

**DECISION
of the Fifth Board of Appeal
of 24 January 2023**

In case R 2088/2021-5

Amstel Brouwerij B.V.

B.P. 28

1000 AA Amsterdam

Netherlands

Cancellation applicant / Appellant

represented by Irenah Klink, De Brauw Blackstone Westbroek, Claude Debussylaan
80, 1082 MD, Amsterdam, Netherlands

v

Anheuser-Busch, LLC

One Busch Place

St. Louis, Missouri 63118

United States of America

EUTM proprietor / Defendant

represented by Hogan Lovells, Avenida Maisonnave 22, 03003 Alicante, Spain

APPEAL relating to Cancellation Proceedings No 44 724 C (European Union trade
mark registration No 2 895 258)

THE FIFTH BOARD OF APPEAL

composed of V. Melgar (Chairperson), R. Ocquet (Rapporteur) and S. Rizzo (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 17 October 2002, Anheuser-Busch, LLC ('the EUTM proprietor') sought to register the figurative mark

ULTRA

as a European Union trade mark ('EUTM') for the following list of goods:

Class 32 - Beers.

- 2 The application was published on 28 June 2004 and the mark was registered on 31 January 2005.
- 3 On 24 June 2020, Amstel Brouwerij B.V. ('the cancellation applicant') filed a request for a declaration of invalidity of the registered mark, on the grounds laid down in Article 59(1)(a) EUTMR in conjunction with Article 7(1)(b) and (c) EUTMR.
- 4 The cancellation applicant submitted the following evidence:

On 24 June 2020

- Annex A: Use of the term 'ULTRA' as a superlative word in European Union;
- Annex B: Descriptive use of word 'ULTRA' in the beer industry;
- Annex C: EUTMs containing the word 'ULTRA' as one element;
- Annex D: Trade mark registrations containing the words 'SUPER', 'MEGA' and 'EXTREME';
- Annex E: Use of the signs 'SUPER', 'MEGA' and 'EXTREME' for beers.

On 21 January 2021

- Annex F: Copy of the notice of refusal of 28 August 2020, EUTM No 18 262 501 ULTRA;
 - Annex G: Extract of the registrations 'BUD ULTRA' and 'BUDWEISER ULTRA';
 - Annex H: Examples of 'ULTRA' beers and 'ULTRA' alcoholic beverages with a clear presence in the EU.
- 5 The EUTM proprietor submitted the following evidence:


On 11 November 2020

- Enclosure 1: Exemplary definitions of 'ULTRA' taken from other EU dictionaries (and their translations);
- Enclosure 2: Examples showing that 'ULTRA' is not used in a descriptive sense, but as an equivalent of a noun designating the EUTM proprietor's goods or those of other trade mark holders;
- Enclosure 3: Excerpts from *Cambridge English Dictionary* illustrating types and corresponding functions of prefixes under English grammar rules.

On 7 June 2021

- Enclosure 4: Excerpts taken from the websites of third party beer manufacturers showing that, in the beer sector, it is common practice to use sub-brands in combination with main brands.
- 6 By decision of 13 October 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:
- The goods target the public at large. The attention of the relevant public will be that of the average consumer. Since the mark consists of the word 'ULTRA', which, *prima facie*, is commonly used in various European Union languages, the relevant public, *prima facie*, is the entire EU.

Article 7(1)(b) EUTMR

- The applicant argues that the mark 'ULTRA' lacks distinctive character. The Cancellation Division disagrees. Although it is true that the term 'ULTRA' means 'more' or 'beyond', the term on its own is distinctive and it needs to be combined with an additional term in order to convey a particular message. The term is a prefix that indicates a message when it is added to other adjective in order to emphasise that something or someone has a quality to an extreme degree. Prefixes are normally added to the beginning of a word to make a new word with a different meaning.
- The term 'ULTRA' without any additional verbal element remains vague and the consumer will lack some additional information in order to understand what (e.g. quality) is surpassed and in what sense. It is true that this word is used to indicate that something is extraordinary, outstanding or of a uniquely high quality, but an additional element is missing for the public to clearly understand in what sense it is extraordinary or outstanding, or what quality in particular it possesses or exceeds. Therefore, the term perceived in relation to beers in Class 32 will not immediately indicate why the product is better or superior to others of this kind. The message will remain vague for the public. Therefore, the mark does not convey any positive or laudatory connotation in relation to the goods concerned, since it does not highlight directly and unambiguously positive aspects of the goods in question. Consequently, the use of this term as a one-word sign in relation to beers is clearly vague and inherently distinctive.
- The refusal of other marks containing or composed by the word 'ULTRA' is not decisive. It is true that the Office must strive for consistency. However, the registration practice evolves and changes over time, and each case must be decided on its merits at a particular moment of time. When assessing the term 'ULTRA' in relation to beers, the Cancellation Division concludes that it remains allusive and does not convey any specific characteristics of the goods.
- The Cancellation Division further notes that this new practice is reflected in the assessment of the EUTM No 18 262 501 ^{U L T R A}  for Class 32 that was registered by the Office on 01 July 2021. The Office concluded that the verbal element 'ULTRA' on its own does not clearly connote a characteristic or quality of the goods. It requires other elements, like 'ultra strong', 'ultra low' 'ultra cold' in order to convey a particular message.

- The cancellation applicant also states that the contested mark falls in the same category as the signs: ‘Super’, ‘Extreme’ and ‘Mega’. However, although the mark might fall within the same category, each mark has to be assessed individually, taking into account the dictionary definitions, Office practice at a relevant point of time and also the perception of the public. The Cancellation Division shares the opinion of the General Court of 09 October 2002, T-360/00, *UltraPlus*, EU:T:2002:244, which – even though from 2002 – concluded that while the term ‘ULTRA’ might be non-distinctive when used in combination with another noun or an adjective, this is not the case when it is used as a sole element.
- The cancellation applicant has not proved that the term ‘ULTRA’ is commonly used to designate that a product is better or superior to others and is commonly used in relation to beers in a superlative way. The documents contained in Annex A merely confirm that, for the term ‘ULTRA’ to be descriptive or non-distinctive, it needs to be combined with another word. The internet research clearly demonstrates that the word is always combined with an additional term in order to have a clear meaning and confirms that the term ‘ULTRA’ is always combined with an additional verbal element to convey a particular message and they do not refer to goods in Class 32. In addition, the examples of the use of the term ‘ULTRA’ in relation to beers in Annex B cannot be taken into consideration as they refer to non-EU countries.
- Moreover, the mark contains certain stylised elements. The term ‘ULTRA’ is depicted in standard black upper-case letters with a very light shading. Although, this stylisation is not able to divert the attention of the public from the verbal message contained in the mark, it cannot be entirely disregarded. The consumer, when encountering the mark, will notice the stylisation of the distinctive element ‘ULTRA’ within the mark. Therefore, the mark’s verbal and figurative elements allow the mark as a whole to fulfil its essential function in relation to the relevant goods.

Article 7(1)(c) EUTMR

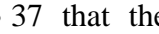
- The term ‘ULTRA’, on its own, does not describe any characteristics of the goods. It is merely allusive and lacks an additional element to indicate what quality it describes. The public would not refer to the beer as ‘ULTRA’ or would not say that the ‘beer is ultra’. In addition, to convey a meaning that the beer is ultra-light, or of low calories, as indicated by the cancellation applicant, an additional term must be added to the word ‘ULTRA’. On its own, the term alludes only to some vague connotations.
 - In light of all the above, the Cancellation Division concludes that the mark does not (and did not at the time of its filing) fall within the scope of the prohibition laid down by Article 7(1)(b) and (c) EUTMR.
- 7 On 11 December 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 31 January 2022.
- 8 In its response received on 26 April 2022, the EUTM proprietor requested that the appeal be dismissed.

