

**DECISION
of the First Board of Appeal
of 25 January 2018**

In Case R 674/2017-1

The Yorkshire Provender Limited

Delicious Hq Conygarth Way
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United Kingdom

Applicant / Appellant

represented by DLA PIPER UK LLP, Princes Exchange, Princes Square,
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APPEAL relating to European Union trade mark application No 15 842 561

THE FIRST BOARD OF APPEAL

composed of Th. M. Margellos as a single Member having regard to Article 165(2) and (5) EUTMR, Article 35(2) and Article 36 of Commission Delegated Regulation (EC) No 2017/1430 and Article 10 of the Decision of the Presidium on the organisation of the Boards of Appeal as currently in force, and to the First Board's Resolution No 3 of 9 March 2012 on decisions by a single Member

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 16 September 2016, The Yorkshire Provender Limited ('the applicant') sought to register the word trade mark applied for

YORKSHIRE PROVENDER

for the following goods:

Class 29 – Meat; fish; seafood; poultry and game; Meat extracts; Preserved, frozen, dried and cooked fruits and vegetables; processed fruits; fruit desserts; processed vegetables; Jellies, jams, compotes; Eggs; egg products; Milk and milk products; dairy products and dairy substitutes; dairy desserts; yoghurt desserts; Edible oils and fats; prepared meals; stocks; potato snacks; fruit snacks; candied fruit snacks; tofu-based snacks; soups; potato crisps; stews; meat stocks; preparations for making broths;

Class 30 – Coffee; tea; cocoa; sugar; natural sweeteners; rice; tapioca; sago; artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery; processed grains, starches, and goods made thereof, baking preparations and yeasts; cereals; bread; baked goods; brioches; confectionery; popcorn; frozen yoghurt; sorbet; chocolate; dessert puddings; edible ices; ice; honey, treacle; yeast, baking-powder; salt; seasonings; food flavourings; mustard; vinegar; sauces (condiments); spices; sandwiches; wraps; sandwich; prepared meals; pasta-based prepared meals; rice-based prepared meals; noodle-based prepared meals; pizzas; pies; pasta dishes; canapes; cereal-based snack food; rice crisps; crackers; pretzels; quiche; sushi.

- 2 On 7 October 2016, the examiner provisionally refused the mark applied for, for all the goods pursuant to Article 7(1)(b), (c) and Article 7(2) EUTMR and partially, namely, for 'milk and milk products, dairy products' and 'preserved, frozen, dried and cooked vegetables; processed vegetables; jellies, jams, compotes' in Class 29 pursuant to Article 7(1)(j) EUTMR. In relation to the objection under Article 7(1)(b), (c) and Article 7(2) EUTMR the examiner stated that since the mark applied for consisted of English words, the target public defined comprised English-speaking consumers within the European Union, and indicated, having regard to the dictionary meaning of the words, that the mark applied for, the expression 'YORKSHIRE PROVENDER' taken as a whole, immediately informed consumers, without further reflection that the goods applied for were foods originating from the English county called Yorkshire. Therefore, according to the examiner the mark applied for conveyed obvious and direct information regarding the kind and geographical origin of the goods in question, which was exclusively descriptive. The mark applied for was also found lacking in distinctiveness because the impact of the mark being primarily descriptive in nature eclipsed any impression that the mark could indicate a trade origin.

As regards Article 7(1)(j) EUTMR, the examiner reasoned as follows:

- a) *Protected geographical indication 'Yorkshire Wensleysale'*
 - The mark applied for contains the designation 'YORKSHIRE', which is a significant part of 'Yorkshire Wensleysale', which is a protected geographical indication for agricultural products and foodstuffs protected under Regulation (EU) No 1151/2012 of 21 November 2012, in particular 'cheeses'.

