

CANCELLATION NO C 59 789 (NULLITÉ)

Interbev, Association, Tour Mattei, 207 rue de Bercy, 75012 Paris, France (applicant), represented by **Nicole Coutrelis**, 137 rue de l'Université, 75007 Paris, France (professional representative)

c o n t r r

BEYOND Meat, Inc., 119 Standard Street, El Segundo, 90245 California, United States (EUTM proprietor), represented by **Nordemann Czychowski Partner Rechtsanwältinnen und Rechtsanwälte mbB**, Kurfürstendamm 59, 10707 Berlin, Germany (professional representative).

On 07/05/2024, the Cancellation Division gives the following

DECISION

1. The application for a declaration of invalidity is partially upheld.
2. EUTM No 18 497 478 is declared invalid for part of the contested goods, namely:

Class 29: *Meat substitutes; Vegetarian and vegan meat substitutes; Herbal meat substitutes; Whipped packing not consisting of dairy products; Non-dairy yoghurt; Yoghurt substitutes; Milk substitutes; Non-laceous milk substitutes; Herbal milk substitutes; Non-dairy substitutes for milk; Butter substitutes; Butter, not consisting of dairy products [dairy substitute]; Cheese substitutes; Cheese not made from dairy products; Herbal cheese substitutes; Coconut based beverages for use as a substitute for milk; Beverages based on products other than dairy products, consisting of the following products: Soya, Riz, Amandes, oats, hemp, Potato; Hemp milk as a milk substitute; Nut-based milk used as a substitute for milk; Soya-based beverages for use as milk substitutes; Refrigerated food kits consisting primarily of the following products: Meat substitutes, sweetendantes of vegetarian and vegans, fermented meat or processed vegetables for making sandwiches; Packaged meals consisting primarily of the following goods: Meat substitutes, vegetarian and vegetarian meat Succedantes, herb or vegetable sugar; Kits of prepared foods ready to be cooked and prepared in the form of meals, the aforesaid goods being composed of the following goods: Meat substitutes, vegetarian and vegetarian meat Succedantes, herbal meat Succedantes, Sauces or Assaisonnings; Prepared, packaged and frozen meals consisting of the following products: Meat substitutes, vegetarian and vegetarian meat Succedanates, and herbal meat sweeteners; Chili con carne; Frozen inflows consisting primarily of the following goods: Meat substitutes, vegetarians and vegetarian or Succentated meat from plants; Prepared entries consisting primarily of the following products: Meat substitutes, vegetarians and vegetarian or Succentated meat from plants; Wrapped and pre-packaged inflows consisting mainly of the following goods: Meat substitutes, vegetarians and vegetarian or Succentated meat from plants; Vegetable-based snack food containing the following products: Meat*

substitutes, vegetarians and vegetarian or Succented meat from plants.

Class 30: *Pizzas containing meat substitutes, vegetarian or vegan meat products or herbal meat substitutes.*

3. The EUTM remains registered for all the remaining, contested or non-contested goods, namely:

Class 29: *Nut-based snack bars; Soy-based snack bars; Snack bars made of seeds; Fruit-based snack bars; Fruit snacks; Snack foods made from vegetables and fruits; Fruit and vegetable bars; Nut and grain snack bars; Nut-based snack foods; Fruit-based and nut-based snack bars; Fruit-based snack bars containing also nuts, grains, cereals and dried fruits; Healthy snacks, namely food bars consisting mainly of nuts, nuts and nuts and also containing other ingredients; Snack mixes consisting primarily of prepared fruits and nuts; Snack mixes consisting primarily of prepared fruits, nuts and/or prepared grapes; Rice milk; Soya milk; Soya-based milk; Egg substitutes; Herbal egg substitutes; Frozen prepared meals consisting primarily of vegetables; Prepared meals consisting primarily of vegetables; Ready to eat dishes consisting primarily of vegetables; Packaged meals consisting primarily of vegetables; Prepared chicken consisting primarily of vegetables, soups, fruit salads and vegetable salads; Vegetarian dishes consisting primarily of the following products: Fruit, nuts, vegetables and seeds; Mixes for making soups; Prepared meals consisting primarily of the following goods: Fruit, nuts, vegetables and seeds; Replacements of meals in the form of fruit-based snack bars, with a base of nuts or vegetables, containing proteins; Fruit-based organic food bars, fruit organic food bars containing the following products: Vegetables, nuts and Semences; Highly nutritive food bars made from treated fruits and vegetables, containing proteins, food bars made from processed nuts, food bars made from treated nuts and seeds; Nut-based snack foods; Nut bars.*

