

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

In case R 639/2021-4

**D-Market Elektronik Hizmetler
ve Ticaret Anonim Sirketi**

Kustepe Mah. Mecidiyeköy Yolu Cad.

No:12 Trump Tower Kule 2 Kat:2

Sisli, Istanbul

Turkey

Cancellation Applicant / Appellant

represented by Curell Suñol S.L.P., Muntaner, 240 – 4º 2ª, Barcelona, Spain

v

Dendiki B.V.

Nucleonweg 1

Roosendaal

The Netherlands

EUTM Proprietor / Defendant

represented by Merk-Echt B.V., Keizerstraat 7, Breda, The Netherlands

APPEAL relating to Cancellation Proceedings No 39 504 C (European Union trade mark registration No 17 151 796)

THE FOURTH BOARD OF APPEAL

composed of N. Korjus (Chairperson), L. Marijnissen (Rapporteur) and C. Govers (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 28 August 2017 and registered on 15 December 2017, Alpak B.V., the predecessor-in-title of Dendiki B.V. ('the EUTM proprietor'), obtained the registration of the word mark

hepsiburada

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

Class 21: *Tableware, cookware and containers; Statues, figurines, plaques and works of art, made of materials such as porcelain, terra-cotta or glass, included in the class; Cosmetic and toilet utensils and bathroom articles; Brushes and other articles for cleaning, brush-making materials; Apple corers; Bouquet holders; Bowls for floral decorations; Bowls for plants; Compost containers for household use; Containers for flowers; Flower baskets; Flower bowls; Flower bowls of precious metal; Flower pot holders; Flower pots; Flower syringes; Flower vases; Flower vases of precious metal; Flower-pot covers, not of paper; Garden syringes; Gardening gloves; Glass vases; Greenhouse syringes; Holders for flowers; Holders for flowers and plants [flower arranging]; Indoor terrariums [plant cultivation]; Indoor terrariums [vivariums]; Jardinieres of earthenware; Jardinieres of glass; Water syringes for spraying plants; Vases; Syringes for watering flowers and plants; Sprinklers; Sprayers attached to garden hoses; Sprayer wands for garden hoses; Spray nozzles for garden hoses; Seed trays; Seed tray inserts; Saucers for flower pots; Repotting containers for plants; Pot plant support sticks; Porcelain flower pots; Plastic spray nozzles; Planters of plastic; Planters of glass; Plastic lids for plant pots; Planters of earthenware; Planters of clay; Plant syringes; Plant baskets; Nozzles for watering hose; Nozzles for watering cans; Nozzles for hosepipes; Lawn sprinklers; Watering cans; Watering devices; Window-boxes; Aquaria and vivaria; Devices for pest and vermin control; Animal activated animal feeders; Animal activated livestock feeders; Animal activated livestock waterers; Animal bristles [brushware]; Bird baths; Bird baths not being structures; Bird cages for domestic birds; Bird feeders; Bird feeders for feeding birds in the wild; Bird feeders for feeding caged birds; Bird feeders in the nature of containers; Birdcages; Brushes for grooming horses; Brushes for pets; Cages for household pets; Cages of metal for domestic use; Cat litter pans; Combs for animals; Drinking troughs; Dog food scoops; Currycombs; Containers for bird food; Combs for use on domestic animals; Pig troughs; Pet feeding and drinking bowls; Perches for bird cages; Non-mechanized pet waterers in the nature of portable water and fluid dispensers for pets; Non-mechanized animal feeders; Nest eggs, artificial; Metal pans for cattle; Mangers for sheep; Mangers for horses; Mangers for cows; Mangers for animals; Mane brushes [horse combs]; Litter trays for birds; Litter scoops for use with pet animals; Horse brushes; Goldfish bowls; Fur brushes for animals; Food containers for pet animals; Filters for use in cat litter pans; Feeding troughs of metal for cattle; Feeding troughs for livestock;*

Feeding troughs; Electronic pet feeders; Wire cages for household pets; Watering troughs for cattle; Small animal feeders; Scoops for the disposal of pet waste; Scoops for the disposal of animals excrement; Rings for birds; Poultry troughs; Poultry rings; Plastics trays for use as litter trays for cats; Plastic containers for dispensing food to pets; Plastic containers for dispensing drink to pets; Water tanks [for live fish]; Terrariums; Stands for indoor aquaria [other than furniture]; Insect vivaria; Insect habitats; Indoor terrariums for insects; Indoor terrariums for animals; Indoor aquaria; Aquariums; Aquarium ornaments; Aquarium hoods; Ant vivaria; Ant habitats; Battery operated lint removers; Boot jacks; Boot stretchers of wood; Boot trees [stretchers]; Brushes for footwear; Buttonhooks; Clothes brushes; Clothes drying hangers; Clothes drying hangers specially designed for specialty clothing; Clothes drying racks; Clothes-pegs; Clothing stretchers; Drying racks for laundry; Electric lint removers; Flat-iron stands; Frames for drying and maintaining the shape of clothing items; Glove stretchers; Ironing board covers, shaped; Ironing boards; Ironing cloths; Laundry baskets; Lint removers, electric or non-electric; Non-electric lint removers; Shirt stretchers; Shoe cloths; Shoe polishing mitts; Shoe scrapers incorporating brushes; Shoe shine cloths; Shoe trees [stretchers]; Tie presses; Trouser presses; Trouser stretchers; Wax-polishing appliances, non-electric, for shoes; Brushes and brush-making articles; Cleaning articles; Glass rods; Glass powder; Glass panels [semi-finished article]; Glass incorporating fine electrical conductors; Glass incorporating electrical conductors; Glass for vehicle windows [semi-finished product]; Glass bars, not for building; Glass (Semi-worked -) for vehicles; Glass (Semi-worked -) adapted to absorb ultra-violet radiation; Glass (Semi-worked -) adapted to absorb heat; Fused silica [semi-worked product], other than for building; Fused quartz; Float glass [semi-worked]; Figured plate glass, not for building; Fibreglass, other than for insulation or textile use; Fibreglass thread, not for textile use; Fabricated safety glass for installation into vehicles; Enamelled glass, not for building; Enamelled glass; Decorative stained glass; Decorative glass [not for building]; Common sheet glass [not for building]; Coloured glass (Semi-worked -); Colored sheet glass [not for building]; Anti-reflecting glass; Semi-worked glass; Semi-finished safety glass; Security glass for making into vehicle windows; Profiled glass [semi-finished]; Pressed glass; Powdered glass for decoration; Porous glass; Polished plate glass; Plate glass for cars; Plate glass being unworked; Plate glass [raw material]; Open pored sintered glass; Opaline glass; Opal glass; Mosaics of glass, not for building; Modified sheet glass [not for building]; Luminous glass [not for building]; Laminated glass [other than for building]; Laminated flat glass [not for building]; Heat reflecting glass [semi-worked]; Heat protective glass (Semi-worked -); Glass, unworked or semi-worked, except building glass; Glass wool, other than for insulation; Glass tubing for use in making signs; Wired plate glass, not for building; Vitreous silica fibers [fibres], not for textile use; Unworked glass [except glass used in building]; Unworked glass; Unfinished glass for vehicle windows; Tempered glass [not for building]; Stamped glass; Spun glass; Smoothed plate glass; Sheets of glass, other than for building; Semi-worked glass [except glass used in building];

Class 35: Advertising, marketing and promotional services; Business analysis, research and information services; Business assistance, management and administrative services; Auctioneering services; Rental of vending machines; Administration of newspaper subscription [for others]; Administrative order


processing; Administrative processing and organising of mail order services; Administrative processing of computerized purchase orders; Administrative processing of purchase orders; Administrative processing of purchase orders placed by telephone or computer; Administrative processing of purchase orders within the framework of services provided by mail-order companies; Administrative processing of warranty claims; Administrative services relating to dental health insurance; Administrative services relating to employee stock plans; Administrative services relating to the referral of clients to lawyers; Administrative services relating to the referral of patients; Administrative services relating to warranty claims processing; Advertising of the services of other vendors, enabling customers to conveniently view and compare the services of those vendors; Advice relating to barter trade; Advisory and consultancy services relating to the procurement of goods for others; Advisory services relating to commercial transactions; Advisory services relating to the ordering of stationery; Advisory services relating to the purchase of goods on behalf of business; Advisory services relating to the purchase of goods on behalf of others; Alcoholic beverage procurement services for others [purchasing goods for other businesses]; Arranging and conducting sales events for livestock; Mail order retail services connected with clothing accessories; Mail order retail services for clothing; Mail order retail services for cosmetics; Mail order retail services related to alcoholic beverages (except beer); Mail order retail services related to beer; Mail order retail services related to foodstuffs; Mail order retail services related to non-alcoholic beverages; Online retail services relating to clothing; Online retail services relating to cosmetics; Online retail services relating to handbags; Online retail services relating to jewelry; Online retail services relating to luggage; Online retail services relating to toys; Online retail store services relating to clothing; Online retail store services relating to cosmetic and beauty products; Rental of sales stands; Retail or wholesale services for pharmaceutical, veterinary and sanitary preparations and medical supplies; Retail services connected with stationery; Retail services connected with the sale of clothing and clothing accessories; Retail services connected with the sale of furniture; Retail services in relation to computer software; Retail services in relation to paints; Retail services in relation to pushchairs; Retail services in relation to recorded content; Retail services in relation to safes; Arranging subscriptions of the online publications of others; Arranging subscriptions to Internet services; Arranging subscriptions to a television channel; Arranging subscriptions to electronic journals; Arranging subscriptions to information media; Arranging subscriptions to information packages; Arranging subscriptions to media packages; Arranging subscriptions to telephone services; Computerized on-line ordering services; Consultancy relating to costing of sales orders; Consultancy services relating to the procurement of goods and services; Consulting in sales techniques and sales programmes; Coupon procurement services for others; Electronic commerce services, namely, providing information about products via telecommunication networks for advertising and sales purposes; Electronic order processing; Energy price comparison services; Negotiation and conclusion of commercial transactions for third parties; Negotiation and conclusion of commercial transactions for third parties via telecommunication systems; Negotiation of contracts relating to the purchase and sale of goods; Negotiation of contracts with health care payors; Newspaper subscriptions; On-line ordering services in the field of restaurant take-out and delivery; Online ordering services; Ordering services for third parties; Providing

