

DECISION
of the Fifth Board of Appeal
of 22 December 2021

In case R 973/2021-5

Société des Produits Nestlé S.A.

Service des Marques

Case postale 353

1800 Vevey

Switzerland

Cancellation Applicant / Appellant

represented by Harte-Bavendamm Rechtsanwälte Partnerschaftsgesellschaft MBB,
Am Sandtorkai 77, 20457, Hamburg, Germany

v

Impossible Foods Inc.

400 Saginaw Drive

Redwood City California CA 94063

United States of America

EUTM Proprietor / Defendant

represented by Irenah Klink, Claude Debussylaan 80, 1082 MD Amsterdam,
Netherlands

APPEAL relating to Cancellation Proceedings No 33 961 C (European Union trade
mark registration No 17 968 798)

THE FIFTH BOARD OF APPEAL

composed of V. Melgar (Chairperson and Rapporteur), S. Rizzo (Member)
and A. Pohlmann (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 15 October 2018, Impossible Foods Inc. (‘the EUTM proprietor’), claiming the priority of US trade mark No 87 924 475 with a filing date of 16 May 2018, sought to register the word mark

IMPOSSIBLE BURGER

for the following list of goods:

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.

- 2 The application was published on 21 November 2018 and the mark was registered on 28 February 2019.
- 3 On 18 March 2019, Société des Produits Nestlé S.A. (‘the cancellation applicant’) filed a request for a declaration of invalidity of the registered mark for all the above goods.
- 4 The grounds of the request for a declaration of invalidity were those laid down in Article 59(1)(a) EUTMR in conjunction with Article 7(1)(b) and (c) EUTMR.
- 5 On 18 March 2019, the cancellation applicant filed the following evidence:
 - 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’.

6 On 20 November 2019, the cancellation applicant filed the following additional evidence:

- 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’.

7 On 18 May 2020, 2 June 2020 and 9 June 2020 the EUTM proprietor filed the following evidence:

- 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 cancellation applicant which are registered as trade marks.
- Judgment of 27 May 2020 of the District Court of The Hague in the matter of infringement of the EUTM proprietor’s ‘impossible’ trade marks by the cancellation applicant’s ‘Incredible Burger’. The Court provisionally found that the present invalidity action cannot succeed because the contested mark is distinctive and not descriptive and decided that there is a risk of likelihood

of confusion between ‘Impossible burger’ and ‘Incredible burger’ and issued a preliminary injunction against the cancellation applicant’s use of ‘Incredible Burger’.

- 8 On 28 September 2020, the cancellation applicant filed the following evidence:
- 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 cancellation applicant.
 - Compilation of various dictionary definitions regarding the term ‘IMPOSSIBLE’.
 - Copy of the pre-trial warning letter sent by the EUTM 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’.

- 9 By decision of 5 May 2021 ('the contested decision'), the Cancellation Division rejected the request for a declaration of invalidity in its entirety. It gave, in particular, the following grounds for its decision:

Preliminary remark

- The adversarial part of the proceedings was first closed on 7 July 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 cancellation applicant an opportunity to comment on the new document. The cancellation 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 December 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, up to and including the cancellation applicant's letter of 5 March 2021. Although it is customary that the defending party has the last word, in the present case, excluding the EUTM proprietor's last submission of 24 March 2021 (which in any event contains only replies to the cancellation applicant's arguments and repetitions of issues already commented on during the course of the proceedings), it 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 cancellation 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 cancellation applicant of the EUTM proprietor's 'impossible' trade marks. It is a standard and legitimate means of legal defence, from the part of the cancellation applicant, to attempt to invalidate the marks on which the infringement actions are based. The fact that the cancellation 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 cancellation 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 cancellation applicant are within the legal means granted to any party of the proceedings and they fall within the boundaries of legitimate defence of its own interests.

Absolute grounds for invalidity – Article 59(1)(a) EUTMR in conjunction with Article 7 EUTMR

Descriptiveness – Article 7(1)(c) EUTMR

- 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 cancellation 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 cancellation 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 recognise; 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.
- 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.
- 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.
- The cancellation 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 is it 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 cancellation 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, EU:T:2007:349, § 80; 09/07/2008, T-304/06, Mozart, EU:T:2008:268, § 90; 10/02/2010, T-344/07, Homezone, 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 cancellation applicant, cannot outweigh a consistently applied principle established by EU courts.
- 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 recalled 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.
- 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 it actually does 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 cancellation 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 cancellation 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 cancellation 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 cancellation 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/ham burger, 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, a description of the goods or services in question or one of their characteristics.
- 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 cancellation applicant have to be taken with great caution. For example, in France, the cancellation 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 summarised 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 cancellation 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 in 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 poss’, ‘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 October 2018 and has priority from 16 May 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 abovementioned, the Cancellation Division concludes that the survey presented by the cancellation applicant cannot be considered as a conclusive proof that the contested mark is descriptive.
- The cancellation 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 cancellation 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 cancellation 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 cancellation 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 cancellation applicant proposes.
- There are 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 cancellation applicant repeatedly emphasises 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 cancellation applicant also provides excerpts from websites showing ‘synonyms’ of the word ‘impossible’ (Annex 6-9) and translations in French, Italian and Spanish. The cancellation 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 cancellation applicant emphasises 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 cancellation 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 cancellation 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 cancellation 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 light of all the above, the Cancellation Division considers that from the arguments and evidence provided by the cancellation 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 request for a declaration of invalidity 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

- The cancellation applicant’s arguments regarding the lack of distinctiveness of the contested mark are twofold.