- 9 After requesting a second round, the cancellation applicant submitted its rejoinder to the statement of grounds on 20 June 20022.
- 10 The EUTM proprietor submitted its further reply on 26 July 2022.

Submissions and arguments of the parties

- 11 The arguments raised by the cancellation applicant in the statement of grounds may be summarised as follows:
 - Beers in Class 32 target the public at large, and the attention of the relevant public will be that of the average consumer. Moreover, the relevant public for the goods at hand consists of persons of legal drinking age.

Article 7(1)(b) EUTMR

- The contested EUTM cannot serve as an indication of origin and therefore fails to fulfil the essential function of a trade mark. Consequently, the contested EUTM lacks distinctive character.
- Ordinary advertising messages, which are perceived exclusively as mere promotional slogans, do not indicate to the consumer the commercial origin of the goods or services. Examples for ordinary advertising messages include terms such as ‘extra’, ‘ultimate’, ‘mega’ or ‘premium’. For a finding that there is no distinctive character, it is sufficient to note that the semantic content of the sign in question indicates to the consumer a characteristic of the product or service relating to its market value which, while not specific, comes from promotional or advertising information that the relevant public will first and foremost perceive as such, rather than as an indication of the commercial origin of the product or service.
- The UKIPO confirmed in its of 4 November 2021 in the matter of application No 3 505 157 ‘ULTRA’ (fig.) by Anheuser-Busch LLC to register the trade mark in Class 32 and in the matter of opposition thereto under No 421 555 by Amstel Brouwerij B.V., § 37 that the sign  lacks distinctive character (Annex I).
- The contested mark is a laudatory or promotional sign. It consists of the term ‘ULTRA’ in banal standard typeface. Contrary to the Cancellation Division, ‘ULTRA’ alone conveys a laudatory meaning emphasising any positive qualities or superior characteristics of the goods concerned. As such, it does not serve as an indication of commercial origin.
- The cancellation applicant further submits various examples of ‘ULTRA’ as used in various sectors. It follows from this overview that ‘ULTRA’ is not only used in combination with other words, but also alone (Annex J). As established in EU case-law, the relevant public directly understands the clear message of the superior quality of a product, deviating from the standard version of the product, labelled with the term ‘ULTRA’.
- ‘ULTRA’ is a term in common use which, by its nature, does not lend itself to an exclusive right. This position was also taken by the EUTM proprietor before the Costa Rican trade mark Office (Annex L). The Cancellation Division correctly found that the word ‘ULTRA’ is commonly used in various European Union languages. According to established case law, it conveys a laudatory meaning as ‘going beyond what is usual or ordinary; excessive, extreme’,

‘extremely; beyond a predetermined level.’ While it can be used as prefix, it is frequently used on its own in the advertising context.


- This is in line with entries in various dictionaries. Excerpts from US dictionaries are also relevant to the interpretation of words in the English language.
- In 2019, the General Court confirmed in the ‘Ultrarange’ judgment (15/10/2019, T 434/18, Ultrarange, EU:T:2019:746, § 21, 32) that the term ‘ULTRA’ on its own is a synonym for ‘going beyond’ and ‘extra’, a superlative or amplifier to denote high and enhanced quality, often used in advertising language across all sectors. Similar to the laudatory terms ‘extra’, ‘mega’ and other superlatives, ‘ultra’ informs the relevant public that the registered goods possess additional positive aspects which exceed consumer expectations.
- The Boards of Appeal consistently find that the term ‘ULTRA’ on its own and in combination with other words, bears a laudatory connotation describing the extraordinary quality of the products, throughout various markets: 16/04/2020, R 483/2020-4, Ultra thermal precision, § 20; 05/09/2019, R 531/2019-4, ULTRASUN, § 13; 12/09/2017, R 877/2017-5, ULTRATEST, § 21.
- This large body of subsequent case-law is not altered by the earlier ‘UltraPlus’ judgment (09/10/2002, T-360/00, UltraPlus, EU:T:2002:244), which the Cancellation Division and the EUTM proprietor refer to in order to support its findings. In that case, not only was the word ‘ULTRA’ linked and attached to the word ‘PLUS’ (being syntactically unusual), the General Court also explicitly stressed that its findings were limited to the context of the ‘UltraPlus’ trade mark registered for ‘plastic ovenware for use in microwave, convection and conventional ovens’ in Class 21.
- The General Court has thus set the record straight in the ‘Ultrarange’ judgment. Consequently, the Cancellation Division based its findings on an incorrect reading of case law.
- ‘ULTRA’ is descriptive for ‘low-alcohol’, ‘low-carb’ and/or ‘low-calories’ Annex K). A descriptive mark cannot be distinctive. In addition to the laudatory connotation by describing the quality of the goods, the term ‘ULTRA’ is descriptive in the beer sector. More specifically, the ‘ultra beers’ designation has become known as a separate beer category in many jurisdictions. Although these jurisdictions fall outside the EU, the beer market is dominated by multinational companies, like Anheuser-Busch Inbev, the EUTM proprietor’s parent company. It is clear that this multinational is trying, through its trade mark registration, to monopolise a whole beer category. Not only is that an abuse of trade mark law (and thus a trade mark registration in bad faith), it also means that the EUTM proprietor is trying to maintain a purely descriptive mark. Even if it were not descriptive in the EU yet, there is a clear market interest to keep this (future) descriptive sign free for all to use, in order to indicate a certain type of beer. Moreover, the EUTM proprietor’s (parent company’s) use of ‘ULTRA’ across its various brands demonstrates that it is used as an indicator of a particular category of beer rather than as a brand name. The EUTM proprietor and its affiliates use the word ‘ULTRA’ to market beers under their Michelob, Cristal and Skol brand – in each case, to

emphasise the low-carb, low-calorie and/or low-alcohol version of those beers. Clearly, the use of ‘ULTRA’ is not intended to serve as a designation of origin, but rather to describe particular qualities of the goods in question. Within the context of the beer market, ‘ULTRA’ is similar to the use of ‘light’ or ‘lite’ to describe beers or other consumables.

- The stylisation does not confer distinctiveness on the sign as a whole. It consists merely of simple standard letters.

Article 7(1)(c) EUTMR

- ‘ULTRA’ is a term regularly used in advertising language to emphasise the positive aspects of a product and to indicate that it is of a better quality than others. This descriptive laudatory use is common practice for both consumer goods in general, and for beer in particular. Thus, it is unsurprising that earlier decisions of the Boards of Appeal and the General Court found ‘ULTRA’ to be descriptive of the characteristics of the goods. The EUIPO Guidelines explicitly list ‘ULTRA’ as an example of a term merely denoting a particular positive or appealing quality or function of the goods and services.
- ‘ULTRA’ is a prime example of a commonplace word that conveys a general positive or beneficial quality of any goods or services in question. Allowing a single company to exclusively appropriate such common promotional term would be detrimental to its competitors whose choice of available vocabulary for describing their own goods is reduced as a result. The *raison d'être* of Article 7(1)(c) EUTMR is to prevent exactly this situation and to ensure that such descriptive laudatory terms can be used freely by all.
- In addition to the clear meaning as a generic laudatory term describing the superior quality of goods, market practice within the beer industry shows that ‘ULTRA’ has been and is being adopted as an indicator of extremely low-carb, low-calorie and/or low-alcohol beers. This trend is global. The article ‘*El ascenso global de las cervezas Ultra*’ (<https://thebeerdaily.com/tag/light-beer/>) describes the global rise of ‘ULTRA’ beers. This is also reflected in the advertisement of ‘ULTRA’ beers by their party breweries, such as Brewhouse (Annex M).
- Many breweries worldwide (including throughout Europe) have started using the term ‘ULTRA’ to convey these characteristics. The Cancellation Division might have overlooked the first pages of the cancellation applicant’s evidence. This shows that ‘ULTRA’ is commonly used on the beer market. The product line offered by the Belgian brewery Gouden Carolus demonstrates that the term ‘ULTRA’ is used in the same manner as other descriptive terms, such as ‘classic’, ‘tripel’ or ‘ambrio’ (for amber) indicating the type of beer (Annex N).
- Likewise, the EUTM proprietor itself uses ‘ULTRA’ in this manner for beers marketed under its Michelob brand. It uses ‘Michelob Ultra’ for its low-carb / low-calorie offerings, ‘Michelob Golden Light’ for its light blonde beer, ‘Michelob Amberbock’ for the amber beer it brews using 100% malt (the latter being the main characteristic of ‘bock’ beers), and ‘Michelob light’ for its light beer. For the EUTM Proprietor, it is nothing more than an indicator of the type of beer (which it wants to monopolise).

