

CANCELLATION No C 71 716 (INVALIDITY)

Ledstores Europe B.V., Suikersilo-West 35, 1165 MP Halfweg, Netherlands (applicant), represented by **Intellectueeleigendom.NL**, Savannahweg 17, 3542 AW Utrecht, Netherlands (professional representative)

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123led B.V., Koningsbeltweg 52, 1329 AK Almere, Netherlands (EUTM proprietor), represented by **Novagraaf Nederland B.V.**, Hoogoorddreef 5, 1101 BA Amsterdam, Netherlands (professional representative).

On 14/10/2026, the Cancellation Division takes the following

DECISION

1. The application for a declaration of invalidity is partially upheld.
2. European Union trade mark No 19 009 870 is declared invalid for some of the contested goods and services, namely:

Class 35: Import and export, purchase and sales services, retail and wholesale services in relation to the following goods: lighting equipment, signalling devices; business mediation in the sale of commodities; the bringing together for the benefit of others, in relation to the following goods: lighting equipment, signalling devices, all the aforesaid services whether or not provided via electronic channels, including the internet.

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

Class 9: Scientific, research, navigation, surveying, photographic, cinematographic, audiovisual, optical, weighing, measuring, signalling, detecting, testing, inspection, life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling the distribution or use of electricity; apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; recorded and downloadable media, computer software, blank digital or analogue recording and storage media; coin-operated mechanisms; cash registers, calculating machines; computers and computer peripherals; jack plugs; commutators; sensors; dimmers; electronic doorbells; cameras [photography]; thermostat controllers; smoke detectors; remote controls; smart door locks; electronic door locks; electronic publications; mobile apps.

Class 11: Apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes; lighting and lighting reflectors; vehicle lighting and lighting reflectors; Christmas lights [other than candles].

Class 35: Advertising; business management; business administration; office functions; sponsorship search; import and export, purchase and sales services, retail and wholesale services in relation to the following goods: apparatus, instruments and

cables for electricity, safety apparatus, security apparatus, monitoring instruments, measuring apparatus, detection devices, surveillance apparatus and controller apparatus, plugs, commutators, sensors, variators, electronic doorbells, cameras, thermostat controllers, smoke detectors, remote control, smart door locks, door locks and vacuum cleaners; the bringing together for the benefit of others, in relation to the following goods: apparatus, instruments and cables for electricity, safety apparatus, security apparatus, monitoring instruments, measuring apparatus, detection devices, surveillance apparatus and controller apparatus, plugs, commutators, sensors, variators, electronic doorbells, cameras, thermostat controllers, smoke detectors, remote control, smart door locks, door locks and vacuum cleaners, enabling customers to view, select and purchase those goods; compilation of statistics; market prospecting, research and analysis; opinion polling; compilation of information into computer databases; data file administration; administrative processing of purchase orders; organisation of trade fairs, conferences and events for commercial or advertising purposes; information and consultancy relating to the aforesaid services; all the aforesaid services whether or not provided via electronic channels, including the internet.

4. Each party bears its own costs.

REASONS

On 14/05/2025, the applicant filed an application for a declaration of invalidity against European Union trade mark No 19 009 870 '123LED' (word mark) (the EUTM), filed on 05/04/2024 and registered on 14/08/2024. The request is directed against some of the goods and services covered by the EUTM, namely:

Class 9: *Dimmers.*

Class 11: *Apparatus for lighting; lighting and lighting reflectors; vehicle lighting and lighting reflectors; Christmas lights [other than candles].*

Class 35: *Import and export, purchase and sales services, retail and wholesale services in relation to the following goods: lighting equipment, signalling devices; business mediation in the sale of commodities; the bringing together for the benefit of others, in relation to the following goods: lighting equipment, signalling devices; all the aforesaid services whether or not provided via electronic channels, including the internet.*

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 contested mark is descriptive and devoid of distinctive character under Article 7(1)(b) and (c) EUTMR. It submits that the relevant public comprises both the general public and professionals. The general public displays an average level of attention in relation to lighting apparatus and Christmas lights, whereas purchasers of lighting reflectors and vehicle lighting and reflectors display a high level of attention because of the nature of those goods.