- ‘Milk and milk products, dairy products’ in Class 29 include cheese that is not of the origin indicated by the geographical indication featured in the trade mark applied for.
- The objection under Article 7(1)(j) EUTMR could be overcome by limiting the abovementioned goods protected by the geographical indication in Class 29 to:

‘Cheese complying with the specifications of the protected geographical indication “Yorkshire Wensleydale”’.
- For ‘milk and milk products; dairy products; dairy desserts; yoghurt desserts’ considered comparable to the cheese protected by the geographical indication, it is not possible for a limitation to overcome the objection under Article 7(1)(j) EUTMR.

b) *Protected designation of origin ‘Yorkshire Forced Rhubarb’*

- The mark applied for ‘YORKSHIRE PROVENDER’ contains the designation ‘YORKSHIRE’, which is a significant part of the protected designation of origin ‘Yorkshire Forced Rhubarb’ under Regulation (EU) No 1151/2012 of 21 November 2012 for the agricultural products and foodstuffs protected.
- The trade mark application covers, inter alia, ‘preserved, frozen, dried and cooked vegetables; processed vegetables; jellies, jams, compotes’ in Class 29. Therefore, this wording includes rhubarb and products made of rhubarb that is not of the origin indicated by the designation of origin featured in the trade mark applied for.
- This ground for refusal may be overcome by limiting the abovementioned goods protected by the geographical indication in Class 29 as follows:

‘Preserved, frozen, dried and cooked rhubarb complying with the specifications of the protected designation of origin ‘Yorkshire Forced Rhubarb’; processed rhubarb complying with the specifications of the protected designation of origin ‘Yorkshire Forced Rhubarb’; jellies, jams, compotes containing rhubarb complying with the specifications of the protected designation of origin ‘Yorkshire Forced Rhubarb’.
- For ‘preserved, frozen, dried and cooked vegetables; processed vegetables; jellies, jams, compotes’, that are comparable to rhubarb, it is not possible for the objection under Article 7(1)(j) EUTMR to be overcome by a limitation.

- 3 On 20 October 2016, the applicant responded to the provisional refusal stating that:

Article 7(1)(j) EUTMR

- The differences between ‘YORKSHIRE PROVENDER’ and ‘YORKSHIRE WENSLEYDALE’ or ‘YORKSHIRE FORCED RHUBARB’ are stark: The elements ‘PROVENDER’, ‘WENSLEYDALE’ and ‘FORCED RHUBARB’ are visually, phonetically and conceptually distinct. Use of ‘YORKSHIRE’ with ‘PROVENDER’ denotes trade origin. The length of the ‘PROVENDER’

element in three syllables, means that it is impossible for it to be discounted from the overall impression of the applicant's mark.

- It would be impossible for the element 'YORKSHIRE' in the mark applied for, which is used in relation to a range of products and services other than cheese and rhubarb, to evoke the geographical indications.
- The average English-speaking consumer will perceive 'WENSLEYDALE' as a type of cheese. Whilst it is accepted that cheese is a dairy product which originates from milk, the average consumer would not confuse cheese with milk as they are clearly different products in that they are produced in different ways, sold in different packaging and the manner in which they are consumed is different.
- The average consumer is unlikely to be confused between rhubarb and other vegetables for a number of reasons. Many consumers will not recognise rhubarb as a vegetable because it is predominantly prepared as a fruit. It is distinctive in both colouration and taste. It is not generally eaten as regularly as other vegetables, and as such the average consumer is likely to pay more attention when selecting rhubarb.

Article 7(1)(b) and (c) EUTMR

- The term 'YORKSHIRE PROVENDER' is not in common parlance for describing the specific goods. The appropriate expression would be 'Yorkshire food' or 'food from Yorkshire'.
 - A Google search of the term 'YORKSHIRE PROVENDER' shows that at least the first 100 search hits relate to the applicant's mark and not to a descriptive use of that term.
 - The word 'PROVENDER' is unlikely to be perceived by the average English-speaking consumer as describing food products for human consumption. It will be understood as 'dry food for domestic animals', which is the top definition in a large number of dictionaries. Therefore, the average consumer will consider the use of the word 'PROVENDER' as a fanciful play on the word when used in relation to the applicant's goods.
 - Due to the low price of the specified goods and the public's lesser than average level of attention, the average consumer will perceive the mark as a whole and not analyse its constituent parts.
 - The mark applied for is syntactically unusual and is not a familiar expression in English.
- 4 On 7 February 2017, the examiner refused the mark applied for, for all the goods pursuant to Article 7(1)(b), (c) and Article 7(2) EUTMR and partially, namely, for 'milk and milk products, dairy products' and 'preserved, frozen, dried and cooked vegetables; processed vegetables; jellies, jams, compotes' in Class 29 pursuant to Article 7(1)(j) EUTMR. The examiner added the following:

- The mark ‘YORKSHIRE PROVENDER’ contains the word ‘YORKSHIRE’ that is a significant part of the protected geographical indication. The words ‘WENSLEYDALE’ and ‘FORCED RHUBARB’ contained in the protected geographical indications are generic words and, therefore, a geographically relevant part of both protected geographical indications is the word ‘YORKSHIRE’.
- Cheese is comparable with ‘milk and milk products; dairy products; dairy desserts; yogurt desserts’ and ‘rhubarb’ is comparable with preserved, frozen, dried and cooked vegetables; processed vegetables; jellies, jams, compotes.

Article 7(1)(b) and (c) EUTMR

- The distinctive character of a trade mark is determined on the basis of the fact that that mark can be immediately perceived by the relevant public as designating the commercial origin of the goods or services in question ... The lack of prior use cannot automatically indicate such a perception. (15/09/2005, T-320/03, Live richly, EU:T:2005:325, § 88). The Office notes that the fact that the mark in question is used merely by the applicant does not automatically mean that the mark is distinctive and non-descriptive.
 - The Office provided, in its notice of 7 October 2016, dictionary definitions of both words contained in the mark. Then the Office examined the mark as a whole in relation to the goods for which registration was sought and in relation to the perception of the relevant public. The combination ‘YORKSHIRE PROVENDER’ follows English grammar rules, it does not constitute a play on words and it does not contain any other element that would endow the mark with distinctive character. The mark merely conveys obvious and direct information that the goods for which registration is sought are foods originating from the English county called Yorkshire.
 - The dictionary definition of the term ‘PROVENDER’ was extracted from the *Collins English Dictionary*, which defines ‘PROVENDER’ as ‘food in general’.
 - While the Office does not dispute the possibility of ‘PROVENDER’ being perceived by a part of relevant consumers as ‘dry food for domestic animals’, it is of the opinion that it is more likely that the definition set out by the Office will be the first and primary interpretation for a substantial part of relevant consumers when perceiving the mark ‘YORKSHIRE PROVENDER’ in relation to the goods for which registration is sought.
- 5 On 4 April 2017, the applicant filed an appeal against the contested decision. The statement of grounds of the appeal was received on 7 June 2017.

Grounds of appeal

- 6 The applicant argues as follows:

Article 7(1)(j) EUTMR

- The examiner failed to take due account of the fact that evocation must be assessed by reference to the image triggered by the relevant designation in the mind of the consumer, who is reasonably well informed and reasonably observant and circumspect, and perceives the mark as a whole and does not engage in an analysis of its various details.
- The ‘PROVENDER’ element in the mark applied for and the ‘WENSLEYDALE’ and ‘FORCED RHUBARB’ elements in the indications, respectively, are not negligible and cannot be ignored in the assessment. The examiner artificially dissected the relevant signs and failed to consider them as a whole through the eyes of the average consumer.
- The indications consist in the combination of ‘YORKSHIRE’, which is known as a sizeable geographical location in the North of England and a verbal element denoting a very specific product. It is only this particular and complete combination which gives rise to the meaning conveyed by each of the indications.
- The consumer will associate ‘Yorkshire’ with a geographical location from which a large and wide range of products and services emanate (see Annex 1). The consumer will associate ‘Yorkshire’ with more than simply forced rhubarb and Wensleydale cheese and is accustomed to distinguishing between such products and services, including by reference to their specific descriptors and other marks which may be used in association with them. As such, it cannot be correct that including a reference to ‘Yorkshire’ in a trade mark will trigger the image of forced rhubarb or Wensleydale cheese in the consumer’s mind. The only thing which the inclusion of the term Yorkshire in a trade mark conveys to the consumer is that the product in question emanates from, or is otherwise associated with, a large geographical region that is known as Yorkshire. The consumer will look to the non-geographical elements of the trade mark for further information regarding the particular goods and services concerned and how they are connected with Yorkshire before forming an image in his or her mind based on the information derived from the trade mark perceived as a whole.
- ‘PROVENDER’ bears no similarity whatsoever to the protected geographical indications or any part of them and does not describe any product. The ‘PROVENDER’ element in the mark applied for and the ‘Wensleydale’ and ‘forced rhubarb’ elements in the indications respectively are visually, phonetically and conceptually distinct. The differences are so stark that the shared elegant ‘Yorkshire’ element will not invoke the geographical indications. It is totally unrealistic to suggest that the mere presence of the ‘Yorkshire’ element in the mark applied for will result in the image of the products protected by the indications being triggered in the mind of the average consumer, irrespective of the products for which the application is to be registered and used. The mark applied for would not evoke the indications in question.
- The purpose of protection from evocation is to prevent trade from taking undue advantage of the reputation of the protected indication. Such a