- For this reason, the EUTM proprietor recently filed various ‘ULTRA’ signs, such as EUTM No 18 262 501 ^{U L T R A} , for ‘beers; non-alcoholic beers; low alcohol beers’, specifically.
- Even if ‘ULTRA’ were not yet associated with low-carb / low-calorie / low-alcohol beers by the relevant public at the moment of registration on the EU market, such association will likely be established in the near future. Given the increasing use of ‘ULTRA’ as a descriptive term among industry professionals and market leaders and in light of the widespread use of ‘ULTRA’ in the marketing of this type of beers, it is reasonable to assume that it will eventually become associated with the characteristics concerned.

In light of the above the Cancellation Division's decision is incorrect. The Cancellation Division is bound by the EUIPO Guidelines as well as the guidance provided by the courts setting EU case law.

12 The cancellation applicant filed the following evidence together with its statement of grounds:

- Annex I: UKIPO decision of 4 November 2021 in the matter of the application No 3505157 ‘ULTRA’ (fig.);
- Annex J: Examples of products using ‘ULTRA’ across the European Union;
- Annex K: Examples of ‘ULTRA’ beers worldwide;
- Annex L: EUTM proprietor’s submission before the Costa Rican trade mark Office, case N 2018-8600 (and translation);
- Annex M: Brewhouse advertisement;
- Annex N: Examples offered by various beer brands.

13 The arguments raised by the EUTM proprietor in the response to the appeal may be summarised as follows:

- None of the evidence and case-law submitted relates to the relevant point in time. The question of 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, not of its registration. Since the contested mark was filed on 17 October 2002, this is the relevant point in time to be considered. However, none of the material submitted by the cancellation applicant shows use of ‘ULTRA’ for beer at that point in time in 2002. Indeed, all of the evidence and case-law submitted by the cancellation applicant is either undated or it dates back to 2020 (if at all).
- Moreover, there are not even any allegations which demonstrate that the term ‘ULTRA’ was to be considered non-distinctive or descriptive for beer in 2002.
- Finally, the case-law quoted by the cancellation applicant should be disregarded as all the decisions refer to the wrong point in time (apart from other irrelevant aspects):
- 16/04/2020, R 483/2020-4, Ultra thermal precision: The filing date was 20 March 2019 and it refers to the use of the term ‘ULTRA’ in combination with other terms. The Board actually stressed as the General Court in various other proceedings that the term ‘ULTRA’ is descriptive only in combination with

other terms ‘The word ‘ultra’ has a laudatory connotation when combined with a noun (09/03/2015, T 377/13, *ultra.air ultrafilter*, EU:T:2015:149, § 18);

- 15/10/2019, T-434/18, *Ultrarange*, EU:T:2019:746: The filing date was 28 April 2017 and it refers to the use of ‘ULTRA’ in combination with other words. The Court did not assess the distinctiveness of the term ‘ULTRA’.
- The UKIPO decision does not prove anything either. The filing date was 26 June 2020. The EUTM regime is autonomous.
- The cancellation applicant bears the burden of proving that and to what extent consumers in the relevant market were actually confronted with the term ‘ULTRA’ before the trade mark application was filed. There is not a single piece of evidence that is close to the relevant filing date in 2002, hence the cancellation applicant has not complied with its burden of proof to show the lack of distinctiveness or descriptiveness of the contested mark.

Article 7(1)(b) EUTMR

- The cancellation applicant claims that the term ‘ULTRA’ alone conveys a laudatory meaning, as it emphasises ‘any positive qualities or superior characteristics of the goods concerned’ but does not mention which are such positive qualities or those superior characteristics. That speaks for itself: without another term (noun or adjective) ‘ULTRA’ does not have any specific meaning.
- In support of its claim, the cancellation applicant submits, inter alia, various examples of ‘ULTRA’ as used in several sectors. However, this evidence mainly refers to goods other than drinks or to the use of ‘ULTRA’ in combination with a noun/adjective. In any event and as mentioned above, none of these examples dates back to 2002.
- Just one visual showing ‘ULTRA’ alone on a drink is clearly insufficient to support the cancellation applicant’s claim. This is all the more so given that (i) it refers to an energy drink and (ii) the same drink in other countries (for example in Italy) is marketed in combination with the word ‘WHIT’E (which is arguably implied in some countries, in view of the colour of the can). In addition, Monster Energy Drink has registered the term ‘ULTRA WHITE’ as an EUTM in Class 32 for energy drinks (see EUTMs No 11 410 578 with a filing date of 10 December 2012 and No 18 000 182 with a filing date of 14 December 2018). Moreover, the same proprietor owns registrations for various other ‘ULTRA’ marks, in particular ‘ULTRA GOLD’, ‘ULTRA BLUE’ and ZERO ‘ULTRA’ (filed either in 2013 or 2021), hence all terms in which ‘ULTRA’ is combined with a colour or the meaning of a number (but not with a descriptive term). All the above proves two aspects: first, that the Office considers ‘ULTRA’ combined with another term such as a colour or number (none of which describes the product) to be distinctive (and no objections were issued in any of the cases). Hence, it must be distinctive also on its own for goods in Class 32. Secondly, even ten years after the filing of the contested mark, the evidence relating to the ‘ULTRA WHITE’ and other ULTRA marks of Monster Energy Drink shows that ‘ULTRA’ was - at that time and still nowadays - considered distinctive, unless combined with a second, descriptive term.