According to the applicant, a substantial part of the relevant public will perceive '123' as the sequence 'one-two-three', conveying speed and ease, rather than as the number one hundred and twenty-three. For the Dutch-speaking consumers, it points out that

the expression 'een-twee-drie', means 'quickly' or 'immediately'. The element 'LED' refers to a light-emitting diode. The applicant relies on Benelux Office for Intellectual Property (BOIP) decisions and Dutch judgments concerning marks containing '123' in support of that interpretation.

The applicant submits that 'LED' describes the nature of the contested lighting goods in Class 11 and their possible use with dimmers in Class 9. It further argues that '123' refers to characteristics such as immediate illumination and the ease and speed of installation or use. As regards the Class 35 services, it emphasises that '123LED' indicates that sales, import, export, retail and wholesale services relating to LED products are provided quickly and efficiently. Since the combination is not unusual or sufficiently removed from the meanings of its components, the applicant considers that the sign directly describes the contested goods and services and cannot indicate their commercial origin.

The applicant submitted the following documents:

- Annex 1: dictionary extracts concerning 'LED' in Dutch and English and 'een-twee-drie (123)' in Dutch;
- Annex 2: a BOIP decision of 10/04/2025 in connection with the word mark '123THEORIE.NL';
- Annex 3: a judgment of the Court of Appeal of The Hague of 03/03/2009 concerning the mark '123VIDEO';
- Annex 4: a judgment of the District Court of 's-Hertogenbosch concerning the distinctive character of '123';
- Annex 5: BOIP refusals concerning marks combining '123' in conjunction with a descriptive term, including terms relating to LEDs and lighting apparatus.

The **EUTM proprietor** disputes the absolute grounds invoked and submits, in the alternative, that the mark has acquired distinctive character through extensive and long-standing use. It argues that the relevant public throughout the European Union includes the general public and professionals, both of whom display a high level of attention.

The EUTM proprietor accepts that 'LED' may allude to lighting technology but maintains that '123', whether considered alone or in the composite sign, does not directly designate a characteristic of the contested goods or services. It rejects the automatic equivalence between the numeral '123' and the Dutch expression 'een-twee-drie' and considers that the mark as a whole is abstract or suggestive rather than descriptive. In particular, the possible use of dimmers with LED lighting and the fact that Class 11 goods may contain LEDs do not, in its view, establish the required direct and specific link. It likewise disputes that the characteristics relied on by the applicant, including rapid illumination, durability, energy efficiency, safety and ease of installation, would cause the public to perceive '123' as descriptive. The same applies to the Class 35 services, for which speed has not been shown to be an objective and inherent characteristic.

The EUTM proprietor further argues that the Office is not bound by decisions of national offices or Courts and that the cited BOIP decisions and Dutch judgments do not establish the perception of a significant part of the relevant EU public. It considers the judgment of the Tribunal *Judiciaire de Paris* to be sector-specific, since it concerns practices relating to doors, gates and windows rather than the goods and services covered by '123LED'. In that context, the EUTM proprietor relies on the fact that '123LED' forms part of an established family of '123-' marks developed through more than 25 years of use, common marketing and a coinciding visual identity.

In support of acquired distinctiveness, the EUTM proprietor states that '123led', founded in 2014 and part of the Digital Revolution B.V. group established in 1995, sells energy-efficient LED lighting and accessories through national websites in Belgium, Ireland, Greece, Spain, France, the Netherlands, Poland and Sweden. It relies on the display of the mark in product titles and on packaging, the use of related domain names, a portfolio of Benelux and EU '123-' marks and common branding across websites, packaging and promotional materials.

