

DECISION
of the Second Board of Appeal
of 15 September 2022

In case R 2076/2021-2

easyGroup Ltd

168 Fulham Road
London SW10 9PR
United Kingdom

EUTM Proprietor / Appellant

represented by Kilburn & Strode LLP, Laapersveld 75, 1213 VB Hilversum,
Netherlands

v

Easy-Tutor GmbH

Münchener Str. 23a
85540 Haar (München)
Germany

Cancellation Applicant / Defendant

represented by DF-MP Dörries Frank-Molnia & Pohlman Patentanwälte
Rechtsanwälte PartG mbB, Fünf Höfe Theatinerstr. 16, 80333 München, Germany

APPEAL relating to Cancellation Proceedings No 45 033 C (European Union trade
mark registration No 10 584 001)

THE SECOND BOARD OF APPEAL

composed of S. Stürmann (Chairperson), H. Salmi (Rapporteur) and
S Martin (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 24 January 2012, easyGroup Ltd ('the EUTM proprietor') sought to register the word mark

EASYJET

for a wide range of goods and services in Classes 3, 8, 9, 12, 14, 16, 18, 25, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 41 and 43.

- 2 The application was published on 21 March 2012 and the mark was registered on 9 January 2015.
- 3 On 28 July 2020, Easy-Tutor GmbH ('the cancellation applicant') filed an application for revocation of the registered mark for all the goods and services covered by the EUTM registration.
- 4 The grounds of the application for a revocation were those laid down in Article 58(1)(a) EUTMR.
- 5 By communication of 21 December 2020, the EUTM proprietor submitted proof of use of the contested mark. The following documents are relevant for the present appeal proceedings.
 - Exhibit 1: extracts from easyJet's revenue relating to the years 2015 to 2020.
 - Exhibit 2: information from the London Stock Exchange showing easyJet's share price over the last seven years.
 - Exhibit 3: awards received by easyJet in 2015 – 2018, including 'Best Low-Cost Airline – Business Traveller Awards', 'Short Haul Airline of the Year – Food and Traveler Readers Awards. easyJet has won awards in Italy, Austria, the United Kingdom and Portugal for its airline services. The information was downloaded from www.worldtravelawards.com and <https://corporate.easyjet.com/investors/awards>.
 - Exhibit 4: an extract from Wikipedia, and an article from <https://www.flight-delayed.co.uk> dated 21/03/2018 showing that easyJet was the fifth largest airline in Europe in 2017. An article from the webpage www.flight-delayed.co.uk, dated 21/03/2018, indicating that easyJet 'operates many cheap flights across Europe' and 'in a year, [...] sells just under 2 million bacon baguettes on board their flights'.
 - Exhibit 5: downloads from www.statista.com and <http://corporate.easyjet.com/investors/traffic-statistics> with the number of passengers carried by easyJet; the former shows that in 2017 it transported 68

million passengers, which was the highest number by any UK airline in this year.

- Exhibit 6: route maps which show easyJet’s operation across a number of European countries.
 - Exhibit 7: press releases, annual reports, shareholder presentations, examples of easyJet Bistro with food and beverages available during the flight.
 - Exhibit 8: issues of easyJet’s Traveller magazine with covers from August 2013 to March 2020.
 - Exhibit 19: witness statement signed by the Commercial Director of the company and accompanying exhibits:
 - Exhibit AM1: a breakdown of sales in respect of fresh and hot foods per country (France, Germany, Italy); it also contains a spreadsheet with sales in relation to a number of food items in the United Kingdom from 2013 to 2017.
 - Exhibit AM2: examples of the easyJet Bistro magazine.
 - Exhibit AM3: a photo of a packaging of the product ‘Margherita Mini Calzone’.
 - Exhibit AM4: an example of <https://preorders.easyjet.com> (from the Wayback machine, dated 22/09/2017).
 - Exhibit AM5: a press release regarding the EUTM proprietor winning the award ‘Best Airline for Inflight Food’ at the Airline Retail Conference 2014.
 - Exhibit 22: issues of the easyJet Bistro magazine, Spring 2017, Autumn / Winter 2019, showing inter alia the sale of sandwiches, focaccia, toasts, hot bacon baguettes, houmous and falafel wraps, margherita mini calzone, stone baked bacon rolls, croissants, muffins.
 - Exhibit 26: screenshots showing options of pre-ordering meal deals of sandwiches, baguettes, focaccia, margherita mini calzone, hot chilli chicken wrap (from the Wayback machine, dated 31/12/2018 and 22/09/2017).
- 6 By decision of 7 October 2021 (‘the contested decision’), the Cancellation Division partially revoked the contested EUTM as from 28 July 2020 for the following goods and services:

Class 3 – Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery; essential oils; cosmetics; hair lotions; dentifrices; deodorants for personal use; preparations and substances for use in the care and appearance of the hair, scalp, lips, face, skin, teeth, nails and eyes; cosmetics; non-medicated toilet preparations; shampoos and conditioners; moisturisers; sun-screening and tanning preparations;

Class 8 – Hand tools and implements; cutlery; electric and non-electric razors;

Class 9 – Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, supervision, life-saving and teaching apparatus and instruments; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers; recording discs; mechanisms for coin operated apparatus; cash registers; calculating machines, data processing equipment and computers; computer hardware and firmware; computer software; software downloadable from the Internet; downloadable electronic publications; compact discs; computer games software; sunglasses; clothing for protection against injury, accident, irradiation or fire; navigation apparatus for vehicles; educational and teaching apparatus and instruments; electronic, magnetic and optical identity and membership cards; sunvisors; cases for spectacles; parts and fittings for all the aforesaid goods;