- Firstly, the cancellation 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 cancellation 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. ImpossibleTM delivers all the flavour, aroma and beefiness. It's just plants doing the Impossible.' or 'endless impossibilities. Break out of the bun. Eat the ImpossibleTM any way you want.'
- The Cancellation Division agrees with the cancellation 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 cancellation 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 cancellation applicant refers to the case-law of the EU courts (21/10/2004, C-64/02 P, DAS PRINZIP DER BEQUEMLICHKEIT,

EU:C:2004:645 and 13/01/2011, C-92/10 P, BEST BUY, 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 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 cancellation 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 cancellation 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 1 280 567 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 request for a declaration of invalidity 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 request for a declaration of invalidity must be rejected in its entirety.
 - The cancellation 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 cancellation 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’.
- 10 On 26 May 2021, the cancellation applicant filed an appeal against the contested decision, requesting that the decision be entirely set aside. The statement of grounds of the appeal was received on 3 September 2021.
 - 11 In its response received on 3 November 2021, the EUTM proprietor requested that the appeal be dismissed.
 - 12 On 26 November 2021, the cancellation applicant requested the Office to grant it the opportunity to reply to the response as it contained new evidence.
 - 13 On 29 November 2021, the EUTM proprietor requested the Office to expedite the examination of the appeal as provided for in Article 31 EUTMDR, due to other proceedings and litigations between the parties at national level.
 - 14 On 6 December, the EUTM proprietor asked the Board to reject the cancellation applicant’s request to grant it the opportunity to reply to the response of 3 November 2021.

Submissions and arguments of the parties

15 The arguments raised by the cancellation applicant may be summarised as follows:

- The combination ‘IMPOSSIBLE BURGER’ registered for inter alia vegetarian burgers will be understood exactly in this way as describing an ‘unbelievable’, etc., (vegetarian) burger that one would not have thought that it could possibly exist. This already suffices to meet the requirements of the prohibition under Article 7(1)(c) EUTMR.
- The public will also understand that this combination refers to a vegetarian burger since the combination ‘impossible + generic descriptive term for the type of foodstuff’ is frequently used to denote foodstuff whose normal essential ingredient is left out or replaced by a substitute. This is especially true for meat substitutes. It follows from the above that also Article 7(1)(b) EUTMR applies since ‘IMPOSSIBLE BURGER’ is merely laudatory and not distinctive as it conveys a value statement relating to the quality of the product.
- The contested decision failed to fully appreciate all possible meanings of the term ‘impossible’. Further, it failed to acknowledge that, when used in connection with the goods at issue, the term ‘IMPOSSIBLE BURGER’ will be perceived as descriptive.
- The expression ‘impossible’ denotes not only ‘not possible’ but also that through dedication, skills, luck or other circumstances, something very difficult was nonetheless achieved and is therefore exceptional and extraordinary. ‘Impossible’ is thus a polyseme whose sense was initially limited to its literal meaning, i.e. not possible, but over time the meaning became broader, also encompassing things that are not quite impossible, just very difficult to achieve.
- ‘Impossible’ can be used to describe something ‘unbelievable’, ‘extraordinary’, ‘which has not been seen before’ and ‘which is extremely difficult to be done’, something ‘amazing’, ‘astounding’, something ‘unimaginably good’ or ‘surprisingly good’ or ‘almost too good to be true’, i.e. something one would have thought that it could not possibly exist.
- In this regard, the term ‘IMPOSSIBLE’ as an element of the contested EUTM is interchangeable with terms such as ‘UNREAL’ or ‘UNBELIEVABLE’. Literally, those terms refer to ‘something that is not real or not believable’.
- As shown before the Cancellation Division and in the Enclosures 33-35 annexed to the statement of grounds, the term ‘impossible’ has also the meaning of ‘unimaginable’, ‘totally unlikely’, ‘unimaginable’, ‘not capable of being done easily or conveniently’.

- The adverb ‘impossibly’ is often used in the food context, as for example ‘impossibly delicious’, ‘impossibly tasty’, ‘impossibly yummy’, ‘impossibly healthy’, ‘impossibly good’, always indicating something extraordinary, something having a quality to the utmost extent, to a degree that hardly seems possible (see Enclosure 37). The use of ‘impossibly’ as an adverb in a certain meaning will have repercussions on the use and meaning of the related adjective ‘impossible’ and vice versa.
- The cancellation applicant submits two expert statements according to which ‘impossible + noun’ ‘denote something unimaginably good’ in the respective context, in particular in the advertising and marketing context (Enclosures 38 and 39).
- The EUTM proprietor itself uses the expression ‘impossible’ in marketing and advertising as a laudatory message, as for example ‘we make impossible possible’ etc. (Enclosure 40 and 21a).
- Third parties use the combination ‘impossible +noun’ in the foodstuff sector as reference to something delicious, exceptional or outstanding (Annex 2 and Enclosure 23).
- The cancellation applicant submits in Enclosure 41 a large table with examples of the use of ‘impossible +noun’ in the context of foodstuff as well as in many other markets for products as well as for services as a laudatory reference to promote the high quality of the goods or services.
- Moreover, it has been proven, also before the Cancellation Division that with regard to foodstuff and drinks, ‘impossible’ is particularly used to denote that the ingredients that one would normally expect are not used, however, the expected taste is preserved. This occurs also in the field of meat substitutes within the EU, where a standing market practice exists to use combinations of common laudatory terms with the generic term for the respective meat product that is substituted (see for example: The unbelievable Burger, The Miracle Burger, the Wonder Burger, the Ultimate Burger, the Next Level Burger etc.).
- If there is an established market practice to use common laudatory names, this will obviously have an impact on how the average consumer will understand the term ‘IMPOSSIBLE BURGER’. It is much more likely that the average consumer will assume that the combination of ‘burger’ with ‘impossible’ is just one further example of such a common laudatory name, in the sense that it was ‘impossible’, it was a ‘miracle’ or that it was a ‘wonder’ to create such an extraordinary burger. The connotations are the same.
- Additionally, a Panel Wizard survey has already been submitted before the Cancellation Division confirming that a significant part of the relevant public attributes a descriptive meaning to the term ‘impossible’ when used in connection with vegetarian meat substitute products. This survey satisfies the