The EUTM proprietor adds that the invalidity application was filed in reply to proceedings it had brought before the District Court of The Hague concerning alleged unlawful conduct and trade mark infringement involving 17 domain names containing '123led' and one containing 'led123' or a confusingly similar sign. It claims that the applicant refused to cease the conduct or transfer of the domain names and instead offered to sell them for a total of EUR 120 000.

The EUTM proprietor refers to annual media expenditure of EUR 500 000 in 2022, 2023 and 2024, as well as radio, television, outdoor and digital advertising, email campaigns, brochures, promotional items and approximately 500 branded vehicles in the Netherlands.

The EUTM proprietor further cites rankings and surveys concerning '123inkt.nl.' In the MT500 2025, based on assessments of 4 315 business professionals, the company ranked 30th overall, 13th for customer focus and first in the wholesale category. It ranked 55th among the 100 strongest Dutch retail brands in 2024, following comparable rankings between 2021 and 2023; 28th overall in the MT1000; and 23rd in the 'Most Customer-Friendly Company in the Netherlands' ranking, with a customer rating of 7.81. The EUTM proprietor argues that evidence relating to the parent company and associated '123-' marks is relevant because distinctive character may be acquired through use alongside another mark where consumers perceive the sign as indicating commercial origin.

The EUTM proprietor submits that evidence post-dating the invalidity application of 14/05/2025 may be taken into account where it permits conclusions about the situation on that date and that separate evidence for every Member State is not required where countries are served through a common cross-border distribution and marketing network. It therefore maintains that the mark is inherently distinctive or, alternatively, has acquired distinctive character through use, and requests that the application be rejected.

The EUTM proprietor submitted the following documents:

- Annexes 1 to 4: the MT/Sprout MT500 survey 2025 and MT1000 survey 2024, RetailTrends Brand Research 2025 and MarketResponse customer research KLANT 2022;
- Annex 5: screenshots of '123led' goods on '123' websites;
- Annex 6: an EUIPO register overview of trade marks beginning with '123';
- Annex 7: archived screenshots of '123' websites offering LED products;
- Annex 8: screenshots of its '123' websites.

The **applicant** maintains that '123' conveys speed, ease or a call to action and is therefore descriptive, or at least commonplace and non-distinctive, for the relevant lighting goods and retail services. It relies on a judgment of the Tribunal *Judiciaire de Paris* of 28/09/2023, promotional videos in which the EUTM proprietor's parent company pronounces its name 'een-twee-drie-inkt', website banners associating '1-2-3' and the EUTM proprietor's services with speed and ease, and a list of refusals by the DPMA and BOIP concerning marks containing '123'.

The applicant further argues that the EUTM proprietor's family of '123-' marks does not in itself establish distinctiveness and that the evidence relates mainly to 123inkt.nl rather than '123LED'. In its view, the rankings, surveys and website extracts are indirect and geographically limited and do not sufficiently demonstrate the relevant public's perception of '123LED' or establish sales, market share, promotion or use throughout the relevant territory. It therefore submits that acquired distinctiveness has not been established in Belgium, the Netherlands or elsewhere in the European Union.

The applicant submitted:

- Annex 6: the judgment of the Tribunal *Judiciaire de Paris* of 28/09/2023;
- Annex 7: promotional videos published by the EUTM proprietor's parent company;
- Annex 8: a printout of 123inkt.nl displaying the banner '*Een fijne werkplek in 1-2-3 geregeld!*';
- Annex 9: a printout of 123led.nl displaying the banner '*De snelste van Nederland. Vóór 23.59 uur besteld, morgen in huis!*';
- Annex 10: a list of trade marks containing '123' refused by the DPMA and BOIP on grounds of descriptiveness and/or lack of distinctive character.

The **EUTM proprietor** argues that the applicant mischaracterises its arguments, applies an incorrect legal standard and has not produced sufficient evidence that the mark is descriptive or devoid of distinctive character.