- The vast majority of the evidence submitted is clearly irrelevant, given that it shows use of ‘ULTRA’ in combination with other words (e.g. ULTRAIPA) or it refers to non-EU countries (e.g. Canada, New Zealand, Panama, Australia, Brazil, USA, Costa Rica, India).
- As for the sole potentially relevant piece of evidence regarding Martens Brewery, this visual alone is clearly not sufficient to prove the alleged non-distinctive character of ‘ULTRA’. Moreover, there is no proof that shows that the product was on the market in 2002. In any event, as a review of the website of the producer Martens Brewery shows now, the product does not even exist any longer.
- Likewise, the Board of Appeal’s decisions quoted by the cancellation applicant should all be dismissed, taking into account that they all refer to the use of ‘ULTRA’ in combination with other terms. In fact all those decisions speak in favour of the registrability of ‘ULTRA’ alone.
- Instead, reference should be made to the General Court’s findings in the ‘UltraPlus’ judgment (09/10/2002, T 360/00, UltraPlus, EU:T:2002:244).
- A careful analysis of the various General Court and Court of Justice rulings demonstrates that the Courts only consider ‘ULTRA’ to be non-distinctive or descriptive if used in combination with another term (09/03/2015, T-377/13, ultra.air ultrafilter, EU:T:2015:149, § 18; 09/10/2002, T-360/00, UltraPlus, EU:T:2002:244, § 52, 53; 25/02/2021, T-437/20, Ultrasun, EU:T:2021:109, § 30).
- At the basis of a similar conclusion there is the understanding that in all of these cases, as well as in the case at hand, there would be a case of mere evocation and not designation (31/01/2001, T-24/00, Vitalite, EU:T:2001:34, § 24). Consequently, the contested sign is also able to function as a badge of origin.
- The cancellation applicant claims that the fact that ‘ULTRA’ is commonly used as a prefix does not detract from its clear positive connotation. In order to support its claim, it refers, inter alia, to the arguments put forward by the EUTM proprietor within a proceeding in Costa Rica. The EUTM proprietor’s pleading in the Costa Rican proceedings was submitted on 19 February 2019 and therefore, it does not refer to the relevant point in time for the purpose of the present proceedings, which is 2002.
- The cancellation applicant simply claims that the stylisation of the contested mark does not confer distinctiveness on the sign as a whole. However, it does not provide any reasoning or supporting evidence for its allegation. When it comes to the assessment of the distinctive character of a composite mark, the fact that each of its elements, considered separately, is devoid of distinctive character does not mean that their combination cannot present a distinctive character (08/05/2008, C 304/06 P, Eurohypo, EU:C:2008:261, § 41).

Article 7(1)(c) EUTMR

- ‘ULTRA’ does not directly describe the characteristics of beer given that this term is vague. That particularly applies to the year 2002. It is by no means

shown that someone in 2002 understood ‘ULTRA’ as referring to a characteristic of a beer.

- Likewise, the cancellation applicant’s allegation that ‘ULTRA’ is a direct indicator of low-carb / low-calorie / low-alcohol beers is also completely unfounded. In particular, in order to support its claim, the cancellation applicant refers to (i) various online publications, (ii) third parties’ advertisings, (iii) the evidence submitted, (iv) Carolus brewery’s use of ULTRA as well as (v) use of ULTRA made by the EUTM proprietor (including the fact that ‘ULTRA’ was registered for, inter alia, ‘low alcohol beers’). However, none of these documents is relevant for the present proceedings because neither the articles nor the advertisements refer to the relevant EU territory. Likewise, the reference to the ‘CAROLUS’ beer should be disregarded, given that in that case the term ‘ULTRA’ is used as an acronym (U.L.T.R.A.) referring to ‘ultimate taste, reduced alcohol’. Eventually, as for the allegations concerning the use by the EUTM proprietor, the EUTM proprietor already demonstrated that such allegations and evidence are both irrelevant (as use outside the EU is not relevant) and unfounded (as the EUTM proprietor is using ‘ULTRA’ in a trade mark manner). Indeed, contrary to the cancellation applicant’s claims, the contested mark is not perceived by the relevant public as a customer mission statement or an inspirational or motivational statement, conveying promotional information. On the contrary, ‘ULTRA’ is perceived as a trade mark capable of indicating the commercial origin of the beer products to which it relates and, therefore, has the intrinsic capacity to distinguish, in the eyes of the relevant public, the EUTM proprietor’s goods from those of a different origin. That already follows from the very prominent use of ‘ULTRA’ on the label of the beer bottle or on the can which is the key product identifier in order to distinguish it from other ‘MICHELOB’ beer types. Finally, again none of the documents refers to the year 2002 and, already for such reason, they need to be disregarded from the outset.
- The EUTM proprietor encloses a Ruling from the Mexican Trademark Office issued on the 31 May 2021 (Enclosure 5), according to which the EUTM proprietor has prior use of ‘MICHELOB ULTRA’ (fig.) in Mexico and therefore the cancellation applicant’s trade mark registration for ‘AMSTEL ULTRA’ (fig.) has been cancelled and which declared that the cancellation applicant committed acts of unfair competition due to the similarity of its ‘AMSTEL ULTRA’ trade dress with the EUTM proprietor’s ‘MICHELOB ULTRA’ trade mark.
- Eventually, in the cancellation applicant’s view, the Cancellation Division incorrectly held that the EUIPO allegedly followed a ‘new practice’, given that it merely referred to a single trade mark application by the EUTM proprietor. It further notes that the EUIPO refused the application of ‘ULTRA’ marks due to their lack of a distinctive character, referring in particular to the application for the word mark ‘ULTRA’ on 25 May 2021. Instead, the EUIPO only recently accepted the EUTM application No 18 325 976 for ‘ULTRA’ (word) for goods in Class 32 with a filing date of 16 September 2021, hence still nowadays the EUIPO considers ‘ULTRA’ as such to be distinctive for beverages.

- 14 The EUTM proprietor submitted the following evidence together with its response:
- Exhibit 5: Ruling issued by the Mexican Trade Mark Office cancelling the cancellation applicant's registration 'AMSTEL ULTRA'.
- 15 The arguments raised by the cancellation applicant in its rejoinder to the statement of grounds may be summarised as follows:
- The EUTM proprietor's as well as the Cancellation Division's arguments rely on the faulty premise that 'ULTRA' is only non-distinctive when used in conjunction with other non-distinctive words. However, there is not a single precedent setting out such rule nor does this follow from the cited case-law. The only conclusion that can be drawn from such case-law is that 'ULTRA' is in any case incapable of adding distinctiveness. Reference is made again to the 'Ultrarange' judgement (15/10/2019, T-434/18, Ultrarange, EU:T:2019:746), according to which the generic meaning of the word element 'ULTRA' is to praise any product or service.
 - This understanding must be inferred from the meaning of the term 'ULTRA', as found by the Cancellation Division and also from the Office Guidelines. Reference is made to the refusal by the UKTM Tribunal of 22 June 2022 in the appeal regarding of the application No 3 505 157 'ULTRA' (fig.) as being non-distinctive and descriptive (Annex P).
 - The cancellation applicant submits examples of a non-distinctive or descriptive use of the term 'ULTRA' at the relevant date with regard to dishwasher tablets, shampoo, cleaning products, batteries, sanitary towels and balm tissues but not for beers (Annex Q).
 - It is reiterated that 'ULTRA' is descriptive for low-carb / low-calorie / low-alcohol beers. The EUTM proprietor itself uses the term 'ULTRA' with that descriptive meaning.
 - The Ruling of the Mexican Trade Mark Office submitted by the EUTM proprietor is not legible and should be therefore dismissed.
- 16 The arguments raised by the EUTM proprietor its further reply may be summarised as follows:
- It is reiterated that the from the 'Ultrarange' judgment (15/10/2019, T-434/18, Ultrarange, EU:T:2019:746) it may not be inferred that the term 'ULTRA' alone would lack distinctive character. The Court made it clear paragraphs 31 to 33 that the term 'Ultrarange' in combination is descriptive and non-distinctive and not its parts alone. This is why the Court ruled that the meaning of 'ULTRA' 'contributes' to the laudatory character of the mark and only 'the association' of 'ultra' and 'range' makes the mark descriptive and non-distinctive, as particularly highlighted in paragraph 33 of the judgment which the cancellation applicant deliberately omitted in its submission.
 - With regard to the examples submitted by the cancellation applicant in Annex Q, they show the use of 'ULTRA' in a prominent and trade mark manner and do not provide any insight into which specific characteristic of the product they describe. The cancellation applicant has also not explained which descriptive meaning 'ULTRA' has for each of these products. It has only stated the product as such, not the specific meaning of 'ULTRA' for that product.