Class 30: *Cereal bars; Snack foods made from cereals; Cereal based snack bars; Cereal bars; Cereal based snack bars also containing nuts; Snack bars made from muesli and cereal based food bars; Cereal based food bars also containing dried fruits, grains, quinoa and other ingredients; Cereal bars; Cereal based snack bars; Brown rice syrup bars; Muesli and cereals; Ready-to-eat food bars and ready-to-eat bars from cereals; Seed, highly nutritive, ready-to-eat food bars; Energy bars; Quinoa food bars; Cereal based snack packs containing mainly complete cereals and also containing other ingredients, namely nuts, fruits and grains; Whole grain savory snacks; Hyper-protein cereal bars; Gluten-free cereal bars; Cereal bars without seeds; Breakfast bars, namely, cereal bars; A mixture of snack foods consisting primarily of savoury biscuits or pretzels or crisp Mélanges consisting primarily of popcorn; Prepared meals consisting primarily of pasta or rice; Frozen meals consisting primarily of pasta or rice; Packaged meals consisting primarily of rice or pasta; Mainly based on quinoa; Frozen meals consisting primarily of quinoa; Packaged meals consisting primarily of quinoa; Prepared meals consisting primarily of noodles; Frozen meals consisting primarily of noodles; Pre-packaged meals consisting primarily of noodles; Dishes consisting primarily of noodles; Meal kits consisting primarily of pasta or rice; Pizzas; Frozen pizzas; Kits of ingredients for making pizzas;*

Calzones; Sandwiches; Wrap sandwiches; Paninis; Non-dairy ice confectionery; Frozen yoghurt [confectionery ices].

Class 32: *Coconutwater [beverage]; Flavoured waters; Juices; Non-alcoholic water-based beverages; Non-alcoholic beverages, namely, fruit beverages; Herbal beverages containing fruit and vegetable juices; Dried fruit or vegetable beverages (smoothies); Soya-based beverages, other than milk substitutes and coconut based beverages other than milk substitutes; Rice-based beverages, other than milk substitutes; Carbonated soft drinks.*

4. Each party bears its own costs.

REASONS

On 21/04/2023, the applicant filed a request for a declaration of invalidity against European



Union trade mark No 18 497

478 (figurative mark) (the European Union trade mark), filed on 22/06/2021 and registered on 22/10/2021. The Application is directed against some of the goods covered by the EUTM, namely all the goods in classes 29 and 30:

Class 29: *Meat substitutes; Vegetarian and vegan meat substitutes; Herbal meat substitutes; Nut-based snack bars; Soy-based snack bars; Snack bars made of seeds; Fruit-based snack bars; Fruit snacks; Snack foods made from vegetables and fruits; Fruit and vegetable bars; Nut and grain snack bars; Nut-based snack foods; Fruit-based and nut-based snack bars; Fruit-based snack bars containing also nuts, grains, cereals and dried fruits; Healthy snacks, namely food bars consisting mainly of nuts, nuts and nuts and also containing other ingredients; Snack mixes consisting primarily of prepared fruits and nuts; Snack mixes consisting primarily of prepared fruits, nuts and/or prepared grapes; Whipped packing not consisting of dairy products; Non-dairy yoghurt; Yoghurt substitutes; Milk substitutes; Non-laceous milk substitutes; Herbal milk substitutes; Non-dairy substitutes for milk; Butter substitutes; Butter, not consisting of dairy products [dairy substitute]; Cheese substitutes; Cheese not made from dairy products; Herbal cheese substitutes; Coconut based beverages for use as a substitute for milk; Beverages based on products other than dairy products, consisting of the following products: Soya, Riz, Amandes, oats, hemp, Potato; Hemp milk as a milk substitute; Nut-based milk used as a substitute for milk; Rice milk; Soya-based beverages for use as milk substitutes; Soya milk; Soya-based milk; Egg substitutes; Herbal egg substitutes; Refrigerated food kits consisting primarily of the following products: Meat substitutes, sweetendantes of vegetarian and vegans, fermented meat or processed vegetables for making sandwiches; Packaged meals consisting primarily of the following goods: Meat substitutes, vegetarian and vegetarian meat Succedantes, herb or vegetable sugar; Frozen prepared meals consisting primarily of vegetables; Prepared meals*

consisting primarily of vegetables; Ready to eat dishes consisting primarily of vegetables; Packaged meals consisting primarily of vegetables; Kits of prepared foods ready to be cooked and prepared in the form of meals, the aforesaid goods being composed of the following goods: Meat substitutes, vegetarian and vegetarian meat Succedantes, herbal meat Succedantes, Sauces or Assaisonnings; Prepared, packaged and frozen meals consisting of the following products: Meat substitutes, vegetarian and vegetarian meat Succedanates, and herbal meat sweeteners; Chili con carne; Frozen inflows consisting primarily of the following goods: Meat substitutes, vegetarians and vegetarian or Succentated meat from plants; Prepared entries consisting primarily of the following products: Meat substitutes, vegetarians and vegetarian or Succentated meat from plants; Wrapped and pre-packaged inflows consisting mainly of the following goods: Meat substitutes, vegetarians and vegetarian or Succentated meat from plants; Vegetable-based snack food containing the following products: Meat substitutes, vegetarians and vegetarian or Succentated meat from plants; Prepared chicken consisting primarily of vegetables, soups, fruit salads and vegetable salads; Vegetarian dishes consisting primarily of the following products: Fruit, nuts, vegetables and seeds; Mixes for making soups; Prepared meals consisting primarily of the following goods: Fruit, nuts, vegetables and seeds; Replacements of meals in the form of fruit-based snack bars, with a base of nuts or vegetables, containing proteins; Fruit-based organic food bars, fruit organic food bars containing the following products: Vegetables, nuts and Semences; Highly nutritive food bars made from treated fruits and vegetables, containing proteins, food bars made from processed nuts, food bars made from treated nuts and seeds; Nut-based snack foods; Nut bars.