requisites in order to be considered as reliable and credible (Enclosures 27 and 29).

- The first question in the survey has been chosen in order to put the persons supposed to answer in the proper context of the goods at hand. The survey would show that a non-negligible part of the consumers in the UK, France, Germany and the Netherlands consider the contested sign as descriptive because it is suggestive for the taste close to a beef burger, of a burger that tastes good or is of a big size.
- If the survey shows an actual understanding of ‘IMPOSSIBLE BURGER’ as descriptive in 2020 it will give evidence that this development had already been likely in autumn 2018.

Conclusion

- In relation to each of the challenged goods, the relevant public will easily understand the term ‘IMPOSSIBLE BURGER’ to clearly convey the meaning that the goods are either burgers or ingredients of burgers, that are extraordinary, amazing, unbelievable and one would never have thought could possibly exist because they are almost too good to be true. This is already sufficient for descriptiveness in the sense of Article 7(1)(c) EUTMR.
 - It has been demonstrated that ‘impossible’ has, especially in marketing and advertising language, a positive meaning which is equivalent to ‘amazing’, ‘unbelievable’, ‘extraordinary’ and ‘almost too good to be true’. So, the sign ‘IMPOSSIBLE BURGER’ will be perceived as a promotional message. Whilst the term ‘BURGER’ simply refers to the goods at issue, the term ‘IMPOSSIBLE’ serves to qualify the term ‘BURGER’. Consequently, the sign ‘IMPOSSIBLE BURGER’ taken as a whole makes a mere value statement and conveys a merely promotional and laudatory message referring to an ‘amazing burger’, ‘unbelievable burger’, ‘extraordinary burger’ or ‘a burger almost too good to be true’. It will be understood as referring to a burger (or its components), which one thought could not possibly exist. Thus, also Article 7(1)(b) EUTMR applies.
- 16 The arguments raised in reply to the appeal by the EUTM proprietor may be summarised as follows:
- The parties are involved at national level in different proceedings relating to the contested marks and others.
 - The contested sign is distinctive because ‘IMPOSSIBLE BURGER’ does not convey any meaning, neither descriptive nor laudatory, because the term ‘impossible’ is not an equivalent to ‘unbelievable’, ‘fantastic’ as explained in particular in the Witness Opinions (Annexes 15 and 16).
 - The examples of use of the adjective ‘impossible’ in connection with a noun submitted by the cancellation applicant show to the contrary that the contested mark is not descriptive but distinctive.

- The market survey is leading and has several formal and substantive deficiencies as explained in the Witness Opinion in Annex 19.

Reasons

- 17 All references made in this decision should be seen as references to the EUTMR (EU) No 2017/1001 (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended, unless specifically stated otherwise in this decision.
- 18 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

Preliminary note:

a) Confidentiality request

- 19 Both parties requested that its submissions be treated as confidential, which means that the inspection of files by third parties is excluded.
- 20 In accordance with Article 114(4) EUTMR, files may contain certain documents which are excluded from public inspection, e.g. parts of the file which the party concerned showed a special interest in keeping confidential (see also Article 6 BoA-RP). In the event that a confidentiality request is made, the Office must check whether that special interest is sufficiently shown.
- 21 In the present case, neither the cancellation applicant nor the EUTM proprietor sufficiently demonstrated its special interest in keeping its submissions filed before the Cancellation Division confidential, having also regard to the fact that some information is blacked out. In any event, the Board will treat the documents with the appropriate standard of care and will, wherever possible, refer to the evidence in general terms without divulging data that is not otherwise available from publicly accessible sources.

b) Parties requests of 26 and 29 November 2021

- 22 On 26 November 2021 the cancellation applicant requested the Office to grant it the opportunity to reply to the response of the EUTM proprietor because it contained new evidence.
- 23 Irrespective of the fact that this request was made belated, the Board considers that even under the assumption that the request was acceptable, it is unfounded because the parties had enough opportunities to submit their facts and arguments in particular before the Cancellation Division which granted several opportunities to file them. The cancellation applicant filed new facts and evidence in its statement of grounds, as did the EUTM proprietor in its response. Both submissions of additional evidence are accepted (see below under paragraph 26). Therefore, there is no further reason to grant a new additional round of

submissions to the parties. Even assuming that the cancellation applicant's request was admissible, it would be rejected.

- 24 On 29 November 2021, the EUTM proprietor requested the Office to expedite the examination of the appeal as provided for in Article 31 EUTMDR, due to other proceedings and litigations between the parties at national level.
- 25 Since the Board hereby decides on the merits of the case, there is obviously no need to adjudicate on the request to expedite the examination of the appeal as provided for in Article 31 EUTMDR.