reputation subsists in the protected indication as a whole and not in one wholly generic or descriptive aspect of the indication such as ‘Yorkshire’ arbitrarily taken out of context.

- It is only the very specific terms as a whole i.e. ‘Yorkshire Wensleydale’ and ‘Yorkshire forced rhubarb’ which convey particular meaning to the consumer. Whilst it is correct to say that ‘Wensleydale’ and ‘forced rhubarb’ are generic terms as referred to above, they are nevertheless each descriptive of a very specific product, in the case of Wensleydale, a specific type of cheese which originated in Yorkshire, and in the case of forced rhubarb, a specific type of vegetable commonly treated and used as a fruit which has grown in a very particular manner.
- ‘Yorkshire Wensleydale’ and ‘Yorkshire forced rhubarb’ evoke very specific products from the Yorkshire region and nothing else. On the contrary, ‘PROVENDER’ does not refer to, or evoke, any specific product at all.

Article 7(1)(b), (c) and Article 7(2) EUTMR

- ‘PROVENDER’ is not used in common parlance to describe human food. The term is antiquated and, in any event, appears more commonly to have been used to denote dried animal foodstuffs. It is devoid of meaning for the average modern-day consumer. The extracts from websites in Annex 2 demonstrate that this word is in very limited usage and is unlikely to be known by the average person.
- The current *Oxford English Dictionary* cites only one single use since 1940, in 1996, in a local Australian weekend supplement.
- According to Google the word is dated and indicates that use of the word overtime has declined very sharply since around 1800.
- According to the *Collins English Dictionary* the use frequency of the word ‘PROVENDER’ is very low and that its use is currently the lowest in its recorded history.
- The average consumer will therefore not understand the word ‘PROVENDER’. It is simply not the case that the relevant consumer perceiving the mark in the normal course of trade without reference to a definition that the mark applied for will convey obvious and direct information that the goods for which registration is sought are food products. The average consumer will perceive the mark applied for as a distinctive and unusual combination of the word ‘Yorkshire’ with the meaningless term ‘PROVENDER’.

Article 7(3) EUTMR

- Alternatively, in the event the objections are upheld, the applicant requests the right to file evidence of acquired distinctiveness.

Reasons

- 7 All references to the EUTMR in this decision should be read as references to EUTMR 2017/1001 (OJ L 154, 16/06/2017, p. 1), codifying EUTMR 207/2009 as amended, unless specifically stated otherwise in this decision.
- 8 The appeal complies with Articles 66 and 67 and Article 68(1) EUTMR. It is, therefore, admissible.

Article 7(1)(c) EUTMR

- 9 Article 7(1)(c) EUTMR provides that trade marks which ‘consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or services may not be registered.
- 10 Article 7(1)(c) EUTMR pursues an aim in the public interest, namely that descriptive signs or indications relating to the characteristics of the goods or services in respect of which registration is sought may be freely used by all. This provision does not permit such signs or indications to be reserved for use by one undertaking as a result of their registration as a trade mark (see 04/05/1999, C-108/97 & C-109/97, Chiemsee, EU:C:1999:230, § 25; 27/02/2002, T-219/00, Ellos, EU:T:2002:44, § 27; 08/04/2003, C-53/01, C-54/01 & C-55/01, Linde, EU:C:2003:206, § 73; 06/05/2003, C-104/01, Libertel, EU:C:2003:244 § 52; 12/02/2004, C-265/00, Biomild, EU:C:2004:87, § 35, 36).
- 11 As regards, more particularly, signs or indications which may serve to designate the geographical origin of the categories of goods in relation to which registration of the mark is applied for, especially geographical names, it is in the public interest that they remain available, not least because they may be an indication of the quality and other characteristics of the categories of goods concerned, and may also, in various ways, influence consumer tastes by, for instance, associating the goods with a place that may give rise to a favourable response (see, to that effect, 04/05/1999, C-108/97 & C-109/97, Chiemsee, EU:C:1999:230, § 26; 15/10/2003, T-295/01, Oldenburger, EU:T:2003:267, § 30)
- 12 For a sign to be rejected as descriptive, there must be a sufficiently direct and specific link or relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics (22/06/2005, T-19/04, Paperlab, EU:T:2005:247, § 25; 27/02/2002, T-106/00, Streamserve, EU:T:2002:43, § 40).
- 13 A sign must be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services concerned (04/05/1999, C-108/97 & C-109/97, Chiemsee, EU:C:1999:230, § 30-31; 20/03/2003, T-355/00, Tele Aid, EU:T:2002:79, § 30; 23/10/2003, C-191/01 P, Doublemint, EU:T:2003:579, § 32; 12/02/2004, C-265/00, Biomild, EU:C:2004:87, § 38).