Class 30: *Cereal bars; Snack foods made from cereals; Cereal based snack bars; Cereal bars; Cereal based snack bars also containing nuts; Snack bars made from muesli and cereal based food bars; Cereal based food bars also containing dried fruits, grains, quinoa and other ingredients; Cereal bars; Cereal based snack bars; Brown rice syrup bars; Muesli and cereals; Ready-to-eat food bars and ready-to-eat bars from cereals; Seed, highly nutritive, ready-to-eat food bars; Energy bars; Quinoa food bars; Cereal based snack packs containing mainly complete cereals and also containing other ingredients, namely nuts, fruits and grains; Whole grain savory snacks; Hyper-protein cereal bars; Gluten-free cereal bars; Cereal bars without seeds; Breakfast bars, namely, cereal bars; A mixture of snack foods consisting primarily of savoury biscuits or pretzels or crisp Mélanges consisting primarily of popcorn; Prepared meals consisting primarily of pasta or rice; Frozen meals consisting primarily of pasta or rice; Packaged meals consisting primarily of rice or pasta; Mainly based on quinoa; Frozen meals consisting primarily of quinoa; Packaged meals consisting primarily of quinoa; Prepared meals consisting primarily of noodles; Frozen meals consisting primarily of noodles; Pre-packaged meals consisting primarily of noodles; Dishes consisting primarily of noodles; Meal kits consisting primarily of pasta or rice; Pizzas; Pizzas containing meat substitutes, vegetarian or vegan meat products or herbal meat substitutes; Frozen pizzas; Kits of ingredients for making pizzas; Calzones; Sandwiches; Wrap sandwiches; Paninis; Non-dairy ice confectionery; Frozen yoghurt [confectionery ices].*

The applicant relies on Article 59(1)(a) EUTMR in conjunction with Article 7(1)(g) EUTMR.

SUMMARY OF THE ARGUMENTS OF THE PARTIES

The applicant claims that the contested trade mark is misleading because it is liable to mislead the consumer by creating confusion as to the nature and quality of the goods it designates in classes 29 and 30. The proprietor manufactures and markets a range of goods presented as substitutes for meat, or even 'meat of vegetable origin' and even simply 'meat'. These preparations fall under the category of 'ultra processed' products. In order to avoid a certain mistrust on the part of consumers about this type of product, some undertakings designing such preparations seek to evoke meat, which remains a raw product, without adding other ingredients. In the present case, that strategy of evocation of meat takes the form, inter alia, of the registration and use by the proprietor of the contested figurative mark, which represents a cow on a green background, which is systematically used in its marketing communication and on the presentation of its goods to consumers, in particular on their packaging. The contested trade mark highlights the goods to which it is affixed as if they were connected with the bovine sector. Moreover, the long list of goods for which the mark was registered suggests that its proprietor offers, at any time, to affix it to other categories of goods, also meat substitutes.

It is common ground that in order to be considered deceptive, the mark must contain an objective indication which contradicts the characteristics of the registered goods and services. Thus, according to the case-law of the Court of Justice of the European Union, the average consumer targeted must be led to believe that the goods and services at issue possess certain characteristics which they do not in fact possess. The applicant argues that representations of cow or cattle are commonly used for meat or dairy products:



The mere fact of presenting an image of cow or beef on a food product containing neither meat nor dairy products, but openly intended to imitate and replace meat, thus conveys contradictory information, which is objectively likely to create an unsound expectation and

thereby create confusion in the mind of consumers as to the exact nature and characteristics of the product. There is therefore no doubt that the contested trade mark, referring to the world of meat, is in itself misleading to mislead the consumer, who is led to purchase the goods concerned by attributing to them qualities which they do not in fact possess.