Class 12 – Vehicles; apparatus for locomotion by land, air or water; motors and engines for land vehicles; airplanes; vehicle body parts and transmissions; vehicle parts, parts for land, air or water locomotion apparatus; bicycles and spare parts thereof (included in this class), golf carts and baby carriages; scooters and spare parts; bike bags;

Class 14 – Precious metals and their alloys and goods made of or coated with these materials not included in other classes; jewelry, precious stones; watches, clocks, chronometric instruments, and horological instruments; cases for all the aforesaid goods;

Class 16 – Paper, cardboard and goods made from these materials; printed matter; photographs; stationery; packaging materials; printed publications; books, manuals, pamphlets, newsletters, albums, newspapers, magazines and periodicals; tickets, vouchers, coupons and travel documents; identity cards; labels and tags; posters, postcards, calendars, diaries; teaching and instructional materials;

Class 18 – Leather and imitations of leather; animal skins, hides; trunks and travelling bags; handbags, rucksacks, purses; briefcases, wallets, pouches and handbags; luggage; suitcases; travelling sets; sports bags; backpacks; umbrellas, parasols and walking sticks; parts and fittings for all the aforesaid goods;

Class 25 – Clothing, footwear, headgear;

Class 28 – Gymnastic and sporting articles;

Class 29 – Meat, fish, poultry and game; meat extracts; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats; canned meat and fish;

Class 30 – Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ice;

Class 31 – Fresh fruits, seeds; nuts;

Class 32 – Beers; mineral and aerated waters; non-alcoholic drinks; fruit drinks and fruit juices; syrups for making beverages;

Class 33 – Alcoholic beverages; wines; spirits and liqueurs; cocktails;

Class 34 – Cigarettes; cigars; tobacco; tobacco products; smokers' articles; lighters; matches;

Class 35 – Advertising; business management; business administration; office functions; operation and supervision of loyalty and incentive schemes; advertising services provided via the Internet; production of television and radio advertisements; provision of business information; retail services connected with the sale of preparations and substances for use in the care and appearance of the scalp, teeth, non-medicated toilet preparations; soaps and cleaning preparations, shampoos, conditioners, moisturisers, tooth cleaning preparations, depilatory preparations, anti-perspirants, deodorisers and deodorants, personal stereos, MP3 players, CD players, apparatus for playing music and video recordings, stones, clocks, books, magazines, newspapers, stationery, calendars,

diaries, umbrellas, parasols, briefcases, luggage, suitcases, travelling sets; sports bags, bike bags, backpacks, playing cards, gymnastic and sporting articles, gymnastic and sporting articles; scooters; marketing and publicity services; dissemination of advertising, marketing and publicity materials;

Class 36 – Insurance; financial services; real estate agency services; banking; issuing of tokens of value; provision of financial information, monetary affairs; foreign exchange services; advice and consultancy relating to the aforesaid services;

Class 38 – Telecommunications; provision of access to the Internet; providing user access to the Internet; advisory and arrangement services relating to all the aforesaid, including, but not limited to, all the aforesaid services provided via telecommunications networks, by online delivery and by way of the Internet; broadcasting of radio and television programmes; electronic transmission of announcements; services in connection with teleconferences;

Class 39 – Transport except transport of passengers and travellers by air; packaging and storage of goods; provision of car parking facilities; transportation of goods by air, land, sea and rail; transportation of passengers and travellers by land, sea and rail; shipping services; arranging of transportation of goods, passengers and travellers by land and sea; cargo handling and freight services; arranging, operating and providing facilities for cruises, tours, excursions and vacations; chartering of aircraft; rental and hire of aircraft, vehicles and boats; chauffeur services; taxi services; bus services; coach services; rail services; airport transfer services; airport parking services; aircraft parking services; escorting of travellers; travel agency services; tourist office services; advisory and information services relating to the aforesaid services;

Class 41 – Education; providing of training; entertainment; sporting and cultural activities; information relating to entertainment and education, provided on-line from a computer database or the Internet; entertainment services provided on-line from a computer database or the Internet; educational information provided on-line from a computer database or the Internet; organising games and competitions, rental of games and playthings;

Class 43 – Temporary accommodation; restaurant, bar and catering services; provision of holiday accommodation; booking and reservation services for restaurants and holiday accommodation; hotel services; hotel reservation services; hotel services for the provision of facilities for exhibitions and conferences.

7 The Cancellation Division allowed the contested EUTM to remain registered for the following services:

Class 35 – Retail services connected with the sale of food and drink, preparations and substances for use in the care and appearance of the hair, lips, face, skin, nails and eyes, cosmetics, perfumes, fragrances, colognes and scents, sun-screening and tanning preparations, sunglasses, jewelry, watches, purses, purses, wallets, pouches and handbags; games;

Class 39 – Transport of passengers and travellers by air; travel arrangement; travel information; transportation of passengers and travellers by air; airline services; airport check-in services; airline services, baggage handling services; advisory and information services relating to the aforesaid services; information services relating to transportation services, travel information and travel booking services provided on-line from a computer database or the Internet;

Class 43 - Services for providing food and drink.

