

Alicante, 05/05/2021

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Notification of a decision to the EUTM proprietor/IR holder

<i>Your reference:</i>	38767-0155EU1
<i>Invalidity number:</i>	000033961 C
<i>Contested trade mark:</i>	017968798 IMPOSSIBLE BURGER

Please find attached the decision terminating the proceedings referred to above. The decision was delivered on **05/05/2021**.

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



Michaela SIMANDLOVA

Enclosures (excluding the cover letter): 19 pages

CANCELLATION No C 33 961 (INVALIDITY)

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

a g a i n s t

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

On 05/05/2021, the Cancellation Division takes the following

DECISION

1. The application for a declaration of invalidity is rejected in its entirety.
2. The applicant bears the costs, fixed at EUR 450.

REASONS

On 18/03/2019, the applicant filed a request for a declaration of invalidity against European Union trade mark No 17 968 798 'IMPOSSIBLE BURGER' (word mark) (the EUTM), filed on 15/10/2018 (with priority from 16/05/2018) and registered on 28/02/2019. The request is directed against all the goods covered by the EUTM, namely:

Class 29: Substitutes for food, namely, plant-based meat substitutes, plant-based fish substitutes, and plant-based chicken substitutes; Meat, fish, seafood, poultry and game; food products made from meat, fish, seafood, poultry or game; extracts for food made from meat, fish, seafood, poultry or game; preserved, frozen, dried and cooked fruits, vegetables, nuts, seeds, seaweed and algae; food products made from fruits, vegetables, nuts, seeds, seaweed or algae; extracts for food made from fruits, vegetables, nuts, seeds, seaweed or algae; eggs, egg whites, egg yolks, egg products, egg substitutes; milk, milk products, milk substitutes; protein milk and protein milk products; edible oils and fats; substitutes for foods made from animals or animals products, in particular plant-based burger patties; substitutes for food, namely, plant-based meat substitutes, plant-based fish substitutes, and plant-based chicken substitutes; meat substitutes; fish substitutes; dairy substitutes, in particular non-dairy butter, non-dairy margarine, non-dairy cheese, non-dairy cottage cheese, non-dairy cream cheese, non-dairy cream, non-dairy yogurt, non-dairy milk, non-dairy half and half, non-dairy buttermilk, non-dairy and non-alcoholic eggnog, non-dairy sour cream, non-dairy whipping cream, non-dairy whipped cream, non-dairy dip excluding salsa and other sauces, non-dairy powdered cheese; food products made from meat substitutes, fish substitutes, seafood substitutes or dairy substitutes; plant-based snack foods; bean-based prepared meals; bean-based snacks.

The applicant invoked Article 59(1)(a) EUTMR in conjunction with Article 7(1)(b) and (c) EUTMR.

SUMMARY OF THE PARTIES' ARGUMENTS

The applicant argues that the mark is descriptive because it immediately informs a consumer about a characteristic of the products concerned, namely that the goods at issue are burgers that cannot possibly exist. It considers this to be a clear laudatory and promotional message, which renders the mark non-distinctive. It puts forward that the contested mark is a simple combination of commonplace English terms which will be understood by European consumers with a basic understanding of English. According to the applicant, the word 'impossible', when used in the context of exclamation, may be perceived not only in its traditional dictionary meanings but also as an expression of astonishment or admiration. The applicant argues that taken as a whole, the public will understand the contested sign as referring to burgers that one thought could not possibly exist, and this will be perceived as a promotional message highlighting the positive qualities of the products. It gives examples of use of the word 'impossible' on the website and social network pages of the EUTM proprietor, claiming that the latter uses the term in non-distinctive manner itself. It puts forward that the mark will be understood as a burger that is difficult to make, for example because it is a vegetarian burger with the taste of a real burger. The applicant also points out to the fact that the EUTM proprietor sent the applicant a warning letter, in which it compared the word 'impossible' to the word 'incredible', claiming that these words are used synonymously to describe something fabulous, never seen before. It gives examples of online use of the word 'impossible', in the context of recipes and cooking shows, and it refers to previous cases which it considers analogous to the present one. It also claims that the word 'impossible' can be used as a synonym of 'incredible' and refers to several decisions in which the marks containing the word 'incredible' were refused. It concludes that the contested trade mark is descriptive. The applicant also alleges that the mark lacks distinctive character, on account of its descriptiveness and, moreover, on account on the purely promotional message that it conveys. It also stresses that there is a public interest in ensuring that undue monopolization does not lead to unfair competitive advantage to a single trader, which, as the applicant believes, is the case here. It points out that the EUTM proprietor believes that the protection of the contested mark extends over other laudatory expressions such as 'incredible'. It argues that such expression should be free to use by anyone and cannot be monopolized by the EUTM proprietor.

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

- Excerpts from Oxford Living Dictionaries regarding 'burger' and 'impossible'.
- Excerpts from websites concerning food, which contain the word 'impossible', namely a restaurant named 'Not Impossible Burger', a blog entitled 'kitchen-impossible', recipes for dishes entitled 'impossible chocolate pie', 'impossible chocolate cream pie', 'impossibly easy vegetable pie', 'impossible peanut butter cookies', 'impossible pudding', an excerpt from 'food network' regarding 'Anita's Impossible buttermilk pie', a forum discussing the topic 'taste, texture and stability: the impossible cookie?', an article entitled 'the best impossible pasta shapes made real by 3D printing', a Wikipedia article regarding an American tv show 'Dinner: Impossible'.

The EUTM proprietor describes the history of the company and its products, focusing on plant based substitutes for meat that would taste like real meat. It claims it achieved a major success in the USA and now it is preparing to expand to Europe. It also draws attention to the relationship and disputes between the two parties, alleging that the applicant attempted to copy the EUTM proprietor's success, when it introduced 'Incredible Burger' for the same products, with striking similarities in marketing. The EUTM proprietor argues that the contested mark is not descriptive, because it does not describe any of the characteristics of the goods. It puts forward that the mark will be perceived as 'burger that cannot exist', which leaves a