On the additional evidence filed at the appeal stage

- 26 Both parties submitted additional evidence with its statement of grounds and in their respective responses. In the case of the cancellation applicant, this evidence consists in further excerpts from dictionaries, screenshots of further examples and additional witness statements concerning the meaning of the term 'IMPOSSIBLE' and the understanding and perception of the public of the combination 'IMPOSSIBLE BURGER' (Enclosures 31 to 41). The EUTM proprietor submitted witness opinions on the understanding and perception of the public of the combination 'IMPOSSIBLE BURGER' and an overview of the cancellation applicant's purported meanings of 'IMPOSSIBLE BURGER' (Annexes 15 to 19).
- 27 According to Article 95(2) EUTMR, the Office may disregard evidence which is not submitted in due time by the party concerned. Pursuant to Article 27(4) EUTMDR, the Board of Appeal may accept facts or evidence submitted for the first time before it only where those facts or evidence meet the following requirements: (a) they are, on the face of it, likely to be relevant for the outcome of the case; and (b) they have not been produced in due time for valid reasons, in particular where they are merely supplementing relevant facts and evidence which had already been submitted in due time, or are filed to contest findings made or examined by the first instance of its own motion in the decision subject to appeal.
- 28 The documents submitted by both parties before the Board of Appeal refer to the crucial issue of the meaning of the contested sign and its perception by the consumers. This evidence complements the information already submitted before the Cancellation Division and provides more clarity of the factual circumstances of the case. Moreover, both parties made use of the opportunity to submit additional evidence at the appeal stage and therefore their acceptance is in line with the principle of equal treatment.
- 29 In light of the above, the Board considers that the conditions for accepting the belated evidence submitted by both parties at the appeal stage have been met and therefore declares the evidence submitted in the statement of grounds and in the respective responses as admissible.

Article 59(1)(a) EUTMR

- 30 Pursuant to Article 59(1)(a) EUTMR, a European Union trade mark shall be declared invalid on application to the Office where the European Union trade mark has been registered contrary to the provisions of Article 7 EUTMR.
- 31 When the Office examines a trade mark application on absolute grounds, it must consider all the relevant facts and circumstances and it cannot carry out an abstract examination. The Office must consider the characteristics peculiar to the mark for which registration is sought and, in the case of a word mark, its meaning, in order to ascertain whether or not any of the grounds of refusal set out in Article 7 EUTMR are applicable. Moreover, the Office must assess the mark by reference to the specific goods or services (12/02/2004, Postkantoor, C-369/99, EU:C:2004:86, § 31-35; 15/09/2005, Live richly, T-320/03, EU:T:2005:325, § 83) and bearing in mind the perception of the relevant public (09/10/2020, T-360/00, UltraPlus, EU:T:2002:244, § 43; 29/04/2004, C-473/01 P and C-474/01 P, Tabs, EU:C:2004:260, § 33; 08/05/2008, C-304/06 P, Eurohypo, EU:C:2008:261, § 67; 21/01/2010, C-398/08 P, Vorsprung durch Technik, EU:C:2010:29, § 34).
- 32 While examining absolute grounds for refusal, the Boards of Appeal are required to examine the facts of their own motion in order to determine whether the mark for which protection is sought comes within one of the grounds of refusal of registration set out in Article 7 EUTMR, within invalidity proceedings, the Office cannot be required to carry out afresh the examination which the examiner conducted, of his or her own motion, as regards the relevant facts which could have led him or her to apply the absolute grounds for refusal (28/09/2016, T-476/15, FITNESS, EU:T:2016:568, § 46-47).
- 33 Indeed, it follows from the joint reading of the rules currently contained in Articles 59 and 63 EUTMR that the EU trade mark is regarded as valid until it has been declared invalid by the Office following invalidity proceedings and, as such, a registered mark enjoys a presumption of validity (28/09/2016, T-476/15, FITNESS, EU:T:2016:568, § 47 and the case-law therein cited). In invalidity proceedings, as the registered EU trade mark is presumed to be valid, it is for the person who has filed the request for a declaration of invalidity to invoke before the Office the specific facts which call the validity of that trade mark into question. It follows from the foregoing that, in invalidity proceedings, the Cancellation Division and the Boards of Appeal are not required to examine of their own motion the relevant facts which might have led them to apply the absolute ground for refusal set out in Article 7 EUTMR (13/09/2013, T-320/10, Castel, EU:T:2013:424, § 27-29).
- 34 The relevant point in time on which the invalidity [cancellation] applicant has to show the applicability of the grounds on which the request of invalidity are based is the filing date of the contested mark (23/04/2010, C-332/09 P, Flugbörse, EU:C:2010:225, § 44).