consumer product information; Providing consumer product information relating to cosmetics; Providing consumer product information relating to food or drink products; Providing consumer product information relating to laptops; Providing consumer product information relating to software; Providing information via the Internet relating to the sale of automobiles; Provision of an on-line marketplace for buyers and sellers of goods and services; Provision of information concerning commercial sales; Subscriptions to electronic journals; Subscriptions to telecommunications database services; Tariff information and advisory services; Telemarketing services; Telephone order-taking services for others; The bringing together, for the benefit of others, of a variety of insurance services, enabling consumers to conveniently compare and purchase those services; The bringing together, for the benefit of others, of a variety of telecommunications services, enabling consumers to conveniently compare and purchase those services; Wholesale ordering services; Retail services in relation to lighting; Retail services in relation to litter for animals; Retail services in relation to musical instruments; Retail services in relation to printed matter; Retail services in relation to sanitation equipment; Retail services in relation to teas; Retail services in relation to time instruments; Retail services in relation to veterinary instruments; Retail services in relation to sanitary installations; Retail services in relation to sex aids; Retail services in relation to stationery supplies; Retail services in relation to sun tanning appliances; Retail services in relation to tobacco; Retail services in relation to umbrellas; Retail services in relation to veterinary apparatus; Retail services in relation to water supply equipment; Retail services in relation to toiletries; Retail services in relation to vehicles; Retail services in relation to veterinary articles; Retail services in relation to veterinary preparations; Retail services in relation to wall coverings; Retail services in relation to weapons; Retail services in relation to works of art; Retail services in relation to yarns; Retail services in relation to information technology equipment; Retail services in relation to lubricants; Retail services in relation to medical apparatus; Retail services in relation to navigation devices; Retail services in relation to seafood; Retail services in relation to sorbets; Retail services in relation to sporting articles; Retail services in relation to tableware; Retail services in relation to hygienic implements for animals; Retail services in relation to mobile phones; Retail services in relation to pet products; Retail services in relation to smartphones; Retail services in relation to smartwatches; Retail services in relation to toys; Retail services in relation to wearable computers; Retail services relating to fake furs; Retail store services in the field of clothing; Shop retail services connected with carpets; Wholesale services in relation to food cooking equipment; Wholesale services in relation to freezing equipment; Wholesale services in relation to jewellery; Wholesale services in relation to metal hardware; Wholesale services in relation to refrigerating equipment; Wholesale services in relation to toiletries; Wholesale services in relation to meats; Wholesale services in relation to non-alcoholic beverages; Wholesale services in relation to saddlery; Wholesale services in relation to stationery supplies; Wholesale services in relation to umbrellas; Wholesale services in relation to vehicles; Wholesale services in relation to weapons; Wholesale services in relation to works of art; Wholesale services in relation to tableware; Wholesale services in relation to threads; Wholesale services in relation to tobacco; Wholesale services in relation to toys; Wholesale services in relation to veterinary articles; Wholesale services in relation to veterinary preparations; Wholesale services in relation to veterinary preparations

and articles; Wholesale services in relation to yarns; Wholesale services in relation to information technology equipment; Wholesale services in relation to kitchen knives; Wholesale services in relation to navigation devices; Wholesale services in relation to preparations for making alcoholic beverages; Wholesale services in relation to seafood; Wholesale services in relation to sporting articles; Wholesale services in relation to sporting equipment; Wholesale services in relation to wall coverings; Wholesale services in relation to sanitation equipment; Wholesale services in relation to sorbets; Wholesale services in relation to teas; Wholesale services in relation to veterinary apparatus; Wholesale services in relation to veterinary instruments; Wholesale services in relation to water supply equipment; Wholesale services relating to automobile accessories; Wholesale services relating to fake furs; Wholesale services relating to automobile parts; Wholesale services relating to candy; Wholesale services relating to flowers; Wholesale services relating to furs; Wholesale services relating to sporting goods.

- 2 On 6 November 2019, D-Market Elektronik Hizmetler ve Ticaret Anonim Sirketi ('the cancellation applicant') filed an application for a declaration of invalidity of the contested mark for all the above goods and services based on Article 59(1)(b) EUTMR arguing that Alpak B.V., the predecessor-in-title of the EUTM proprietor, had acted in bad faith when it filed the contested mark. In its explanation of grounds, filed on the same day, the cancellation applicant argued the following:

- The cancellation applicant is the owner of the trade mark 'hepsiburada' - a Turkish leading e-commerce brand since 1998. The online platform www.hepsiburada.com (referred to below as Hepsiburada.com) delivers everything needed for its customers via a single click and leads the growth in Turkish e-commerce.
- Growing rapidly since its debut, Hepsiburada.com hosted more than 95 million monthly visits, with tens of millions of product types across approximately 40 categories. Hepsiburada.com has been elected Turkey's favourite e-commerce brand on three occasions so far. The cancellation applicant owns one of the largest operation centres of e-commerce (100 thousand square-metre storage area in Gebze, Turkey) and contributes to the improvement of the Turkish e-commerce and digital transformation with its high-tech infrastructure. It is part of Hepsiburada Group, one of the largest e-commerce platforms in the Eastern Europe, Middle East and Africa (EEMEA) region, and Hepsiburada.com is the number one e-commerce platform in Turkey.
- The cancellation applicant's Turkish trade mark No 2012/79983 'HEPSIBURADA', filed on 20 September 2012 and registered in Classes 35,

38 and 42, Turkish trade mark No 2000/20142 , filed on 22 September 2000 and registered in Classes 35, 38 and 42 and Turkish trade mark No 2010/48306 'hepsiburadaoutlet', filed on 22 July 2010 and registered in Classes 35, 38 and 42 (Annexes 1 and 2) were well known at the time of application of the contested mark as confirmed by the Turkish Patent Institute (Annex 3). The cancellation applicant further elaborates on its worldwide recognition and reputation in Turkey (Annexes 4-12). It operated in the

European Union well before the EUTM proprietor had filed for the contested mark as it is evident by the invoices submitted as Annex 11.

- A simple search on Google reveals more than 22 million results and as a first result the cancellation applicant's website www.hepsiburada.com (screenshots provided in the submission). Hepsiburada.com is in the App Store and Google Play, it has more than 85 000 subscribers on YouTube, 1 000 000 followers on Instagram, more than 408 000 followers on Twitter (account created in 2009) and almost 3 000 000 likes on Facebook (again screenshots provided in the submission). Therefore, the contested mark rides on the coat-tails of the cancellation applicant's reputed trade marks in order to benefit from the power of attraction, the reputation and prestige of those trade marks and to exploit, without paying any financial compensation, the marketing effort made by the cancellation applicant and its trade marks all over the years.
- Due to its increasing business growth, the cancellation applicant decided to register its trade mark in the European Union in order to protect its legitimate rights under the sign as it has been operating in this market and delivered goods worldwide (Annex 11). Thus, on 10 August 2018, the cancellation applicant filed its EUTM application No 17 941 312 'hepsiburada.com' in Classes 35, 38 and 42. At that point, it found that Alpak B.V. had already registered the contested mark. Although the cancellation applicant tried to contact Alpak B.V. in order to solve the matter on a friendly basis given the earlier rights of the cancellation applicant, not only did the EUTM proprietor never reply, but it filed an opposition against the cancellation applicant's EUTM application.
- Alpak B.V. knew of the existence and reputation of the highly distinctive trade mark 'hepsiburada' in Turkey because it has not only registered that sign but also some other third parties' Turkish trade marks, such as EUTM No 17 165 788 'dekorazon' (fig.) filed on 3 September 2017 in Classes 21 and 35 and EUTM No 17 968 517 'ARYILDIZ' filed on 15 October 2018 in Classes 7, 8, 21 and 35. This illustrates that Alpak B.V. was acting in bad faith, trying to register third parties' trade marks, being a dishonest objective to prevent third parties from entering the European Union market.
- Alpak B.V. copied the cancellation applicant's trade mark for the purposes of obtaining exclusive rights over it in the European Union in order to take unfair advantage of the trade mark's attractive power and to create an obstacle for the cancellation applicant to further develop its activities in the European Union market and exploit its trade mark. The intensive use and reputation of the cancellation applicant's trade mark implies that Alpak B.V. knew or ought to have known that the sign 'hepsiburada' enjoyed some degree of legal protection and third party rights.
- It is not plausible that the contested mark was a result of an independent development and creation. Alpak B.V. registered the contested mark being aware of that prior use and not in pursuit of legitimate objectives.
- The cancellation applicant further stated that the three requisites of bad faith were fulfilled in the present case:

- 1) First, the contested mark ‘hepsiburada’ was identical or fully included in the cancellation applicant’s trade marks under the third indent above as their distinctive element was the same. Since the common element ‘hepsiburada’ was highly distinctive, it could not be sustained that this same element was a result of an independent design development and creation by Alpak B.V. The services in Class 35 covered by the marks at hand were also identical. Concerning the contested goods in Class 21, these were similar to the services covered by the cancellation applicant’s marks in Class 35 as its wholesale and retail services referred to a great range of products, including identical and similar products as those included in the contested mark in Class 21.
 - 2) Second, the cancellation applicant’s trade marks have been intensively used and enjoyed reputation in Turkey. Even if there was no evidence regarding any direct or indirect relation or contact between the parties, the cancellation applicant considered that the facts and evidence submitted in the case at hand allowed for the presumption that Alpak B.V. must have known that the cancellation applicant had been using a sign identical to the contested mark prior to August 2017. The activity of the cancellation applicant as an e-commerce company (e-retailer) had gathered much attention and praise and the name had been heavily featured in articles from both the specialised and general press in the European Union. It was evident that the Alpak B.V.’s use of the contested mark, for the same and highly similar goods and services, would make people believe that its business was related with the cancellation applicant. The public would certainly confuse the origin of the goods and services and believe that Alpak B.V. was in charge of the European Union distribution of Hepsiburada, all the more so given that the cancellation applicant delivered goods in the Netherlands, i.e. where Alpak B.V. was seated.
 - 3) Third, the overall assessment of all the facts and evidence, according to the cancellation applicant, demonstrated that Alpak B.V. had a deliberate intention to create an association with the famous and well-known trade mark of the cancellation applicant and thus to compete unfairly by taking advantage of the renown it attained. By filing and registering the contested mark, Alpak B.V. effectively put a potential obstacle to the cancellation applicant in its business activities on the European Union market. Also, given the Alpak B.V.’s registration of other third parties’ trade marks, the burden of proof had effectively shifted from the cancellation applicant to Alpak B.V. in the sense that the latter should have been able to explain and demonstrate the reasons for such concrete ‘choices’ as its trade mark registrations.
- All in all, in view of the recognition of the cancellation applicant’s trade mark, of its long term tradition and prestige, which had to be known by Alpak B.V., and in view of the fact that Alpak B.V. developed a business activity also online and used exactly the same denomination, it is difficult to imagine any scenario in which Alpak B.V.’s intentions when filing the contested mark were other than to try to acquire an advantage by associating itself with the prestigious e-commerce company to which it was not connected in any way and was never authorised by the cancellation applicant.