In addition to the physical proximity of the goods at the points of sale, they are presented in similar packaging. It is indisputable that the packaging of the goods (meat trays with translucent operator) was chosen with the intention of recalling the packaging of fresh meat in large retailers. However, the choice of this type of packaging further reinforces the likelihood of confusion. On this packaging, the elements such as 'Meat', 'Burger' or 'Sausage', always accompanied by the cow on a green background which, apart from the varieties of products, is a constant one, are clearly highlighted (used several times, with the largest font). The goods are even presented as 'even MEATIER', which suggests that they contain more meat. The first visual element of the packaging brought to the consumer's attention, in the order in which it is read, is systematically the contested trade mark (upper part of the packaging). Similarly, the appearance and physical characteristics of the meat were carefully imitated in order to make the products indistinguishable for the consumer. Neither the texture nor the colour of the goods were left randomly. The use of denominations specific to meat (burger, sausage, mincé), imitation of the physical characteristics of the meat (colour, shape, etc.), the presentation of the products, the marketing section, the use of the word 'Meat', and even 'meat' on the website create an amalgamation in the minds of consumers between the goods in question and meat. Moreover, this is all the subject of the proprietor's communication strategy. However, the deceptive nature of those elements taken as a whole is further accentuated by the systematic presence of the mark as registered.

In support of its observations, the applicant submitted the following evidence:

Exhibit 1: Articles of association of Interbev.

Exhibit 2: Power of Interbev in Mtre Nicole Coutrelis.

Exhibit 3: Etiquettes Beyond Burger and Beyond Sausage
<https://bibliobs.nouvelobs.com/idees/20171227.OBS9840/les-faux-aliments-ont-colonise-jusqu-a-50-de-nos-supermarches.html>



Attachments 4 and 5: Office Norvegien de la propriété intellectuelle, notification of provisional refusal, 22/05/2020 and confirmation of refusal, 09/11/2020, in English.

Exhibit 6: Report by bailiff Monoprix concerning the marketing of the proprietor's goods.

The EUTM proprietor argues that the applicant is active in meat lobbying and that its purpose is apparently to prevent the marketing of goods which offer European consumers an alternative to animal meat, made from plant proteins. The contested mark has been registered in many countries worldwide. The holder was founded in 2009 by the son of a teacher and a farm with the aim of providing consumers with a source of proteins that is more respectful of animal welfare. Its goods, all bearing the contested trade mark, are marketed in more than 85 countries worldwide, many of which are Member States of the European Union, in particular France, Germany, Austria, the Netherlands and Sweden. Contrary to the applicant's assertions, the trade mark proprietor does not advocate a total substitution of meat for its products. Rather, it offers a source of proteins based on plants, which responds to a growing demand on the part of European consumers. However, the products of the trade mark proprietor and animal meat have a point in common, they provide consumers with a source of protein and enable them to prepare meals with different types of proteins, including herbal protein. They therefore fulfil this function of adding proteins to the diet of the consumer but originating from a different source and therefore with different nutritional and dietary characteristics. Contrary to what the applicant appears to claim, the section where the alternative products are found is, of course, determined by the distributor, and often by the individual market, depending on the general organisation of its shop. Almost all products offering an alternative to meat use the names 'meat' to indicate the actual product for which they are supposed to offer an alternative.

In the present case, the contested trade mark is not of such a nature as to deceive the relevant public as to the nature or quality of the goods covered by its wording. There is neither actual deceit nor a sufficiently serious risk that the consumer will be deceived, as the trade mark does not convey to European consumers a clear and unequivocal message, but which would be deceptive, about the characteristics of the goods concerned. In the present case, the contested trade mark was registered (inter alia) for various foodstuffs, dishes, snacks and ingredients in classes 29 and 30. These goods are mainly directed at the public at large. The level of attention of the consumers is average. However, the holder concludes that, as a general rule, contemporary consumers pay a higher degree of attention to the food they purchase because they have become increasingly sensitive to different ways of nourishing, whether for gluten or lactose allergies, for the protection of animals or the environment.

According to the proprietor, the contested mark does not convey a clear, precise and unambiguous message concerning specific characteristics of the goods. The public is very accustomed to seeing images of stylised animals in a wide variety of contexts and cites several trade marks reproducing cows or bulls. The contested mark is in addition to this line of trade marks, which may communicate a vague idea of strength, perseverance and stability, but do not convey a clear and precise message. The wrapper could create an idea of protecting the animal. The green colour of the mark and the wrapper may evoke leaves, plants or shadow in general. In any event, the wrapper adds a very original and fanciful element which will make the logo appear as an image of a decorative trade mark — the public will not see the 'bull caught' as representing a real cow or beef (or even an animal), but rather as a stylised and abstract figure perhaps conveying a general association of strength or heroic character. For all these reasons, the mark does not indicate that the goods on which it is used are or contain meat or are of animal origin.

The fact that consumers are not deceived by the contested mark is confirmed by the results of the September 2022 IPSOS survey submitted as Annex 3: even if, on the basis of an image of the contested trade mark, only 9 % of French consumers say they know the trade mark Beyond Meat (as opposed, for example, 58 % in the case of other Céral Bio trade marks or 30 % for Nat summaries Vie), the majority of French consumers correctly identify the products of the trade mark proprietor as being plants, because of the names of the goods and the information provided on their packaging. In particular, 77 % of consumers correctly identified the proprietor's product of the trade mark 'Beyond Burger' as being of plant origin and 71 % correctly identified the product 'Beyond Meatballs' as being of plant origin.