8 It gave, in particular, the following grounds for its decision that are relevant for the present appeal proceedings.

- Part of the evidence also refers to the years 2013 and 2014 as the EUTM proprietor filed documents already submitted in a prior revocation application

(24 962 C) with a different (partly earlier) relevant period. However, there is still ample evidence on file relating the time frame pertinent to these proceedings, namely from 28 July 2015 to 27 July 2020. This includes (but is not limited to) the information from the London Stock Exchange showing that easyJet shares have been traded on the London Stock Exchange over the relevant period (Exhibit 2), the company's results for the years 2015-2020 (Exhibit 1), the awards in Exhibit 3 that also contain information about the place of use (among others Best Low Cost Airline for Business Travellers in Italy in 2015 and Best airline for business travel – EMEA region - Italian Mission Award event 2016 in 2017), the figures of the number of passengers in the article downloaded from 'Statista' (Exhibit 5), the route maps with information relating to flights in many countries in Europe (Exhibit 6), the issues of the company's Traveller magazine with information relating to countries and time frame (Exhibit 8), and the samples from the Bistro and Boutique magazine found in Exhibits 21 and 22 which state prices in GBP or EUR.

- Consequently, there is enough information regarding the place and time of use of the contested mark.
- The combination of the documents on file shows that the contested mark has been used in a broad range of countries within the relevant territory, for the whole of the five years that the relevant period comprises and even before. The revenue generated has been very substantial, as proved by the company's results for the years 2015-2020 and by the fact that the company trades in the London Stock Exchange (Exhibits 1 and 2 respectively). There is, also, evidence of the company having obtained some awards for some of the goods and services branded under the contested mark (Exhibit 3). In addition, third parties attest to the fact that the airline company is the fifth largest in Europe and mention the number of passengers transported (Exhibits 4 and 5 respectively).
- Consequently, the extent of use of the mark has been properly documented, albeit only for some goods and services.
- The EUTM proprietor claims to have used the mark for a number of food items in Classes 29, 30 and 31 and also refers to the use of the mark for some drinks in Classes 32 and 33. The EUTM proprietor refers to the witness statement in Exhibit 19 and to its accompanying Exhibits AM1 – AM5, as well as to the contents of Exhibits 7 and 8.
- The witness statement explains that easyJet's hot and cold food and snacks are presented in plain packaging and the only branding the consumer sees is that of easyJet (both on the easyJet Bistro magazine and on the cabin crew uniform). It adds that if consumers have feedback or would like to complain about any easyJet food or snack products, they can contact the easyJet customer services team.
- The easyJet Bistro and Boutique magazines (Exhibits 7 and AM2) show examples of the food and drink items that can be ordered onboard easyJet

flights; these magazines are found by passengers onboard all easyJet flights and in this regard, the article in Exhibit 4 counts easyJet among the eight biggest airlines in Europe; the article 'statista' (Exhibit 5) mentions the number of passengers in the easyJet flights. The items of food can also be pre-ordered, as seen in Exhibit AM4.

- The Bistro magazines show the prices of meals, sometimes in GBP and sometimes in EUR; these meals are composed of a main course, to which drinks and snacks can be added:

MIX & MATCH MEAL DEAL
TASTY & FRESH
Choose a main + a drink + a snack for just £6.50

* Save up to £2.50 based on the usual selling price of a sandwich, snack and a hot drink. Subject to availability.

MEAL DEAL
Save up to £2.50*

1 CHOOSE A MAIN

1 NEW Stone Baked Bacon Roll
Smoked back bacon served inside an artisanal stone baked roll served with Heinz® Tomato Ketchup or HP Brown Sauce.

2 Hot Toasted Ham & Cheese
Filled with a creamy béchamel sauce and thick cut gammon ham.

3 Hot Margherita Mini Calzone
Delicious margherita filling of tomato, basil & mozzarella on an artisanal folded pizza base.

4 NEW Sweet Chilli Chicken Wrap
Pulled chicken breast in a sweet chilli sauce, cherry tomatoes, lettuce with a hint of coriander and mint, served in a tortilla wrap.

5 NEW Cheese Salad Sandwich
Locally sourced cheese with a regional chutney and vibrant fresh salad.

6 Mezze Snack Box
Green olives, red pepper dip, humous, rosemary crackers and baklava.

7 Tapas Snack Box
 chorizo, serrano ham, tomato & cregano dip and tomato flavoured crackers.

2 ADD A DRINK

- Harrogate still/sparking water
- Coca-Cola/Diet Coke/Coke Zero
- Sprite No Sugar
- San Pellegrino Orange
- Sogafredo coffee
- Nescafé® Azera® cappuccino
- Cadbury hot chocolate
- Any Clopper tea

3 ADD A SNACK

- Pringles paprika
- Pringles sour cream & onion
- Corkers sea salt crisps
- Real Olive Co Olives
- Kit Kat®
- Twix®

SAVE up to £2/2.50€

SWAP YOUR DRINK TO A BEER/WINE/CIDER MEAL DEAL

- Heineken Lager
- BrewDog Punk IPA
- Rakordberg Strawberry & Lime Cider
- Red Wine, Syrah/Grenache
- White Wine, Chenin Blanc
- Rosé Wine, Syrah

Does not include premium wines.
Only available to persons aged 18 years and above.
Always drink responsibly.

Main Only £4.50/6€

- Some goods also appear in a table provided in Exhibit AM1, broken down per items and country; furthermore, this exhibit contains a table with figures for three individual items ('bacon baguette and ketchup, cheese and ham melt and tomato and mozzarella panini') sold in the United Kingdom in the years 2013 to 2017 and another referring to total fresh / hot food sales. Though these are internal documents from the company, their contents are supported not only by the magazines mentioned before, but also by the contents of other evidence provided by the EUTM proprietor. By way of example, Exhibit 3 mentions awards that the company has obtained, among others, relating to its food ('Food and Travel Reader Awards in 2015'); in addition, the article found in Exhibit 4 mentions that 'in a year, easyJet sells just under 2 million bacon baguettes on board their flights'.
- The evidence overall proves that some items of food such as sandwiches, paninis, melts, wraps and rolls have been sold under the mark. However,

these goods are not covered by the contested registration given that they do not fall within any of the categories for which it is registered.