3 The cancellation applicant filed the following evidence in support of its arguments:

- Annex 1: Extracts from <https://online.turkpatent.gov.tr> regarding the cancellation applicant's Turkish trade marks: No 2012/79983 'HEPSIBURADA', filed on 20 September 2012 and registered in



Classes 35, 38 and 42; No 2000/20142 , filed on 22 September 2000 and registered in Classes 35, 38 and 42; No 2010/48306 'hepsiburadaoutlet', filed on 22 July 2010 and registered in Classes 35, 38 and 42 (with English translation).

- Annex 2: A list from TMview showing all the cancellation applicant's registered trade marks including the term 'hepsiburada'. It includes 19 Turkish trade mark registrations in Classes 16, 18, 25, 35, 38, 41 and 42, and the application for EUTM No 17 941 312 'hepsiburada.com' from 10 August 2018.
- Annex 3: A decision of the Turkish Patent Institute dated 14 April 2016 in



which the cancellation applicant's trade mark was recognised as a well-known trade mark in relation to 'gathering of goods in virtual environment' (with English translation).

- Annex 4: Printouts from different websites showing the recognition of Hepsiburada.com such as: Google (2017), Facebook Business (2019), Salesforce Success Stories, and Criteo Success Story.
- Annex 5: Tables from an unknown source which, according to the cancellation applicant, show the number of visitors to the website www.hepsiburada.com in the periods 25-31 October 2006 and 2006-2018, in Europe and divided by country, together with the Google analytics for the same periods and part of the same territories.
- Annex 6: A Deloitte E-commerce report from 2014 on the e-commerce in Turkey referring to Hepsiburada.com in the category 'Multi-category', 'Pure Online'.
- Annex 7: An extract from the World Economic Forum (2019) mentioning Hepsiburada.com as one of the largest e-commerce platforms in the Eastern Europe, Middle East and Africa region and the fastest growing in Europe. It states that the company founded in 1998 has 18 million unique visitors, 60 million monthly visits and ships 2 million products a month.
- Annex 8: An extract from www.e-commercenews.eu dated 2015 showing the Top 500 European e-retailers. Hepsiburada.com appears as one of the fastest growers in Europe.

- Annex 9: An undated extract from the Financial Times titled ‘Abraaj takes \$100m stake in Turkish online group Hepsiburada’.
 - Annex 10: An extract from SimilarWeb (September 2019) showing the traffic overview of www.hepsiburada.com which shows 79.31 million visits.
 - Annex 11: Invoices in Turkish issued by the cancellation applicant dated 2015-2017 and addressed to clients with addresses in the European Union (Austria, Bulgaria, Denmark, Germany, Greece, Finland, France, Italy, Latvia, the Netherlands, the UK, Slovenia, Sweden) as well as outside the European Union (Norway, Switzerland). All invoices show the sign ‘hepsiburada.com’ in the top left-hand corner.
 - Annex 12: A document from an unknown source in Turkish which, according to the cancellation applicant, refers to an excel document with the click rates in the European Union (2017).
- 4 On 26 March 2020, in reply, Alpak B.V. argued that the cancellation applicant had failed to show the existence of bad faith. It argued in essence the following:
- The contested goods and services are not similar to the goods and services of the earlier marks.
 - Alpak B.V. did not have any knowledge of the cancellation applicant’s trade marks as those were national Turkish trade marks. Since the earlier trade marks are from beyond the European Union, these would not have been known to Alpak B.V..
 - No previous trade relations with the parties were established and the trade marks at issue were created independently. The sign ‘hepsiburada’ means ‘everything here’, which is quite banal. Therefore, there was no dishonest intention on the part of Alpak B.V..
- 5 On 5 June 2020, the cancellation applicant reiterated its claim of the existence of bad faith arguing in essence the following:
- Since Turkish is not a native language of the European Union, a sign in Turkish would be perceived as an exotic and fanciful sign.
 - Alpak B.V. has links with the Turkish language and society. In particular, the director of Alpak B.V. – Nurdan Erdem – is also an authorised employee of the company Alkapida B.V., registered at the same address as Alpak B.V. and owner of the website www.alkapida.com. That website appears to be addressed to Turkish people living in Europe as the sales are made to European countries but the website is in Turkish. This is the same retail sector as the sector of the cancellation applicant’s www.hepsiburada.com.
 - Therefore, it is not plausible that Alpak B.V. and its representative did not know about Hepsiburada.com taking into account that they operated in the same field of retail services. Alpak B.V. had knowledge that the contested mark enjoyed legal protection and that a third party had a better claim over it.

By filing and registering the contested mark, Alpak B.V. has effectively put a potential obstacle to the cancellation applicant in its business activities in the European Union market.

- 6 In support of its arguments summarised in the previous paragraph, the cancellation applicant submitted the following additional evidence:
 - Annex A: An extract from the Dutch Chamber of Commerce in relation to the company Alpak B.V..
 - Annex B: An extract from <https://drimble.nl> showing the commercial details of Alkapida B.V..
- 7 The EUTM proprietor was invited by the Office to submit observations in reply, but refrained from doing so.
- 8 On 20 October 2020, the cancellation applicant submitted that Alpak B.V. owned the domain name www.hepsiburada.life and provided a who.is screenshot in that regard. It argued that that Alpak B.V. presented itself as ‘Hepsiburada European Online Sales (Shopping) Website’ (in Turkish: *Hepsiburada Avrupa Online Satış Sitesi*) in the heading of the website. The same reference appeared in the Store Information together with a reference to Turkey (screenshots provided in the submission). Thus, it was trying to make an impression that www.hepsiburada.life was the European Union part of Hepsipurada.com.
- 9 By decision of 10 February 2021 (‘the contested decision’), the Cancellation Division rejected the application for a declaration of invalidity in its entirety and ordered the cancellation applicant to bear the costs. It gave, in particular, the following grounds for its decision:
 - The cancellation applicant’s submission of 20 October 2020 was filed outside of the time-limit set to submit its arguments. The Office informed the cancellation applicant that those observations were forwarded to the EUTM proprietor for information purposes only and they would not be taken into account as they were not received within the time-limit under Article 17(2) EUTMDR. In any case, these observations do not change the outcome as it will be shown below.
 - From the arguments and the evidence submitted (extracts from third parties such as Google or Facebook Business and a short article from the World Economic Forum), it follows that the cancellation applicant as a company has been present in Turkey in the retail industry since 1998 (Annexes 4 and 7). The World Economic Forum explains: *Hepsiburada is one of the largest e-commerce platforms in the Eastern Europe, Middle East and Africa (EEMEA) region and the fastest growing in Europe. Founded in 1998 by five people working from a studio flat in Istanbul, the site started by taking orders online for IT hardware. Hepsiburada grew rapidly into an e-commerce leader and has been an online marketplace for big brands as well as small and medium-sized enterprises around Turkey, since 2015.*

- The cancellation applicant also proves that it is the owner of several trade marks registered in Turkey in 2000, 2010 and 2012 including the term ‘hepsiburada’ (Annex 1) and provides a list from the TMview database showing all the cancellation applicant’s registered marks including the term ‘hepsiburada’ in Turkey (Annex 2).
- It is also clear from the observations and evidence that the cancellation applicant has used an identical or similar mark as the contested mark ‘hepsiburada’ for retail services in Turkey and that it has become well known, which has been recognised by the Turkish Patent Institute in a decision of 14 April 2016 (Annex 3). In addition, extracts from Google or Facebook Business (Annex 4) as well as the World Economic Forum (Annex 7) have mentioned the recognition of Hepsiburada.com. An extract from *E-commerce News* dated 2015 shows the Top 500 European e-retailers and Hepsiburada.com appears as one of the fastest growers in Europe (Annex 8).
- The invoices show that the cancellation applicant is trying to expand its business outside Turkey and seeks to start selling its services in, among others, several countries in the European Union (Bulgaria, Finland, France, Germany, Italy, the UK, Latvia and Denmark) as well as outside the European Union (Norway) (Annex 11). However and contrary to the cancellation applicant’s argument, the said invoices are dated between 2015 and 2017, therefore, only two years before the filing date of the contested mark (28 August 2017). In addition, the EUTM No 17 941 312 ‘hepsiburada.com’ was filed by the cancellation applicant on 10 August 2018, that is, almost one year after the filing of the contested mark.
- Moreover, several extracts are supposed to demonstrate the number of users of Hepsiburada.com in several countries of the European Union. However, not enough evidence has been provided to demonstrate that the contested mark has reputation in the European Union.
- The cancellation applicant has not submitted any evidence to show that at the time of filing of the contested mark Alpak B.V. was aware of the cancellation applicant’s trade marks. No connection between the two entities was proven and only marginal use of the cancellation applicant’s trade marks was shown in the European Union. In this case, there is no conclusive evidence that shows that Alpak B.V. was aware or must have been aware that the cancellation applicant has been using in the European Union an identical or similar mark, to conclude that Alpak B.V. acted in bad faith.
- Indeed, the signs share the distinctive element ‘hepsiburada’; however, the fact that the signs are identical does not establish bad faith on the part of Alpak B.V., where there are no other relevant factors. The registration of a supposedly similar sign is not a clear indication of an abusive or fraudulent intention. It is rather an indication that Alpak B.V. intended to use its trade mark on the marketplace in accordance with the trade mark functions set out in the EUTMR.
- The cancellation applicant has not submitted any conclusive evidence to show that the intention of Alpak B.V. was to take advantage of the reputation and

well-known character of the cancellation applicant's trade marks in a market outside the European Union (Turkey) and to create obstacles for the cancellation applicant to expand its activities into the European Union. The EUTM system is a 'first-to-file' system which means that property in a EUTM is acquired not by prior adoption and use but by prior registration. Therefore, Alpak B.V. was free to apply for the contested mark in order to protect its trade mark rights at a European level.

