

OPPOSITION No B 3 155 717

Impossible Foods Inc., 400 Saginaw Drive, CA 94063 Redwood City, United States (opponent), represented by **De Brauw Blackstone Westbroek**, Claude Debussylaan 80, 1082 MD Amsterdam, Netherlands (professional representative)

a g a i n s t

S. Malhotra & Co. AG, Haldenstrasse 5, 6340 Baar, Switzerland (applicant), represented by **Sonia Del Valle Valiente**, c/ Miguel Angel Cantero Oliva, 5, 53, 28660 Boadilla Del Monte (Madrid), Spain (professional representative).

On 18/02/2023, the Opposition Division takes the following

DECISION:

1. Opposition No B 3 155 717 is upheld for all the contested goods and services.
2. European Union trade mark application No 18 479 700 is rejected in its entirety.
3. The applicant bears the costs, fixed at EUR 620.

REASONS

On 30/09/2021, the opponent filed an opposition against all the goods and services of European Union trade mark application No 18 479 700 'NOTHING IS IMPOSSIBLE' (word mark), namely against all the goods and services in Classes 29, 30, 35 and 43. The opposition is based, on inter alia, European Union trade mark registration No 17 924 675 'IMPOSSIBLE' (word mark). The opponent invoked Article 8(1)(b) EUTMR and Article 8(5) EUTMR.

LIKELIHOOD OF CONFUSION — ARTICLE 8(1)(b) EUTMR

A likelihood of confusion exists if there is a risk that the public might believe that the goods or services in question, under the assumption that they bear the marks in question, come from the same undertaking or, as the case may be, from economically linked undertakings. Whether a likelihood of confusion exists depends on the appreciation in a global assessment of several factors, which are interdependent. These factors include the similarity of the signs, the similarity of the goods and services, the distinctiveness of the earlier mark, the distinctive and dominant elements of the conflicting signs, and the relevant public.

The opposition is based on more than one earlier trade mark. The Opposition Division finds it appropriate to first examine the opposition in relation to the opponent's European Union trade mark registration No 17 924 675.

a) The goods and services

The goods and services on which the opposition is based are, inter alia, the following:

Class 29: *Bean-based prepared meals; bean-based snacks.*

Class 30: *Baking-powder; bread; bread-based snacks; cereal-based snacks; chewing gum; chocolate substitutes; chocolate; chocolate-based beverages; chocolate-based products; cocoa; cocoa-based beverages; cocoa substitutes; coffee; coffee-based beverages; coffee substitute; confectionery; corn-based prepared meals; corn-based snacks; crackers; dough; flour; frozen confectionery; non-dairy frozen confections; frozen yogurt [confectionary ices]; honey; ice; ice cream; ice cream substitutes; non-dairy ice cream substitutes; mayonnaise; mayonnaise substitutes; dairy substitutes, namely egg and dairy free mayonnaise; meat pies; mustard; noodles; noodle-based prepared meals; pancakes; pasta; pasta-based prepared meals; pasta-based snacks; pasta sauces; pastries; pizzas; popcorn; preparations made from cereals; puddings; non-dairy dessert pudding; quiches; rice; rice-based prepared meals; rice-based snacks; sago; salad sauces; salt; sandwiches; sauces [condiments]; non-dairy cheese sauce; spices; spring rolls; sugar; sugar substitutes; sushi; tacos; tapioca; tea; tea-based beverages; tea substitutes; tortillas; treacle; vinegar; waffles; yeast.*

Class 43: *Services for providing food and drink; providing food and drink via a mobile truck; bar, self-service restaurant and take-out restaurant services; restaurant services; café services, cafeterias, snack bar services, and the provision of food and beverages in restaurants and cafés; making reservations and bookings for meals and beverages; catering services; catering services for meals and beverages; providing banquet and social function facilities for special occasions; rental of crockery, cutlery, table linen, glassware, cooking apparatus and cooking utensils, tables, chairs, table decorations and tents; arranging meals; information and consultancy regarding the aforementioned services.*

The contested goods and services are the following:

Class 29: *Burgers; Formed textured vegetable protein for use as a meat substitute; Meat substitutes; Poultry substitutes; Prepared meals consisting primarily of meat substitutes; Vegetable-based meat substitutes; Dairy products and dairy substitutes; Egg substitutes.*

Class 30: *Chocolate; Chocolate-based beverages; Chocolate based products; Chocolate desserts; Coffee, teas and cocoa and substitutes therefor; Dairy-free chocolate; Ice, ice creams, frozen yogurts and sorbets; Ice cream substitute; Non-dairy ice cream; Sweets (candy), candy bars and chewing gum.*