- The rest of the items in Classes 29, 30, 31, 32 and 33 do not appear in the evidence, and when they do, they are simply ingredients from some meals (like ham, chicken) and / or bear their own trade mark (for example brownies, muffins and croissants, salted peanuts and various drinks); consumers are aware of this fact by the offers and pictures in the magazines:

SAVOURY SNACKS

Love Corn BBQ / 45g Delicious, savoury, premium crunchy corn snack	£2,250€
Pringles Paprika / 40g	£2,250€
Pringles Sour Cream & Onion / 40g	£2,250€
Corkers Sea Salt Crisps / 35g	£2,250€
Real Olive Co Olives / 60g	£2,250€
Planters Lightly Salted Peanuts / 100g	£2,250€
Grate Britain Cheddar Crackers / 45g Artisanal crackers made with Cove aged Farmhouse Cheddar	£2,250€

SWEET SNACKS

Kit Kat® / 45g	£1,50,2€
Twix® / 50g	£1,50,2€
Candy Kittens Watermelon / 50g Gourmet gummy candies made with real fruit. 3d06	£1,50,2€
House of Edinburgh Shortbread / 45g	£1,50,2€
Joe & Seph's Double Salted Caramel Popcorn / 25g Gourmet popcorn lovingly handcrafted in London	£2,250€
Wicked Cake Company Blueberry Muffin / 100g	£2,50,3€
Belgian Chocolate Brownie / 60g	£2,50,3€
Maltesers Share Bag / 75g	£3,4€

LIGHT MEALS

Délices All Butter Croissant Served with Bonne Maman Strawberry jam	£2,50,3€
NEW MOMA Porridge	£2,50,3€
• Plain	
• Cranberry & Raisin	
• Coconut & Chia Seed	
Heinz Tomato Soup	£2,50,3€
Kabuto Rice Noodles	
Chicken Ramen / 60g	£3,4€
Mezze Snack Box	£4,50,6€
Tapas Snack Box	£4,50,6€

All product prices in this catalogue are inclusive of VAT under current VAT regulations and are offered by easyJet in the name of and on behalf of Gate Gourmet Switzerland GmbH and its affiliates. For further details of the principal please refer below: Gate Gourmet Switzerland GmbH, Saengerstrasse 20, CH-8152 Glettrugg, Switzerland



Certain products may be found on selected routes only. Please ask your cabin crew for today's selections.

333 Brochure Date: October 2018

gateretail

BEER/CIDER / 330ML	£4,50,6€
• Heineken Lager	
• BrewDog Punk IPA	
• Rekordlig Strawberry & Lime Cider	
NEW WINE / 1875CL	£4,50,6€
• RED Phenola IGP Pays D'Oc, Syrah/Grenache	
• WHITE Cape Spring, Chenn Blanc	
• ROSE Belles Eaux, Syrah	
NEW PREMIUM WINE / 1875CL	£5,50,7€
• RED Mirambeau Bordeaux, Merlot/Cabernet Sauvignon	
• WHITE Nau Mai, Sauvignon Blanc	
Aperol Spritz / 175CL	£4,50,6€
Bottega Gold Prosecco / 20CL	£6,50,8,50€
NEW Bottega Rose Gold Sparkling / 20CL	£6,50,8,50€
SPIRITS / 50ML	£4,50,6€
• Bacardi Rum	• St-Rémy XO Brandy
• Jack Daniel's Whiskey	• Bombay Sapphire Gin
• Johnnie Walker Black Label Whisky	• Smirnoff Vodka
PREMIUM SPIRITS / 50ML	£6,7,50€
• Hendrick's Gin	NEW • Bacardi Cuatro
NEW • Gray Goose Vodka	

50ml is equivalent to a UK double measure

Ask your cabin crew for the gin and beer of the month runs November 2018-January 2019

SPIRIT & MIXER

Choose a spirit & mixer Upgrade to a premium spirit & mixer

PREMIUM WINE DEAL:

SAVE MORE: GREAT VALUE

1. CHOOSE A PREMIUM WINE

- Mirambeau Bordeaux, Merlot/Cabernet Sauvignon
- Nau Mai, Sauvignon Blanc

2. ADD A SNACK

- Olives, Cheddar Crackers
- Salted Peanuts or Double Salted Caramel Popcorn

£6,50,8€

SOFT DRINKS

Fever-Tree Naturally Light Tonic Water / 100ML	£2,2,50€
Big Tom Spiced Tomato Juice / 100ML	£2,2,50€
Robinsons Apple & Blackcurrant Fruit Shoot / 200ML	£2,2,50€
Harrogate Still Or Sparkling Water / 500ML	£2,2,50€
Coca-Cola / 330ML	£2,2,50€
Diet Coke / 330ML	£2,2,50€
Coke Zero / 330ML	£2,2,50€
Sprite No Sugar / 330ML	£2,2,50€
San Pellegrino Orange / 330ML	£2,2,50€
Tropicana Orange Or Apple Juice / 250ML	£2,50,3€
Shaken Udder Chocolush Milkshake / 330ML	£2,50,3€

- Consequently, the use of the mark cannot be acknowledged inter alia for 'preparations made from cereals, bread, pastry and confectionery', in Class 30.

- 9 On 7 December 2021, the EUTM proprietor filed an appeal against the contested decision, requesting that the decision be partially set aside. As specified in the statement of grounds of the appeal received on 7 February 2022, the contested decision was appealed to the extent that the mark was revoked in respect of the following goods:

Class 30 - Preparations made from cereals, bread, pastry and confectionery.