- There is in any event no direct link between the meaning of ‘ULTRA’ and the goods at hand.
- The reference made by the cancellation applicant to the EUIPO Guidelines is also completely irrelevant, given that the only mention of the alleged descriptiveness of ‘ULTRA’ in this context is in connection with the Board of Appeal’s decision 09/12/2002, R 333/2002-1, ULTRAFLEX. However, this decision is devoid of any probative value given that, in that case, the term ‘ULTRA’ was used in combination with an additional word (namely FLEX) for the purpose of designating, inter alia, ‘extremely flexible’.
- The refusal by the UKIPO of the application No 3 505 157 ‘ULTRA’ (fig.) (Annex P) as being non-distinctive and descriptive is not relevant since it does not refer to the relevant point in time.
- The alleged descriptiveness of the contested mark has not been proven at all and the evidence submitted rather shows a use as a trade mark.
- Finally, a new copy of the Ruling from the Mexican Trademark Office issued on 31 May 2021 is enclosed.

Reasons

Applicable law

- 17 Given the date on which the application for registration of the contested mark was filed, namely 17 October 2002, which is decisive for the purposes of identifying the applicable substantive law, the facts of the case are governed by the substantive provisions of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) (see, to that effect, 18/06/2020, C-702/18 P, Primart Marek Łukasiewicz, EU:C:2020:489, § 2; 12/05/2021, T-70/20, Museum of Illusions, EU:T:2021:253, § 16). However, for ease of reference, the Board will refer to the ‘EUTMR’. Should there be differences in relation to the relevant substantive law matters between Council Regulation (EC) No 40/94 and subsequent versions of that regulation, they will be highlighted.
- 18 Regarding procedural rules, it is recalled that, according to settled case-law, they are generally held to apply on the date on which they enter into force (12/05/2021, T-70/20, Museum of Illusions, EU:T:2021:253, EU:T:2021:253, § 17).
- 19 Since the appeal was filed on 11 December 2021, pursuant to Article 82(2)(j) EUTMDR, the EUTMDR shall apply to the appeal proceedings in the present case. In particular, the admissibility of new evidence filed before the Board will be governed by the provisions of the EUTMDR.

Scope of the appeal

- 20 The contested decision entirely rejected the request for a declaration of invalidity against the contested mark which was based on Article 7(1)(b) and (c) EUTMR.
- 21 The cancellation applicant filed the present appeal against the contested decision in its entirety. Consequently, the scope of the present appeal concerns the assessment as to whether the contested decision correctly rejected the request for declaration of invalidity in its entirety.

Confidentiality of the documents submitted by the cancellation applicant

- 22 The cancellation applicant has marked as confidential all the documents submitted at appeal stage. It did not however show any special interest in keeping these documents confidential.
- 23 Article 114(4) EUTMR provides that files may contain certain documents which are withheld from inspection, in particular if the party concerned shows a special interest in keeping them confidential.
- 24 In the event that a special interest in keeping a document confidential is invoked in accordance with Article 114(4) EUTMR, the Office must check whether a special interest is sufficiently shown. Such a special interest must exist because of the confidential nature of the document or its status as a trade or business secret.
- 25 In lack of any justification for the special interest to keep the submitted documents as confidential, the rejects is hereby rejected.

Admissibility of belated evidence filed at various stages of appeal proceedings

- 26 The Board notes that both parties filed new arguments and evidence in the course of the appeal proceedings. These arguments and evidence include, in particular, from the cancellation applicant, some further examples of products to which the term 'ULTRA' is affixed, some advertisements for beers and further beers offered including the term 'ULTRA' from the cancellation applicant, as well documents regarding a procedure in Costa Rica (Annexes I -Annex O) as well as the ruling of the UKTM Tribunal regarding the appeal against the refusal of the application No 3 505 157 'ULTRA' (fig.) (Annex P). From the EUTM proprietor, it concerns a Ruling issued on the 31 May 2021 by the Mexican Trademark Office (Enclosure 5), confirming that the Respondent has prior rights of 'MICHELOB ULTRA' (fig.) in Mexico and cancelling the Appellant's registration for 'AMSTEL ULTRA' (fig.) on this ground.
- 27 The Board recalls that, as the Court has held, it results from the wording of Article 95(2) EUTMR that, as a general rule and unless otherwise specified, the submission of facts and evidence by the parties remains possible after the expiry of the time-limits to which such submission is subject under the provisions of the EUTMR; the Office is in no way prohibited from taking account of facts and evidence which are submitted or produced late (07/2013, C-621/11 P, Fishbone, EU:C:2013:484, § 22), that is after the time-limit provided by the Regulation and, as the case may be, for the first time before the Board of Appeal.
- 28 In stating that the latter 'may', in such a case, decide to disregard evidence, Article 95(2) EUTMR grants the Office broad discretion to decide, while giving reasons for its decision in that regard, whether or not to take such evidence into account.
- 29 According to Article 27(4) EUTMDR, the Board may accept facts or evidence submitted for the first time before it only where those facts and evidence meet two requirements. Firstly, it must be established that they are prima facie relevant for the outcome of the case. Secondly, it must be established that these facts and arguments 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 the findings made or examined by the first instance of its own motion in the decision subject to appeal.
- 30 It follows that although Article 95(2) EUTMR and Article 27(4) EUTMDR grant the Board wide discretion to decide, while giving reasons for its decision in that

regard, whether or not to take into account evidence submitted for the first time before the Board; there are clear limits to this discretion, which will be duly taken into account in the examination which follows below.

- 31 In the present case, the conditions for accepting the belated evidence submitted by the cancellation applicant as well as by the EUTM proprietor at the appeal stage have been met, since all these evidence in principle may be relevant for the outcome in the present case.
- 32 Consequently, all this supplementary evidence produced by both parties will be taken into consideration.

Article 59(1)(a) EUTMR

- 33 In accordance with Article 59(1)(a) EUTMR, an EUTM is to be declared invalid on application to the Office where it has been registered contrary to the provisions of Article 7 EUTMR.
- 34 The cancellation applicant invoked Article 7(1)(b) and (c) EUTMR.
- 35 An EUTM is regarded as valid until it has been declared invalid by the EUIPO following invalidity proceedings. The contested mark therefore enjoys a presumption of validity, which is the logical consequence of the check carried out by the EUIPO in the examination of an application for registration. In those circumstances, it is for the person who has filed the application for a declaration of invalidity to place the specific facts which call the validity of the contested mark into question, such as, for example, its alleged descriptiveness (23/09/2020, T-738/19, *Wi-Fi Powered by The Cloud* (fig.), EU:T:2020:441, § 36; 13/09/2013, T-320/10, *Castel*, EU:T:2013:424, § 27-29).
- 36 Each of the absolute grounds for refusal of registration listed in Article 7(1) EUTMR is independent of the others and requires separate examination, even though there is an obvious degree of overlap between their respective scopes (07/05/2019, T-423/18, *vita*, EU:T:2019:291, § 64, first sentence). Each of these absolute grounds has indeed its own sphere of application and they are neither mutually dependent nor mutually exclusive (29/04/2004, C-456/01 P and C-457/01 P, *Tabs*, EU:C:2004:258, § 45-46). Even if those grounds were applicable separately, they could also be applied cumulatively (07/05/2019, T-423/18, *vita*, EU:T:2019:291, § 65).
- 37 Furthermore, those grounds for refusal must be interpreted in light of the public interest underlying each of them (07/05/2019, T-423/18, *vita*, EU:T:2019:291, § 64, second sentence; 08/04/2003, C-53/01 to C-55/01, *Linde*, EU:C:2003:206, § 71).