The proprietor then puts forward the arguments based on the case-law and EUIPO's practice according to which, for a trade mark to be declared invalid on account of its deceptive nature within the meaning of Article 7 (1) (g) EUTMR:

- The risk of deception must be sufficiently serious;
- Non-deceptive use of the mark must be excluded;
- A mark conveying a general idea of quality is not sufficient, since the message conveyed by the mark must relate to a specific characteristic of the goods.

The proprietor adds that the likelihood of deception must be assessed in relation to the relevant market on the basis of the current perceptions and habits of consumers.

There is also no (likelihood of) deception for the goods of the contested mark which are not supposed to offer a concrete alternative to the corresponding meat products: given that the contested trade mark does not contain a clear and precise message, let alone in relation to a 'carne' quality of the goods, it will not come to the consumer's mind that, for example, a Muesli bar, a nut bar, a very short muesli or even rice milk are, to repeat the applicant's argument, 'a product (s) which can be substituted for meat in every respect, having the same nutritional properties, quality and the same qualities'.

In support of its observations, the holder submitted the following:

- 1: Extract from the online encyclopaedia Wikipedia for 'National Interprofessional Association of Bed and Meat' (Interbev).
- 2: The leader of the proprietor's registrations for the relevant logo from the EUIPO database TMView.
- 2a: List from the Markify.com database, as a number of National Offices are not included in TMView.
- 3: Swavage carried out by IPSOS in September 2022, commissioned by the proprietor of the trade mark, on a basis of 1.000 people representative of French consumers. According to this survey, a majority of consumers (75 %) are flexitarians, i.e. they sometimes consume animal meat, but also consume other sources of proteins such as fish or plant proteins. Furthermore, that survey shows that more than 1 French out of 5 stated that it had reduced its meat consumption over the last 3 years, in particular because of the price of meat and animal welfare concerns.
- 4: Poll in 9 European countries (including the United Kingdom and Switzerland) conducted among consumers by the organisation for food awareness awareness

'ProVeg International' in May 2020, which showed that 66 % of French consumers, 79 % of German consumers, 63 % of Austrian consumers, 85 % of Belgian consumers, 89 % of Dutch consumers, 86 % of Danish consumers and 64 % of Czech consumers consume herbal products as alternatives to meat.

5 and 6: Extracts from the website of BILLA or INTERSPAR distributors in Austria, storing alternative products separately but in a place directly adjacent to products of animal origin.

7 and 8: Extracts from the website of the German distributor REWE.

9: Screenshot from the website of the French company HappyVore.

10: Screenshot of the website of the French company Herta.

11: Screenshot of the French company Carrefour.

12: Screenshot from the Dutch distributor Albert Heijn.

13: European Commission opinion of January 2022 in English and French as part of the TRIS notification procedure of the draft decree implementing Article L.412-10 of the French Consumer Code on the use of the term 'meat' for products other than meat.

In its reply, **the applicant** emphasises that its objective is not to prevent the marketing of goods which offer alternatives to meat, but to prevent such marketing using signs or misleading statements as to the nature and quality of those goods. The contested figurative mark depicts a bovine animal, which is affixed, as the respondent itself states, to imitation goods which are not meat but vegetable protein substitutes.

The proprietor's arguments concerning consumer trends, as well as the other products alternative to meat present on the market and the names 'carnées' of some of them are irrelevant. The applicant cites case-law which considered that the relevant public has a lower than average degree of attention in the field of foodstuffs. There is no likelihood of consumers being deceived when the goods designated have nothing to do with the sign adopted as a figurative mark. The bovine animal, which is unequivocally recognisable as such by anyone paying even average attention and placed on meat substitutes, is misleading. Such a connection is obviously not the result of chance and is not, in the present case, arbitrary in relation to the goods covered.

It might be possible to restrict the cancellation only to the designated goods which are described openly as meat substitutes. However, since the inventiveness of operators has no limit to copy meat, it is very difficult, if not even impossible, to predict which products do not present any risk of deception beyond those currently on the market. Consequently, the few goods designated by the respondent which, a priori, have nothing to do with meat substitutes, should also, in the applicant's view, be included in the total cancellation applied for in respect of all the goods in Classes 29 and 30.

In its reply, **the holder** points out that the European Commission notes that the use of the words 'meat', recalling the names of parallel meat products, is not only common in the European Union, but, moreover, is useful to consumers, as these terms 'meat' enable them to better understand how to use products other than meat (see Annex 13). The relevant public is in no way deceived by the use of the contested mark. The consumer is used to seeing and purchasing products alternative to meat, precisely under the names 'meat' and presentations referring to meat products or meat products. Contrary to what the applicant

claims, the circumstances in which goods other than meat are presented on the market do not lead the consumer to believe that the qualities of the alternative goods are identical to those of meat. This is quite the opposite: the very different qualities of products other than meat are precisely the reason why consumers choose them instead of meat. The consumer specifically wishes to exchange meat against something else, whether for ecological reasons or for reasons of animal protection or for other reasons. In decision 08/06/2020, R 0002/2020-5, NEXT LEVEL MEAT, § 27, the Board of Appeal cited the mark BEYOND MEAT as an example of a trade mark which correctly alludes to the fact that there are goods other than meat and which therefore do not contain it. The Board of Appeal considered that the proprietor's word mark 'BEYOND MEAT' was not misleading.