- 10 No response was filed by the cancellation applicant.

Submissions and arguments of the EUTM proprietor

- 11 The arguments raised in the statement of grounds by the EUTM proprietor may be summarised as follows.

- The Cancellation Division found that the evidence submitted was sufficient to demonstrate use of the mark for some foods such as sandwiches, paninis, melts, wraps and rolls. However, it held that such goods were not covered by the EUTM's registration and so use in relation to them was considered insufficient to save the registration in respect of goods in Classes 29 and 30.
- The EUTM proprietor recently defended an application to revoke its EUTM registration No 1 232 909 under cancellation action No 24 962 C for the same mark as in the present proceedings, namely easyJet. There was considerable overlap between the specification of the goods and services of that registration subject to a cancellation action, and those of the contested registration at stake. Further, the relevant time period for the cancellation action in respect of registration No 1 232 909 was 12 July 2013 to 11 July 2018, which overlaps with the relevant time period between 28 July 2015 to 27 July 2020 in the present proceedings.
- The EUTM proprietor therefore was asked to demonstrate the use of EASYJET in Europe over very similar time periods for many similar goods and services. Almost all of the evidence submitted in the cancellation action No 24 962 C was also submitted in the present proceedings, since the issues were largely the same.
- In the 'Easyjet' decision (30/04/2021, R 301/2020-5), the Board of Appeal upheld the appeal of the EUTM proprietor in part and held that the registration should be maintained for additional goods in Classes 29 and 30, namely: 'prepared meals; snacks and snack foods'.
- Whilst it is a well-founded doctrine and principle that the Boards is not bound by other decisions from the Boards, nevertheless in the present case it is submitted that the earlier decision should provide helpful guidance for the present proceedings as it deals with the same mark, broadly the same relevant time periods, and similar goods and services.

- It is therefore submitted that the contested decision was incorrect insofar as it revoked the registration for ‘preparations made from cereals, bread, pastry and confectionery’ in Class 30 as it was held in the ‘Easyjet’ case (30/04/2021, R 301/2020-5) by the Board of Appeal that the evidence had already demonstrated use of the mark in an overlapping time period for inter alia croissants, muffins, brownies, snacks.
- As use of the contested EUTM was shown for foodstuffs, specifically for sandwiches, wraps, paninis and rolls, there are sufficient grounds that the EUTM registration be maintained for ‘preparations made from cereals, bread, pastry and confectionery’ in Class 30.

Reasons

Admissibility of the appeal

- 12 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

Scope of the appeal

- 13 The EUTM proprietor explicitly limited the appeal to the extent that the application for a declaration of revocation was upheld by the Cancellation Division in respect of the goods ‘preparations made from cereals, bread, pastry and confectionery’ in Class 30. Therefore, the present appeal relates to whether or not the Cancellation Division correctly upheld the application for a declaration of revocation of the contested EUTM in respect of the above goods on the grounds of Article 58(1)(a) EUTMR.
- 14 The contested decision has become final and binding as far as the Cancellation Division upheld the application for revocation of the EUTM registration No 10 584 001 for goods and services listed in paragraph 6 and allowed the EUTM to remain registered for part of the services in Classes 35, 39 and 43 listed in paragraph 7.

Confidential documents

- 15 The EUTM proprietor requested that some documents submitted be kept confidential vis-à-vis the public in accordance with Article 114(4) EUTMR because they contained commercially sensitive information.
- 16 Article 114(4) EUTMR provides that files may contain certain documents which are withheld from inspection, in particular if the party concerned showed a special interest in keeping them confidential.
- 17 In the event that a special interest in keeping a document confidential is invoked in accordance with Article 114(4) EUTMR, the Office must check whether a

special interest is sufficiently shown. Such a special interest must exist because of the confidential nature of the document or its status as a trade or business secret.

- 18 In the present case, the Cancellation Division found the EUTM proprietor's request to be reasoned and described the evidence only in the most general terms without divulging any commercially sensitive information. As neither of the parties has discussed that approach, the Board adopts the same. To the extent necessary for the present decision, the Board will indicate any commercial information that is needed only in general terms.

Article 58(1)(a) EUTMR – revocation because of non-use

- 19 According to Article 58(1)(a) EUTMR, the rights of the proprietor of the European Union trade mark will be revoked on application to the Office, if, within a continuous period of five years, the trade mark has not been put to genuine use in the European Union for the goods or services for which it is registered, and there are no proper reasons for non-use.
- 20 According to Article 19(1) EUTMDR in conjunction with Article 10(3) EUTMDR, the indications and evidence of use must establish the place, time, extent and nature of use of the contested trade mark for the goods and / or services for which it is registered.
- 21 There is genuine use of a trade mark where the mark is used in accordance with its essential function as a trade mark, which is to guarantee the identity of the origin of goods or services for which it is registered, in order to create or preserve an outlet for those goods and services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark (11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 43). Moreover, the condition relating to genuine use of the trade mark requires that the mark, as protected on the relevant territory, be used publicly and outwardly (11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 37; 30/04/2008, T-131/06, Sonia Sonia Rykiel, EU:T:2008:135, § 38; 18/01/2011, T-382/08, Vogue, EU:T:2011:9, § 27).
- 22 Genuine use of a trade mark in the sense of Article 58(1)(a) EUTMR in conjunction with Article 18 EUTMR must be understood to denote real use that is not merely token, serving solely to preserve the rights conferred by the mark (fictitious use). Genuine use of the mark entails use of the mark on the relevant market and not just internal use by the undertaking concerned (27/09/2007, T-418/03, La Mer, EU:T:2007:299, § 54; 11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 36-37).
- 23 Genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (12/12/2002, T-39/01, Hiwatt, EU:T:2002:316, § 47).
- 24 Finally, an overall assessment of all pieces of evidence must be made, taking account of all the relevant factors in the particular case, which entails a degree of interdependence between the factors presented (18/01/2011, T-382/08, Vogue,