- 14 In the context of an analysis of whether or not it may be descriptive, the mark must, moreover, be considered as a whole (19/04/2007, C-273/05 P, Celltech, EU:C:2007:224, § 78-80).
- 15 Accordingly, for a trade mark which consists of a word or a neologism produced by a combination of elements to be regarded as descriptive within the meaning of Article 7(1)(c) EUTMR, it is not sufficient that each of those components may be found to be descriptive, but the word or neologism itself must also be found to be so (see, by analogy, 12/02/2004, C-363/99, Postkantoor, EU:C:2004:86, § 96; see also 12/06/2007, T-339/05, Lokthread, EU:T:2007:172, § 30 and the case-law cited).
- 16 A trade mark consisting of a neologism composed of elements each of which is descriptive of characteristics of the goods or services in respect of which registration is sought is itself descriptive of those characteristics, unless there is a perceptible difference between the neologism and the mere sum of its parts; this presupposes that, because of the unusual nature of the combination in relation to the goods or services, the neologism creates an impression which is sufficiently far removed from that produced by the mere combination of the elements of which it is composed, with the result that the word is more than the sum of its parts (12/02/2004, C-265/00, Campina Melkunie, EU:C:2004:87, § 37-41; 25/02/2010, C-408/08 P, Color Edition, EU:C:2010:92, § 61, 62).
- 17 Where there is a perceptible difference of that kind, a sufficiently direct and specific association cannot be found to exist between the sign and the categories of goods or services in respect of which registration is sought, as is necessary for a finding that the disputed sign is descriptive (see, by analogy, 27/02/2002, T-106/00, Streamserve, EU:T:2002:43, § 39; 20/03/2002, T-356/00, Carcard, EU:T:2002:80, § 28).
- 18 Article 7(2) EUTMR states that Article 7(1) EUTMR is to apply notwithstanding that the grounds of non-registrability obtain in only part of the European Union. That provision implies that, if a combination of words is purely descriptive in one of the languages used in trade within the European Union that is sufficient to render it ineligible for registration as a European Union trade mark.
- 19 Taking account of the fact that the contested mark is composed of English words, the public by reference to whom the existence of an absolute ground for refusal must be assessed is the English-speaking public. The goods covered by the mark applied for are directed to the public at large.
- 20 The element ‘YORKSHIRE’ as the applicant acknowledges is a sizeable geographical location in the North of England. Yorkshire is formerly the name of the largest of the northern counties of England which is currently divided into the three counties of North, West, and South Yorkshire. The name ‘Yorkshire’ is still used loosely to designate the region covered by the former county or, more accurately, to that formed by the present three counties, or to describe anything ‘pertaining to or characteristic of Yorkshire’ (see *The Oxford English Dictionary* at <http://www.oed.com>).
- 21 Indeed, the extracts in Annex 1 that the applicant itself has provided illustrate that the relevant public is accustomed to food products with Yorkshire grown

ingredients or food products that originate from Yorkshire (for example, 'Yorkshire lemon curd' and 'Yorkshire granola' made by undertakings established in Yorkshire or, 'Yorkshire crisps' from locally grown Yorkshire potatoes referred to in Annex 1).