question as to its characteristics wide open. It contends that the expression forming the mark is paradoxical and calls it a creative witticism. The mark creates in the viewer an expectation of something unimaginable and it is incapable of conveying any precise information. It recalls the literal meaning of the word 'impossible' and emphasizes the paradox of the mark, which describes something existing as non-existing, thus creating a conceptual tension. It also analyses the figurative meanings of the word 'impossible' as described in the dictionaries and concludes that the mark is not descriptive even in these meanings, which are negative in tone, and if anything, enhance the mark's semantic mistiness. It rejects the applicant's claim that the consumers would understand 'impossible burger' as 'burger made of plants' as the antithesis of burger and argues that burgers are too multifaceted for the consumers to be able to pick one characteristic of theirs and conclude that the word 'impossible' indicates that the products are the opposite of that characteristic. Moreover, it argues that 'impossible' does not equal to a negation of something, in other words, 'impossible' is not the same as 'anti'. It stresses that if the applicant relies on a meaning of the word that is not literal and is less obvious, the burden of proof lies with the applicant to demonstrate that such perception exists. It concludes that there is no sufficiently specific and direct relationship between the contested mark and the contested goods. As regards the use of the word 'impossible' by the EUTM proprietor and third parties, the EUTM proprietor argues that the word is a part of the English language and anyone is allowed to use it as such. The meaning of the entire sentences including the word 'impossible' have no evidentiary value regarding the descriptiveness of the trade mark. Moreover, from such use of the word it become obvious that no laudatory connotations can be found in the word 'impossible' inherently. As regards the use by others, the EUTM proprietor points out that such use has been made in many different contexts and no conclusion in the sense that one specific meaning can be extracted from these examples can be drawn. Moreover, some of the applicant's examples are registered trade marks. It provides a list of trade marks containing the word 'impossible' that were registered, to counter the applicant's examples of rejected trade marks. Finally, concerning the alleged lack of distinctiveness of the mark, the EUTM proprietor argues that the mark is not non-distinctive on account of its descriptiveness, which was not demonstrated, and neither is it non-distinctive on account of it being a promotional message, because it is not a merely promotional message.

The applicant reiterates its previous arguments and, in addition, it argues that recently, various companies entered the EU market with the new type of meat alternatives, which, unlike the previous products for vegetarians, are more similar in taste and texture to meat and are aimed at meat-eaters. It claims that this new types of substitutes are often advertised as incredible, ultimate, unbelievable, epic etc. It puts forward that this shows a market practice of using common laudatory names to label such products. The applicant concludes that it has not been trying to imitate the EUTM proprietor's advertising strategy but rather using a common non-distinctive terms which are no unique selling point of the proprietor. Moreover, the applicant contends that if the consumers were to understand the term 'impossible' in its literal meaning, i.e. non-existent, the mark would be deceptive as clearly the products do exist. The applicant insists that it is rather clear to which characteristic of a burger the word 'impossible' relates, in particular bearing in mind the list of goods. It maintains that 'being made of meat' is the most essential characteristic of a burger and submits several documents to support this. It argues that for a sign to be descriptive, it is sufficient if one of its meanings is descriptive and that not every uncertainty as to the content of a term establishes distinctiveness. It gives an example of 'best burger', which is not a registrable expression, despite the fact that consumers cannot be sure what exactly makes the burger to be the best. It rejects the EUTM proprietor's arguments about the inner tension and paradox created by the mark and gives examples of 'paradoxical' signs that were refused registration. According to the applicant, even the negative figurative connotations of the word presented by the EUTM proprietor such as 'unacceptable burger' or 'objectionable burger', are descriptive. It provides a list of synonyms to the word 'impossible' to support the claim that it is a simple laudatory expression. It provides also dictionaries of French, Italian and Spanish to show the meaning of the word 'impossible'

in those languages. It argues that the way in which other parties refer to the EUTM proprietor also shows that the word 'impossible' is merely a laudatory and descriptive term. Finally, it refers to a video published by the EUTM proprietor on YouTube, in which, according to the applicant, the word 'impossible' again was used in a descriptive or laudatory and promotional way. In its opinion, there is no need of any mental steps to grasp the laudatory meaning of the word. It maintains that the contested mark is descriptive and non-distinctive.

The applicant submitted the following documents:

- Documents to illustrate that 'burger' is normally understood as a meat product: a Wikipedia article regarding 'hamburger', an article published on www.wired.com entitled 'The Impossible Burger: Inside the Strange Science of the Fake Meat that Bleeds'; an article published on www.cnet.com entitled: 'Impossible Burger 2.0: How does it taste, is it safe and where can you get it?'.
- Excerpt from thesaurus.com, macmillanthesaurus.com and Collins Dictionary online showing the synonyms for 'impossible' in English.
- Excerpts from www.synonymes.net, www.woxikon.it and buscapalabra.com, showing synonyms for the word 'impossible' in French, 'impossibile' in Italian and 'imposible' in Spanish.
- An article entitled '5 Disruptions to Watch in the Food Industry: Impossible Foods' published in 2019 on www.foodprocess.ng.com.
- An article entitled 'Burger King releases 'Unbelievable Burgers' in Europe', published in September 2019 in *Vegconomist*.
- An excerpt from the Swedish trade mark database showing the mark 'Unbelievable Whopper' as expired.
- Excerpt from the EUIPO database regarding the mark 'Impossible Objects'.

The EUTM proprietor reiterates its previous arguments and explains the history of the company. It argues that the goods of the EUTM proprietor, plant based burgers, were the first ones on the market of its kind and a sensational outbreak, which resulted in a number of parties trying to free ride on the goodwill of the 'impossible burger' trade mark. It claims that the applicant is one of such parties. It insists that the term 'impossible burger' is not descriptive and that it lacks sufficiently direct and specific relationship to the goods. The EUTM proprietor claims that there is an interpretational need when it comes to the meaning of 'impossible burger' and that there is no meaning of this expression that is apparent without further reflection. According to the EUTM proprietor, the applicant's own submissions make it clear that the meaning of 'impossible burger' is uncertain at best. The EUTM proprietor also maintains its previous position that the mark is distinctive and that it cannot be considered to be merely laudatory, while pointing out that the meaning of 'impossible' is, in the common and everyday speech, more negative than positive. It puts forward that even if a term can have, under certain circumstances, positive connotations, this is not sufficient to conclude that it is non-distinctive. It dismisses the applicant's references to synonyms of the word 'impossible' in various languages, and illustrates on examples from the same websites that the relationships between the words given there are very loose. It dismisses the applicant's argument regarding the recent trend in naming plant based burgers with laudatory names, because those names are different from 'impossible' and are used in different contexts. It also notes that most of the mentioned products were introduced to the market only after the filing date of the contested mark. The EUTM proprietor points out that the applicant referred to case

law but having no previous examples of the word 'impossible' being judged as descriptive or non-distinctive, it resorted to cases involving different words such as 'incredible', 'awesome', 'extraordinary' etc., which are not words comparable to 'impossible', according to the EUTM proprietor.

The EUTM proprietor submitted the following documents:

- Documents to show the renown of Impossible Foods brand (articles published in non-EU press, articles published in the European press and references from EU consumers).
- Examples of what the EUTM proprietor considers to be infringement of the EUTM proprietor's trade marks.
- Examples of signs referred to by the applicant which are registered as trademarks.
- Judgment of 27/05/2020 of the District Court of The Hague in the matter of infringement of the EUTM proprietor's 'impossible' trade marks by the applicant's 'Incredible Burger'. The Court provisionally found that the present invalidity action cannot succeed because the contested mark is distinctive and not descriptive, decided that there is a risk of likelihood of confusion between 'Impossible burger' and 'Incredible burger' and issued a preliminary injunction against the applicant's use of 'Incredible Burger'.