The EUTM proprietor rejects the suggestion that its claim is limited to the Netherlands. It relies on the mark's significant online presence and use in Belgium, Ireland, Greece, Spain, France, the Netherlands, Poland and Sweden, and argues that a significant proportion of the relevant public perceives the mark as indicating commercial origin.

The EUTM proprietor argues that Article 7(1)(c) EUTMR requires a sufficiently direct, specific and immediately understandable relationship between the sign and the relevant goods or services. In its view, the applicant has not established that consumers perceive '123' as the sequence 'one, two, three', rather than as the number '123', or that the combined sign directly describes any characteristic of the goods or services.

The EUTM proprietor submits that the ruling of the Tribunal *Judiciaire de Paris* confirms that descriptiveness must be assessed in light of the particular mark, goods, public and evidence. It argues that evidence concerning French practices in the doors, gates and windows sector cannot establish that '123' is generally descriptive or non-distinctive for the goods and retail services covered by '123LED'. It further argues that the mark must be assessed as a whole and does not convey obvious, direct or unequivocal information about dimmers, lighting products, vehicle lighting, Christmas lights or retail services in Classes 9, 11 and 35.

The EUTM proprietor explains that '123LED' forms part of a broader family in which '123' is consistently combined with different second elements. It submits that the argument concerns the distinctive character of each composite mark, reinforced by a common marketing strategy, visual presentation and consumer recognition. It also relies on evidence intended to show that '123LED' goods are offered through several related '123' websites and that the marks are present on the market.

It further submits that separate evidence for every Member State is not required where several countries are served through a common cross-border distribution and marketing network.

The EUTM proprietor relies on more than ten years of sales through websites serving several EU countries, 2 240 different '123LED' goods, sales of 565 754 products in 2024 and more than 442 099 in 2025, expenditure on advertising and search-engine optimisation, and newsletters sent to large customer groups in Spain, Poland and Sweden. It argues that materials relating to the parent company and associated '123' marks are relevant because distinctive character may be acquired through use of a sign together with another mark, provided that consumers perceive the sign as identifying commercial origin.

The EUTM proprietor maintains that, even if descriptiveness were claimed only for the Dutch-speaking public, the mark is inherently distinctive or, alternatively, has acquired distinctive character through use. It submits that the numerical and verbal elements must be examined together and that any weakness in an individual component does not necessarily deprive the composite mark of distinctive character.

The EUTM proprietor submitted the following documents:

- Annex 9: screenshots of the 123schoon.nl, 123accu.nl and 123-3d websites showing sales of '123led' products and referrals to the 123led website.
- Annex 10: screenshots of newsletters from 123ink.se, 123tinta.es, and 123drukuj.pl containing the 123led trade mark.

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).

The General Court has held that whether a trade mark should be registered or should be declared invalid must be assessed on the basis of the situation at the date of its application (03/06/2009, T-189/07, Flugbörse, EU:T:2009:172; confirmed by 23/04/2010, C-332/09 P, Flugbörse, EU:C:2010:225). The relevant date is therefore the filing date of the contested mark, namely 05/04/2024.

Regarding the relevant public, the goods and services in question target both professionals (e.g. vehicle lighting reflectors, wholesale services) and the general public (e.g. Christmas lights). The degree of attention of both the general public and professional consumers is expected to vary according to the specialised nature, purpose, and price of the goods. In any event, the question whether the level of

attention of the relevant public is low, average, or high is irrelevant for the application of Article 7(1)(c) EUTMR (20/12/2023, T-779/22, Haus & Grund, EU:T:2023:854, § 40).

The element 'LED' will be understood in several languages, including Dutch, as the abbreviation for 'light-emitting diode', that is an electronic light source capable of emitting light in different colours (Prisma Woordenboek, cited by the applicant). It therefore directly describes the nature, technology or essential component of *lighting equipment* and *signalling devices*. Indeed, signalling devices commonly use light-emitting diodes to produce visual signals, warnings or indications, for example by means of indicator lights, illuminated signs, warning lamps, traffic signals or emergency signalling equipment. The element 'LED' will not be perceived as indicating the commercial origin of those goods.