Article 59(1)(a) in conjunction with Article 7(1)(b) EUTMR

- 35 Under Article 7(1)(b) EUTMR, trade marks which are devoid of any distinctive character are not to be registered. According to Article 7(2), Article 7(1), EUTMR is to apply notwithstanding that the grounds of non-registrability obtain in only part of the Union.
- 36 In order for a trade mark to possess distinctive character within the meaning of that provision, it must serve to identify the goods or services in respect of which registration is sought as originating from a particular undertaking, and thus to distinguish those goods from those of other undertakings (13/10/2021, T-523/20, Blockchain Island, EU:T:2021:691, § 14; 17/01/2019, T-91/18, Diamond Card, EU:T:2019:17, § 13).
- 37 Signs which are devoid of distinctive character are regarded as incapable of performing the essential function of a trade mark, namely that of identifying the origin of the goods and services, thus enabling the consumer who acquired them to repeat the experience, if it proves positive, or to avoid it, if it proves negative, on the occasion of a subsequent acquisition (20/10/2021, T-211/20, \$ Cash App, EU:T:2021:712, § 18; 09/12/2020, T-30/20, Promed, EU:T:2020:599, § 40; 25/09/2015, T-366/14, 2good, EU:T:2015:697, § 13).
- 38 For a finding that there is no distinctive character, it is sufficient that the semantic content of the word mark indicates to the consumer a characteristic of the goods or services relating to their market value which, whilst not specific, comes from promotional or advertising information which the relevant public will perceive first and foremost as such, rather than as an indication of the commercial origin of the goods or services (30/06/2004, T-281/02, Mehr für Ihr Geld, EU:T:2004:198, § 31).
- 39 The distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, secondly, by reference to the perception of them by the relevant public, which consists of the consumers of those goods or services (17/11/2021, T-658/20, Forme d'une tasse, EU:T:2021:795, § 15; 17/01/2019, T-91/18, Diamond Card, EU:T:2019:17, § 14).

Relevant public

- 40 The contested mark is composed of English words. The evidence and arguments submitted by the cancellation applicant refer to the meaning of the sign in English and also in Spanish, Italian and French. The Board will, therefore, take into account the perception of the public speaking any of the languages to which the cancellation applicant's evidence relates.
- 41 With respect to the English language, the Board however points out that the sign 'IMPOSSIBLE BURGER' has a meaning not only for a public who are native English speakers, but also for a public who has sufficient knowledge of English, even more bearing in mind that both 'IMPOSSIBLE' and 'BURGER' are basic English words. In this respect, a basic understanding of English by the general public, in any event, in the Scandinavian countries, the Netherlands and Finland is

a well-known fact (26/11/2008, T-435/07, *New Look*, EU:T:2008:534, § 23). The same applies to Cyprus where English was the sole official language until 1960, and which continues to be spoken by a significant part of its population (22/05/2012, T-60/11, *Suisse Premium*, EU:T:2012:252, § 50; 09/12/2010, T-307/09, *Naturally active*, EU:T:2010:509, § 26-27). The Court has also stated, for example, that the knowledge of English, admittedly to varying degrees, is relatively widespread in Portugal and that, although it cannot be claimed that the majority of the Portuguese public speaks English fluently, it may, however, reasonably be presumed that a significant part of that public has at the very least a basic knowledge of that language (16/01/2014, T-528/11, *Forever*, EU:T:2014:10, § 68).

- 42 The goods at hand in Class 29 are inexpensive everyday consumer goods with the result that the relevant consumer is the average consumer who will have an attentiveness to a below average degree (12/09/2007, T-363/04, *La Española*, EU:T:2007:264, § 108; 17/12/2010, T-395/08, *Shape of a chocolate rabbit*, EU:T:2010:550, § 20).
- 43 In any event, a mark must allow the relevant public to distinguish the products or services covered by that mark from those of other undertakings without paying particular attention, so that the distinctiveness threshold necessary for registration of a mark cannot depend on the public's level of attention (20/10/2021, T-211/20, *Cash App*, EU:T:2021:712, § 53).

The meaning of 'IMPOSSIBLE BURGER'

- 44 After defining the terms 'IMPOSSIBLE' and 'BURGER', the contested decision found that 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 combination thus creates an impression of a slightly amusing paradox, of something clearly possible and real with the name that contradicts the very existence of it.
- 45 The cancellation applicant puts forward that the adjective 'impossible' has several meanings (polyseme) which cannot be reduced to referring to something that 'cannot exist or be done', but refers to something which is 'extremely difficult to achieve' and will, if referring to something in fact achieved and in existence, be understood by the public as 'extraordinary', 'amazing', 'unbelievable', 'unimaginably good' or 'surprisingly good' and, thus, referring to something 'astounding' or 'almost too good to be true', so that one would not have thought that it could possibly exist or be brought about, especially if used in marketing language as a reference to food in the combination 'impossible + generic descriptive term for the type of foodstuff'.
- 46 The cancellation applicant rightly claims that in order to determine the meaning or meanings of a verbal mark, as in the present case, there are several factors and circumstances which may be relevant, such as the development of the language, the colloquial language and not merely dictionary meanings, the role of synonyms, the use of similar combinations or in specific contexts.