EU:T:2011:9, § 30; 05/03/2019, T-263/18, MEBLO (fig.), EU:T:2019:134, § 38). Article 10(3) EUTMDR does not state that each piece of evidence must necessarily give information about all four elements to which proof of genuine use must relate, namely the place, time, extent and nature of use. An accumulation of evidence may allow the necessary facts to be established, even though each of those pieces of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (17/04/2008, C-108/07 P, Ferro, EU:C:2008:234, § 36; 16/11/2011, T-308/06, Buffalo Milke, EU:T:2011:675, § 61; 05/03/2019, T-263/18, MEBLO (fig.), EU:T:2019:134, § 84).

- 25 In the present case, it is not disputed by the parties that the request for revocation is admissible, given that the contested EUTM had been registered for more than five years at the date of filing the request. The contested EUTM was registered on 9 January 2015 and the request for revocation was filed on 28 July 2020. The relevant period for assessing use of the contested EUTM is therefore between 28 July 2015 and 27 July 2020 inclusive.
- 26 Having regard to the scope of appeal, as determined in paragraph 13, the EUTM proprietor had to provide evidence of genuine use of the contested EUTM in respect of ‘preparations made from cereals, bread, pastry and confectionery’ in Class 30.

Preliminary remarks regarding the effect of Brexit

- 27 The opponent has submitted evidence relating to the United Kingdom and dated before 1 January 2021 with a view to demonstrating genuine use of the contested mark.
- 28 In accordance with the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01) concluded between the European Union and the United Kingdom (‘the Withdrawal Agreement’), the latter left the European Union on 1 February 2020. Nonetheless, it is stipulated in the Withdrawal Agreement that during a transition period that lasted until 31 December 2020, EU law remained applicable to and in the United Kingdom (Articles 126 and 127 of the Withdrawal Agreement). This extended to the EUTM Regulations and their implementing instruments.
- 29 Reference is made to Communication No 2/20 of 10 September 2020 of the Executive Director of the Office on the impact of the United Kingdom’s withdrawal from the European Union on certain aspects of the practice of the Office (‘ED Communication No 2/20’), which was adopted with a view to dealing with the specific circumstances of the end of the transition period, that is to say, on the terms and conditions laid down in the Withdrawal Agreement.
- 30 That communication reflects general instructions and informs users and stakeholders about the way in which the Office intends to handle the specific circumstance that the EUTM (and RCD) Regulations will – save explicit exceptions provided for in the Withdrawal Agreement – cease to apply to the United Kingdom as from the end of the transition period (see Article 1 of ED

Communication No 2/20). Although, pursuant to Article 166(7) EUTMR, members of the Boards of Appeal shall be independent and are, in their decisions, not bound by any instructions, the said Communication sets out an interpretation of the law which, in the Board's opinion is both fair and reasonable.

- 31 With respect to the proof of use of earlier EUTMs, Article 14 stipulates the following:

‘As regards the proof of use of earlier EUTMs, evidence relating to the UK and to a period of time prior to 1 January 2021 will be relevant to maintain the rights in the EUTM and will be taken into account. The significance of that use for the overall assessment of genuine use in the EU will progressively decrease – from potentially sufficient to entirely irrelevant – depending upon the extent to which it covers the period for which use has to be established in the case at hand. The same applies to actions for the revocation of an EUTM for non-use’.

- 32 It follows from the above that use in the United Kingdom prior to the end of the transition period constituted use ‘in the EU’.
- 33 Therefore, the evidence submitted by the EUTM proprietor aimed at showing genuine use of the earlier mark relating to the United Kingdom and to a period prior to 1 January 2021 is relevant with a view to maintaining rights in the EU and will be taken into account.

General comments on the assessment of the evidence


- 34 As proof of use, the EUTM proprietor adduced, inter alia, a witness statement drawn up by its Director (Exhibit 19) together with annexes (Exhibits AM1 – AM5), as described above.
- 35 It is necessary to recall in this regard that Article 10 EUTMDR, relating to the supporting documents and items which may be provided for the purpose of proving use of a mark, refers to, inter alia, statements in writing sworn or affirmed as referred to in Article 97(1)(f) EUTMR. Moreover, according to case-law, sworn statements which have evidential value under national legislation constitute, in principle, evidence which is admissible in proceedings before the Office (07/06/2005, T-303/03, *Salvita*, EU:T:2005:200, § 40-41).
- 36 Nevertheless, in order to assess the evidential value of sworn statements, it is necessary, as is the case for every document, first of all, to verify the credibility and veracity of the information which they contain. In that regard, account must be taken of, inter alia, the person from whom the document originates, the circumstances in which it came into being, the person to whom it is addressed, and whether, on its face, the document appears sound and reliable (07/06/2005, T-303/03, *Salvita*, EU:T:2005:200, § 42).
- 37 It is clear from case-law that affidavits by a person with close links to the party concerned are of lesser probative value than those of third parties and cannot on their own constitute sufficient evidence (11/12/2014, T-196/13, *la nana*, EU:T:2014:674, § 32 and the case-law cited).