The element '123' may be perceived by the relevant public as the number one hundred and twenty-three. However, a non-negligible part of that public is also likely to understand it as the numerical sequence 'one, two, three'. This interpretation is consistent with the Benelux Office for Intellectual Property and the Court of Appeal of The Hague as well as the EUTM proprietor's own use of the mark 123inkt.nl, as shown by the applicant. It is particularly relevant for the Dutch-speaking public, since the verbal equivalent 'een-twee-drie' ('one-two-three') is a common expression meaning 'quickly' or 'immediately', as confirmed by the dictionary evidence submitted by the applicant. Accordingly, that part of the public will understand '123' as referring to something carried out quickly or immediately. However, the isolated decision of the *Tribunal Judiciaire de Paris* does not allow the conclusion that the French public would perceive the element '123' as a term lacking distinctive character as that decision relates to completely different goods (doors, gates and windows). No evidence has been provided regarding the meaning of this element in other languages, beyond its perception as a number.

In relation to the contested *import, export, purchase, sales, retail and wholesale services and the bringing together of goods for the benefit of others*, 'LED' directly identifies the lighting equipment and signalling devices to which those services relate. As regards *business mediation in the sale of commodities*, although that service is not expressly restricted to LED products, its broad wording encompasses mediation relating to the sale of LED goods. A non-negligible part of the Dutch-speaking public will understand '123LED' as indicating that the services concerning LED products are provided quickly or immediately. The sign therefore describes the subject matter and a commercially relevant quality of those services, rather than their commercial origin.

The EUTM proprietor's arguments do not alter that finding. Article 7(1)(c) EUTMR covers indications designating a quality of services or the manner in which they are provided; speed and immediacy are commercially relevant qualities of the services at issue, including those supplied electronically. It is immaterial that '123' may also be understood as the number one hundred and twenty-three, since one descriptive meaning is sufficient. The dictionary extracts and the EUTM proprietor's own use of '1-2-3' and 'een-twee-drie' in contexts emphasising speed and immediacy support that meaning for a non-negligible part of the Dutch-speaking public. The combination '123LED' does not create an unusual or independent meaning: 'LED' identifies the relevant products or their essential component and '123' describes the manner in which the services are provided. Although national decisions are not binding on the Office, this conclusion results from an autonomous assessment of the sign, the services and the relevant public. The EUTM proprietor's objections must therefore be rejected in relation to the contested services.

Although 'LED' is commonly understood as referring to light-emitting diode technology, the contested goods are not expressly limited to products incorporating that technology. Dimmers regulate light intensity and, while they may be compatible with LED lighting, they are not themselves LEDs. This indirect link is insufficient for the public to perceive, immediately and without further thought, a description of the goods (22/06/2005, T-19/04, PAPERLAB, EU:T:2005:247, § 25). Likewise, although part of the Dutch-speaking public may understand '123' as referring to speed or immediacy, that element does not directly describe the kind, purpose or any other inherent characteristic of *apparatus for lighting; lighting and lighting reflectors; vehicle lighting and lighting reflectors; Christmas lights [other than candles]*. Interpreting '123LED' as referring to rapid illumination, immediate operation or ease of installation would require an additional and non-unequivocal conceptual step. Taken as a whole, the sign therefore does not directly designate the goods or one of their essential characteristics in normal usage (22/06/2005, T-19/04, PAPERLAB, EU:T:2005:247, § 24) but is at most suggestive.