- 47 The Board emphasises that, as set out above under paragraph 33, it is the cancellation applicant who has to establish the meaning of the contested sign and the consumers perception thereof as a non-distinctive sign pursuant to Article 7(1)(b) EUTMR.
- 48 Although, the cancellation applicant has provided entries in dictionaries according to which the adjective, 'impossible' has also the meanings of 'very difficult' or 'totally unlikely' or even 'unimaginable', 'unbelievable' or 'amazing' and some more, it becomes evident from the evidence as a whole that these specific meanings of the adjective 'impossible' appear only in specific contexts in which that adjective is used. For example, in the phrase, 'an impossible goal of Messi' indeed it will be perceived that Messi was able to score a goal which seemed to be impossible or very difficult and therefore it was an awesome goal. However, as will be seen, such understanding and perception of the adjective 'impossible' is not general and, contrary to what the cancellation applicant sustains, may not be applied to any combination of 'impossible + any noun'.
- 49 The statements submitted by both parties on the meaning and perception of the adjective 'impossible' when combined with a noun confirm that the meaning of 'impossible' as 'incredible', 'amazing' or 'awesome' depends on the specific context and colloquial expressions or phrases.
- 50 In the Expert Opinion of Prof. Trips submitted by the cancellation applicant (Annex 38) the examples where in common parlance 'impossible' means 'incredible', 'amazing' or 'awesome' are 'impossible dream', 'impossible task', 'impossible choice', 'impossible job', 'impossible goal', 'impossible shot', 'impossible miracle' etc.
- 51 In these examples the adjective 'impossible' does indeed not mean 'not possible' but something difficult to achieve. However, there are differences of perception depending on the context. 'Impossible dream' or 'Impossible goal' denotes something difficult but still desirable and positive. 'Impossible job' or 'impossible person' or 'impossible behavior' also denotes something difficult but negative and not desirable. In the example 'impossible miracle' the noun 'miracle' already has the concept of something incredible and therefore the adjective 'impossible' merely underlines this meaning. This shows already that the perception of 'impossible' depends strongly on the specific context and use which is also emphasized in the conclusions of the Expert Opinion of Prof. Trips (Annex 38).
- 52 The second Expert Opinion submitted by the cancellation applicant (Annex 39) explains that the use of the adjective 'impossible + noun' as referring to something 'surprising', 'astounding' or 'amazing' is subject to the subjective intentions. The examples provided in this statement are 'impossible child', 'impossible position' or 'impossible speed'. As before, in these examples 'impossible' denotes something difficult but in a vague sense and is again limited to the specific use in combination with the nouns 'child, position or speed'.

- 53 The Witness Opinion submitted by the EUTM proprietor (Annex 16) explains that in specific contexts where the nouns refer to abstract qualities such as ‘beauty, speed, strength etc.’ the noun itself establishes a relevant framework of expectations and criterion by which the adjective ‘impossible’ serves to connote a superlative sense of quality, e.g. ‘impossible beauty’ or ‘impossible speed’. Further, with respect to persons or their character the term ‘impossible’ denotes ‘difficult to deal with or tolerate’, e.g. ‘impossible husband’, ‘impossible child’ etc.
- 54 The Witness Statement underlines further that in connection with ordinary physical items like a ‘burger’, there is no such context able to establish a framework of expectations suggesting any level of difficulty or challenge so that the term ‘impossible’ used as adjective could suggest a superlative in quality or an extreme difficulty. Consequently, ‘Impossible Burger’ without any additional information or context does not give rise to any linguistic meaning.
- 55 Consequently, the meaning of ‘impossible’ as referring to ‘very difficult’ or ‘unbelievable, amazing, extraordinary’ which is reflected in certain dictionaries as indicated by the cancellation applicant is circumscribed to specific contexts or combinations with specific nouns and a general meaning. In relation to items such as foodstuff including ‘burgers’ this meaning and understanding has not been shown by the cancellation applicant including in particular in the Expert Opinions in Annexes 38 and 39.
- 56 This conclusion is further confirmed by the examples of use of the term ‘impossible’ in combination with nouns for foodstuff submitted by the cancellation applicant. The meaning and use of ‘impossible’ in these examples shows great differences and variants, which shows that there is no established and consistent use and understanding of the adjective ‘impossible’ when used in combination with foodstuff. To illustrate this the Board refers to some examples found in the excerpts from websites submitted before the Cancellation Division and included also in the statement of grounds:
- 57 In the example ‘Impossible Cookies’, ‘impossible’ means that only two ingredients have been used. In the example ‘Impossible Waffles’, ‘impossible’ means that the inside of the waffle is purple. In the example ‘Impossible dish’, ‘impossible’ means that even though caramelised sugar is used it adds no sweetness to the dish. In the example ‘Impossible Meal’, ‘impossible’ means that the food is at the same time tasty, healthy, filling and low in calories so as to help to reduce weight. In the example ‘Impossible Wine’, ‘impossible’ means that the wine comes from Normandy famous for its cider and Calvados production, but not wines. In the example ‘Impossible Hot Chocolate’, ‘impossible’ refers to the difficulties and challenges to establish a New York branch of a successful French-style tea room that is famous for its hot chocolate. In the example ‘Impossible Lemonade’, ‘impossible’ refers to a seemingly impossible lemonade cocktail that everyone dreams of.
- 58 The cancellation applicant provides further examples of the use of the adjective ‘impossible’ in combination with a noun outside the foodstuff sector where the

adjective ‘impossible’ conveys a wide range of different meanings depending on the specific use and context.