- 22 The relevant English-speaking public will, therefore, understand that the term 'YORKSHIRE' designates products that pertain to, or are a characteristic of, the geographical location of Yorkshire in the North of England. Associating the goods in the application to the region of Yorkshire will give rise to a favourable purchase response in the minds of the relevant public.
- 23 As to the word 'PROVENDER' it is apparent from the extracts from the English dictionaries, which the applicant itself submitted (*The Oxford English Dictionary* at <http://www.oed.com> and *Collins English Dictionary*) as well as the Google extract (Annex 2), that that word means 'food; food in general; food provisions'.
- 24 According to the applicant, the conclusion as regards Article 7(1)(c) EUTMR is incorrect in so far as the examiner relied on the finding that the mark applied for constituted a combination of 'very common and meaningful English words'. Here, in effect, the applicant claims, in essence, that, in order for the term 'YORKSHIRE PROVENDER' to be regarded as descriptive, the term 'PROVENDER' which is uncommon would have to be understood by the average consumer.
- 25 However, according to the case-law, for the purposes of the application of Article 7(1)(c) EUTMR, it suffices that there is, at least from the point of view of a not insignificant part of the target public, a sufficiently direct and specific relationship between the sign at issue and the goods or services in respect of which registration has been sought (23/10/2015, T-822/14, Cottonfeel, EU:T:2015:797, § 23 and the case-law cited).
- 26 The Board considers that at the very least, a significant part of the general public at whom the goods in question are directed, consists of consumers who are connoisseurs of food, who particularly enjoy food and who have, consequently, extensive knowledge of food and of the vocabulary in the field of food. Accordingly, it is likely that a significant part of the relevant public will know that 'provender' means 'food in general'. Furthermore, the infrequent use of the word 'PROVENDER' cannot, on its own, be regarded as evidence necessarily signifying that it will not be known by a significant part of the public targeted.
- 27 Therefore, the finding that under at least one of its meanings the word 'PROVENDER' means 'food in general; food; provisions' is sufficient for it to be held that the examiner correctly took the view that the expression 'YORKSHIRE PROVENDER' would be understood, by the relevant public, as a reference to food from the region of Yorkshire.
- 28 Moreover, it must be noted here that, in order for the Office to refuse registration of a trade mark under Article 7(1)(c) EUTMR, it is not necessary that the signs and indications composing the mark that are referred to in that article actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in relation to which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that

provision itself indicates, that such signs and indications could be used for such purposes (21/06/20017, T-856/16, LONGHORN STEAKHOUSE, EU:T:2017:412, § 45; 07/06/2005, T-316/03, MunichFinancialServices, EU:T:2005:201, § 41 and the case-law cited).

- 29 In any case, the applicant has not provided evidence capable of establishing that the public targeted would not perceive the meaning of the term ‘PROVENDER’. In particular, it would appear from the very dictionaries and the Google extract that the applicant has cited, that it is rather the meaning of ‘dry food, as hay, oats etc. for horses or cattle; fodder, forage’ that is dated. Protection is not sought for food for animals and, therefore, it is inconceivable that the word ‘PROVENDER’ will call to mind the meaning of dry food for animals.
- 30 The public targeted will accordingly perceive the mark applied for as the designation of the kind, quality and geographical origin of the goods in the application. The mark applied for, as a whole, describes food elaborated in, or elaborated from products originating from, the region of Yorkshire. Consequently, the examiner was fully entitled to conclude that the contested mark was descriptive for the purposes of Article 7(1)(c) EUTMR.

Article 7(1)(j) EUTMR

- 31 Pursuant to Article 7(1)(j) EUTMR, trade marks excluded from registration, pursuant to Union legislation ... providing for protection of designations of origin and geographical indications shall not be registered.
- 32 According to Article 7(2) EUTMR, Article 7(1) EUTMR shall apply notwithstanding that the grounds of non-registrability obtain in only part of the European Union.
- 33 Within the meaning of Article 13(1) of Regulation (EC) No 510/2006 (rectius: Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, which repeals and replaces the aforesaid in the interests of clarity and transparency – see the 13th, 14th and 21st recitals), registered names shall be protected against (emphasis added by italics):
- a) any direct or indirect commercial use of *a registered name in respect of products not covered by the registration where those products are comparable to the products registered under that name or where using the name exploits the reputation of the protected name, including when those products are used as an ingredient;*
 - b) any misuse, imitation or *evocation*, even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by an expression such as ‘style’, ‘type’, ‘method’, ‘as produced in’, ‘imitation’ or similar, including when those products are used as an ingredient;
 - c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product that is used on the inner or outer packaging, advertising material or documents relating to the product concerned, and the

packing of the product in a container liable to convey a false impression as to its origin;