- The submitted evidence does not indicate that Alpak B.V.'s sole intention at the time of filing of the contested mark was to create an obstacle for the cancellation applicant to use its mark, but rather to protect a mark of its own.
 - The cancellation applicant failed to prove its allegation that Alpak B.V. was acting in bad faith when filing the contested mark. The cancellation applicant confined itself to a statement not supported by enough evidence or facts leading to a safe conclusion that Alpak B.V. had a duty to refrain from filing the contested mark. As a consequence, the cancellation applicant cannot be considered to have established Alpak B.V.'s dishonest intention or any other unfair practice involving lack of good faith on its part.
- 10 On 9 April 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 10 June 2021.
 - 11 In its response received on 11 November 2021, the EUTM proprietor requested that the appeal be dismissed.
 - 12 On 20 January 2022, the cancellation applicant submitted further arguments and evidence.
 - 13 The EUTM proprietor submitted further arguments in response received on 8 March 2022.

Submissions and arguments of the parties

- 14 The arguments raised in the statement of grounds by the cancellation applicant may be summarised as follows:
 - The cancellation applicant enjoys reputation in Turkey, as it can be inferred from all the documents submitted in the cancellation proceedings and those filed on appeal, in particular Enclosures 1-12. The website www.hepsiburada.com received around 75 million visitors in 2020 and around 85 million visitors in April 2021. The annual revenue over the last years was above EUR 150 million in 2018 and above EUR 600 million in 2020. The cancellation applicant has just launched their initial public offering (IPO) on Nasdaq and it is present in all social media platforms.
 - The cancellation applicant is one of Turkey's largest companies and both the company and its trade marks are well known to the Turkish population. The cancellation applicant delivered goods worldwide well before Alpak B.V. had

filed for the contested mark, many sales being made in the European Union as from 2016, including the Netherlands.

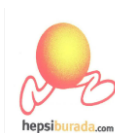
- Alpak B.V. is a company focused on packaging services operating online. A simple Google search does not provide any substantial information regarding the company or its actual activities; it only appears in various databases concerning companies where very little information is provided. The directors of Alpak B.V., Nurdan Erdem and Ilker Erdem, are both Turkish citizens residing in Istanbul and the main activities of the company refer to retail services (Enclosures 17-18). Having in mind the existence and reputation of the cancellation applicant's trade mark 'hepsiburada' in Turkey, it is more than reasonable to assume that a Turkish national and a person of Turkish origin knew or should have been aware of the existence and reputation of the trade mark 'hepsiburada'.
- Nurdan Erdem and Ilker Erdem also hold the Dutch company Alkapida B.V., whose authorised employee is Nurdan Erdem and which shares the same address as Alpak B.V.. They also own the Turkish company Alkapida Teknoloji Pazarlama Elektronik Limited Şirketi, established in 2012 and having the same commercial activity as the cancellation applicant's company (Enclosures 19-20). That Turkish company owns the website www.alkapida.com which is in Turkish language and appears to be addressed at Turkish people living in Europe.
- Furthermore, Alpak B.V. holds the website www.hepsiburada.life which cannot be accessed following an interlocutory judgment of 2 June 2021 on temporary injunction in the Civil Court process against Alpak B.V. and its directors before the Ankara 5th Civil Court of Intellectual and Industrial property rights – case 2020/333 – included as Enclosure 21. The dishonest intention of Alpak B.V. is proven by the fact that when entering www.hepsiburada.life through the Wayback Machine tool, it can be seen that in 2019 Alpak B.V. presented itself as the Hepsiburada European Sales (Shopping) Site (in Turkish: *Hepsiburada Avrupa Online Satış Sitesi*) and offered the same services as the cancellation applicant.
- Alpak B.V. has not only registered the sign 'hepsiburada' but also filed other third parties' trade marks such as 'Dekorazon' and 'Aryildiz' (also of Turkish origin), the second one being rejected by the Opposition Division following an opposition by the legitimate proprietor. As stated above, a Google search does not provide any indications of Alpak B.V. being active or actually using any trade marks, which is indeed another indicator that Alpak B.V. applied for registration of various EUTMs without intending to use them, its sole objective being to prevent third parties from entering the market.
- Considering the reputation of the cancellation applicant, it being Turkey's best-known online shopping website, and having in mind all these Turkish references directed to Turkish people living in Europe – also considering that Turkish is not a very common language in Europe but it is common for Turkish citizens based in Europe – the directors of Alpak B.V. being two Turkish nationals which moreover are also partners in the Turkish company Alkapida

Teknoloji Pazarlama Elektronik Ticaret Limited Şirketi (which is active in Turkey), it is obvious that Alpak B.V., owned by Turkish citizens familiar with the Turkish society, knew about the Turkish website www.hepsiburada.com. Moreover, the activity of Alpak B.V. refers to retail services as well as the activities of the other company Alkapida B.V.

- It follows from the above that the cancellation applicant has a real and genuine interest in exploiting their trade mark in the European Union. On the contrary, Alpak B.V. is trying to register third parties' trade marks, it being a dishonest objective to prevent the rightful third parties from entering the European Union market.
- The parties in the present proceedings are also involved in a case before the Turkish courts where, for the time being, the website www.hepsiburada.life has been closed with an interim decision. An expert report from the court proceedings (Enclosure 22) acknowledged that Alpak B.V.'s use of the sign 'hepsiburada' as a domain name and the website content had been an act of infringement of the cancellation applicant's trade mark rights in Turkey and an act of unfair competition. In this report it the well-known character of the cancellation applicant's trade marks has also been recognised and consequently, that Alpak B.V.'s acts may take unfair advantage or be detrimental to the cancellation applicant's trade marks' reputation. Further details are provided as Enclosures 23-24.
- The objective circumstances of the case lead to the conclusion that Alpak B.V. was acting in bad faith when filing the contested mark. It copied the cancellation applicant's trade marks for the purposes of obtaining exclusive rights over them in the European Union, which amounts to taking unfair advantage of the cancellation applicant's trade marks' attractive power and, at the same time, an intention to create an obstacle for the cancellation applicant to further develop its activities in the European Union market and exploit its trade marks. The intensive use and reputation of the cancellation applicant's trade mark 'hepsiburada' implies that Alpak B.V. knew about the earlier mark, especially considering that the directors behind Alpak B.V. are Turkish citizens who live in Turkey and own the Turkish company Alkapida Teknoloji Pazarlama Elektronik Ticaret Limited Şirketi as partners. It is not plausible that the contested mark was a result of an independent development and creation.
- Even if there is no evidence regarding any direct or indirect relation or contact between the parties, it is the opinion of the cancellation applicant that the facts and evidence submitted in the case at hand allow for the presumption that Alpak B.V. must have known that the cancellation applicant had been using an identical sign prior to August 2017.
- As Alpak B.V. is a company offering retail and wholesale services and whose directors are from Turkey, it was impossible not to know about the existence of Hepsiburada.com, whose reputation extends beyond the borders of Turkey, especially considering the awards that were granted to them at the date of filing the contested mark as well as years before this date.

- The contested mark is the word mark ‘hepsiburada’ registered for goods and services in Classes 21 and 35. It cannot be disputed that it is identical to the famous trade mark(s) of the cancellation applicant, which is moreover quite an uncommon and unusual name in the relevant territory and which is exclusively associated with them. In this context, the cancellation applicant fails to see what could have been the commercial logic on the part of Alpak B.V. (in which respect no arguments were raised by the latter) when applying for the contested mark other than a deliberate intention to create an association with the famous trade mark of the cancellation applicant and, thus, to piggyback off its attractive force and/or to even prevent the cancellation applicant from registering their legitimate sign in the European Union.
 - Even in case that there was no prior registration of the earlier ‘hepsiburada’ trade marks for goods in Class 21 acting against and trying to avoid such a logical brand extension of a reputed brand must be defined as dishonest intention. The goods in Class 21 are also similar to the earlier services in Class 35 as the earlier wholesale and retail services refer to a great range of products, including identical and similar products as those included in the contested mark in Class 21.
 - By filing and registering the contested mark, Alpak B.V. has effectively put an obstacle to the cancellation applicant in their business activities on the European Union market. As such the objective circumstances of the evidence and facts combined with the specific circumstances, lead to a conclusion of bad faith.
 - In view of the recognition of the cancellation applicant’s sign, which had to be known by Alpak B.V., due to its long term tradition and prestige, which has garnered much attention and praise and the name has been heavily featured in articles from both the specialised and general press in the European Union as well as considered reputed by the Turkish Patent Institute (since 2015) and also in view of the fact that Alpak B.V. business activities as registered also concern retail operations online and uses exactly the same denomination, as well as of the fact that Alpak B.V. is directed by two Turkish citizens, it is difficult to imagine any scenario in which Alpak B.V.’s intentions when filing the contested mark were other than to try to acquire an advantage by associating itself with the prestigious e-commerce company to which it is not in fact connected in any way and was never authorised by the cancellation applicant.
 - It is evident that Alpak B.V.’s use of the trade mark ‘hepsiburada’ for the same and highly similar goods and services will unfairly make people believe that its business is related with that of the cancellation applicant. The public will certainly confuse the origin of the goods and services and will believe that Alpak B.V. is in charge of the European Union distribution of ‘hepsiburada’, this is the more so, since the cancellation applicant has delivered goods in the Netherlands (as seen in the invoices) and thus, a simple connection could be made.
- 15 Together with the statement of grounds, the cancellation applicant submitted the following additional evidence:

- Enclosure 1: An undated Google case study entitled ‘Hepsiburada Closes the Loop on Mobile Conversions and Improves ROI’.
- Enclosure 2: An affidavit dated 3 June 2021 signed by the CFO and CCO of the cancellation applicant providing information regarding the company and its trade marks ‘hepsiburada’.
- Enclosure 3: Invoices in Turkish issued by the cancellation applicant dated 2016-2021 and addressed to clients with addresses in the European Union (including Germany, Spain, the Netherlands, Italy, Portugal, Slovenia, France, Belgium, Greece, Denmark etc.) and outside the European Union.
- Enclosure 4: A list of sales made through www.hepsiburada.com and other foreign marketplaces between 2016-2021.
- Enclosure 5: A document from an unknown source including the number of clicks that the website www.hepsiburada.com received from around the world, whereby Turkey was ranked first, and the Netherlands was ranked in the fourth place.
- Enclosure 6: An excel sheet from an unknown source with page impressions from the period 1 January 2020-28 February 2021.
- Enclosure 7: Two documents from an unknown source with the number of visitors of the website www.hepsiburada.com and its mobile application from April to May 2021.
- Enclosure 8: A list with awards received by Hepsiburada.com in the period 2006 to 2019, for instance, but not limited to: Fastest growing e-commerce site (2006); E-commerce site of the year (2011); Turkey’s favourite e-commerce site (2013-2015); Super brand of the year (2015); Turkey’s coolest online shopping platform (2015, 2017 and 2018); The most successful brand of the year in the e-commerce sector (2016 and 2017); Turkey’s largest retail company in e-commerce (2017), etc.
- Enclosure 9: A list of articles concerning Hepsiburada.com from the period 2009-2020.
- Enclosure 10: Promotional brochures of Hepsiburada.com, partially dated in 2018.
- Enclosure 11: A list of sponsored publications concerning Hepsiburada.com from the period 2016-2020.
- Enclosures 12-13: A survey from 2020 about the recognition of the sign ‘hepsiburada’ demonstrating a spontaneous awareness of 77% and a total awareness of 97% (with English translation).
- Enclosure 14: Copies of the trade mark registration certificates of the cancellation applicant’s Turkish trade marks: No 2012/79983 ‘HEPSIBURADA’, filed on 20 September 2012 and registered in Classes 35,



38 and 42; No 2000/20142 , filed on 22 September 2000 and registered in Classes 35, 38 and 42; No 2010/48306 ‘hepsiburadaoutlet’, filed on 22 July 2010 and registered in Classes 35, 38 and 42 (with English translations).