The applicant's arguments do not alter that conclusion. The cited decisions of national courts and offices are not binding on the Office, since the EU trade mark system is autonomous and the legality of the Office's decisions must be assessed solely on the basis of the EUTMR, as interpreted by the EU judicature. Although such national decisions may be taken into account as potentially relevant factual material, they cannot determine the outcome of the present proceedings, particularly where they concern different signs, goods or services, relevant publics or evidential contexts. Assessed as a whole and in relation to the goods at issue, '123LED' is capable of indicating commercial origin. The objection under Article 7(1)(c) EUTMR must therefore be rejected for those goods.

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 distinctive character of a trade mark 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).

The applicant's arguments concerning the lack of distinctive character of the contested mark are essentially based on its alleged descriptiveness. As established above, the sign '123LED' will be perceived by a non-negligible part of the Dutch-speaking public, in relation to the contested services in Class 35, as indicating that services concerning LED lighting and signalling devices are provided quickly or immediately. Consequently, for those services, the sign conveys descriptive information rather than identifying the services as originating from a particular undertaking. It is therefore also devoid of distinctive character within the meaning of Article 7(1)(b) EUTMR.

By contrast, the sign has not been shown to be descriptive of the contested goods in Classes 9 and 11. The applicant has not submitted any independent arguments or evidence demonstrating that, notwithstanding the absence of descriptiveness, the sign is incapable of indicating the commercial origin of those goods. Accordingly, the

objection under Article 7(1)(b) EUTMR must be upheld for the contested services in Class 35 and rejected for the contested goods in Classes 9 and 11.

ACQUIRED DISTINCTIVENESS – ARTICLE 7(3) AND ARTICLE 59(2) EUTMR

The EUTM proprietor claims that the mark has become distinctive through its long-term and intensive use.

Under Article 7(3) EUTMR, the absolute grounds for refusal laid down in Article 7(1)(b), (c) or (d) EUTMR do not preclude registration of a mark if, for the goods and services for which registration has been requested, that mark has become distinctive in consequence of the use which has been made of it. Furthermore, as regards cancellation proceedings, Article 59(2) EUTMR provides that where a European Union trade mark has been registered in breach of Article 7(1)(b), (c) or (d) EUTMR, it may nevertheless not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

These provisions are, therefore, worded in a similar manner, the only difference being the points in time for which acquired distinctiveness must be proved (respectively, at the filing date of the contested mark and the filing date of the application for declaration of invalidity). Accordingly, by virtue of these provisions, a mark which initially was descriptive and non-distinctive can be maintained, if disputed, if evidence is provided that it has acquired distinctive character through use in the part of the European Union for which the objection to registrability was found to exist (22/06/2006, C-25/05 P, Bonbonverpackung (fig.), EU:C:2006:422, § 82 and 83).

It is incumbent upon the EUTM proprietor to demonstrate that its mark had acquired distinctive character in the part of the European Union where the absolute ground for refusal arose, either before the filing date of the contested mark (05/04/2024) or before the filing date of the application for declaration of invalidity (14/05/2025).

The acquisition of a distinctive character through use of a mark requires that at least a significant proportion of the relevant section of the public identifies goods or services as originating from a particular undertaking because of the mark. In determining whether a mark has acquired distinctive character through its use, the Cancellation Division must globally assess the evidence that the mark has come to identify the goods and services concerned as originating from a particular undertaking, and thus to distinguish those goods or services from goods or services of other undertakings. In this context, it is necessary to consider, *inter alia*, the market share held by the mark; how intensive, geographically widespread and long-standing the use of the mark has been; the amount invested by the undertaking in promoting the mark; and the proportion of the relevant class of persons who, because of the mark, identify goods as originating from a particular undertaking (06/03/2007, T-230/05, GOLF USA, EU:T:2007:76, § 79 and the case-law cited).