Relevant point in time

- 38 The relevant point in time for the assessment of whether the EUTM has been registered contrary to the provisions of Article 7 EUTMR is the filing date of that trade mark.
- 39 In the present case, the contested mark was filed on 17 October 2002. It follows that the Board must primarily assess the factual situation pertaining at that date.
- 40 However, evidence postdating the filing date may nevertheless be relevant to the extent that they allow conclusions to be drawn regarding the situation at the

relevant filing date of the contested mark (23/04/2010, C-332/09 P, Flugbörse, EU:C:2010:225, § 41 and 43).

Article 7(1)(b) EUTMR

- 41 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) is to apply notwithstanding that the grounds of non-registrability concern only part of the European Union.
- 42 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 (09/12/2020, T-30/20, Promed, EU:T:2020:599, § 40; 25/09/2015, T-366/14, 2good, EU:T:2015:697, § 13).
- 43 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. Such is the case, in particular, with regard to signs which are commonly used in the marketing of the goods or services concerned (25/09/2015, T-366/14, 2good, EU:T:2015:697, § 13; 17/09/2015, T-550/14, Competition, EU:T:2015:640, § 12; 12/07/2019, T-114/18, Free, EU:T:2019:530, § 19).
- 44 A minimum degree of distinctive character is sufficient to render the absolute ground for refusal set out in Article 7(1)(b) EUTMR inapplicable (14/03/2014, T-131/13, Affixing of a flower to a collar, EU:T:2014:129, § 16).
- 45 Registration of a sign as an EUTM or as an IR designating the European Union is not subject to a finding of a specific level of linguistic or artistic creativity or imaginativeness on the part of the proprietor of the mark. It suffices that the mark should enable the relevant public to identify the origin of the goods or services protected thereby and to distinguish them from those of other undertakings (13/05/2020, T-49/19, Create delightful human environments, EU:T:2020:197, § 20).
- 46 As regards marks made up of signs or indications that are also used as advertising slogans, indications of quality or incitements to purchase the goods or services covered by that mark, their registration is not excluded as such by virtue of such use (08/11/2022, T-232/22, Catlover, not yet published, § 22).
- 47 In the assessment of the distinctive character of such marks, it is inappropriate to apply criteria which are stricter than those applicable to other types of signs (12/07/2012, C-311/11 P, Wire machen das besondere einfach, EU:C:2012:460, § 25; 21/10/2004, C-64/02 P, Das Prinzip der Bequemlichkeit, EU:C:2004:645, § 32, 41, 44; 21/01/2010, C-398/08 P, Vorsprung durch Technik, EU:C:2010:29, § 35-36; 13/07/2022, T-634/21 We do support, EU:T:2022:459, § 20; 24/04/2018, T-297/17, We know abrasives, EU:T:2018:217, § 32).
- 48 However, the relevant public's perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks

of other categories (21/01/2010, C-398/08 P, Vorsprung durch Technik, EU:C:2010:29, § 37; 05/10/2022, T-500/21, Together. Forward, EU:T:2022:609, § 15; 25/05/2016, T-422/15, The Dining Experience, EU:T:2016:314, § 47).

- 49 A sign such as an advertising slogan, indication of quality or incitement to purchase the goods or services covered by the mark, which fulfils functions other than those of a trade mark in the traditional sense of the term is distinctive for the purpose of Article 7(1)(b) EUTMR, only if it may be perceived immediately as an indication of the commercial origin of the goods or services in question, so as to enable the relevant public to distinguish without any possibility of confusion, the goods or services of the owner of a mark from those of a different commercial origin (12/06/2014, C-448/13 P, Innovation for the real world, EU:C:2014:1746, § 36-37; 03/07/2003, T-122/01, Best Buy, EU:T:2003:183, § 20-21).
- 50 Thus, a trade mark consisting of a promotional formula or an indication of quality must be regarded as being devoid of distinctive character if it is liable to be perceived by the relevant public as a mere promotional formula (12/07/2019, T-114/18, Free, EU:T:2019:530, § 23; 17/09/2015, T-550/14, Competition, EU:T:2015:640, § 17; 09/10/2018, T-697/17, Cooking chef gourmet, EU:T:2018:661, § 33).
- 51 Also, the mere fact that a mark is perceived by the relevant public as a promotional formula and that, because of its laudatory nature, it could in principle be used by other undertakings, is not sufficient, in itself, to support the finding that that mark is devoid of distinctive character (21/01/2010, C-398/08 P, Vorsprung durch Technik, EU:C:2010:29, § 44).
- 52 The distinctive character of a sign must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them by the relevant public (21/01/2010, C 398/08 P, Vorsprung durch Technik, EU:C:2010:29, § 34, 09/09/2010, C-265/09 P, α , EU:C:2010:508, § 32; 12/07/2019, T-114/18, Free, EU:T:2019:530, § 22; 08/07/2020, T-696/19, Moins de migraine pour vivre mieux, EU:T:2020:329, § 14; 13/02/2020, T-8/19, Inventemos el futuro, EU:T:2020:66, § 59; 17/01/2019, T-91/18, Diamond Card, EU:T:2019:17, § 14).

Relevant public under Article 7(2) EUTMR and their level of attention

- 53 In the present case, the relevant goods, namely ‘beers’ in Class 32 are aimed at the public at large.
- 54 Since the the goods in question are everyday consumer goods, the general public will have, at the best, an average level of attention (26/06/2018, T-556/17, Staropilsen, EU:T:2018:382, § 25).
- 55 The word ‘ULTRA’ is an English word which has in many official languages the same or a very similar meaning. Therefore, the relevant territory encompasses the whole European Union.

Meaning of the contested mark

- 56 The contested mark consists of the slightly stylised sign ‘ULTRA’.
- 57 The cancellation applicant stated that the term ‘ULTRA’ means, inter alia, ‘to an extreme degree; very; beyond’ and concluded therefrom that the contested mark

would be a laudatory or promotional sign merely emphasising any positive qualities or superior characteristics of the goods concerned.