- Enclosure 15: A list from TMview showing all the cancellation applicant’s registered trade marks including the term ‘hepsiburada’. It includes 19 Turkish trade mark registrations in Classes 16, 18, 25, 35, 38, 41 and 42, and the application for EUTM No 17 941 312 ‘hepsiburada.com’ from 10 August 2018.
 - Enclosure 16: A list of all the Turkish, other national and international trade mark registrations of the cancellation applicant.
 - Enclosure 17: An extract from the Dutch Chamber of Commerce in relation to the company Alpak B.V..
 - Enclosure 18: Extracts from the Turkish Trade Registry Gazette pages for the company Alkapida Teknoloji Pazarlama Elektronik Ticaret Limited Şirketi.
 - Enclosure 19: An extract from <https://drimble.nl> showing the commercial details of Alkapida B.V..
 - Enclosure 20: An extract from the Istanbul Chamber of Commerce for the company Alkapida Teknoloji Pazarlama Elektronik Ticaret Limited Şirketi.
 - Enclosure 21: Copy of the interlocutory judgment of 2 June 2021 on temporary injunction in the Civil Court process against Alpak B.V. in case 2020/333 before the Ankara 5th Civil Court of Intellectual and Industrial Property Rights.
 - Enclosures 22-23: Expert report and further details in case 2020/333.
- 16 The arguments raised in reply to the appeal by Alpak B.V. may be summarised as follows:
- Nurdan Erdem is the sole director of Alpak B.V..
 - Alpak B.V. intends to use the trade mark ‘hepsiburada’ in the European Union. The EU trade mark system is a ‘first-to-file’ system which means that property in an EUTM is acquired by prior registration. Therefore, Alpak B.V. was free to apply for the contested mark in order to protect its trade mark rights at an European Union level.
 - Any use of the sign ‘hepsiburada’ in the European Union by the cancellation applicant is an infringement of Alpak B.V.’s trade mark registration.
 - The goods and services of the contested mark in Classes 21 and 35 are not similar to the goods and services of the earlier marks.

- Alpak B.V. did not have knowledge of the trade marks of the cancellation applicant. These earlier marks are national Turkish trade marks. As the earlier marks are from beyond the European Union, these would not have been known to Alpak B.V..
 - Alpak B.V. had no previous trade relations with the cancellation applicant and the trade marks at issue were created independently.
 - As the sign ‘hepsiburada’ is a concoction of the Turkish words for ‘everything’ and ‘here’ and thus means ‘everything here’, the words of which are quite banal, it is not inconceivable to create independently the same trade mark.
 - It cannot be asserted that Alpak B.V. acted in bad faith by applying for registration of the contested mark. The cancellation applicant has failed to show the existence of bad faith on the part of Alpak B.V..
- 17 The additional arguments and evidence raised by the cancellation applicant on 20 January 2021 may be summarised as follows:
- The contested mark was transferred to Dendiki B.V. during the cancellation proceedings. The two companies, Alpak B.V. and Dendiki B.V., have the same address and the same director, namely Nurdan Erdem, as it is evident from Enclosures 17 and 25.
 - As a new recent development, a bill of indictment has been issued by the public prosecutor in Turkey in October 2021, received by the cancellation applicant in December 2021, in relation to the infringement of the cancellation applicant’s trade mark ‘hepsiburada’ through the website www.hepsiburada.life (Enclosures 26-27). The two suspects in the Turkish criminal proceedings – İlker Erdem and Savaş Erdem – seem to be related to Nurdan Erdem – director of Alpak B.V. and Dendiki B.V.. They share the surname Erdem and they appear to have been business partners. For instance, Nurdan Erdem and İlker Erdem founded the Turkish company Alkapida Teknoloji Pazarlama Elektronik Ticaret Limited Şirketi in 2012 and had the same address (Enclosure 18). Savaş Erdem joined the company in 2018 (Enclosure 18).
 - The owner of the domain name hepsiburada.life was Alpak B.V.. The company Alkapida B.V. was also related to the website www.hepsiburada.life. In 2018, it included @alkapida.com e-mail address in the ‘contact us’ section. In fact, the domain names that are hosted on the same IP address (web host) as hepsiburada.life include alkapida.be, alkapida.fr, dendiki.com (registered by Alpak B.V.), and sevenlex.com.tr (registered by Alkapida Teknoloji Pazarlama Elektronik Ticaret Limited Şirketi). A report made by Domain Tools is submitted as Enclosure 28. The three Dutch companies Alpak B.V., Dendiki B.V. and Alkapida B.V. have the same address (Enclosures 17 and 19).
 - In view of the evidence on file, it can be seen that Nurdan Erdem, Savaş Erdem and İlker Erdem, on the one hand, and the companies Alpak B.V., Dendiki B.V. and Alkapida B.V., on the other, are all related. Therefore, the assignment of

the contested mark between those companies should not prevent a finding of bad faith on the part of Alpak B.V..

- Furthermore, the General Court has ruled in its judgment of 29/09/2021, T-592/20, Agate / Agate, EU:T:2021:633, that the complete absence of evidence relating to the commercial activities of the proprietor of the contested mark is an indication that it did not have the intention of genuinely using the contested mark at the time of filing the application for its registration (see § 68 and § 69 of the judgment).
- 18 Together with its submission, the cancellation applicant submitted the following additional evidence:
- Enclosure 25: An extract from <https://drimble.nl> showing the commercial details of Dendiki B.V..
 - Enclosure 26-27: Bill of indictment dated 21 October 2021.
 - Enclosure 28: Domain Tools report for hepsiburada.life dated 5 January 2022.
- 19 The additional response in reply submitted by Dendiki B.V. on 8 March 2022 may be summarised as follows:
- The criminal proceedings referred to by the cancellation applicant have been challenged. The cancellation applicant requested an investigation against Savaş (Nurdan) Erdem and İlker Erdem by filing an irregular and misleading complaint to the Public Prosecutor’s Office of the Republic of Turkey, even though there was no crime involved.
 - Upon the complaint petition, the Public Prosecutor’s Office of the Republic of Turkey decided to create an expert report by a trade mark and patent expert to examine the claims subject to the complaint. Relying on this expert report, the Public Prosecutor’s Office of the Republic of Turkey, considered Savaş (Nurdan) Erdem and his brother İlker Erdem as suspects. However, the expert report was false and contrary to facts.
 - Thereupon, a criminal complaint was filed against the expert who prepared the expert report. As a result of the investigation made by the Public Prosecutor’s Office of the Republic of Turkey, it has been determined that the expert prepared an expert report by partially or completely changing the evidence she obtained. Subsequently, an indictment was drawn up about her and the file was sent to the criminal court for immediate punishment, as it is evident from the enclosure to the submission.
 - The contested mark has no commercial activity in the Republic of Turkey.
 - İlker Erdem, brother of Savaş (Nurdan) Erdem, has no connection with the ‘hepsiburada’ brand both in the Republic of Turkey and the official institutions of the European Union. In the indictment, mentioned above, it was not stated in any way that İlker Erdem had any ties or affiliations with the ‘hepsiburada’ brand.

- The cancellation applicant is not acting in good faith. In both the European Union and the Republic of Turkey, the cancellation applicant does not reveal the whole truth and constantly tries to gain malicious advantage by giving incomplete information.
- There is no restriction that prevents the transfer of the contested mark from Alpak B.V to Dendiki B.V.. Neither Alkapıda Teknoloji Pazarlama Elektronik Ticaret Limited Şirketi, which was established according to the laws of the Republic of Turkey, nor İlker Erdem has any interest or relation with the ‘hepsiburada’ brand.

20 Together with its submission, Dendiki B.V. submitted the following evidence:

- Bill of indictment dated 15 October 2021.

Reasons

- 21 All references made in this decision should be seen as references to the EUTMR (EU) No 2017/1001 (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended, unless specifically stated otherwise in this decision.
- 22 Given the date of filing of the application for registration at issue, namely 28 August 2017, the substantive law applicable to the registrability of the contested mark is Regulation No 207/2009. Consequently, the references made by the parties, in their arguments, and by the Cancellation Division, in the contested decision, to Article 59(1)(b) EUTMR must be understood as referring to Article 52(1)(b) of Regulation No 207/2009, which is identical in content (29/09/2021, T-592/20, Agate / Agate, EU:T:2021:633, § 19).
- 23 Furthermore, as procedural rules are generally deemed to apply on the date on which they enter into force, the dispute is governed by the procedural provisions of the EUTMR (11/12/2012, C-610/10, Commission vs Spain, EU:C:2012:781, § 45; 29/09/2021, T-592/20, Agate / Agate, EU:T:2021:633, § 19-20).
- 24 The appeal complies with Articles 66, 67 and 68(1) EUTMR. It is admissible and well founded, as reasoned by the Board below.

On the evidence submitted at the appeal stage

- 25 Pursuant to Article 27(4) EUTMDR, in accordance with Article 95(2) EUTMR, 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, on the face of it, likely to be 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 contested decision subject to appeal.