The applicant argues that the decision of The Hague court is erroneous and appeal is pending against it. It emphasizes that the EUIPO has an exclusive competence to register or refuse a trade mark and the national judgments are not binding for the EUIPO. It puts forward that the judgment is a mere preliminary ruling and the main proceedings are suspended waiting for the outcome of the invalidity proceedings against the EUTM proprietor's trade marks. The applicant describes the market of vegetarian meat substitutes and claims that the EUTM proprietor is no pioneer in that market. Even in the field of meat substitutes that resemble meat, the EUTM proprietor is not the first one. It puts forward that the EUTM proprietor's products are not even yet on the EU market and they were launched in the US only recently. It emphasizes the role of the applicant in the meat substitutes area. It argues that its use of 'Incredible burger' is only descriptive, next to the trade mark 'Garden Gourmet'. It declares that in another infringement case brought by the EUTM proprietor, the District Court in Frankfurt decided not to grant the injunction, stating that the EUTM proprietor's mark is weakly distinctive at best and that no infringement occurred. The EUTM proprietor withdrew its action and filed a new one with the District Court of Hamburg, with the same result. Only then the EUTM proprietor filed the action with the Court of The Hague, and there the EUTM proprietor succeeded. The applicant continues with clarifications regarding the previous negotiations between the parties in the USA regarding a possibility of using 'Impossible minced meat' in the vegan lasagna in the hospitality industry. Furthermore, the applicant repeats, reiterates and elaborates on its previous arguments regarding the descriptiveness and lack of distinctive character of the contested mark. In particular it emphasizes that for a refusal of a sign it is sufficient if it is descriptive in one of its meanings. It also focuses on arguing that the word 'impossible' can have a laudatory meaning. It gives further examples of the use of the word 'impossible' on the EUTM proprietor's websites and in advertising slogans by third parties. It submits a survey according to which a certain part of the relevant public associates the contested mark with the meanings suggested by the applicant, such as a tasty burger or a burger that tastes like meat. Finally, the applicant maintains that the mark will be perceived as a merely promotional message and that it is non-distinctive.

The applicant submitted the following documents:

- List of proceedings based on Article 7(1)(b) and (c) EUTMR, dealt with either by the Cancellation Division or the Board of Appeals of the EUIPO in 2019 and 2020, showing 74% of the proceedings resulting in the marks considered non-distinctive.
- Article from the website foreignpolicy.com regarding the amount of English speakers in Japan.
- Compilation of articles regarding the company “Beyond Burger” and its product.
- Compilation of various articles regarding the market introduction of the “IMPOSSIBLE BURGER” and the issues with one of the ingredients.
- Notification from the District Court of Frankfurt in the preliminary injunction proceeding, re 2-06 O 122/19, in which the Court finds that there can be no likelihood of confusion between Impossible Burger and Incredible Burger, as there is no aural and conceptual similarity and the earlier mark has, at best, a low inherent distinctiveness.
- English language translation of the Notice of Appeal including its Grounds submitted at the District Court of the Hague by the applicant.
- Compilation of various dictionary definitions regarding the term ‘IMPOSSIBLE’.
- Copy of the pre-trial warning letter sent by the Proprietor to Nestlé as part of the German preliminary injunction proceedings.
- Examples of inspirational quotes or advertising slogans mostly inspiring to do ‘the impossible’.
- Examples of the use of the word ‘impossible’ or ‘impossibly’ in online recipes and other food contexts.
- Decisions of the EUIPO refusing the marks ‘PERFECT BURGER’, ‘GREAT BURGER’ and ‘Glamburgers’.
- Survey by PanelWizard, carried out in August 2020, among consumers of the UK, France, Germany and the Netherlands, regarding the perception of meaning of ‘impossible burger’.

The EUTM proprietor reiterates the importance of the judgment of The Hague Court and claims that the application is not substantiated. It also stresses that the applicant failed to show the relationship between the mark and the relevant goods, which cover a broad range of foodstuff. It argues that the mark must be assessed as registered and how it is used is irrelevant and, therefore, the documents showing the use of the word ‘impossible’ by the EUTM proprietor have no significance in these proceedings. The EUTM proprietor refers to case-law establishing that evocative or suggestive trade marks are registrable. It reiterates its previous arguments. It criticizes the survey submitted by the applicant and argues that the applicant’s interpretation is misleading, that the largest group of the respondents did not associate the mark with any descriptive concept and that the applicant only provided the summarized results without making the raw data available. It submits an expert report in which the raw data of the applicant’s survey are analysed. As regards the mark’s distinctiveness, the EUTM proprietor argues that the fact alone that something may be a promotional slogan does not automatically disqualify the sign from registration as a trade mark. It refers to previous cases in which trade marks such as ‘BEYOND SUGAR’ or ‘UNSTOPPABLE’ were considered distinctive.

The Office closed the adversarial part of the proceedings after this submission of the EUTM proprietor, on 17/12/2020, and informed the parties that no further observations should be submitted. The adversarial part of the proceedings was already closed for the second time, after it was reopened following the EUTM proprietor's submission of the judgment of the Court of The Hague.

After the closure of the adversarial part of the proceedings on 17/12/2020, the EUTM proprietor filed another letter, in which it brought the attention to the fact that the applicant has filed new cancellation requests against the EUTM proprietor's 'IMPOSSIBLE' trade marks. It accuses the applicant of delaying tactics and abuse of law, with the purpose of preventing the EUIPO from issuing any validating decisions for the marks while the appeal is pending before The Hague Court.

The applicant also filed another observations, arguing that the EUTM proprietor's last submission contained new evidence, namely the expert report, and, therefore, the applicant must either be given an opportunity to comment on this new evidence, or the EUTM proprietor's last observations must not be taken into account. In these observations, the applicant largely repeats and reiterates arguments already raised repeatedly in its previous observations. It submits a statement of an independent expert to confirm that the survey previously submitted was conducted in line with industry standards and that it observed requirements set up by the EU case law. It also submits the raw data of the survey, i.e. actual answers of all the respondents of the survey. It argues that only answers that confirmed the descriptiveness of the mark are relevant as the mark is descriptive if only a part of the relevant public finds it descriptive. It also submitted two judgments, of a Benelux Court of Justice (PET'S Budget) and of German Federal Court of Justice (HOT).

The EUTM proprietor argues that the applicant's request to again reopen the adversarial part of the proceedings is delaying tactics and that both parties had sufficient opportunities to present their views of the case.

The applicant refutes the EUTM proprietor's accusations of delaying tactics and recalls that it was the EUTM proprietor who introduced new evidence into the proceedings. It argues that the EUTM proprietor is trying to cut off the applicant's basic procedural rights and insists that if its last observations should not be taken into account, the Office must disregard also the last observations of the EUTM proprietor.

On 24/03/2021, the EUTM proprietor filed observations in which it claims that it is the applicant who wants to deprive the other party of the right to be heard and summarizes the applicant's actions during the proceedings against all the EUTM proprietor's contested 'impossible' trade marks. It requests that the applicant's request to reopen the adversarial part of the proceedings be rejected. It submits the response of its own expert to the statement of the expert of the applicant. On 22/04/2021 the EUTM proprietor informed that the hearing before the Court in The Hague is scheduled for 24/06/2021 and requested that the decision in the present case be taken at least two weeks prior to the hearing.