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

Pursuant to Article 59(1)(a) and (3) EUTMR, an EU trade mark shall be declared invalid on application to the Office where it has been registered contrary to the provisions of Article 7 EUTMR. Where the ground for invalidity exists in respect of only some of the goods or services for which the EU trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

Furthermore, it is apparent from Article 7(2) EUTMR that Article 7(1) EUTMR is to apply notwithstanding that the grounds of non-registrability obtain in only part of the Community.

As regards the assessment of absolute grounds for refusal pursuant to Article 7 EUTMR, which were examined *ex officio* before registration of the EUTM, the Cancellation Division does not, in principle, carry out its own research, but limits 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 prevent it from also taking into consideration facts which are well known, that is, facts which are likely to be known by all or which may be learnt from generally accessible sources.

Even though those facts and arguments must date from the period in which the EUTM application was filed, it may be that facts relating to a later period 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, § 41-43).

It is appropriate to interpret those grounds for refusal in light of the general interest which underlies each of them. The public interest taken into account must reflect different considerations, depending on which ground for refusal is at issue (16/09/2004, C-329/02 P, SAT.2, EU:C:2004:532, § 25).

Deceptive caractere — Article 7(1)(g) EUTMR

Article 7(1)(g) EUTMR prohibits the registration of trade marks which might deceive the public as to the nature, quality or geographical origin of the goods or services.

According to case-law, that ground for invalidity presupposes the existence of actual deceit or a sufficiently serious risk that the consumer will be deceived (04/03/1999, C-87/97, Cambozola, EU:C:1999:115, § 41). Therefore, the mere theoretical possibility that the public might be misled does not fall within the scope of an objection under Article 7(1)(g) EUTMR (17/04/2007, R 1102/2005-4, SMARTSAUNA, § 32).

Furthermore, Article 7(1)(g) EUTMR requires a sufficiently specific designation of the potential characteristics of the goods and services covered by the mark. It is only when the targeted consumer is led to believe that the goods and services possess certain characteristics, which they do not in fact possess, that he would be deceived by the mark (24/09/2008, T-248/05, I.T.@Manpower, EU:T:2008:396, § 65).

Article 7(1)(g) EUTMR only applies where the trade mark creates an expectation which is manifestly contrary to the nature, quality or geographical origin of the goods, with the result that there is a sufficiently serious risk that the consumer will be deceived. The trade mark must be refused where the list of goods is worded in such a way that non-deceptive use of the trade mark is not guaranteed and there is a sufficiently serious risk that the consumer will be deceived (26/01/2022, R 2424/2020 5, Representation of concentric circles (fig.)).

The mark is assessed in relation to the goods and services for which registration is sought and the relevant consumer's understanding of it (05/05/2011, 41/10, esf école du ski français (fig.), EU:T:2011:200, § 51).

Relevant public and level of attention

The average consumer's level of attention is likely to vary according to the category of goods and services (13/02/2007, 256/04, Respicur, EU:T:2007:46, § 42).


The holder argues that, as a general rule, contemporary consumers pay a higher degree of attention to the food they buy because they have become increasingly sensitive to different ways of nourishing, whether for gluten allergies or lactose, for the protection of animals or the environment. The applicant cites, for its part, case-law which considered that, on the contrary, the level of attention is lower than average.

However, the Cancellation Division considers that the contested goods in Classes 29 and 30 are directed at the public at large and the level of attention will be average. These goods are frequently purchased and used by the relevant consumers. As a general rule, these goods are neither expensive nor rare and their purchase does not require any particular knowledge or experience.

Even though these goods may be purchased by vegetarians or vegans, the fact remains that such foodstuffs are generally found in supermarkets and that a significant part of the public buys food, including the goods concerned, hastily and will display at most an average degree of attention (08/06/2020, R 3/2020-5, Next meat next level burger (fig.), § 13, 20; 14/02/2022, R 1425/2021 5, Just egg, § 21-22). As a general rule, these goods are neither expensive nor rare, and their purchase does not require any particular knowledge or experience.

