goods. Therefore, the application is not successful in this respect.

The EUTM proprietor has not proved genuine use of the EUTM for the remaining goods and services, for which it must, therefore, be revoked:

Class 1: *Sweeteners.*

Class 3: *Perfumery, dentifrices; deodorants and deodorising skin sprays.*

Class 5: *Dietetic foodstuffs, not for medical purposes, namely vitamin tablets, capsules and juices.*

Class 8: *Hand tools for use in agriculture and gardening (except ratchet secateurs); cutlery.*

Class 11: *Apparatus for steam generating.*

Class 16: *Paper, cardboard and goods made from these materials, namely babies' napkins and packaging containers; plastic materials for packaging, namely covers; artists' materials, namely goods for drawing, painting and modelling; pamphlets; advertising material, namely designs for advertisements in newspapers and periodicals.*

Class 18: *Goods of leather and imitations of leather, namely bags and small leather goods, in particular purses, pocket wallets, key wallets, trunks and travelling bags; umbrellas and parasols.*

Class 21: *Household or kitchen containers; combs; brushes (except paint brushes); glassware, porcelain and stoneware for the household and kitchen.*

Class 28: *Decorations for Christmas trees; games; gymnastic and sporting articles, included in class 28.*

Class 29: *Game; milk products, namely powdered milk for food; dietetic margarine, dietetic oils and fats; reduced calorie foods.*

Class 30: *Tapioca, sago, artificial coffee; other wholemeal products, namely wholemeal pastries, wholemeal rice, wholemeal noodles; treacle; yeast and yeast extracts; glucose; low-calorie foods.*

Class 31: *Seeds.*

Class 32: *Beers.*

Class 33: *Alcoholic beverages (except beers), in particular wine, spirits and liqueurs, and alcoholic mixed milk beverages, cocktails and apéritifs with a spirit or wine base; beverages containing wine.*

Class 35: *Archiving of information material; advertising and marketing for retailers, including the devising of advertising initiatives and conducting of advertising campaigns, market research; inventory and payroll preparation; organisational, professional*

business and technical consultancy with regard to the establishment, design and construction of shops, including shop fitting and presentation of goods; market analysis; shop-window dressing; advertising and business consultancy; marketing; data processing, for others; recording the exact turnover of goods for retailers, further processing of this data in a disposition proposal, intercompany comparisons for retailers, business accounting, for others; organisational consultancy, professional business consultancy, employment consultancy, product range consultancy, all the aforesaid services for others.

Class 36: *Financial consultancy; delcredere services between manufacturers and retailers (factoring).*

Class 39: *Packaging of goods.*

Class 41: *Providing of training and further training, including management courses, sales training, product training and training of apprentices; organisation of exhibitions and trade fairs; publication of information material; training courses and awards ceremonies.*

Class 42: *Computer programming and creating program systems, for others, in particular program systems for retailers for the ordering of goods, the warehousing thereof and inventory management; consumer consultancy, namely developing proposals for improving the nutritional and utility value of food products and everyday products; publication of recommendations for optimised cultivation, production, recycling, energy saving and handling-related transport methods; establishing criteria for assessing foodstuffs and everyday products; examining foodstuffs and everyday products in respect of their health-promoting, environmentally-friendly, energy-saving and recycling properties.*

According to Article 62(1) EUTMR, the revocation will take effect from the date of the application for revocation, that is, as of 19/01/2021. 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 more than one earlier date, namely either 14/12/2009 or 15/09/2020. However, to understand why an earlier date should be fixed for the revocation to take effect, the cancellation applicant should indicate a specific legal interest. Article 62(1) EUTMR puts a strict onus on the cancellation applicant to set out the facts that would support its legitimate interest in considering either of these dates as the relevant date, and also to prove it, which the applicant failed to do. The applicant's submissions give no justification or explanation for specifying these dates. Therefore, and 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 any 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. According to Article 109(3) EUTMR, where each party succeeds on some heads and fails on others, or if reasons of equity so dictate, the Cancellation Division will decide a different apportionment of costs.

Since the cancellation is successful only for part of the contested goods and services, both parties have succeeded on some heads and failed on others. Consequently, each party has to bear its own costs.

**The Cancellation Division**

Frédérique SULPICE

Christophe DU JARDIN

Maria Luce CAPOSTAGNO

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.