Finally, on 27/04/2021, the applicant filed another submission, in which it refers to the last observations of the EUTM proprietor and argues that since it contains a new evidence, namely the expert report of 65 pages, which should not be taken into account. The applicant requests that the EUTM proprietor's observations of 24/03/2021 not be taken into consideration and that the adversarial part of the proceedings be closed. Should the last observations of the EUTM proprietor be taken into account, the applicant demands to be given a chance to comment on it, in accordance with the principle of the right to be heard.

Preliminary remark

The adversarial part of the proceedings was first closed on 07/07/2020. After this, the EUTM proprietor submitted a judgment, which was considered to be an important new document in the proceedings, and considering it was not possible to submit it earlier, the Office decided to take the document into account and reopened the adversarial part of the proceedings in order to give the applicant an opportunity to comment on the new document. The applicant took this opportunity to also present new evidence, in particular a survey conducted among consumers regarding their perception of the contested trade mark. After an exchange of the parties' observations, the adversarial part of the proceedings was closed again on 17/12/2020. Both parties submitted further documents and observations after the closure.

The Cancellation Division, exercising its discretionary power pursuant to Article 95(2) EUTMR, decided to take into account all the submissions of the parties, including those filed after the closure of the adversarial part of the proceedings, until the applicant's letter of 05/03/2021 (that one included). Although it is customary that the defending party has the last word, in the present case, excluding the last proprietor's submission of 24/03/2021 (which in any event contains only replies to the applicant's arguments and repetitions of issues already commented on during the course of the proceedings) is not to the detriment of the EUTM proprietor. A different approach would lead to another extension of the proceedings, which, according to the statements of both parties, is not a desirable solution for either of them. The Cancellation Division considers that both parties had sufficient opportunities to express their opinions and submit evidence regarding the subject matter of the case and answer all the arguments and evidence brought by both parties.

Regarding the EUTM proprietor's arguments concerning the alleged abuse of law and delaying tactics by the applicant, the Cancellation Division concludes the following. It is clear that there is an ongoing dispute between the two parties regarding an alleged infringement, by the applicant, of the EUTM proprietor's 'impossible' trade marks. It is a standard and legitimate means of legal defense, from the part of the applicant, to attempt to invalidate the marks on which the infringement actions are based. The fact that the applicant attacked all the EUTM proprietor's 'impossible' trade marks, cannot be considered to be an abuse of law but, rather, a hardly avoidable consequence of the fact that the EUTM proprietor owns multiple 'impossible' trade marks. The fact that the applicant did not file all the invalidity actions at the same time and that it filed new evidence at a later stage of the proceedings and insisted on reopening the adversarial part of the proceedings, or requested suspensions in the related proceedings, does not amount to abuse of law or even delaying tactics. The Cancellation Division notes that the actions of the applicant are within the legal means granted to any party of the proceedings and they fall within the boundaries of legitimate defense of its own interests.

ABSOLUTE GROUNDS FOR INVALIDITY – ARTICLE 59(1)(a) EUTMR IN CONJUNCTION WITH ARTICLE 7 EUTMR

According to Article 59(1)(a) and (3) EUTMR, a European Union trade mark will be declared invalid on application to the Office, where it has been registered contrary to the provisions of Article 7 EUTMR. Where the grounds for invalidity apply for only some of the goods or services for which the European Union trade mark is registered, the latter will be declared invalid only for those goods or services.

Furthermore, it follows from Article 7(2) EUTMR that Article 7(1) EUTMR applies notwithstanding that the grounds of non-registrability obtain in only part of the Union.

As regards assessment of the absolute grounds of refusal pursuant to Article 7 EUTMR, which were the subject of the *ex officio* examination prior to registration of the European Union trade mark, the Cancellation Division, in principle, will not carry out its own research but will confine

itself to analysing the facts and arguments submitted by the parties to the invalidity proceedings.

However, restricting the Cancellation Division to an examination of the facts expressly submitted does not preclude it from also taking into consideration facts that are well known, that is, that are likely to be known by anyone or can be learned from generally accessible sources.

Although these facts and arguments must date from the period when the European Union trade mark application was filed, facts relating to a subsequent period might also allow conclusions to be drawn regarding the situation at the time of filing (23/04/2010, C-332/09 P, *Flugbörse*, EU:C:2010:225, § 41 and 43).

It is settled case-law that each of the grounds for refusal to register listed in Article 7(1) EUTMR is independent and requires separate examination. Moreover, it is appropriate to interpret those grounds for refusal in the light of the general interest which underlies each of them. The general interest to be taken into consideration must reflect different considerations according to the ground for refusal in question (16/09/2004, C-329/02 P, *SAT.2*, EU:C:2004:532, § 25).

DESCRIPTIVENESS – ARTICLE 7(1)(c) EUTMR

Article 7(1)(c) EUTMR prohibits the registration of ‘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 service’.

By prohibiting the registration as EU trade marks of the signs and indications to which it refers, Article 7(1)(c) EUTMR pursues an aim which is in the public interest, namely that descriptive signs or indications relating to the characteristics of goods or services for which registration is sought may be freely used by all. That provision prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks (23/10/2003, C-191/01 P, *Doublemint*, EU:C:2003:579, § 31).

According to settled case-law, the signs and indications referred to in Article 7(1)(c) EUTMR are those which may serve in normal usage, from a consumer’s point of view, to designate, either directly or by reference to one of their essential characteristics, goods and services such as those for which registration of a mark is sought (22/06/2005, T-19/04, *Paperlab*, EU:T:2005:247, § 24).

According to case-law, for a sign to be caught by the prohibition set out in Article 7(1)(c) EUTMR, there must be a sufficiently direct and specific relationship between the sign and the goods and/or services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and/or services in question or one of their characteristics (22/06/2005, T-19/04, *Paperlab*, EU:T:2005:247, § 25). Moreover, in order to be caught by Article 7(1)(c) EUTMR, it is not necessary that the signs and indications composing the mark actually be in use at the time of the application for registration in a way that is descriptive but it is sufficient that such signs and indications could be used for such purposes. A sign must therefore be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services concerned. It is sufficient that at least one of the possible meanings of a word sign designates a characteristic of the goods concerned (23/10/2003, C-191/01 P, *Doublemint*, EU:C:2003:579, § 32).

The existence of the abovementioned relationship must be assessed, first, in relation to the goods or services for which registration of the sign is sought and, second, in relation to the

perception of the section of the public targeted, which is composed of the consumers of those goods or services (27/11/2003, T-348/02, Quick, EU:T:2003:318, § 29).

In the present case, the contested goods are foodstuff in Class 29. The relevant public is the public at large.