- 59 From this evidence it must be concluded that the use of ‘impossible + noun’ has a widespread use in and outside the foodstuff sector whereby the meaning of the term ‘impossible’ shows a great variance having different connotations depending on the specific context and subjective intentions. There is no established and consistent meaning or perception of the adjective ‘impossible’ when combined with foodstuff, as for example in ‘Impossible Burger’.
- 60 Also the references to ‘Impossible Burger’ as contained in the Expert Opinion of Prof. Trips submitted by the cancellation applicant (Annex 38) refer to the USA and cannot establish a general and uniform understanding of the contested mark by the consumers within the EU in the sense as being an amazing, unbelievable or surprising burger.
- 61 The further arguments put forward by the cancellation applicant in order to sustain the fact that the contested mark is understood as a reference to the characteristics of the goods and therefore devoid of distinctive character are not successful.
- 62 First of all, the cancellation applicant stated that there are many combinations with the adverb ‘impossibly’ such as ‘impossibly delicious’, ‘impossibly tasty’, ‘impossibly yummy’, ‘impossibly healthy’, ‘impossibly good’. To that end it submitted evidence of use of those combinations from the Internet (Enclosures 36 and 37).
- 63 However, it must be held that the contested sign consists in the combination of the adjective ‘IMPOSSIBLE’ combined with the noun ‘BURGER’ which is different to the adverbial use of ‘impossibly’ combined with an adjective as in the examples provided by the cancellation applicant. The understanding and perception by the public is different and consequently the arguments and evidence referring to the adverbial use of ‘impossible’ cannot affect the assessment of the contested mark.
- 64 The cancellation applicant argued that ‘impossible’ is to be considered as equivalent to ‘unreal’, ‘unbelievable’, ‘incredible’, ‘extraordinary’, ‘amazing’, ‘next Level’ or even ‘fantastic’ and relied on previous decisions where such signs have been found non-distinctive or descriptive.
- 65 Firstly, it should be recalled that decisions concerning registration of a sign as an EU trade mark taken by the Boards of Appeal pursuant to the EUTMR fall within the scope of circumscribed powers and are not a matter of discretion and, accordingly, the legality of those decisions must be assessed solely on the basis of that regulation, as interpreted by the Courts of the European Union. Accordingly, the Boards of Appeal cannot be bound by the previous decisions of EUIPO 14/02/2019, T-123/18, DARSTELLUNG EINES HERZENS (fig.), EU:T:2019:95, § 36 and the case-law cited).

- 66 Secondly, and more to the point, as assessed above in paragraphs 44 to 56, from a factual point of view, the cancellation applicant failed to establish that the meaning of ‘impossible’ in the combination ‘IMPOSSIBLE BURGER’ has a similar meaning as ‘unreal’, ‘unbelievable’, ‘incredible’, ‘extraordinary’, ‘amazing’.
- 67 Therefore, the previous decisions concerning trade marks containing terms such as ‘unreal’, ‘unbelievable’, ‘incredible’, ‘extraordinary’, ‘amazing’ have no impact on the present case.
- 68 The evidence referring to the Italian, Spanish and French languages where ‘impossible’ is a synonym for ‘fantastic’ are not relevant since the cancellation applicant has not put forward any argument or reasoning on how the Italian, Spanish or French-speaking consumers will perceive the contested sign as being non-distinctive or descriptive.
- 69 The cancellation applicant further sustained that the public will also understand that this combination refers to a vegetarian burger since the combination ‘impossible + generic descriptive term for the type of foodstuff’ is frequently used to denote foodstuff whose normal essential ingredient is left out or replaced by a substitute. This is especially true for meat substitutes. It follows from the above that also Article 7(1)(b) EUTMR applies since ‘IMPOSSIBLE BURGER’ is merely laudatory and not distinctive as it conveys a value statement relating to the quality of the product.
- 70 However, the cancellation applicant failed to show that in the foodstuff market there is an established practice to indicate the fact that a product has a specific taste although it does not contain the main ingredient responsible for that taste by the term ‘impossible’. It included some hits from the Internet with other terms as ‘Miracle Burger’, ‘Next Level Burger’, ‘Perfect Burger’, ‘Unbelievable Burger’, ‘Ultimate Burger’ or ‘Revolution Burger’ and argued that these examples show that also the ‘Impossible Burger’ would be a variant or type of Burger, namely one that tastes like meat being vegetarian. It referred to the case 10/02/2021, T-153/20, Lightyoga, EU:T:2021:70, § 52 ff, which however is not applicable because in that case the Court held that the consumers would perceive the term ‘Light’ before the term ‘Yoga’ as one of several types of Yoga. The difference is that the term ‘Light’ is clear as to what it refers to whereas ‘impossible’ can obviously not refer to any kind of ‘Burger’, nor the examples from the Internet submitted by the cancellation applicant.
- 71 In this context the survey submitted by the cancellation applicant before the Cancellation Division must also be rejected. The Board finds that the assessment and findings in the contested decision on the survey are well reasoned and clear. The Board endorses those conclusions on the survey. The first question, namely “‘The IMPOSSIBLE BURGER’ is a vegetarian hamburger. What do you think of when you see “IMPOSSIBLE BURGER”?” is a leading question where the meaning of the term, ‘impossible’, is put in relation to a vegetarian burger which cannot taste like meat. Also the second question, ‘What does the word “impossible” in IMPOSSIBLE BURGER mean according to you?’ has a leading effect because the adjective ‘impossible’ is written in lowercase suggesting that it

is a descriptive adjective of the noun 'BURGER'. Additionally, after the first question, the persons answering are lead to believe that 'impossible' in the context of a vegetarian burger will mean that it tastes like meat.