Class 35: *Retail services in relation to foodstuffs; Retail services in relation to ice creams; Retail services in relation to chocolate; Retail services in relation to confectionery; Retail services in relation to desserts; Retail services in relation to dairy products; Retail services relating to food; Retail services via catalogues related to foodstuffs; Retail services via global computer networks related to foodstuffs.*

Class 43: *Catering services; Catering services for the provision of food and drink; Cookery advice; Fast-food restaurant services; Food and drink catering; Food preparation; Food preparation services; Information, advice and reservation services for the provision of food and drink; Preparation of meals; Providing food and beverages; Providing food and drink in restaurants and bars; Provision of food and drink in restaurants; Provision of food and drink; Provision of information relating to the preparation of food and drink; Restaurant services for the provision of fast food; Restaurant services; Serving food and drink for guests in restaurants; Serving food and drinks; Take-away fast food services; Take-out restaurant services.*

An interpretation of the wording of the list of goods and services is required to determine the scope of protection of these goods and services.

The term 'namely', used in the opponent's list of goods and services to show the relationship of individual goods and services to a broader category, is exclusive and restricts the scope of protection only to the goods and services specifically listed.

As a preliminary remark, it is to be noted that according to Article 33(7) EUTMR, goods or services are not regarded as being similar to or dissimilar from each other on the ground that they appear in the same or different classes under the Nice Classification.

The relevant factors relating to the comparison of the goods or services include, inter alia, the nature and purpose of the goods or services, the distribution channels, the sales outlets, the producers, the method of use and whether they are in competition or complementary.

Contested goods in class 29

The contested *dairy products and dairy substitutes* are similar to a high degree to the opponent's *ice cream* as they have the same purpose and nature. They usually coincide in producer, relevant public and distribution channels. Furthermore, they are in competition.

The contested *egg substitutes* are similar to the opponent's *bean-based prepared meals* as they may be made of beans and legume-based products. They coincide in distribution channels, producer and target the same public.

The contested *burgers; formed textured vegetable protein for use as a meat substitute; meat substitutes; poultry substitutes; prepared meals consisting primarily of meat substitutes; vegetable-based meat substitutes* are at least similar to the opponent's *bean-based prepared meals* because they have the same nature. They usually coincide in distribution channels, producer and target the same public. Moreover, they are in competition.

Contested goods in class 30

The contested *sweets (candy), candy bars and chewing gum* are included in the opponent's broad category of *confectionery*. Therefore, they are identical.

Frozen yogurts; Cocoa; Chocolate; chocolate-based beverages; chocolate based products; ice cream substitute; ice; ice creams are identically contained in both lists of goods (including synonyms).

The contested *non-dairy ice cream* includes, or overlaps with, the opponent's *non-dairy ice cream substitutes*. Since the Office cannot dissect ex officio the broad category of the contested goods, they are considered identical to the earlier goods.

The contested *chocolate desserts; dairy-free chocolate* are included in the opponent's broad category of *chocolate-based products*. Therefore, they are identical.

The contested *sorbets* is highly similar to the opponent's *frozen yogurt [confectionary ices]* as they have the same purpose. They usually coincide in producer, relevant public and distribution channels. Furthermore, they are in competition.

The contested *cocoa substitutes* are highly similar to the opponent's *cocoa* as they can coincide in producer, relevant public, distribution channels and method of use. Furthermore, they are in competition.

The contested *coffee, teas and substitutes therefor* are similar to the opponent's *cocoa* as they usually coincide in relevant public, distribution channels and method of use. Furthermore, they are in competition.

Contested services in class 35

Retail services concerning the sale of specific goods are similar to an average degree to these specific goods. Although the nature, purpose and method of use of these goods and services are not the same, they are similar because they are complementary and the services are generally offered in the same places where the goods are offered for sale. Furthermore, they target the same public.

Therefore, the contested *retail services in relation to chocolate* are similar to the opponent's *chocolate*; the contested *retail services in relation to ice creams* are similar to the opponent's *ice cream*; the contested *retail services in relation to desserts* are similar to the opponent's *non-dairy dessert pudding*; the contested *retail services in relation to confectionery* are similar to the opponent's *confectionery*. Lastly, the contested *retail services in relation to foodstuffs; retail services relating to food; retail services via catalogues related to foodstuffs; retail services via global computer networks related to foodstuffs* are similar to the opponent's *bread*.