Meaning of the sign and deceptiveness in relation to the contested goods



In the present case, the figurative mark  will be perceived by all the public in the European Union as representing a stylised bovine animal wearing a wrapper on a green background. The animal could very well be perceived as a beef but also as a dairy cow. Directly, this sign cannot be used in a non-deceptive way for any product which is not meat or milk or mainly composed of meat or milk. The logo represented gives contradictory information with all those goods presented as substitutes for meat or dairy substitutes, but

also with products which are not mainly made up of meat or dairy products. The trade mark conveys clear information that the goods contain meat or dairy products whereas they cannot in fact display those characteristics. Therefore, there is a sufficiently serious risk that the relevant public will be deceived in relation to certain types of contested goods.

The contested goods are directed at the public at large. The relevant consumers are average consumers and the degree of attention of most of them will not be high. Consumers will see in the contested sign a direct reference to meat or milk, namely proteins of animal origin. The applicant argues that representations of cows or cattle are commonly used for meat or dairy products. The Cancellation Division shares this view. The wrapper of the bovine animal and the green background do not distance the relevant public from the perception that the mark represents a stylised bovine animal.

The Cancellation Division therefore considers that the mark is clearly deceptive for **all the goods presented in the wording as not containing meat or dairy products** as the logo indicates otherwise. For example, all goods presented as 'substitutes', 'not based on', 'other than', 'as substitutes'... for meat or dairy products are refused because they are deceptive.

On the other hand, in the case of vegetable products which are not worded as not being capable of containing meat or milk products, the trade mark is not misleading. For example, the term 'milk' is now used not only for cow's milk but also for other similar milks such as soybean milk, without consumers being misled since the product is presented as vegetable milk without being presented as a substitute for animal milk. Similarly, it cannot be ruled out that the goods presented as 'principally' plants contain proteins of bovine origin and the good faith of the proprietor is assumed.

Arguments of the holder

The holder argues that the Office has accepted several similar registrations. However, according to settled case-law, decisions concerning registration of a sign as a European Union trade mark are adopted in the exercise of circumscribed powers and are not a matter of discretion.

Furthermore, as pointed out by the applicant, vegetarian and non-vegetarian foods are found close to each other in supermarkets and are packaged in a similar way. Most supermarket purchases are customary and consumers make little cognitive effort when purchasing many common products.

The Cancellation Division considers that the opinion of the European Commission relied on by the holder is irrelevant. The information on the food labels allows citizens to obtain comprehensive information on the content and composition of food products and helps consumers make an informed choice when purchasing foodstuffs. It is also clear from the case-law that offering consumers the possibility of verifying the label of a product itself **does not prevent the mark referring to those goods from being perceived as being deceptive** (19/11/2009, 234/06, Cannabis, EU:T:2009:448, § 43; 26/10/2017, 844/16, Klosterstoff, EU:T:2017:759, § 45; 19/12/2022, R 1201/2022 5, MYBACON, § 35). In the present case, this does not exclude that a consumer may simply rely on the contested sign when making a purchase.

Finally, the survey mentioned in Annex 3 indicates that the majority of the public correctly identifies the holder's non-animal products but not because of the contested logo, but rather '*because of the name of the products and the information provided on their packaging*'. In the absence of these indications, the contested trade mark remains deceptive for the consumer. However, the subject matter of the present action is indeed the contested trade mark.

The cases cited by the holder differ because they do not generally cover goods in classes 29 and 30. Therefore, the examples provided are not directly comparable. Finally, 08/06/2020, R 0002/2020-5, NEXT LEVEL MEAT, § 27 differs in that the proprietor's mark 'BEYOND MEAT' is also a word mark which 'means *'beyond meat' and refers precisely to the fact that there are also other foodstuffs that do not contain meat'* whereas the contested figurative mark does not indicate anything of that kind.

For the above reasons, and pursuant to Article 7(1)(g) EUTMR, the contested mark is deceptive for the relevant goods in Classes 29 and 30.

On the other hand, since the good faith of the proprietor is presumed and the applicant has not provided any evidence of deception as regards the other goods, the trade mark will be considered to be used in a non-deceptive manner for these goods:

Class 29: *Nut-based snack bars; Soy-based snack bars; Snack bars made of seeds; Fruit-based snack bars; Fruit snacks; Snack foods made from vegetables and fruits; Fruit and vegetable bars; Nut and grain snack bars; Nut-based snack foods; Fruit-based and nut-based snack bars; Fruit-based snack bars containing also nuts, grains, cereals and dried fruits; Healthy snacks, namely food bars consisting mainly of nuts, nuts and nuts and also containing other ingredients; Snack mixes consisting primarily of prepared fruits and nuts; Snack mixes consisting primarily of prepared fruits, nuts and/or prepared grapes; Rice milk; Soya milk; Soya-based milk; Egg substitutes; Herbal egg substitutes; Frozen prepared meals consisting primarily of vegetables; Prepared meals consisting primarily of vegetables; Ready to eat dishes consisting primarily of vegetables; Packaged meals consisting primarily of vegetables; Prepared chicken consisting primarily of vegetables, soups, fruit salads and vegetable salads; Vegetarian dishes consisting primarily of the following products: Fruit, nuts, vegetables and seeds; Prepared meals consisting primarily of the following goods: Fruit, nuts, vegetables and seeds; Mixes for making soups; Prepared meals consisting primarily of the following goods: Fruit, nuts, vegetables and seeds; Replacements of meals in the form of fruit-based snack bars, with a base of nuts or vegetables, containing proteins; Fruit-based organic food bars, fruit organic food bars containing the following products: Vegetables, nuts and Semences; Highly nutritive food bars made from treated fruits and vegetables, containing proteins, food bars made from processed nuts, food bars made from treated nuts and seeds; Nut-based snack foods; Nut bars.*