- 72 The cancellation applicant's arguments with respect to the survey are not convincing since they simply rebut that the questions are leading and the result is therefore reliable and true reflecting the consumer's perception in the UK, France, Germany and the Netherlands already at the relevant date of filing.
- 73 In this aspect it has to be underlined that the survey was carried out in August 2020 and the relevant date is autumn 2018. The use of trade marks in advertising and promotion can have a fast evolution in the market and as the cancellation applicant has put forward, the EUTM proprietor promoted its burgers as soon as the trade mark was registered. Therefore, the perception of the consumers may already have been affected in this very short time and consequently the results of the survey do not reflect the situation at the filing date.
- 74 The cancellation applicant also pointed out that the EUTM proprietor uses the term impossible in a descriptive way in its promotion and advertising activity and therefore this would show that the public would perceive the sign as non-distinctive or descriptive.
- 75 In this respect it must be underlined that the case-law as to the prospective examination applied to relative grounds for refusal also applies to absolute grounds of refusal by analogy. The prospective examination pursues an aim in the general interest, which is that the relevant public is not exposed to the risk of being misled as to the commercial origin of the goods in question. That examination cannot be dependent on the commercial intentions, whether carried out or not, and naturally subjective, of the trade mark proprietors (17/04/2013, T-383/10, Continental, EU:T:2013:193, § 60).
- 76 In the case at hand, this means that the cancellation applicant had to show that the contested sign incurred at the date of filing one of the grounds of refusal invoked by it, irrespective of the use of the contested sign by the EUTM proprietor which is in any case irrelevant for the examination of the inherent distinctiveness (20/10/2021, T-617/20, Standardkessel, EU:T:2021:708, § 63 and case-law cited).
- 77 In light of the above, the Board concludes that the cancellation applicant was not able to show that the contested sign was at the date of filing perceived as a non-distinctive sign unable to indicate the origin of the goods at hand. Rather to the contrary, it appears that by juxtaposing the adjective 'impossible' with the noun 'BURGER' the sign created at least at the date of filing a conceptual link which was very vague, unclear and not immediately comprehensible nor did it denote any characteristic of the goods. Therefore, the sign had a fanciful and distinctive character which called for an interpretative effort on the consumers and setting off a cognitive process in their mind (22/01/2015, T-133/13, WET DUST CAN'T FLY, EU:T:2015:46, § 49-51).
- 78 Moreover, as stated in the contested decision the evidence submitted by the cancellation applicant mainly refers to a period after the relevant filing date and

hence does not permit any conclusion to be reached as regards the perception of the contested mark by the public at that relevant point in time. This further contributes to the rejection of the request for invalidity.

- 79 Consequently, the request for a declaration of invalidity must fail based on the ground of refusal of Article 7(1)(b) EUTMR

Article 59(1)(a) in conjunction with Article 7(1)(c) EUTMR

- 80 Under Article 7(1)(c) EUTMR, 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 are not to be registered. A ‘characteristic’ within the meaning of Article 7(1)(c) EUTMR is any feature of the goods that might be instantly perceived as relevant for the target consumer in the context of his or her purchase decision (06/12/2018, C-629/17, *adegaborba.pt*, EU:C:2018:988, § 19; 10/03/2011, C-51/10, 1000, EU:C:2011:139, § 50).
- 81 Article 7(1)(c) EUTMR pursues an aim that is 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 (10/02/2021, T-157/20, *Lightyoga*, EU:T:2021:71, § 42; 13/02/2019, T-278/18, *Dentaldisk*, EU:T:2019:86, § 38; 04/05/1999; C-108/97 and C-109/97, *Chiemsee*, EU:C:1999:230, § 25).
- 82 In order to benefit from the prohibition laid down in Article 7(1)(c) EUTMR, the sign must have a sufficiently direct and specific link with the goods or services in question to enable the public concerned to perceive immediately and without further thought the description of the goods and services in question or one of their characteristics (see, to that effect, 20/07/2004, T-311/02, *Limo*, EU:T:2004:245, § 30 and 22/06/2005, T-19/04, *Paperlab*, EU:T:2005:247, § 25).
- 83 The cancellation applicant argued that the condition that the public perceives immediately and without further thought the description of the goods in question would not be really necessary for the application of the ground for refusal in Article 7(1)(c) EUTMR.
- 84 The Board will refrain from assessing that argument because in order to apply the aforesaid provision the sign must have in any event a sufficiently direct and specific link with the goods. It has already been examined above under Article 7(1)(b) EUTMR, that the cancellation applicant failed to establish that the sign will be perceived as non-distinctive because several mental steps are necessary and a cognitive process in order to grasp a meaning of the sign in the context of the goods at hand. This applies all the more to Article 7(1)(c) EUTMR where the sign has to have a direct and immediate connection with the goods or their characteristics.

85 Consequently, the request for a declaration of invalidity must also fail based on the grounds of refusal of Article 7(1)(c) EUTMR.

Costs

86 Since the cancellation applicant is the losing party within the meaning of Article 109(1) EUTMR, it shall be ordered to bear the costs incurred by the EUTM proprietor in the cancellation and appeal proceedings.

87 As to the appeal proceedings, these consist of the EUTM proprietor's costs of professional representation of EUR 550.

88 As for the cancellation proceedings, the Cancellation Division ordered the cancellation applicant to bear the costs of the EUTM proprietor fixed at EUR 450. This decision remains unaffected.

89 The total costs of the appeal and opposition proceedings amount to EUR 1 000.

Order

On those grounds,

THE BOARD

hereby:

- 1. Dismisses the appeal;**
- 2. Orders the cancellation applicant to bear the EUTM proprietor's costs in the appeal and cancellation proceedings in the amount of EUR 1 000.**

Signed

V. Melgar

Signed

S. Rizzo

Signed

A. Pohlmann

Registrar:

Signed

H.Dijkema