- 58 In this regard, it is correct that the term ‘ULTRA’ means, inter alia ‘extreme; very or beyond’. However, as it is emphasized for example in the Oxford Online Dictionary, the term ‘ULTRA’, if not used as a noun, is a prefix with the aforesaid meaning which is further to be combined with a further element as for example ‘ultra-modern or ultraviolet’ (*Oxford Learners Dictionaries*, https://www.oxfordlearnersdictionaries.com/definition/american_english/ultra_2).
- 59 This use of ‘ULTRA’ as a prefix which is to be combined with a further element can also be verified in other languages as for example in Spanish (*Diccionario de la Real Academia Española*, <https://dle.rae.es/ultra-?m=form>) or in German (*Duden*, <https://www.duden.de/rechtschreibung/ultra>). Further, the links of the online dictionaries submitted on 21 January 2021 by the cancellation applicant in the proceedings before the Cancellation Division confirm all the aforesaid.
- 60 Therefore, it must be concluded that the expression ‘ULTRA’ on its own without any further addition cannot be considered as purely laudatory or promotional. This is further confirmed by the case-law which has been submitted by the cancellation applicant itself. The cases indicated by the cancellation applicant are in particular the following:
- 09/03/2015, T-377/13, ultra air ultrafilter, EU:T:2015:149 ;
 - 15/10/2019, T-434/18, Ultrarange, EU:T:2019:746;
 - 16/04/2020, R 483/2020-4, ULTRA thermal precision;
 - 27/04/2020, R 1453/2019-4, ULTRASUN;
 - 28/02/2020, R 2086/2019-4, Ultraweiss;
 - 14/04/2020, R 483/2020-4, ULTRA thermal precision;
 - 15/11/2018, R 1152/2018-4, Turbo Ultra;
 - 24/07/2018, R 1490/2017-5, UltraContact;
 - 30/10/1998, R 84/1998-1, Ultra Moist;
 - 29/06/2018, R 1656/2017-1, ULTRA-LOK;
 - 12/09/2017, R 877/2017-5, ULTRATEST;
 - 05/04/2016, R 0004/2016-2, ULTRAHEALTH;
 - 15/02/2012, R 1447/2011-1, TIP-TOP ULTRA CLEAN;
 - 11/11/2010, R 1794/2010-2, EFFECTIVE (ULTRA PERFORMANCE);
 - 18/01/2013, R 1747/2012-4, ULTRAICE;
 - 23/02/2009, R 443/2007-4, ULTRATRACE;
 - 12/06/2002, R 105/2001-4, Ultraheat.
- 61 In all the aforesaid cases, the corresponding signs have been rejected because the prefix ‘ULTRA’ has been combined or joined with a second element which informs the consumers in which sense the concerned goods or services go beyond, being thus of better quality. Since in the case at hand the term ‘ULTRA’ stands alone, the factual situation is different to the aforementioned cases and consequently, the outcome in those cases cannot be applied to the current case.
- 62 The cancellation applicant’s argument that from those judgments and decisions it may be inferred that the expression ‘ULTRA’, also on its own without any addition, would be laudatory and non-distinctive or descriptive, may not be followed because in all those cases the reasoning is based on the marks at issue and in the full context of those signs including the further elements added to the ‘ULTRA’ as a prefix.

- 63 Also the further case-law from the Court establishes that there is a clear difference between ‘ULTRA’ alone and ‘ULTRA’ together with a further indication. In the judgment ‘Ultraplus’ (09/10/2002, T-360/00, UltraPlus, EU:T:2002:244, § 23 to 25) it has been clearly said that the prefix ‘ULTRA’ is capable to be an indication reinforcing the quality of a good if used together with a further indication but as such and on its own does not designate any quality or characteristic of the goods which in that case were *plastic ovenware* in Class 21. The same applies to the element ‘PLUS’ with the result that the whole combination is not descriptive nor non-distinctive.
- 64 According to the cancellation applicant, the more recent judgement ‘Ultrarange’ (15/10/2019, T-434/18, Ultrarange, EU:T:2019:746) would contradict the reasoning of the aforesaid judgment which would, accordingly, not be applicable any more. However, this view cannot be followed because the ‘Ultrarange’ precisely confirms the ‘Ultraplus’ judgment as it confirms that the term ‘ULTRA’ with the addition of a further descriptive element indeed may be considered as descriptive and non-distinctive.
- 65 Moreover, the recent ‘Pluscard’ judgment (02/03/2022, T-669/20, Pluscard (fig.), EU:T:2022:106, § 60) expressly refers to the ‘Ultraplus’ judgment of 2002 confirming its reasoning. Consequently, the reasoning in said judgment is still valid and the cancellation applicant’s criticism must be rejected.
- 66 Further, in the First Board’s decision of 09/12/2002, R 333/2002-1, ULTRAFLEX § 14, the Board stated that even in the combination ‘ULTRA’ + ‘FLEX’, the consumers would not consider ‘ULTRA’ as purely laudatory or descriptive.
- 67 The cancellation further expressed its view that the expression ‘ULTRA’ is fully comparable to other terms which purely highlight positive aspects of any product or service as ‘EXTRA’ or ‘MEGA’ and should therefore be barred from registration as being laudatory and descriptive.
- 68 The Board cannot but disagree with this allegation. Indeed, as also confirmed by the case-law, terms as ‘EXTRA’ (28/04/2015, T-216/14, Extra, EU:T:2015:230; 24/06/2015, T-552/14, Extra, EU:T:2015:462; 24/06/2015, T-553/14, Extra, EU:T:2015:459) or ‘MEGA’ (15/05/2012, R 1977/2011-2, MEGA) are even standing alone laudatory and non-distinctive and therefore not able to indicate the commercial origin of goods or services. This does however not apply in the same way to the prefix ‘ULTRA’ since such prefix needs a further element that indicates in which sense or aspect the goods or services go beyond or are excellent.
- 69 The cancellation applicant further stressed that the term ‘ULTRA’ is generally used in trade as a non-distinctive element and in particular with regard to ‘beers’ as descriptive indication denoting low calories, low carbs or low content of alcohol. To this end, the cancellation applicant submitted several printouts from the Internet showing the use of ‘ULTRA’ on packaging relating to different products and on beer bottles and containers. The EUTM proprietor itself would, according to the cancellation applicant, use ‘ULTRA’ as such non-distinctive and descriptive indication.
- 70 The majority of the evidence provided by the cancellation applicant is not dated and can therefore not establish if the consumers perceived the contested mark at the filing date as a non-distinctive indication. The evidence submitted at appeal stage on 20 June 2022 referring to the relevant point in time is not related to beers

and merely shows different packaging where the expression ‘ULTRA’ appears next to other indications and signs. In all these examples, the element ‘ULTRA’ does not appear alone and are therefore not capable to establish that the sign ‘UTRA’ used alone for beers is non-distinctive.

- 71 With regard to the alleged use of the contested mark by the EUTM proprietor itself, it must be stated that even under the assumption that it used the mark already at the filing date as a non-distinctive or descriptive indication, this is irrelevant in the framework of the assessment whether the term ‘ULTRA’ had at the relevant point in time was intrinsically distinctive or not (09/10/2002, T-360/00, UltraPlus, EU:T:2002:244, § 52; 20/03/2002, T-358/00, Truckcard, EU:T:2002:81, § 47).
- 72 In the light of the above, the evidence as a whole provided by the cancellation applicant cannot establish that at the filing date of the contested mark, the term ‘ULTRA’ has been perceived as non-distinctive be it as a purely laudatory expression or be it as an indication that the beers are of low calories or low carbs or have a low content of alcohol. Nor that at that date it could be reasonably expected that it would be perceived as non-distinctive in the future.
- 73 Consequently, the cancellation applicant failed to establish that the contested mark should have been refused based on Article 7(1)(b) EUTMR.

Article 7(1)(c) EUTMR

- 74 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
- 75 For a sign to fall within the scope of Article 7(1)(c) EUTMR, it must convey a sufficiently direct and concrete link to the goods or services in question to enable the public concerned immediately, and without further thought, to perceive a description of the goods and services in question or of one of their characteristics (26/01/2022, T-233/21, Clustermedizin, EU:T:2022:27, § 16; 14/07/2021, T-527/20, Cucina (fig.), EU:T:2021:433, § 19; 10/02/2021, T-157/20, Lightyoga, EU:T:2021:71, § 40; 18/12/2020, T-289/20, Facegym, EU:T:2020:646, § 18; 02/12/2020, T-26/20, Forex, EU:T:2020:583, § 29).
- 76 By using the terms ‘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’ in Article 7(1)(c) EUTMR, the EU legislature made it clear, first, that those terms must all be regarded as corresponding to characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of the goods or services may also be taken into account (07/05/2019, T-423/18, vita, EU:T:2019:291, § 42).
- 77 The fact that the EU legislature chose to use the word ‘characteristic’ highlights the fact that the signs referred to in Article 7(1)(c) EUTMR are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. Consequently, a sign can be refused registration on the basis of that provision only if it is reasonable to believe that it will actually be recognised by the relevant class

of persons as a description of one of those characteristics (25/06/2020, T-133/19, Off-White (fig.), EU:T:2020:293, § 36).