- 26 The Board finds that the evidence submitted before the Cancellation Division, including the observations and evidence filed on 20 October 2020, has already convincingly proven the bad faith of Alpak B.V. when filing the contested mark. The Cancellation Division was wrong to disregard that submission and the evidence thereto as they prove the dishonest intention on the part of Alpak B.V. and change the outcome, as it will be reasoned below. The documents filed for the first time on appeal, at least those which are relevant for these proceedings and are explicitly mentioned in the reasoning below, further support this outcome as they supplement the documents originally filed as a proof of Alpak B.V.'s knowledge of the earlier trade marks and its dishonest intention at the date of filing of the contested mark as well as the chronology of the events before and after filing of the contested mark. Others, such as Enclosure 28, are new and were not available during the first instance proceedings. In addition, the stage in the proceedings in which the submissions and documents were filed, both at first and second instance, as well as the circumstances surrounding it, do not oppose the inclusion of these submissions and evidence. Most importantly, both parties had many opportunities to submit their observations in reply.
- 27 As regards the evidence under Enclosures 3 to 13 and 16, these were rejected by the Registry of the Boards of Appeal by communication of 2 July 2021 as it did not comply with the technical requirements as defined by Article 2 of Decision No EX-20-10 of the Executive Director of the Office. According to Article 4 of the same decision these enclosures were not acceptable and were deemed not filed, the deficiency not been subject to remedy.
- 28 Therefore, the documents that will be taken into consideration in these proceedings include those filed in the cancellation proceedings (paragraphs 3 and 6 above) and in the appeal proceedings (paragraphs 15, 18 and 20 above), except for those explicitly mentioned under the paragraph above.

Article 52(1)(b) of Regulation No 207/2009

- 29 According to Article 52(1)(b) of Regulation No 207/2009, an EU trade mark shall be declared invalid if the EUTM proprietor was acting in bad faith when it filed the application for the trade mark. As observed by Advocate General Sharpston (opinion of 12/03/2009, C-529/07, Lindt Goldhase, EU:C:2009:148, § 36), the concept of bad faith referred to in Article 52(1)(b) of Regulation No 207/2009 is not defined, delimited or even described in any way in the legislation. However, the Court of Justice provided some guidance on how to interpret this concept in its judgment in the same case, as did the General Court in several cases.
- 30 Bad faith involves conduct which departs from accepted principles of ethical behaviour or honest commercial and business practices (07/07/2016, T-82/14, Luceo, EU:T:2016:396, § 28). The Court of Justice stated that Article 52(1)(b) of Regulation No 207/2009 applies 'where it is apparent from relevant and consistent indicia that the proprietor of an EU trade mark has filed the application for registration of that mark not with the aim of engaging fairly in competition but with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties, or with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within

the functions of a trade mark, in particular the essential function of indicating origin' (12/09/2019, C-104/18, *STYLO & KOTON* (fig.), EU:C:2019:287, § 46).

- 31 While, in accordance with its usual meaning in everyday language, the concept of 'bad faith' presupposes the presence of a dishonest state of mind or intention, that concept must moreover be understood in the context of trade mark law, which is that of the course of trade. In that regard, Council Regulations (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), No 207/2009 and No 2017/1001, which were adopted successively, have the same objective, namely the establishment and functioning of the internal market. The rules on the EU trade mark are aimed, in particular, at contributing to the system of undistorted competition in the European Union, in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable the consumer, without any possibility of confusion, to distinguish those goods or services from others which have a different origin (12/09/2019, C-104/18, *STYLO & KOTON* (fig.), EU:C:2019:287, § 45; 29/09/2021, T-592/20, *Agate / Agate*, EU:T:2021:633, § 24).
- 32 The intention of an applicant for a trade mark is a subjective factor which must, however, be determined objectively by the competent administrative or judicial authorities. Consequently, any claim of bad faith must be the subject of an overall assessment, taking into account all the factual circumstances relevant to the particular case. It is only in that manner that a claim of bad faith can be assessed objectively (12/09/2019, C-104/18, *STYLO & KOTON* (fig.), EU:C:2019:287, § 47; 29/09/2021, T-592/20, *Agate / Agate*, EU:T:2021:633, § 26).
- 33 The following three factors can be particularly relevant when assessing whether the EUTM proprietor was acting in bad faith: (i) the fact that the applicant knows or must know that a third party is using an identical or similar sign for identical or similar goods or services capable of being confused with the sign for which registration is sought; (ii) the applicant's intention to prevent that third party from continuing to use such a sign; and (iii) the degree of legal protection enjoyed by the third party's sign and by the sign for which registration is sought (11/06/2009, C-529/07, *Lindt Goldhase*, EU:C:2009:361, § 37 and § 53; 27/06/2013, C-320/12, *Malaysia Dairy*, EU:C:2013:435, § 36-37).
- 34 Knowledge may be presumed to exist ('must have known') on the basis, *inter alia*, of general knowledge in the economic sector concerned or of the duration of use (29/09/2021, T-592/20, *Agate / Agate*, EU:T:2021:633, § 29). There is knowledge, for example, when the identity or quasi-identity between the contested mark and the earlier sign 'manifestly cannot be fortuitous' (28/01/2016, T-335/14, *Doggis*, EU:T:2016:39, § 60). Depending on the circumstances of the case, this presumption may apply even if the identical or similar sign was registered in a non-European Union country (28/01/2016, T-335/14, *Doggis*, EU:T:2016:39, § 64-71).
- 35 The intention of an applicant for a trade mark is a subjective factor which must be determined in the light of the objective circumstances of the case (23/05/2019, T-3/18 & T-4/18, *Ann Taylor*, EU:T:2019:357, § 35). In order to find out whether the owner had been acting in bad faith at the time of filing the application, an overall assessment must be made in which all the relevant factors of the individual

case must be taken into account (27/06/2013, C-320/12, Malaysia Dairy, EU:C:2013:435, § 37; 11/06/2009, C-529/07, Lindt Goldhase, EU:C:2009:361, § 37 and § 42). Account may also be taken of the commercial logic underlying the filing of the application for registration of the sign as an EUTM (14/02/2012, T-33/11, Bigab, EU:T:2012:77, § 21), and the chronology of events leading to that filing (03/06/2010, C-569/08, Internetportal, EU:C:2010:311, § 52).

- 36 It is for the cancellation applicant to submit the facts that prove bad faith, good faith being presumed until proven otherwise (23/05/2019, T-3/18 & T-4/18, Ann Taylor, EU:T:2019:357, § 34; 14/02/2019, T-796/17, Mouldpro, EU:T:2019:88, § 84). Also facts adduced by the EUTM proprietor are to be taken into consideration as it is best placed to provide information and evidence on its intentions at the time of applying for registration (23/05/2019, T-3/18 & T-4/18, Ann Taylor, EU:T:2019:357, § 37). In any case, the cancellation applicant needs to prove that there was bad faith on the part of the EUTM proprietor at the time of filing the EUTM, for example, that the EUTM proprietor had the sign registered with no intention of using it but with the sole objective of preventing a third party from entering the market (13/12/2012, T-136/11, Pelikan, EU:T:2012:689, § 56; 08/05/2014, T-327/12, Simca, EU:T:2014:289, § 37; 07/07/2016, T-82/14, Luceo, EU:T:2016:396, § 30).
- 37 Furthermore, where the Office finds that the objective circumstances of the particular case relied on by the applicant for a declaration of invalidity may lead to the rebuttal of the presumption of good faith applying to the application for registration of the mark at issue, it is for the proprietor thereof to provide plausible explanations on the objectives and commercial logic pursued by the application for registration of that mark (23/05/2019, T-3/18 & T-4/18, Ann Taylor, EU:T:2019:357, § 36; 29/09/2021, T-592/20, Agate / Agate, EU:T:2021:633, § 32). The owner of the trade mark is best placed to provide the Office with information on his or her intentions at the time of applying for registration of that mark and in order to provide it with evidence capable of convincing it that, in spite of the existence of objective circumstances such as those referred to in this paragraph above, those intentions were legitimate (23/05/2019, T-3/18 & T-4/18, Ann Taylor, EU:T:2019:357, § 37; 29/09/2021, T-592/20, Agate / Agate, EU:T:2021:633, § 33).

The relevant facts of the case

- 38 Essentially, the relevant facts of the case are as follows:
- The cancellation applicant is the owner of the website www.hebsiburada.com, a Turkish leading e-commerce platform operating since 1998, which offers for sale a vast number of products.
 - In 2013, Hepsiburada.com has been included amongst the leading Turkish e-commerce providers, as it is evident from the report on e-commerce in Turkey, prepared by Deloitte Consulting (Annex 6).
 - In 2015, Hepsiburada.com was listed amongst the Top 500 European e-retailers and it was particularly noted as being one of the fastest growers with more than EUR 924 million web sales in 2014 (Annex 8).

- The cancellation applicant is the proprietor of 19 Turkish trade marks registered in Classes 35, 38 and 42, all of them having the element ‘hepsiburada’, the first one being Turkish trade mark No 2000/20142 for the



figurative sign, filed on 22 September 2000 and registered on 26 April 2002 for, amongst others, ‘bringing goods and services together in a virtual environment and offering them for third parties to see and purchase’ (Annexes 1 and 2).



- In 2016, the figurative sign was found well known in relation to ‘gathering of goods in virtual environment’ by the Turkish Patent Institute (Annex 3).
- Since 2016, Hepsiburada.com delivers goods not only in Turkey but also in Austria, Bulgaria, Denmark, Germany, Greece, Finland, France, Italy, Latvia, Slovenia, Sweden, the United Kingdom, and also the Netherlands (Annex 11).
- A simple search on Google of the word ‘hepsiburada’, which was tested and confirmed by the Board, revealed as a first result the cancellation applicant’s website www.hepsiburada.com.
- Hepsiburada.com is in the App Store and Google Play, it has thousands of subscribers on YouTube and thousands of followers on Twitter, more than two million followers on Instagram and more than three million likes on Facebook (screenshots provided by the cancellation applicant on 6 November 2019).
- On 28 August 2017, Alpak B.V., the EUTM proprietor at the time of filing of the contested mark, applied for registration of the contested mark, EUTM No 17 151 796, for the word mark ‘hepsiburada’. The contested mark was registered on 15 December 2017.
- Alpak B.V.’s registered activity includes internet retail services in the home and garden supplies sales, in particular via the internet, of household products and other articles (Annex A, Enclosure 17).
- The director of Alpak B.V. – Nurdan (Savaş) Erdem, who is also director of Alkapida B.V., Dendiki B.V. and Alkapida Teknoloji Pazarlama Elektronik Ticaret Limited Şirketi – is a Turkish citizen residing in Istanbul (Annex B, Enclosures 17-20).
- The Turkish company Alkapida Teknoloji Pazarlama Elektronik Limited Şirketi was established in 2012 with registered activity in the retail sector (Enclosure 20). It owns the website www.alkapida.com which is in Turkish language and appears to be addressed at Turkish-speaking customers in Europe. The customer can select the European country of delivery which changes the list of available products.