The EUTM proprietor's reliance on an alleged family of '123-' marks is not relevant to the assessment of the absolute grounds for refusal, which must be carried out in relation to the contested sign itself and the goods and services at issue. In the present case, the evidence submitted is insufficient to establish that the contested mark '123LED' had acquired distinctive character through use by either of the relevant dates. As the applicant correctly observed, a substantial part of the material concerns 123inkt.nl, the EUTM proprietor's parent company, its general commercial reputation or other signs belonging to the alleged family of '123-' marks. The MT500, MT1000, RetailTrends and MarketResponse materials assess the reputation, customer focus or

market position of 123inkt.nl or of the undertaking more generally. They do not show that the relevant public identifies the contested services as originating from a particular undertaking because of the mark '123LED'.

Likewise, the evidence concerning the EUTM proprietor's portfolio of marks, its coinciding visual identity and the alleged family of '123-' signs cannot, in itself, establish acquired distinctiveness of the contested mark. Acquired distinctiveness must be demonstrated for the sign whose validity is at issue.

The screenshots of related websites, product pages and newsletters contain only limited references to '123LED'. Even where the contested mark is visible, many of those materials post-date the filing date of the contested mark. Although these materials may be relevant to determining whether the mark had acquired distinctive character by the filing date of the application for a declaration of invalidity, they contain no information from which conclusions may be drawn regarding the relevant public's perception by either of the relevant dates. They do not provide sufficient information about the duration, intensity and geographical extent of that use, the number of relevant consumers exposed to the mark or the effect of their use on their perception. Nor do they demonstrate that the relevant public understands '123LED', rather than the other '123-' marks or the name of the undertaking, as identifying the commercial origin of the contested services.

The sales volumes, number of products, advertising expenditure, search-engine optimisation activities and newsletters relied on by the EUTM proprietor do not remedy those deficiencies. The figures are not sufficiently broken down by reference to the contested mark, the contested services, the relevant territories and the relevant dates. In particular, no reliable evidence has been provided concerning the market share held under '123LED', the proportion of the relevant Dutch-speaking public exposed to that mark or the extent to which the advertising expenditure specifically promoted it. Evidence of commercial activity or substantial investment by the undertaking is not equivalent to proof that the public has come to perceive the contested mark as an indication of origin.

The EUTM proprietor's argument that the relevant countries are served through a common cross-border distribution and marketing network cannot alter that conclusion. Although acquired distinctiveness need not necessarily be proved by separate items of evidence for each Member State, the evidence, assessed globally, must nevertheless enable the Cancellation Division to conclude that a significant proportion of the relevant public throughout the territory in which the absolute ground exists perceives the mark as indicating commercial origin. The predominantly Netherlands-centred evidence, together with isolated website and newsletter extracts concerning other Member States, does not permit such a conclusion.

Consequently, viewed individually or as a whole, the evidence does not demonstrate that a significant proportion of the relevant public had come to identify the contested services as originating from the EUTM proprietor because of the mark '123LED', either by 05/04/2024 or by 14/05/2025. The EUTM proprietor's claim of acquired distinctiveness under Article 7(3) and Article 59(2) EUTMR must therefore be rejected.

Conclusion

The contested mark was descriptive pursuant to Article 7(1)(c) EUTMR in relation to the abovementioned contested services at the time of its filing. The EUTM proprietor did not demonstrate that it had acquired distinctive character either before its filing date or before the filing date of the application for invalidity in relation to those services.

In light of the above, the application is partially successful insofar as it is directed against the following services:

Class 35: Import and export, purchase and sales services, retail and wholesale services in relation to the following goods: lighting equipment, signalling devices; business mediation in the sale of commodities; the bringing together for the benefit of others, in relation to the following goods: lighting equipment, signalling devices, all the aforesaid services whether or not provided via electronic channels, including the internet.

Therefore, the contested trade mark must be declared invalid for these contested services.

The application is not successful insofar as the contested goods are concerned.

COSTS

According to Article 109(1) EUTMR, the losing party in cancellation proceedings must bear the fees and costs incurred by the other party. According to Article 109(3) EUTMR, where each party succeeds on some heads and fails on others, or if reasons of equity so dictate, the Cancellation Division will decide a different apportionment of costs.

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



The Cancellation Division

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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.