- d) any other practice liable to mislead the consumer as to the true origin of the product.
- 34 In addition, within the meaning of Article 14(1) of the foregoing Regulation, the registration of a trade mark the use of which would contravene Article 13(1) and which relates to a product of the same type shall be refused if the application for registration of the trade mark is submitted after the date of submission of the registration application in respect of the designation of origin or the geographical indication to the Commission.
- 35 The specific objectives of protecting designations of origin and geographical indications are securing a fair return for farmers and producers for the qualities and characteristics of a given product, or of its mode of production, and providing clear information on products with specific characteristics linked to geographical origin, thereby enabling consumers to make more informed purchasing choices (see the 18th recital and Article 4 of Regulation (EU) No 1151/2012).
- 36 It is not in dispute that under Regulation (EC) No 510/2006 rectius: Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs ‘Yorkshire Wensleysale’ is a protected geographical indication (PGI) for ‘cheeses’ with a date of registration of 21 December 2013 and ‘Yorkshire Forced Rhubarb’ is a protected designation (PDI) with a date of registration of 25 March 2010 (see the entries for these indications in the Database of Origin & Registration of product names for foodstuffs registered as Protected Designation of Origin (PDO), Protected Geographical Indication (PGI) and Traditional Specialties Guaranteed).
- 37 In this case, the applicant argues that the mark applied for would not evoke the PGI ‘Yorkshire Wensleydale’ or the PDI ‘Yorkshire Forced Rhubarb’ given the dissimilarity of the additional elements ‘PROVENDER’, on the one hand, and ‘WENSLEYDALE’ or ‘FORCED RHUBARB’, on the other. The applicant also considers that the application is for products that are not comparable to the types of products protected by the above PGI and PDI.

Products

- 38 ‘Yorkshire Wensleydale’ is a protected geographical indication for ‘cheeses’. A cheese is a dairy food made from pressed milk curds. The curds are formed by the addition of rennet to cow’s milk especially, which are separated from the whey, or watery part of the milk, before being pressed and ripened.
- 39 ‘Milk products; dairy products’ in the application, which clearly include cheeses, are clearly identical to cheeses covered by the PGI ‘YORKSHIRE WENSLEYDALE’.
- 40 Since cheeses are made primarily from milk and a cheese may be a constituent of cheese-based products, the following products in the application are comparable

products within the meaning of Article 13(1)(a) of Regulation (EC) No 510/2006 cited above:

‘Milk and milk products; dairy products; dairy desserts’.

- 41 ‘YORKSHIRE FORCED RHUBARB’ is a protected designation of origin. As the applicant points out forced rhubarb is a type of rhubarb grown in a particular manner. It is an out of season rhubarb that is first grown outside, lifted from the ground and placed in a heated darkened forcing shed, which forces the rhubarb to grow quickly in search of light. Though a plant, the edible stalks of rhubarb are used like fruit and may be preserved, frozen, processed or cooked. They may be used in the elaboration of desserts, jellies, jams, compotes, dessert puddings and baked goods, in the making of which rhubarb may be an important ingredient. The forcing process adds colour and sweetness, which are particularly sought after in the making of food products using rhubarb as the essential ingredient.
- 42 The following goods in the application, the primary and essential ingredient of which may be rhubarb, may, thus, be considered comparable to forced rhubarb:

Class 29 – Preserved, frozen, dried and cooked fruits and vegetables; processed fruits; fruit desserts; processed vegetables; Jellies, jams, compotes;

Class 30 – Baked goods; dessert puddings.