Class 30: *Cereal bars; Snack foods made from cereals; Cereal based snack bars; Cereal bars; Cereal based snack bars also containing nuts; Snack bars made from muesli and cereal based food bars; Cereal based food bars also containing dried fruits, grains, quinoa and other ingredients; Cereal bars; Cereal based snack bars; Brown rice syrup bars; Muesli and cereals; Ready-to-eat food bars and ready-to-eat bars from cereals; Seed, highly nutritive, ready-to-eat food bars; Energy bars; Quinoa food bars; Cereal based snack packs containing mainly complete cereals and also containing other ingredients, namely nuts, fruits and grains; Whole grain savory snacks; Hyper-protein cereal bars; Gluten-free cereal bars; Cereal bars without seeds; Breakfast bars, namely, cereal bars; A mixture of snack foods consisting primarily of savoury biscuits or pretzels or crisp Mélanges consisting primarily of popcorn; Prepared meals consisting primarily of pasta or rice; Frozen meals consisting primarily of pasta or rice; Packaged meals consisting primarily of rice or pasta; Mainly based on quinoa; Frozen meals consisting primarily of quinoa; Packaged meals consisting primarily of quinoa; Prepared*

meals consisting primarily of noodles; Frozen meals consisting primarily of noodles; Pre-packaged meals consisting primarily of noodles; Dishes consisting primarily of noodles; Meal kits consisting primarily of pasta or rice; Pizzas; Frozen pizzas; Kits of ingredients for making pizzas; Calzones; Sandwiches; Wrap sandwiches; Paninis; Non-dairy ice confectionery; Frozen yoghurt [confectionery ices].

Conclusion

The contested mark was deceptive within the meaning of Article 7(1)(g) EUTMR for all the remaining contested goods than the abovementioned contested at the date of filing.

In view of the above, EUTM No 18 497 478 is declared invalid for part of the contested goods, namely:

Class 29: *Meat substitutes; Vegetarian and vegan meat substitutes; Herbal meat substitutes; Whipped packing not consisting of dairy products; Non-dairy yoghurt; Yoghurt substitutes; Milk substitutes; Non-laceous milk substitutes; Herbal milk substitutes; Non-dairy substitutes for milk; Butter substitutes; Butter, not consisting of dairy products [dairy substitute]; Cheese substitutes; Cheese not made from dairy products; Herbal cheese substitutes; Coconut based beverages for use as a substitute for milk; Beverages based on products other than dairy products, consisting of the following products: Soya, Riz, Amandes, oats, hemp, Potato; Hemp milk as a milk substitute; Nut-based milk used as a substitute for milk; Soya-based beverages for use as milk substitutes; Refrigerated food kits consisting primarily of the following products: Meat substitutes, fermented meat and vegans, fermented meat or processed vegetables for making sandwiches; Packaged meals consisting primarily of the following goods: Meat substitutes, vegetarian and vegetarian meat Succedantes, herb or vegetable sugar; Kits of prepared foods ready to be cooked and prepared in the form of meals, the aforesaid goods being composed of the following goods: Meat substitutes, vegetarian and vegetarian meat Succedantes, herbal meat Succedantes, Sauces or Assaisonnings; Prepared, packaged and frozen meals consisting of the following products: Meat substitutes, vegetarian and vegetarian meat Succedanates, and herbal meat sweeteners; Chili con carne; Frozen inflows consisting primarily of the following goods: Meat substitutes, vegetarians and vegetarian or Succentated meat from plants; Prepared entries consisting primarily of the following products: Meat substitutes, vegetarians and vegetarian or Succentated meat from plants; Wrapped and pre-packaged inflows consisting mainly of the following goods: Meat substitutes, vegetarians and vegetarian or Succentated meat from plants; Vegetable-based snack food containing the following products: Meat substitutes, vegetarians and vegetarian or Succented meat from plants.*

Class 30: *Pizzas containing meat substitutes, vegetarian or vegan meat products or herbal meat substitutes.*

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

The application is rejected in respect of the remaining goods.

COSTS

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

Since the cancellation is confirmed for only some of the contested goods, both parties have each failed on one or more heads. Each party must therefore bear its own costs.



The Invalidation Division

Carmen SÁfavoured EZ
PALOMARES

Jessica N. LEWIS

Richard Bianchi

According to Article 67 EUTMR, any party adversely affected by this decision may appeal against it. 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.