- 78 The assessment of the descriptiveness of a sign is to be carried out, first, in relation to the understanding of the sign by the relevant public and, second, in relation to the goods or services concerned (15/09/2021, T-702/20, made of wood, EU:T:2021:589, § 29; 02/12/2020, T-26/20, Forex, EU:T:2020:583, § 30; 19/12/2019, T-270/19, ring, EU:T:2019:871, § 45; 13/06/2019, T-652/18, oral Dialysis, EU:T:2019:412, § 17).
- 79 The cancellation applicant stated that ‘ULTRA’ in combination with ‘beers’ denotes a low-carb, low-calorie and/or low-alcohol beers.
- 80 In order to avoid unnecessary repetition, the reasoning made above in the context of Article 7(1)(b) EUTMR applies in respect of the relevant public the meaning and perception of the contested mark and the cancellation applicant’s failure to show at the relevant filing date any descriptive link between the mark and the goods at hand, namely ‘beers’ in Class 32.
- 81 The cancellation applicant stated that the submitted evidence would at least show that already at the filing date it was likely that the term ‘ULTRA’ would be perceived as direct information on the aforesaid characteristics of the goods.
- 82 The Board cannot follow this view. With regard to beers, the cancellation applicant merely furnished undated printouts of beer bottles and containers where the term ‘ULTRA’ appears next to many other indications. The cancellation applicant does not explain why these appearances of the expression ‘ULTRA’ would indicate that those beers are of low calories, low carbs or of low content of alcohol. Further, in any case, these printouts may not establish any descriptive meaning of the prefix ‘ULTRA’ alone at the relevant filing date.
- 83 Finally, the evidence relating to the Mexican market and according to which ‘ULTRA’ would be used as denoting a ‘light beer’ has no impact on the perception of the consumers within the European Union and again is not dated with the result that it does not permit any conclusion with respect to the relevant point in time.
- 84 In the light of the above, the cancellation applicant also failed to establish that the contested mark should have been refused based on Article 7 (1) (c) EUTMR.

Previous decision rejecting the sign ‘ULTRA’

- 85 The cancellation applicant relied on a national decision from the UKIPO namely Decision no. 817/21 dated 4 November 2021 in the matter of application No 3 505 157 Ultra’ (fig.) and the appeal decision of the UKTM Tribunal of 22 June 2022 where the same mark as in the present proceedings has been refused, inter alia, for beers in Class 32 as descriptive and non-distinctive.
- 86 As starting point, it is well-known that national decisions are not such as to call into question the findings of the contested decision. It suffices to recall that the EUTM regime is autonomous and that the legality of decisions of the Office is assessed solely on the basis of the applicable Regulation ruling on the European Union Trade Mark, with the result that EUIPO, or, on appeal, the General Court, is not required to reach the same conclusions as those arrived at by national authorities or courts in similar circumstances (15/12/2015, T-83/14, Arthur &

Aston, EU:T:2015:974, § 37). The EUIPO and, if appropriate, the European Union judicature are therefore not bound by a decision given in a Member State (or a former Member State such as the United Kingdom), or indeed a third country (13/05/2020, T-532/19, *patys ECLI:EU:T:2020:193*, § 33; 14/12/2018, T-7/18, *Business and technology working as one*, EU:T:2018:974, § 45).

- 87 It has to be further stressed that in said proceedings before the UKIPO, the application No 3 505 157 ‘ULTRA’ (fig.) had been filed before that national office on 26 June 2020, whereas the relevant point in time of the present invalidity proceedings is the 17 October 2002. Consequently, the factual situation in the case before the UKIPO is not comparable to the present case and therefore cannot call into question the outcome in the current proceedings.
- 88 The same applies with regard to the other national decisions on which the cancellation applicant relies, namely of the Benelux Office (application BBIE/OBPI No 1 359 805 ‘ULTRA’) and the German Trade Mark Office (application No 302 277 250 ‘ULTRA’).
- 89 The cancellation applicant further relied on the following applications where the Office has rejected the sign ‘ULTRA’ for different goods and services as not distinctive or descriptive:
 - IR No 1 474 930, ‘ULTRA’;
 - IR No 1 198 244, ‘ULTRA’;
 - EUTM No 109 641 53 ‘ULTRA’;
 - EUTM No 4 272 051 ‘ULTRA’;
 - EUTM No 3 244 911 ‘ULTRA’;
 - EUTM No 2 982 619 ‘ULTRA’;
 - EUTM No 124 370 ‘ULTRA’.
- 90 The Office’s earlier decisions cannot give rise to legitimate expectations (27/11/2018, T-756/17, *Word Law Group*, EU:T:2018:846, § 52) and examination standards may develop over time.
- 91 Although, having regard to the principles of equal treatment and of sound administration, the Office must take into account the decisions previously taken in respect of similar applications and consider with special care whether it should decide in the same way or not, the way in which those principles are applied must be consistent with respect for the principle of legality (21/12/2021, T-598/20, *Arch Fit*, EU:T:2021:922, § 37; 08/07/2020, T-696/19, *Moins de migraine pour vivre mieux*, EU:T:2020:329, § 36; 24/06/2015, T-552/14, *Extra*, U:T:2015:462, § 27).
- 92 Furthermore, even if these cited decisions were comparable, it appears that they are all first-instance decisions, and the Boards did not have the opportunity to assess them. The Boards cannot be bound by decisions of the first-instance departments. It would be contrary to the Boards of Appeal’s competence, as defined in Articles 66 to 71 EUTMR, for its jurisdiction to be restricted by the requirement to respect the decisions of the first-instance adjudicating bodies of the EUIPO (14/09/2022, T-498/21, *Black Irish*, EU:T:2022:543, § 73; 09/11/2016, T-290/15, *Smarter Travel*, EU:T:2016:651, § 73).

Office Guidelines

- 93 The cancellation applicant finally puts forward that according to the Office Guidelines the expression ‘ULTRA’ alone would be non-distinctive and descriptive.
- 94 In this context it has to be recalled that the EUIPO Guidelines are not binding legal acts for the purpose of interpreting provisions of EU law (19/12/2012, C-149/11, Onel, EU:C:2012:816, § 48). Moreover, to the extent that the decisions which the EUIPO Boards of Appeal are called on to take under European Union trade mark Regulation are adopted in the exercise of circumscribed powers and are not a matter of discretion, the legality of those decisions must be assessed solely on the basis of that Regulation, as interpreted by the Courts of the European Union (13/03/2018, C-560/17P, mediaexpert, EU:C:2018:179, § 4 and case-law cited).
- 95 Therefore, the Board cannot be bound by the Guidelines as indicated by the cancellation applicant.

Final conclusion

- 96 The cancellation applicant failed to show that the contested mark would be non-distinctive or descriptive and consequently the request for a declaration of invalidity pursuant to Article 7(1)(b) EUTMR and 7(1)(c) EUTMR must be rejected in its entirety.
- 97 For the sake of completeness, the Board acknowledges that the contested mark has a slight stylisation. However, this aspect is of secondary importance and is not decisive for the final outcome in the present case.

Costs

- 98 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.
- 99 As to the appeal proceedings, these consist of the EUTM proprietor’s costs of professional representation of EUR 550.
- 100 As for the cancellation proceedings, the Cancellation Division ordered the cancellation applicant to bear the costs fixed at EUR 450. This decision remains unaffected.
- 101 The total amount is EUR 1 000.

Order

On those grounds,

THE BOARD

hereby:

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

Signed

V. Melgar

Signed

R. Ocquet

Signed

S. Rizzo

Registrar:

Signed

H. Dijkema