The contested mark is composed of English words. The evidence and arguments submitted by the applicant refer to the meaning of the sign in English and also in Spanish, Italian and French. The Cancellation Division will, therefore, take into account the perception of the public speaking any of the languages to which the applicant's evidence relates.

The contested mark is composed of two words, 'IMPOSSIBLE' and 'BURGER'.

According to the Oxford Dictionary online (www.oed.com), the word 'impossible' means:

- Not possible; that cannot be done or effected; that cannot exist or come into being; that cannot be, in existing or specified circumstances
- In recent use, with ellipsis of some qualification suggested by the context; as, impossible to deal with, to carry into practice, to do anything with, to get on with, to tolerate, to recognize; utterly unsuitable or impracticable, 'out of the question'.

According to Collins English dictionary (www.collinsdictionary.com), the word 'impossible' means:

- Something that is impossible cannot be done or cannot happen.
- An impossible situation or an impossible position is one that is very difficult to deal with.
- If you describe someone as impossible, you are annoyed that their bad behaviour or strong views make them difficult to deal with.

According to the latter dictionary, the word 'burger' means:

- a flat round mass of minced meat or vegetables, which is fried and often eaten in a bread roll.

In view of the above meanings, the combination of the words 'impossible burger' creates an unusual expression, literally meaning a burger that cannot exist, cannot be done or is very difficult to deal with. The remaining meanings are used in connection with living beings and are not positive. The combination thus creates an impression of a slightly amusing paradox, of something clearly possible and real (as the product labelled with the mark will evidently be in the realm of existence, when consumers encounter it) with the name that contradicts the very existence of it. This situation does not fall under Article 7(1)(g) ETMR, as the applicant suggests at one point, because the risk of deceit falling under this provision must be real, actual and sufficiently serious (04/03/1999, C-87/97, Cambozola, EU:C:1999:115, § 41), none of which conditions are fulfilled in the present case. Consumers cannot be seriously deceived into thinking that the product at issue does not exist.

The term as a whole does not describe any specific characteristic of the goods. The consumers are, at first, presented with an unusual combination of words which contains a conceptual dilemma, which may lead them to different conclusions. They may assume that the producer of the 'impossible burger' wanted to pass a certain message when choosing the

name of the burger, however, it is not clear and unambiguous what this message is. The word 'impossible' does not describe any particular quality, or any superior quality, on the contrary, in the common use outside of its primary meaning (something that cannot exist) it has negative connotations (see above the dictionary definitions). Consumers are not used to seeing words with negative connotations in the names of products, which creates another conceptual surprise. An average consumer of basic foodstuff will not assume that 'impossible' burger is a description of the fact that the burger is annoying and unpleasant to deal with.

As said above, for the purpose of applying Article 7(1)(c) EUTMR, it is necessary only to consider, on the basis of the relevant meaning of the word sign at issue, whether, from the viewpoint of the public addressed, there is a sufficiently direct and specific relationship between the sign and the goods in respect of which registration is sought (20/07/2004, T-311/02, *Limo*, EU:T:2004:245, § 30).

The fact that the legislature chose to use the word 'characteristic' highlights the fact that the signs referred to in Article 7(1)(c) EUTMR are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. A sign can be refused registration on the basis of that provision only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics (10/03/2011, *Agencja Wydawnicza Technopol v OHIM*, C-51/10 P, EU:C:2011:139, § 50).

The applicant argues that consumers will perceive the mark as 'a burger that one thought could not possibly exist'. However, this interpretation already requires several mental steps. Nowhere in the mark it is suggested that the burger is 'seemingly' impossible, so the addition of 'one thought could not exist' is already a result of a certain mental process which may or may not happen, and in any case, breaks the line of 'direct' relationship. Moreover, even with this interpretation, the connection between the idea that the burger could possibly not exist and any actual characteristic of the goods is not 'direct and specific'. Consumers would have to turn again to their imagination to find such a connection. Clearly, without further thought, an idea that something cannot exist is not an actual description of any characteristic of an existing object.

The applicant claims that the test of 'without further reflection' is not a condition for finding a sign descriptive. It argues that the Courts have not elevated this to a test for descriptiveness and merely copy it in their judgments. It submitted a judgment from the Benelux Court of Justice, where the Court considers that the 'immediate connection' is not necessary. The Cancellation Division notes that the General Court consistently repeats that *for a sign to be caught by the prohibition in Article 7(1)(c) EUTM, there must be a sufficiently direct and specific link to the goods or services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods or services in question or of one of their characteristics* (e.g. 20/11/2007, T-458/05, *TEK*, ECLI:EU:T:2007:349, § 80; 09/07/2008, T-304/06, *Mozart*, ECLI:EU:T:2008:268, § 90; 10/02/2010, T-344/07, *Homezone*, ECLI:EU:T:2010:35 § 34). The General Court does not just 'copy' statements from previous judgments and include them in other judgments if it does not consider that such statements are part of established jurisprudence. The conditions mentioned above were not introduced in an isolated judgment and disregarded in other cases but they are consistently applied. The principles established by the General Court and the European Court of Justice are very relevant for the practice of the EUIPO. An isolated judgment of a national court, as the one submitted by the applicant, cannot outweigh a consistently applied principle established by EU courts. For the sake of completeness, it is noted that the judgment of the German Court, submitted by the applicant on the same occasion, does not contain a statement that the condition 'without further thought', is not necessary.

The use of the combination 'impossible burger' may spark the curiosity of consumers, who may employ their imagination and their individual mental process may lead them to some ideas, which will vary and depend on each consumer's individual predisposition. However, this mental process involves many steps and its results are unclear. It is reminded that Article 7(1)(c) EUTMR does not apply to those terms which are only suggestive or allusive as regards certain characteristics of the goods (31/01/2001, T-135/99, 'Cine Action', ECLI:EU:T:2001:30, § 29).

The expression in question in relation to foodstuffs remains in the suggestive area. The connection between the contested mark and the goods concerned is sufficiently vague, ambiguous and conceptually surprising. The meaning which could be attributed to the word 'impossible' does not involve any specific feature of the goods concerned. The consumers are likely to perceive this expression, in relation to the contested goods, as a surprising and slightly amusing paradox and not as an actual description of the goods or any of their characteristics, because they would not expect foodstuff to be described as 'impossible' and in any event, it would be unclear what specific characteristic this word refers to and what does it actually indicate. The direct and specific relationship between the goods and the trade mark necessary to find a sign descriptive, does not exist in the present case.