- On 10 August 2018, the cancellation applicant filed its EUTM application No 17 941 312 ‘hepsiburada.com’ in Classes 35, 38 and 42. This application was opposed by Alpak B.V..
- On 28 August 2018, Alpak B.V. registered the website www.hepsiburada.life, which was operational at least in 2019, as it is evident from the Wayback Machine screenshot, provided in the statement of grounds. That screenshot demonstrates that Alpak B.V. presented the website www.hepsiburada.life as Hepsiburada European Sales (Shopping) Site (in Turkish: *Hepsiburada Avrupa Online Satış Sitesi*). The same reference appeared in the Store Information together with a reference to Turkey (screenshots provided in the cancellation applicant’s submission of 20 October 2020).
- The company Alkapida B.V. is also related to the website www.hepsiburada.life. In 2018, it included @alkapida.com e-mail address in the ‘contact us’ section. The domain names that are hosted on the same IP address (web host) as hepsiburada.life include alkapida.be, alkapida.fr, dendiki.com (registered by Alpak B.V.) (Enclosure 28).
- In 2017-2018, Alpak B.V. applied for registration of EUTM No 17 165 788 [dekorazon](http://dekorazon.com), filed on 3 September 2017 in Classes 21 and 35 and EUTM No 17 968 517 ‘Ar Yıldız’, filed on 15 October 2018 in Classes 7, 8, 21 and 35, which correspond to third parties’ Turkish websites www.dekorazon.com and www.aryildiz.com accordingly, both of them being online retailers of a vast number of products.
- On 6 November 2019, the cancellation applicant filed the subject application for a declaration of invalidity.
- Hepsiburada.com had 18 million unique visitors, 60 million monthly visits and shipped two million products a month in 2019 (Annex 7), whereas the total visits in September 2019 went up to 79 million (Annex 10).
- In 2020, the cancellation applicant launched an initial public offering (IPO) on Nasdaq and Hepsiburada.com has been presented as Turkey’s second biggest e-commerce platform according to <https://www.bloomberg.com/news/articles/2021-05-31/turkey-s-second-biggest-e-commerce-platform-files-for-nasdaq-ipo> (see statement of grounds).
- On 2 June 2021, the website www.hepsiburada.life was closed following an interlocutory judgment in the Turkish Civil Court process against Alpak B.V. and its director before the Ankara 5th Civil Court of Intellectual and Industrial property rights – case 2020/333 – in which it was acknowledged that Alpak B.V.’s use of the sign ‘hepsiburada’ as a domain name and the website content had been an act of infringement of the cancellation applicant’s trade mark rights in Turkey and an act of unfair competition.
- On 9 December 2021, the contested mark was transferred from Alpak B.V. to Dendiki B.V..

The bad faith assessment

- 39 In the case at hand, in light of the above relevant facts and considering the further arguments adduced by the parties, and unlike the Cancellation Division, the Board finds that the behaviour of Alpak B.V. falls under the definition of bad faith.

a) On the identity or similarity of the trade marks

- 40 The evidence on file proves and it is not disputed by the parties that the cancellation applicant is the owner of many earlier Turkish trade marks consisting of the word ‘hepsiburada’, the earliest one dating back to 2000 and registered for, amongst others, retail services in Class 35 in relation to a long list of goods. It has also been



proven that the trade mark , including the verbal element ‘hepsiburada.com’, has been found to be well known in Turkey (Annexes 1 and 3).

- 41 It is also clear and not disputed by the parties that the website www.hepsiburada.com has been included amongst the leading Turkish e-commerce providers already in 2013, as it is evident from the report on e-commerce in Turkey, prepared by Deloitte Consulting (Annex 6). In 2015, Hepsiburada.com was listed amongst the Top 500 European e-retailers and it was particularly noted as being one of the fastest growers with more than EUR 924 million web sales in 2014 (Annex 8).
- 42 The numerous amount of invoices (Annex 11) further proves the use of the website www.hepsiburada.com and the trade mark ‘hepsiburada’ by a large number of customers in the European Union, including in the Netherlands – the place of registration of Alpak B.V. and its successor-in-title, since 2016.
- 43 Both the contested mark and the earlier trade marks consists of or clearly comprise the identical element ‘hepsiburada’. Whether it is distinctive or not for the Turkish-speaking public is of secondary importance insofar as this is the single element of the contested mark and many of the earlier trade marks, and also a co-dominant element of another part of the earlier trade marks. In addition, as correctly argued by the cancellation applicant, the sign ‘hepsiburada’ will be perceived as a fanciful word by the non-Turkish-speaking public in the European Union.
- 44 As to the goods and services of the contested mark, most, if not all, of the contested goods in Class 21 fall within the variety of products of the cancellation applicant’s retail services in Class 35 of Turkish trade mark No 2012/79983 ‘HEPSIBURADA’, which include, amongst others, retail of the following broad categories of products:

material, frames for pictures, paintings, ID cards, tags, badges, tags. Wood or synthetic material, containers, barrels, barrels, containers, containers, transport containers, crates, transport pallets and caps used therewith. Hardware or hardware made of wood or synthetic materials, furniture fittings, opening and closing devices. Ornaments and decorative articles of wood, candles, beeswax, plastic or plaster. Baskets, fishing baskets. Booths, nests, beds for pets. Portable ladders made of wood or synthetic materials, mobile ladders. Bamboo curtains, roller blinds, strip curtains, beaded curtains for decoration; curtain hooks, curtain rings, curtain hooks, curtain rods. Non-electrical cleaning equipment (including brushes, steel shavings, sponges, steel wool, upholstery, textile cleaning and wiping cloths, dishwashing gloves, non-electric polishing machines, carpet sweepers, floor mats with brushes, electric brushes without machine parts). Toothbrushes, electric toothbrushes, dental floss, shaving brushes, hair brushes, combs (including electric-non-electric make-up removal devices). Non-electrically operated household and kitchen utensils, clothes pegs, utensils, vases (including precious metal). Ironing boards and covers, clothes dryers, clothes hangers. Cages and materials for pets, plants and animals used in the home (terrariums). Ornaments and decoration articles of glass, porcelain, ceramics, clay. Mouse traps, vermin traps, fly catchers, fly rackets (mosquito nets), lids for toilet stone holes (fly and vermin repellent or destructive electrical devices) for non-electric tools, powder puffs, boxes for toiletries. Spray nozzles, nozzles for irrigation strainers, irrigation tools, garden irrigation strainers, taps fitted to taps. Raw glass, semi-processed glass, glass mosaics and glass powders for decoration (except for construction), glass wool (not for insulation and textile purposes).



- 45 Moreover, the earlier Turkish trade mark No 2000/20142 includes the services *bringing goods and services together in a virtual environment and offering them for third parties to see and purchase* in Class 35, whereas the Turkish trade mark No 2010/48306 ‘hepsiburadaoutlet’ includes most of the contested services in Class 35, as follows:

Class 35: Advertising, marketing and public relations services (including organization of exhibitions and fairs for commercial and advertising purposes). Office services. Business management, administration and related consultancy, accounting and financial consultancy services (including import-export agency services). Appraisal services for commercial and industrial products. Organization and realization of auctions. Services for bringing together a variety of goods to enable customers to view and purchase goods conveniently (the services provided may be provided through retail, wholesale stores, electronic media, catalogues and other similar methods).

- 46 The General Court has ruled that retail services in Class 35 which concern the same goods as the goods of the other mark are similar to an average degree (07/10/2015, T-365/14, Trecolore, EU:T:2015:763, § 34-35; 20/03/2018, T-390/16, Dontoro, EU:T:2018:156, § 32-33), mainly on account of their complementary character (24/09/2008, T-116/06, O Store, EU:T:2008:399, § 42-58; 19/12/2019, T-729/18, Lloyd, EU:T:2019:889, § 35-36). The relationship between the retail services relating to specific goods and the same goods is close in the sense that the goods are indispensable to the provision of the retailing and wholesale services, which are specifically provided when those goods are sold. Such services, which are provided with the aim of selling certain specific goods, would make no sense without those goods.
- 47 An average similarity can also be found between retail services of certain goods and goods that are not only strictly identical to the goods subject of the retail (25/11/2020, T-309/19, Sadia, EU:T:2020:565, § 141) but also for those that are very similar (15/07/2015, T-352/14, Happy Time, EU:T:2015:491, § 28, 30). The General Court has even confirmed that such an average similarity also exists when retailed goods are similar to an average degree and that, if the retailed goods are only weakly similar to the goods of the other mark, these services must be regarded


as weakly similar to those goods (28/11/2019, T-736/18, Bergsteiger, EU:T:2019:826, § 90-91).

- 48 It follows that the contested goods in Class 21 are similar to the earlier services in Class 35, whereas the contested services in Class 35 are identical or similar to various degrees to the earlier services in the same class of the earlier Turkish trade marks.
- 49 In any event, in relation to the question whether, in the event of a finding of bad faith, all the goods and services applied for have to be cancelled or only those used by the cancellation applicant, the Advocate General in the *STYLO & KOTON* case stated convincingly that dividing an application into a part filed in bad faith and a part filed in good faith would offer an incentive to apply to register trade marks for a larger set of goods and services than is justified by the actual intended uses. There would be no fear of any disadvantage for the trade mark actually being used if bad faith were discovered. The fact that an application was originally filed for a trade mark for goods and services in respect of which the applicant knew or should have known that identical or similar trade marks existed may in any event be an important indication that the application to register that trade mark for other goods or services was also filed in bad faith. It is then for the applicant of such a trade mark to present, in respect of those other goods, a commercial logic of his use for those other goods (Opinion of the Advocate General of 4 April 2019 in Case C-104/18, *STYLO & KOTON* (fig.), § 58-61).
- 50 In the present case, it is sufficient to state that all the contested goods in Class 21 are capable of being offered for sale by a provider of online retail and wholesale services, including the cancellation applicant. Also, although the likelihood of confusion between the contested mark and the earlier trade marks is more than obvious, this is not a prerequisite for a finding of bad faith. The Court of Justice in the ‘*STYLO & KOTON*’ judgment stated that in the absence of any likelihood of confusion between the sign used by a third party and the contested trade mark, or in the event of a lack of use by a third party of a sign identical or similar to the contested trade mark, other factual circumstances may, where appropriate, constitute relevant and consistent indications, establishing bad faith on the part of the applicant’ (12/09/2019, C-104/18, *STYLO & KOTON* (fig.), EU:C:2019:287, § 56), which is the case at hand, as further reasoned below.

b) On the knowledge of the use of an identical or similar trade mark

- 51 The fact that *Alpak B.V.* is a company whose main activities are part of the e-commerce sector and also the fact that its director *Nurdan Erdem* is a Turkish citizen residing in Istanbul (Annex A, Enclosures 17-18) leave no doubt that they have been familiar with the market reality in Turkey, in particular in the field of e-commerce already in 2016 when the company *Alpak B.V.* was registered.
- 52 It has been proven that the director *Nurdan Erdem* is also a director of the Turkish company *Alkapida Teknoloji Pazarlama Elektronik Limited Şirketi* which was established in 2012 with registered activity in the retail sector (Enclosure 20). It owns the website www.alkapida.com which is in Turkish language and is addressed at Turkish-speaking customers in Europe. In fact, the services offered by

the websites www.alkapida.com and www.hepsiburada.com overlap. Both are online retailers offering for sale a vast number of goods.