- 38 Since the witness statement submitted before the Cancellation Division originates from the EUTM proprietor's Director, it is of low probative value and should be supported by independent evidence. It must be taken into account within the context of an overall assessment of the evidence produced in the documents in the case.

Place and time of use

- 39 With regard to the place and time of use, the vast majority of the evidence filed falls within the relevant five-year period starting on 28 July 2015 and ending on 27 July 2020 and shows use of the mark in the European Union. In particular, the place and time of use is proven by the company results from 2015 to 2020 (Exhibit 1), numerous awards (Exhibit 3), publications by third parties showing that easyJet was the fifth largest airline in Europe in 2017 (Exhibit 4) with 68 million passengers transported in 2017 (Exhibit 5), as well as easyJet route maps in 2018 (Exhibit 6), press releases, annual reports, shareholder presentations, and examples of the easyJet Bistro magazine with food and beverages available during the flight (Exhibits 7 and 26).
- 40 The Board also notes that the evidence originating from the EUTM proprietor in combination with the independent evidence from third parties support the witness statement drawn up by the EUTM proprietor's director (Exhibit 19) together with materials submitted in the annexes (Exhibits AM1 – AM5).
- 41 There is no doubt that the place and time of use of the contested EUTM has been duly demonstrated.

Nature of use

- 42 Word marks are considered to be used as registered insofar as the graphic additions do not alter the general impression that they produce (27/06/2019, T-268/18, Luciano Sandrone / DON LUCIANO, EU:T:2019:452, § 42). In the present case, nearly all the evidence shows use of the contested mark as follows:
- . This constitutes use in a variation that in no way alters the distinctive mark as registered (word mark 'EASYJET'). The differences concern only non-distinctive elements, namely the depiction in two colours and the typeface. Therefore, the variations of use as attested by the evidence are covered by the registered form, according to Article 18(1)(a) EUTMR.
- 43 Consequently, the Cancellation Division rightly held that the contested sign has been used as registered.

Use in relation to 'preparations made from cereals, bread, pastry and confectionery' in Class 30

- 44 The EUTM proprietor argues that the Cancellation Division erred in finding that, although the evidence demonstrated use of the contested EUTM in respect of some foodstuffs as sandwiches, paninis, melts, wraps and rolls, such use could

not be regarded as use in respect of the registered goods ‘preparations made from cereals, bread, pastry and confectionery’ in Class 30 considering that the latter did not encompass the former.

- 45 The EUTM proprietor refers in this regard to the ‘Easyjet’ decision of the Board of Appeal (30/04/2021, R 301/2020-5) where, on the basis of virtually the same evidence, the Board found that the use of the ‘EASYJET’ trade mark for sandwiches, croissants, muffins, brownies, stone baked bacon rolls, sweet chilli chicken wraps, hot toasts, hot margherita mini calzones and different snacks was found sufficient to maintain the EUTM registration for ‘prepared meals; snacks and snack foods’ in Classes 29 and 30.
- 46 The Board notes that the facts, arguments and evidence that led the Board of Appeal to adopt the ‘Easyjet’ decision (30/04/2021, R 301/2020-5) are indeed similar to those in the present case. However, it should also be observed that in the present case the relevant proof of use period is different and, in addition, the relevant goods ‘preparations made from cereals, bread, pastry and confectionery’ in Class 30 are not the same as in the other ‘Easyjet’ decision (30/04/2021, R 301/2020-5) where genuine use of the contested EUTM was assessed and found sufficient in respect of ‘prepared meals; snacks and snack foods’ in Classes 29 and 30.
- 47 The Board finds that in the present case the evidence adduced as Exhibits 4, 7, 8, 22, 26 and AM2 indeed provides sufficient indications with regard to the use of the contested mark in connection with various baked foodstuffs, namely sandwiches, baguettes, focaccia, margherita mini calzones, toasts, houmous and falafel wraps, hot chilli chicken wraps, stone baked bacon rolls, croissants, and muffins.
- 48 That evidence supports the explanations provided in the witness statement (Exhibit 19) that easyJet offers onboard, also on the basis of pre-orders made by travellers, a variety of foods including sandwiches and croissants. As explained in the witness statement and illustrated in accompanying Exhibits AM2 to AM4, the purchase of those food products by consumers is optional and they must pay for what they select via the easyJet Bistro magazine or by making a pre-order. Some of the food items originate from third parties, bearing their trade marks, but some come from easyJet. In respect of the latter, the only branding the customer sees in relation to those food products is the easyJet brand on the easyJet Bistro magazine and on the cabin crew uniform. Therefore, the customer perceives those foods as originating from easyJet. In its advertising and press release statements concerning bistro services and easyJet food offerings, easyJet takes care in distinguishing between third-party branded items and the easyJet branded items (30/04/2021, R 301/2020-5, Easyjet § 45-47).
- 49 The Board finds that, although the evidence does not show the trade mark ‘EASYJET’ on the packaging of food products listed above in paragraph 46, it can be acknowledged that in the eyes of consumers the commercial origin of those products is associated with ‘EASYJET’ (30/04/2021, R 301/2020-5, Easyjet § 52).