The applicant also argues that 'impossible' can be perceived as 'difficult to make' and that, therefore, the contested trade mark will be understood as 'burger that is difficult to make'. It submits several dictionary excerpts, according to which the word impossible can have the following meanings:

- Felt to be incapable of being done, insuperably difficult (Merriam-Webster)
- Not capable of being done easily or conveniently (Collins, 'in American English')
- An impossible situation is extremely difficult to deal with or solve (Cambridge Dictionary)
- Extremely difficult to do or to deal with (Macmillan dictionary)
- Mission impossible – a difficult or impossible task (Oxford learners dictionaries)

These meanings do not show that the word 'impossible' in general is a synonym to 'difficult'. The excerpt from Merriam-Webster shows the classic meaning of 'impossible', that is, not as difficult to make but as felt incapable of being done or insuperably difficult. The entry showing the meaning in American English must be considered with caution. It is true that the ties between some of the English-speaking EU public and the US are historically strong, but there are nuances in the language some of which may be known to the EU English speakers and others not and if a dictionary specifically mentions a meaning as American, it is an indication that the English-speakers in the EU do not perceive the word in that meaning. The remaining examples refer to specific combinations such as 'impossible situation' or 'mission impossible' but do not show that a combination of the word 'impossible' with an object will be perceived as that the object is difficult to create. Overall, these dictionary excerpts cannot alter the conclusions drawn above regarding the lack of sufficiently direct and specific relationship between the mark and the contested goods.

The applicant submitted a survey carried out in August 2020 among consumers in the United Kingdom, France, Germany and the Netherlands. The first question of the survey was the following: 'The IMPOSSIBLE BURGER is a vegetarian burger. What comes to mind when you see IMPOSSIBLE BURGER?'. The applicant presented a simplified result of the answers, and later on, after comments from the EUTM proprietor, also a document containing all the

answers. According to the summary presented by the applicant, 40% of the consumers in the UK, 35% in the Netherlands, nearly 30% in France and around 23% in Germany, answered that what comes to mind is a taste that is close to a beef hamburger, a burger that tastes good or other descriptive answers.

It has to be reminded that according to the established case law, for a sign to be classified as descriptive, it must be shown that there is a sufficiently direct and specific link to the goods or services in question to enable the public concerned immediately to perceive, without further thought, (emphasis added) a description of the goods or services in question or one of their characteristics (10/02/2010, T-344/07, Homezone, ECLI:EU:T:2010:35, § 34 and case-law cited).

By asking the consumers what comes to mind when seeing 'impossible burger', the consumers are already prompted, forced even, to think about it and give an answer, which is the result of the thought process and imagination. The answers given may thus be considered to be more the result of the suggestive or evocative nature of the mark, but they do not necessarily mean that the consumers see the mark as a direct description of a characteristic of the goods. This is supported even by the choice of words in the survey results themselves, which inform that there are answers indicating that IMPOSSIBLE BURGER is *suggestive* of a taste. The survey does not answer the question what consumers perceive immediately, without further thought. It shows what they perceive after many further thoughts.

Moreover, while the Cancellation Division understands that the intention was to introduce the context of meat substitutes, which appear to be the goods for which the EUTM proprietor uses the mark, the formulation of the entire question is rather unfortunate. By putting the two sentences together as was done in the questionnaire ('The IMPOSSIBLE BURGER is a vegetarian burger. What comes to mind when you see IMPOSSIBLE BURGER?'), the consumers might have assumed, and logically so, that they are invited to describe how they imagine vegetarian burgers (as in the type of sentences 'Mario is an Italian chef. What comes to mind when you see Mario?'). Indeed, answers such as 'no meat', 'it is a burger that is eaten by vegans', 'plant based', 'tofu maybe?', 'no meat and lots of toppings', 'veggie burger or plant ingredients', 'not something I would like', 'greasy food', 'frozen burger', 'vegetables, meat free', 'bizarre ingredients', 'healthy meat free', 'tasteless', 'no animals suffered in the making of this burger', 'lack of taste and fibre', 'if it is a veggie burger it is not a burger', 'a burger that is 3 burgers high with lettuce and tomato in it', 'a meaty paste with gunge sprouting from it', 'a burger made of ridiculous components', 'healthy good for environment', 'green bits in a burger, trendy burger' and many others, suggest that many consumers merely stated a characteristic of a vegetarian burger or described their idea of a vegetarian burger. It would be rather far-fetched to assume that the above answers are the result of a mere semantic analysis of the expression 'impossible burger'. Such answers would then be seemingly counted into the percentage of consumers that gave 'descriptive' answers, but this view would be very distorted. Since such answers form a very significant proportion of the answers, the overall percentages given by the applicant have to be taken with great caution. For example, in France, the applicant claims that 12.1 % answered that the image that comes to mind is that of a taste that is close to a beef burger. However, when the Cancellation Division reviewed the French answers, it appears that the answers that could be summarized like that are very few. It is not clear which answers were included under that category. If also answers which are merely saying that the image that comes to mind is that of a burger which is not made of meat, is a vegan burger or is a substitute to meat, or burger made of plants, this cannot really be considered as proof of descriptiveness of the mark, because, as explained above, this may only be a reflection of the fact that the question was introduced with a statement that 'impossible burger' is a vegetarian burger.

The applicant argues that in reality, the consumers will see the mark on vegetarian burgers and, therefore, will see the same context. However, in reality the consumers will not be asked

to reproduce their thought process and will not be confronted with confusing questions that can be interpreted in different ways. A realistic situation was not simulated in the survey, where consumers were put in a position which they could interpret as a request to describe their idea of a vegetarian burger or an invitation to try to come up with an interpretation of an expression. This is even more apparent in the second question, where consumers were given a multiple choice of answers to the question 'what do you think 'impossible' means in 'impossible burger?'. With such question, the consumers were first implicitly informed that 'impossible' should mean something in the sign and were then put to a position to guess what it means. This is not what happens in reality.

The consumers were not confronted with the only relevant question, that is, whether or not they consider that all the products labelled with 'impossible burger' come from one company or whether they think that this is a mere description of a characteristic of a burger.

Furthermore, even under the circumstances of the survey, the majority of the consumers either gave no answer to the first question (ticked 'nothing comes to mind'), or gave answers such as 'I think it's not a hamburger', 'why this name: strange', 'this is not a nice name', 'it's a puzzle', 'a burger that nobody would make', 'super name', 'nothing at all', 'not sure', 'I really like the name of it. Anything is possible', 'this makes me hungry', 'that the name is ridiculous', 'I would like to try', 'I did not understand the meaning', 'it's intriguing and disturbing, it is a call for adventure and a challenge', etc.

As a final remark, it must also be noted that the survey was carried out in August 2020. It relies on the public perception in 2020. However, the contested mark was filed on 15/10/2018 and has priority from 16/05/2018. The market with meat substitute burgers has been developing fast in recent years and it cannot be taken for granted that the perception of public was the same in the mid-2020 as in 2018.

Overall, taking into account all the above mentioned, the Cancellation Division concludes that the survey presented by the applicant cannot be considered as a conclusive proof that the contested mark is descriptive.