- 53 Also, the use of a term derived from two Turkish words in the contested mark implies that it is addressed in particular to Turkish-speaking consumers and suggests knowledge of that language on the part of Alpak B.V. and its director (by analogy, 28/04/2021, T-311/20, Choumicha Saveurs (fig.), EU:T:2021:219, § 31). In that regard, the fact that the contested mark was registered for goods and services in Classes 21 and 35, whereas the cancellation applicant's trade mark is well known for services in Class 35 is also indicative that the use of the word 'hepsiburada' in the contested mark is not fortuitous, but intentional (by analogy, 28/04/2021, T-311/20, Choumicha Saveurs (fig.), EU:T:2021:219, § 32).
- 54 Given that the cancellation applicant's trade mark is well known in Turkey and the website www.hepsiburada.com was amongst the leading Turkish e-commerce providers already in 2013, there can be no doubt about the fact that Alpak B.V. and its director, a Turkish citizen residing in Istanbul, were aware of the use of the sign 'hepsiburada', at least in Turkey, for online retail services when filing the contested mark in 2017.
- 55 In this respect the Board further notes that the fact that Alpak B.V. has filed also other trade marks, namely EUTM No 17 165 788 , filed on 3 September 2017 in Classes 21 and 35 and EUTM No 17 968 517 'Ar Yıldız', filed on 15 October 2018 in Classes 7, 8, 21 and 35, which correspond to third parties' Turkish websites www.dekorazon.com and www.aryildiz.com accordingly, is an additional indication that Alpak B.V. and its director are familiar with the Turkish e-commerce providers. This is even more so given that the first application was filed only a week after the contested mark's application on 28 August 2017.

c) On the dishonest intention on the part of the EUTM proprietor

- 56 The fact that a third party has been using a sign for an identical product, capable of being confused with the contested mark and enjoys there to some degree legal protection, is one of the relevant factors for the assessment of whether the EUTM proprietor was acting in bad faith at the time of the application.
- 57 There are, therefore, relevant indications from which it may be concluded that Alpak B.V.'s intention, when filing the contested mark, was to create an association in the minds of the relevant public between its own goods and services and the well-known trade mark of the cancellation applicant.
- 58 This intention and behaviour can by no means be seen as following any commercial logic, or engaging fairly in competition, but only as a clear example of bad faith, namely undermining, in a manner inconsistent with honest practices, the interest of a third party, in this case the cancellation applicant, by taking unfair advantage of its well-known trade mark and preventing it from exploiting it within the territory of the European Union.

- 59 In the case at hand, Alpak B.V. and its successor-in-title Dendiki B.V. have not shown any use of the mark ‘hepsiburada’ as an indication of the commercial origin of its own products. Nor had they adduced any convincing evidence of good faith and of the commercial logic which would justify the registration of the contested mark. By contrast, the evidence on file shows use of the mark ‘hepsiburada’ exclusively by the cancellation applicant through its website www.hepsiburada.com in Turkey and in a number of European Union Member States, including the Netherlands the country of residence of the Alpak B.V..
- 60 The contested mark for the word mark ‘hepsiburada’ is distinctive and identical or highly similar to the trade marks used by the cancellation applicant in Turkey since 1998. Even though the cancellation applicant’s trade marks vary from word to figurative, their distinctive and (co-)dominant element is always the word ‘hepsiburada’. The registered services in Class 35 which include also retail services for a variety of goods are identical or similar to the contested goods and services in Classes 21 and 35. The explanations of Alpak B.V. that it invented the name ‘hepsiburada’ bear no scrutiny. Not only has it not been proven that Alpak B.V. has ever sold any products under the contested mark but it provided no reasonable explanation as to how it came up with that trade mark.
- 61 Moreover, the registration of the website www.hepsiburada.life and the subsequent use of the sign ‘Hepsiburada European Sales (Shopping) Site’ (in Turkish: *Hepsiburada Avrupa Online Satış Sitesi*) and offering of the same services as the cancellation applicant’s www.hepsiburada.com is an additional indication of the dishonest intention of Alpak B.V. intending to associate its services with those of the cancellation applicant. The Board finds that the way of use of the sign, as described above, shows that ‘hepsiburada’ was not a sign originally created by Alpak B.V. as it clearly presented its services as being the European website of Hepsiburada. Neither Alpak B.V. nor its successor-in-title Dendiki B.V. provided any explanation with regard to the use of the sign ‘hepsiburada’ on the website www.hepsiburada.life.
- 62 The fact that Alpak B.V. contested the export report (Enclosure 22) used in the civil court proceedings which resulted in the closure of the website www.hepsiburada.life is irrelevant in the present case. The Bill of indictment dated 15 October 2021 under paragraph 20 above does not refute the use of the sign ‘hepsiburada’, as explained in the paragraph above.
- 63 Given the chronology of events, the objective circumstances of the case and all the indications considered together, it is inconceivable that Alpak B.V. did not know about the cancellation applicant’s earlier rights of the trade mark ‘hepsiburada’, its well-known and even reputed character in Turkey and the use of the mark in Turkey and abroad, including in many European Union countries amongst which is the Netherlands and that its intentions when filing for the contested mark were to honestly use the mark in the course of trade and not to block the European Union market for the cancellation applicant and take over its market share, its use of the sign ‘hepsiburada’ in the meantime indeed already being explicitly being forbidden in Turkey (Enclosure 21).
- 64 The company file of Alpak B.V. (Annex A, Enclosure 17) gives no indications that at the time of application it has used or wanted to use the contested mark in respect

of its own products or any other plausible explanations on the objectives and commercial logic pursued by the application for registration of that mark. It is not possible to identify any business strategy in which the contested mark is applied. The only activity related to it which can objectively be identified is hindering others. With filing the contested mark, Alpak B.V. pursued dishonest purposes and abused the trade mark system, which shows the existence of bad faith in the sense described above.

- 65 Contrary to the Cancellation Division's findings, the cancellation applicant did not have to prove reputation of its earlier rights in the European Union. The fact that 'hepsiburada' is merely well known and even reputed in Turkey, that is outside the European Union, does not prevent the finding of bad faith (28/01/2016, T-335/14, Doggis, EU:T:2016:39, § 64-71). The cancellation applicant fully protected its trade mark in Turkey. The choice whether or not to protect a mark otherwise through registration is made by the proprietor alone as part of its business strategy; non-registration does not necessarily lead to the conclusion of it being absent on the market. Indeed, it is clear that the cancellation applicant developed its activities on the European Union market at least since 2016, delivering goods in various Member States since that date, and it was precisely when the cancellation applicant sought to register its 'hepsiburada' mark as an EUTM, in line with a normal business practice due to this extended use, that it found out of the existence of the contested mark filed in August 2017.
- 66 On the other hand, the fact that Alpak B.V. sought to register a trade mark that was virtually identical to certain of the earlier marks of the cancellation applicant and covering identical or similar goods and services does not make any sense from a business perspective at all for the reasons indicated above. This having been said, Alpak B.V. does not rely on, or even make an attempt to start any line of argument, there being any commercial logic whatsoever to justify its course of action. Instead, it merely and repeatedly, despite all the extensive and convincing arguments of the cancellation applicant to the contrary, puts forward, in essence, a number of simple arguments to the effect that it was unaware of the existence of the earlier trade marks belonging to the cancellation applicant when it filed the application for registration of the contested mark.
- 67 Bad faith is tantamount to manifestly dishonest business intentions and comprises situations where well-known or reputed trade marks of third parties with which the applicant has no connection are applied for. Frequently such filings are made to extort money but that is not a necessary condition for a finding of bad faith. Moreover, under Article 52(1)(b) of Regulation No 207/2009 it is more the subjective intention of the applicant, if it can be inferred from the circumstances that the applicant deliberately chose a third party's mark on account of its reputation or attractive force. The Board finds that the combination of all the elements discussed above, including the registered activity of Alpak B.V. and its connection to the Turkish company Alkapida Teknoloji Pazarlama Elektronik Limited Şirketi together with the Turkish residence of their common director, the way the sign 'hepsiburada' was used on the website www.hepsiburada.life and the impression Alpak B.V. sought to give that it operates the European sales of Hepsiburada without doubt being aware of the well-known and even reputed character of that trade mark in Turkey as well as of use of it in the European Union, the Netherlands included, and the filing of at least one other mark in similar

circumstances, is sufficient to establish, with the requisite degree of certainty, that Alpak B.V. acted in bad faith at the time of filing of the contested mark.

- 68 In light of the foregoing, the contested decision has to be annulled and the European Union trade mark has to be declared invalid in respect of all the registered goods and services.

Costs

- 69 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the EUTM proprietor, as the losing party, must bear the cancellation applicant's costs of the cancellation and appeal proceedings.
- 70 As to the appeal proceedings, these consist of the appeal fee of EUR 720 and the cancellation applicant's costs of professional representation of EUR 550.
- 71 As to the cancellation proceedings, the EUTM proprietor must reimburse the cancellation fee of EUR 630 and the cancellation applicant's cost of professional representation of EUR 450.
- 72 The total amount is fixed at EUR 2 350.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision;**
- 2. Declares EUTM No 17 151 796 invalid in its entirety;**
- 3. Orders the EUTM proprietor to bear the cancellation applicant's costs incurred in the cancellation and appeal proceedings in the amount of EUR 2 350.**

Signed

N. Korjus

Signed

L. Marijnissen

Signed

C. Govers

Registrar:

Signed

H. Dijkema