- 50 The Board finds that there are also sufficient indications as regards the extent of use of the trade mark ‘EASYJET’ in respect of those baked products. Even if the EUTM proprietor did not provide any independent evidence on sale figures, the combination of the documents submitted shows that the sale of the food products under the contested mark ‘EASYJET’ has been fairly significant and does not constitute only token use. The EUTM proprietor’s information regarding sales of prepared food and snacks, contained in the witness statement and the spreadsheet showing the breakdown (Exhibit AM1), are duly supported by other evidence. For instance, the article from www.flight-delayed.co.uk indicates that easyJet ‘in a year, [...] sells just under 2 million bacon baguettes on board their flights’ (Exhibit 4) (30/04/2021, R 301/2020-5, Easyjet § 48-50).
- 51 Having regard to the above, it has to be assessed whether use of the mark ‘EASYJET’ in respect of sandwiches, baguettes, focaccia, margherita mini calzones, toasts, houmous and falafel wraps, hot chilli chicken wraps, stone baked bacon rolls, croissants, muffins, can be regarded as use of the contested mark for ‘preparations made from cereals, bread, pastry and confectionery’ in Class 30, as claimed by the EUTM proprietor.
- 52 The contested decision in this regard found that, although the evidence on the whole proves that some items of food such as sandwiches, paninis, melts, wraps and rolls were sold under the ‘EASYJET’ mark, these were not covered by the contested EUTM registration given that they did not fall within any of the categories of goods for which it was registered.
- 53 The Board observes that in accordance with case-law, the list of goods and services in respect of which a trade mark is registered and with regard to which proof of genuine use has been requested must, for the purpose of ascertaining the extent of the protection of that mark and settling the issue of its genuine use, be interpreted in the most coherent manner, in light of its literal meaning and its grammatical construction, but also, if there is a risk of an absurd result, of its context and the actual intention of the mark’s proprietor as regards its scope (17/10/2019, T-279/18, AXICORP ALLIANCE / ALLIANCE et al., EU:T:2019:752, § 50; 01/09/2021, T-697/20, Donas dulcesol / Dulcesol, EU:T:2021:526, § 28).
- 54 To that end, it should be borne in mind that the scope of protection of an EU trade mark is always defined by the natural and usual meaning of the terms chosen (01/09/2021, T-697/20, Donas dulcesol / Dulcesol, EU:T:2021:526, § 29).
- 55 Furthermore, while it is true that the Nice Classification is purely administrative, reference should, however, be made to it in order to determine, where necessary, the range or the meaning of the goods and services in respect of which a mark has been registered (10/09/2014, T-199/13, Star, EU:T:2014:761, § 35).
- 56 Having regard to the literal meaning of the terms ‘bread’ (‘food made of flour, water, and yeast or another leavening agent, mixed together and baked’, (<https://www.lexico.com/definition/bread>) and ‘pastry’ (‘an item of food consisting of sweet pastry with a cream, jam, or fruit filling’, <https://www.lexico.com/definition/pastry>) for which the contested mark is inter

alia registered, the Board finds that these rather broad categories of goods encompass those baked products for which use of the contested mark 'EASYJET' has been demonstrated. Indeed, being also general indications of the heading of Class 30 of the Nice Classification in its tenth edition, dating from 2012, which was in force at the date of the application for registration of the contested EUTM, the terms 'bread, pastry' can be regarded as including various bread-based items of food such as sandwiches, baguettes, toasts, paninis, croissants, muffins.

- 57 Moreover, although the categories 'bread, pastry' for which the contested EUTM is registered are not strictly identical to those in respect of which the EUTM proprietor has succeeded in proving genuine use, they are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. In practice, it is impossible for the trade mark proprietor to bear the burden of proving genuine use for all conceivable variations of the goods concerned by the registration (14/07/2005, T-126/03, Aladin, EU:T:2005:288, § 46; 13/10/2021, T-12/20, Frutaria. (fig.), EU:T:2021:702, § 78-86). Therefore, the Board considers that those baked food items for which use of the contested EUTM has been demonstrated cannot be distinguished from the rest of the categories 'bread, pastry' other than in an arbitrary manner.
- 58 Consequently, contrary to the Cancellation Division's findings, and having also regard to those of the Board of Appeal in the 'Easyjet' decision (30/04/2021, R 301/2020-5), it is concluded that genuine use of the contested EUTM is established for the categories 'bread, pastry'.
- 59 The contested decision is endorsed to the extent it revoked the contested EUTM in respect of 'preparations made from cereals, confectionery'. As regards the term 'preparations made from cereals', according to its natural and usual meaning, and also in the context of the Explanatory notes of Class 30 in the Nice Classification, it should be regarded as encompassing cereals prepared for human consumption, for example, oat flakes, corn chips, husked barley, bulgur, muesli etc. The term 'confectionery' designates 'sweets and chocolates considered collectively' (<https://www.lexico.com/definition/confectionery>). There is no evidence that the contested EUTM has been used in respect of any food item that would fall under the categories 'preparations made from cereals, confectionery'.

Conclusion

- 60 The evidence adduced by the EUTM proprietor shows genuine use of the contested mark for 'bread, pastry' in Class 30.
- 61 However, the evidence does not show use of the contested mark in respect of 'preparations made from cereals, confectionery' in Class 30 or any possible sub-category of these goods.

Costs

- 62 Pursuant to Article 109(3) EUTMR, where each party succeeds on some and fails on other heads, the Boards of Appeal shall decide a different apportionment of costs. As the appeal is successful in part, it is appropriate to order that each party bears its own costs in the appeal proceedings.
- 63 As to the costs of the cancellation proceedings, it is appropriate that, for the same reasons, each party bears its own costs in these proceedings as well.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision to the extent that the EUTM was revoked for the following goods:**

Class 30 – Bread, pastry.

- 2. Rejects the application for revocation for the above goods;**
- 3. Dismisses the appeal in the remainder;**
- 4. Orders the parties to bear their own costs in the revocation and appeal proceedings.**

Signed

S. Stürmann

Signed

H. Salmi

Signed

S. Martin

Registrar:

Signed

p.o. N. Granado Carpenter