The applicant also submitted a number of website excerpts which involve foodstuff and contain the word 'impossible'. In their vast majority these websites contain recipes. The majority of the recipes are for 'impossible pies' or 'impossible cakes'. One of the excerpts is from 'food network' where it appears that there are 573 results for the keyword 'impossible pie'. However, only 'Anita's Impossible buttermilk pie' is visible, no other recipes, and when the Cancellation Division tried to replicate the search, it found out that the word 'impossible' is not present in any other of the hits. In any event, 'impossible pies' and 'impossible cakes' are the subject of the majority of the recipe websites submitted by the applicant. When reading the websites, it becomes clear that 'impossible pie' and 'impossible cake' are customary names used for a specific type of a pie and a cake. Some of the recipes explain this. For example, some of the websites containing the recipe for 'impossible pie' explain that 'impossible pies' are pies that make their own crust. This is explained in some websites, others simply contain the recipes of different impossible pie variations, all being the same type of pie. As regards 'impossible cake', it is explained that 'chocoflan' or 'Impossible cake' is a popular Mexican dessert that blends a rich chocolate cake layer with creamy flan layer. Another website explains that 'it's been called The Impossible Chocolate Cake and Magic Mexican Chocolate Flan Cake but that the author prefers the name Chocoflan'. Indeed, the other 'impossible cake' recipes are for the same type of cake. There are also variations, such as 'pastel imposible red velvet', which is the same type of cake but the cake layer is in red velvet style. These two types of recipes form the vast majority of the submitted website extracts. It is clear that the word 'impossible' is not used in a descriptive way, as suggested by the applicant, namely that the dishes would be difficult to make or exceptionally tasty but as an integral part of a name that has become customary for the particular type of dessert. Whilst indeed a mark 'impossible pie' or 'impossible cake' would

have to be considered descriptive for pastry, in view of this information, this does not mean that 'impossible burger' is descriptive for the contested goods, as it was not demonstrated that this would be, unlike 'impossible pie or cake' a customary name for a type of burger. It also cannot be inferred from this evidence that the word 'impossible' would be commonly used to describe any characteristic of food in general.

There are other examples among the websites submitted by the applicant, many of them are used as distinctive names ('The Impossible Cream' by Baileys, a new cookie named 'Chocolate Impossible', a restaurant introducing their new 'the impossible curry' dish, 'IMPOSSIBLE SUSHI' as an event where two renown sushi chefs will meet, 'Impossible Men' as a name of a restaurant, a wine branded 'L'Impossible' etc.). There are also websites in Spanish where 'imposible' is used in the context of food; however, the context is 'mejor paella imposible', 'mejor pescado imposible' etc., in reviews of restaurants, which can be translated as *it is impossible to find a better paella, fish*, etc. This is use of the word 'impossible' in its usual meaning in normal language but not as a qualifier of a dish to denote some of its qualities. In some of the websites it is hard to say what it is that the 'impossible dish' represents, for example 'mushroom impossible' showing a picture of a group of people holding awards, or items where 'impossible' is used with an unknown purpose, for example a recipe for 'impossible pasta pomodoro' which could be a type of pasta or a name invented by the author of the recipe, but it can hardly be deduced that the author desired to use 'impossible' in a descriptive manner because it would indeed not be clear what the word should describe. In the same vein, there are also mentions of 'Impossible Pad Thai Noodles' in the streets of Bangkok, which is written with a capital 'I' and it is not clear if a specific dish with such a name is meant or if 'Impossible' is used in any other sense. There are more similar examples. Admittedly, there are also a few examples where the word is used to denote a particular thing, for example 'impossible burrito challenge' denoting that the burrito is so big that it is impossible to be eaten by one man, a mention in a blog of 'impossible cookie', which refers to French macaroon, on account of the seeming impossibility of making it. In the same sense there is a video of a person trying (unsuccessfully) to make 'impossible hand pulled noodle'. However the latter occasions are scarce and seemingly isolated incidents of such use of the word 'impossible' and it cannot be concluded from them that the word 'impossible' has become used and understood in the common parlance, to denote that a dish is of outstanding quality, that it is a vegetarian dish resembling meat or in any other descriptive meanings that the applicant proposes.

There is also a number of websites including expressions such as 'impossibly delicious', 'impossibly good' etc. Such expressions, however, differ significantly from the contested mark, as they contain the word 'impossibly' instead of 'impossible' and they also contain a word that clearly denotes some characteristic of the dish such as delicious or good, unlike the contested mark, which contains no such description.

The applicant repeatedly emphasizes the principle that for a sign to be found descriptive, it is sufficient that at least one of its meanings is descriptive. Nevertheless, it was not shown in the present case that the contested mark is descriptive in any of its meanings.

The applicant also provides excerpts from websites showing 'synonyms' to the word 'impossible' (Annex 6-9) and translations in French, Italian and Spanish. The applicant submitted excerpts from www.thesaurus.com, www.collinsdictionary.com and www.macmillanthesaurus.com. Synonyms for the word 'impossible' are given on these websites, which are words such as absurd, futile, hopeless, impassable, inaccessible, impracticable, unfeasible, unachievable etc. These words include words that confirm the prevalent meaning of the word 'impossible' as something that cannot occur or they are words which can reflect the meaning of the word 'impossible' in very specific contexts, such as 'hopeless', 'cureless' etc. Something impossible to cure is 'cureless' but this does not imply that the mark 'impossible burger' will realistically be perceived by anyone as 'cureless burger'.

The applicant emphasizes the presence of the word 'unbelievable' in MacMillan thesaurus. However, this is not listed as a synonym (the only synonym on this website is 'not possible'). 'Unbelievable' is listed under the title '9 useful words' together with e.g. 'possibly'. It is clear that this is not a list of synonyms of the words 'impossible'. The words like 'unbelievable' and 'incredible', which the applicant argues are equivalent to 'impossible', are not listed in any of the websites as synonyms. As regards the websites in French, Italian and Spanish, the words are defined also in the sense of something not achievable. The applicant puts emphasis on the word 'fantastique', 'fantastico' that appears in the French and Italian dictionary, respectively. However, as is clear from the websites, this is not meant as the equivalent of the word 'fantastic' as it is used in English (to refer to something very good), but it is listed as a reference to something unreal, chimeric.

The applicant gives examples of other plant-based meat substitute products and their names and argues that in recent years many such products were introduced to the market under names such as 'amaze', 'ultimate', 'wonder', 'miracle' etc. Aside from the fact that it is not clear whether any of these products were on the market before the relevant date for the present action, the Cancellation Division does not fully understand what is the supposed relevance of this information. The fact that other companies are introducing meat substitute products on the market under certain names, different from the contested mark, is great news for cows and the planet, but it is of little relevance to the present proceedings. Whether or not these other names are distinctive would have to be the subject of a separate assessment, which is not the subject matter of this case and which, in any event, can hardly affect the present case in any way.

In the light of all the above, the Cancellation Division considers that from the arguments and evidence provided by the applicant it is not possible to conclude that the mark did, at the relevant point of time, fall within the scope of the prohibition laid down by Article 7(1)(c) EUTMR. The application must be rejected insofar as it was based on Article 59(1)(a) EUTMR in conjunction with Article 7(1)(c) EUTMR.