Evocation

- 43 The concept of ‘evocation’ mentioned in the above paragraph covers a situation where the term used to designate a product incorporates part of a protected designation, so that when the consumer is confronted with the name of the product, the image triggered in his or her mind is that of the product whose designation is protected (04/03/1999, C-87/97, Cambozola, EU:C:1999:115, § 25; 26/02/2008, C-132/05, Commission v Germany, EU:C:2008:117, § 44).
- 44 The Court of Justice also held that there could be evocation of a protected designation even in the absence of any likelihood of confusion between the goods concerned, since what matters is, in particular, that an association of ideas regarding the origin of the products is not created in the mind of the public, and that a trader does not take undue advantage of the reputation of the indication in question (02/02/2017, T-510/15, TOSCORO, EU:T:2017:54, § 31).
- 45 The applicant claims in essence here that if the mark applied for is viewed as a whole it is not likely to give rise to confusion with the PGI and the PDI in question, since the different additional word elements are visually and phonetically different. This argument cannot succeed, since the ground for refusal laid down in Article 7(1)(j) EUTMR applies without it being necessary to consider whether or not the mark for which registration is sought is liable to deceive the public, or whether it leads to a likelihood of confusion regarding the origin of the product (11/05/2010, T-237/08, Cuvée Palomar, EU:T:2010:185, § 119, 120).
- 46 In that respect it must be stated that according to the case-law, for the absolute ground for refusal referred to in Article 7(1)(j) EUTMR to apply, it suffices that the mark applied for contains or consists of elements which enable the geographical indication in question to be identified with certainty (see to that

effect, 11/05/2010, T-237/08, Cuvée Palomar, EU:T:2010:185, § 125, 131) That is the case here: ‘Yorkshire’ is the essential region from which the goods that are identical and comparable to the PGI and PDI originate.

- 47 The decisive question is that when the consumer is confronted with the trade mark on identical and comparable products, the image triggered in his or her mind will be that of the product whose designation is protected. For the image to be triggered in the mind of the consumer a likelihood of confusion is not required, it is sufficient that there is an association of ideas regarding the origin of the products. In this case, such an association is all the more likely since ‘YORKSHIRE’ is reproduced identically at the beginning of the mark applied for, which, as the initial part of the sign applied for will attract the consumer’s attention. Moreover, it does not have its own autonomous meaning that would significantly distinguish the mark applied for, designating identical or comparable goods from the PGI and the PDI at issue.
- 48 In any case, contrary to the applicant’s argument, the presence of the additional elements – ‘PROVENDER’ on the one hand and ‘WENSLEYDALE’ or ‘FORCED RHUBARB’, on the other hand – in themselves, therefore, cannot overcome the application of the concept of ‘evocation’. ‘PROVENDER’ in the mark applied for, on the one hand, which means ‘food products; food in general’ lacks distinctive character for the products at issue. ‘FORCED RHUBARB’, and ‘WENSLEDALE’, in the other hand, as the applicant itself concedes, are generic terms for a plant with long fleshy edible stalks and as a style of cheese, respectively. The additional terms will, therefore, not add to the distinctive character of the geographical indication ‘YORKSHIRE’.
- 49 The presence of the word ‘YORKSHIRE’ is sufficient to evoke, in the minds of a significant proportion of the English-speaking public, the PGI ‘YORKSHIRE WENSLEYDALE’ and the PDI ‘YORKSHIRE FORCED RHUBARB’ not only for identical but also comparable products. Article 7(2) EUTMR reinforces the principle of the unitary character of the European Union trade mark by stipulating that the registration of such a trade mark must be refused notwithstanding that the grounds of non-registrability obtain in only part of the Union.
- 50 The mark applied for is also refused in part, namely for the good below under Article 7(1)(j) EUTMR:

Class 29 – Milk and milk products; dairy products; dairy desserts; Preserved, frozen, dried and cooked fruits and vegetables; processed fruits; fruit desserts; processed vegetables; Jellies, jams, compotes;

Class 30 – Baked goods; dessert puddings.

Article 7(3) EUTMR

- 51 In the alternative, the applicant requests that, in the event the objections of the examiner are upheld, the right to file evidence of acquired distinctiveness.
- 52 The onus is on the applicant to present all the evidence and arguments to rebut the findings of the examiner. The applicant has failed to do so. The request is, therefore, rejected. In addition, the claim would not overcome the objection in part under Article 7(1)(j) EUTMR.

53 In light of the above considerations, the appeal is dismissed.

Order

On those grounds,

THE BOARD

hereby:

Dismisses the appeal.

Signed

Th. M. Margellos

Registrar:

Signed

H. Dijkema