There is a low degree of similarity between the retail services concerning specific goods and other goods which are either highly similar or similar to those specific ones. This is because of the close connection between them on the market from consumers' perspective. Consumers are used to a variety of highly similar or similar goods being brought together and offered for sale in the same specialised shops or in the same sections of department stores or supermarkets. Furthermore, they are of interest to the same consumers. Therefore, the contested *retail services in relation to dairy products* are similar to a low degree to the opponent's *ice creams*.

Contested services in class 43

Restaurant services; catering services are identically contained in both lists of services (including synonyms).

The contested *providing food and beverages; provision of food and drink; take-away fast food services; take-out restaurant services; preparation of meals; fast-food restaurant services; food preparation services; catering services for the provision of food and drink; serving food and drink for guests in restaurants; restaurant services for the provision of fast food; food and drink catering; serving food and drinks; food preparation; providing food and drink in restaurants and bars; provision of food and drink in restaurants* are included in, or overlap with the opponent's broad category of *services for providing food and drink*. Therefore, they are identical.

The contested *reservation services for the provision of food and drink* is included in, or overlaps with, the opponent's *making reservations and bookings for meals and beverages*. Therefore, they are identical.

The contested *cookery advice; provision of information relating to the preparation of food and drink; information, advice services for the provision of food and drink* are included in the

opponent's *information and consultancy regarding the aforementioned services (services for providing food and drink)*. Therefore, they are identical.

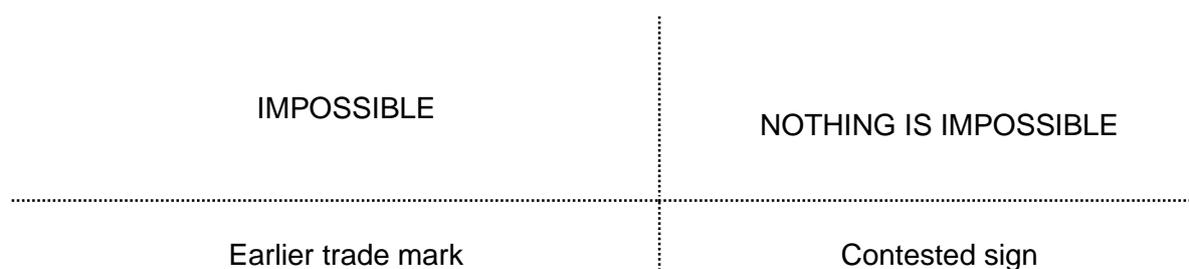
b) Relevant public — degree of attention

The average consumer of the category of products concerned is deemed to be reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's degree of attention is likely to vary according to the category of goods or services in question.

In the present case, the goods and services found to be identical or similar target the public at large (e.g. *chocolate*) but also the professional public (e.g., *advice consultancy in the field of restaurants*).

The degree of attention may vary from average (for goods and services in Classes 29, 30 and 35) to higher than average (e.g. *advice consultancy in the field of restaurants* in Class 43), which will mainly be of interest to the attentive professional in the trade (23/11/2018, R 1931/2017-1, § 24).

c) The signs



The relevant territory is the European Union.

The global appreciation of the visual, aural or conceptual similarity of the marks in question must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23).

The unitary character of the European Union trade mark means that an earlier European Union trade mark can be relied on in opposition proceedings against any application for registration of a European Union trade mark that would adversely affect the protection of the first mark, even if only in relation to the perception of consumers in part of the European Union (18/09/2008, C-514/06 P, Armafoam, EU:C:2008:511, § 57). Therefore, a likelihood of confusion for only part of the relevant public of the European Union is sufficient to reject the contested application.

The earlier mark's verbal element 'Impossible' would be understood by the English-speaking public as, inter alia, 'not able to be done or to happen' (information extracted from the *Collins* English dictionary on 10/02/2023 at <https://www.collinsdictionary.com/dictionary/english-thesaurus/impossible>) which as a whole does not convey any information nor describe any characteristic of the relevant goods and services and as such is distinctive.

The contested sign's verbal elements 'Nothing is impossible' convey a meaningful expression in English which will be understood by the English-speaking public as having the opposite meaning of 'impossible', in the sense that all is possible or feasible.

However, the English words 'Nothing is' of the contested sign will not be associated with any particular meaning by at least a substantial part of the French and Spanish public who is not familiar with English, whereas the word 'Impossible' would be understood in both territories either because it is identical (for instance, in French) or due to its proximity to its equivalent official word (for example in Spanish 'imposible'). Indeed, with the exception of certain terms forming part of basic English vocabulary, it cannot be assumed that English terms are widely known in the European Union (29/04/2020, T-109/19, TasteSense (fig.) / Multisense et al., EU:T:2020:162, § 65).