NON-DISTINCTIVENESS – ARTICLE 7(1)(b) EUTMR

According to case-law, the signs referred to in Article 7(1)(b) EUTMR are signs which are regarded as being incapable of performing the essential function of an individual trade mark, namely that of identifying the commercial origin of the goods or services, thus enabling the consumer who acquired them to repeat the experience if it proves to be positive, or to avoid it if it proves to be negative, on the occasion of a subsequent acquisition (27/02/2002, T-79/00, Lite, EU:T:2002:42, § 26).

The applicant's arguments regarding the lack of distinctiveness of the contested mark are twofold.

Firstly, the applicant argues that the mark lacks distinctiveness for the same reasons for which it is descriptive. These arguments must be rejected because, as seen above, it cannot be concluded that the contested sign is descriptive for the abovementioned goods. Therefore, no lack of distinctiveness of the contested mark can be affirmed on account of its alleged descriptiveness.

Secondly, the applicant claims that the mark is a mere promotional message. It submitted examples of texts present in the EUTM proprietor's websites and social media pages and screenshots of promotional videos and argues that the EUTM proprietor itself has been using the word 'impossible' in a promotional, laudatory way. Some examples of such texts are 'Doing the impossible: together we're working to transform the global food system...', 'Love meat? Eat meat. Impossible™ delivers all the flavor, aroma and beefiness. It's just plants doing the

Impossible.’ or ‘endless impossibilities. Break out of the bun. Eat the Impossible™ any way you want.’

The Cancellation Division agrees with the applicant in that slogans such as ‘doing the impossible’, ‘make the impossible happen’ are commonly used promotional and motivational slogans. Expressions in which the meaning of ‘achieving the impossible’ is conveyed are used in the promotional language. Such slogans and common speech, however, relate essentially exclusively to only this one meaning, that is, ‘achieve the impossible’, with the meaning that something seemingly impossible was/is/will be made reality. This is also shown by the examples of slogans used by third parties submitted by the applicant, such as ‘only those who attempt the absurd can achieve the impossible’, ‘you need to attempt the impossible in order to achieve the impossible’, ‘it’s kind of fun to do the impossible’, ‘most of the things worth doing in the world had been declared impossible before they were done’ etc. However, the contested mark does not follow the pattern of such promotional messages. The word ‘impossible’ does not seem to be used in the trade mark as a part of a motivational expression referring to achieving something vaguely identified as impossible, but it is used as a qualifier of a specific noun. It is not used like this in the promotional slogans or in common language. Admittedly, the EUTM proprietor is walking on thin ice mixing its trade marks and promotional statements such as ‘the plants are doing the Impossible’. This is also true for the promotional videos. However, the Cancellation Division considers that there is still a difference between the aforementioned slogans and the mark, and that consumers perceive the difference and see the texts and videos of the EUTM proprietor as somewhat amusing puns.

Furthermore, the applicant refers to the case law of the EU courts (21/10/2004, C-64/02 P, DAS PRINZIP DER BEQUEMLICHKEIT, ECLI:EU:C:2004:645 and 13/01/2011, C-92/10 P, BEST BUY, ECLI:EU:C:2011:15), according to which not every uncertainty as to the content of a term also establishes its distinctiveness. Even terms which have not a clearly defined meaning can be understood by the public as a mere non-distinctive or laudatory terms. Even new combinations or previously unused combinations may lack distinctiveness, provided that they exclusively convey factual information or general advertising promise.

The contested trade mark does not contain exclusively factual information (it contains the information that the nature of the goods is ‘burger’ but the adjective ‘impossible’ cannot be associated with any exclusively factual information). And, as mentioned above, it does not constitute a general advertising promise. The contested trade mark cannot be compared to marks such as ‘BEST BURGER’ or ‘PERFECT BURGER’, as the applicant suggests, because the word ‘impossible’ is simply not an equivalent to ‘best’, ‘perfect’ or any such other common laudatory promotional terms but has different connotations that are not, in the context of the contested mark, generally promotional.

Finally, the applicant referred to previous decisions of the EUIPO and national authorities. It mentions the following trade marks that were refused protection: ‘IMPOSSIBLE OBJECTS’, ‘UNBELIEVABLE E-CIGS’, ‘UNBELIEVABLE TEKKERS’, ‘IMPOSSIBLE BUSINESS MAKERS’, ‘WHAT YOU NEVER THOUGHT POSSIBLE’, trade marks containing the words ‘Incredible’ or ‘unreal’, ‘Making Impossible possible’, ‘Achieve the impossible’, ‘access the inaccessible’, ‘see the unseen’, ‘what you never thought possible’, ‘impossible is nothing’ and slogans containing the words ‘possible’. From these trade marks, the only ones that can be considered analogical to the contested mark in these proceedings are ‘IMPOSSIBLE OBJECTS’ and ‘IMPOSSIBLE BUSINESS MAKERS’, the other ones contain words that are not ‘impossible’ and, as already explained above, cannot be considered equivalent or synonymous, or they are standard promotional slogans, which is also not the case with the contested mark. As regards ‘IMPOSSIBLE OBJECTS’, it is true that an IR No 1280567 filed in 2015 was refused, regarding the EU, by the Office. On the other hand, an EUTM No 16 332 694 filed in 2017, also a word mark ‘IMPOSSIBLE OBJECTS’, was registered. Therefore, no conclusion can be drawn from this. The mark ‘IMPOSSIBLE BUSINESS

MAKERS' was refused by the German PTO and the EUIPO is not bound by its decision. It cannot be concluded, from the mentioned cases, that there is an established opinion, neither on the EU level nor on the national level in the EU, according to which marks such as the contested one are descriptive or non-distinctive.

Consequently, the application must be rejected also insofar as it is based on Article 59(1)(a) EUTMR in conjunction with Article 7(1)(b) EUTMR.

Conclusion

In light of all the above, the Cancellation Division concludes that the mark did not, at the relevant point in time, fall within the scope of the prohibition laid down by Article 7(1)(b) and (c) EUTMR. Therefore, the application must be rejected in its entirety.

The applicant claimed that there is a public interest in keeping certain terms free for use for anyone. This is true and this public interest underlies many of the provisions of Article 7 EUTMR. However, this public interest, in the context of Article 7(1)(b) and (c) EUTMR reflects the need of descriptive and non-distinctive terms to be kept free for use. When a trade mark is not descriptive or non-distinctive, these provisions do not apply. The EUTM proprietor, by owning the contested trade mark, cannot prohibit third parties from using the word 'impossible' in a non-trade mark sense, for example in promotional slogans. The fact that the EUTM proprietor argued, in a cease-and-desists letter to the applicant, that the word 'impossible' is conceptually equivalent to the word 'incredible', has no bearing on this case. It is a normal practice that companies argue differently in different cases and it is up to the decision-making authority to assess which of the arguments hold water. The Cancellation Division considers that it was not shown that the word 'impossible' is perceived by consumers as a synonym to 'incredible'.

COSTS

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

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

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



The Cancellation Division

Anne-Lee KRISTENSEN

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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.