As the English-speaking part of the relevant public may associate opposite meanings in the signs which would render them as conceptually not similar, the Opposition Division considers it appropriate to focus the comparison of the signs on the part of the public who will not associate any meaning with the English words 'Nothing is' of the contested sign and only understand the meaning of 'IMPOSSIBLE' being therefore more prone to confusion, as is the case for the part of the French- and Spanish-speaking public who is not familiar with English, as explained above.

The considerations as regards the perception and the distinctiveness of the element 'IMPOSSIBLE' in the earlier mark on part of the relevant public apply equally for the contested sign. The elements 'Nothing is' of the contested sign have no meaning for the relevant part of the public and are consequently distinctive.

Visually and **aurally**, the earlier trade mark is completely included in the contested sign. The signs differ in the verbal elements 'Nothing is' of the contested mark and their sound depicted at the beginning of the contested sign, which as explained above is meaningless for the part of the relevant public and distinctive.

Therefore, the signs are visually and aurally similar to an average degree.

Conceptually, reference is made to the previous assertions concerning the semantic content conveyed by the marks. The signs will be associated with a similar meaning on account of the common verbal element 'IMPOSSIBLE' as the expression of the contested sign as a whole will not be perceived due to the fact that the words 'nothing is' will be perceived as meaningless. Therefore, the signs are conceptually similar to an at least average degree.

As the signs have been found similar in at least one aspect of the comparison, the examination of likelihood of confusion will proceed.

d) Distinctiveness of the earlier mark

The distinctiveness of the earlier mark is one of the factors to be taken into account in the global assessment of likelihood of confusion.

According to the opponent, the earlier mark has been extensively used and enjoys an enhanced scope of protection. However, for reasons of procedural economy, the evidence filed by the opponent to prove this claim does not have to be assessed in the present case (see below in 'Global assessment').

Consequently, the assessment of the distinctiveness of the earlier mark will rest on its distinctiveness per se. In the present case, the earlier trade mark as a whole has no meaning

for any of the goods in question from the perspective of the public in the relevant territory. Therefore, the distinctiveness of the earlier mark must be seen as normal.

e) Global assessment, other arguments and conclusion

A global assessment of a likelihood of confusion implies some interdependence between the relevant factors, and in particular, similarity between the trade marks and between the goods or services. Accordingly, a greater degree of similarity between the goods may be offset by a lower degree of similarity between the marks, and vice versa (22/06/1999, C 342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 20; 11/11/1997, C 251/95, Sabèl, EU:C:1997:528, § 24; 29/09/1998, C 39/97, Canon, EU:C:1998:442, § 17).

The earlier mark has a normal degree of distinctiveness. The goods are partly identical and partly similar to varying degrees and target the general and professional public whose degree of attention is average to higher than average.

Account is taken of the fact that average consumers rarely have the chance to make a direct comparison between different marks but must trust in their imperfect recollection of them (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26).

The signs are visually and aurally similar to an average degree and conceptually similar to an at least average degree. The earlier mark is fully reproduced in the contested sign as a distinctive element. Bearing in mind the consumer's imperfect recollection and the interdependence principle, consumers are likely to notice the distinctive element 'IMPOSSIBLE' and associate the marks based on their common distinctive element. Therefore, the differences between the signs are not sufficient to outweigh their similarities.

Evaluating likelihood of confusion implies some interdependence between the relevant factors and, in particular, a similarity between the marks and between the goods or services. Therefore, a lesser degree of similarity between goods and services may be offset by a greater degree of similarity between the marks and vice versa (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17). The Opposition Division has taken this principle into account when assessing the likelihood of confusion and the fact that some of the services are similar to a low degree cannot offset the visual and aural similarities identified between the signs.

Considering all the above, there is a likelihood of confusion on a substantial part of the French- and Spanish-speaking part of the public. As stated above in section c) of this decision, a likelihood of confusion for only part of the relevant public of the European Union is sufficient to reject the contested application.

As the earlier right No 17 924 675 leads to the success of the opposition and to the rejection of the contested trade mark for all the goods and services against which the opposition was directed, there is no need to examine the other earlier rights invoked by the opponent (16/09/2004, T-342/02, Moser Grupo Media, S.L., EU:T:2004:268).

Since the opposition is fully successful on the basis of the ground of Article 8(1)(b) EUTMR, there is no need to further examine the other grounds of the opposition, namely Article 8(5) EUTMR.

COSTS

According to Article 109(1) EUTMR, the losing party in opposition proceedings must bear the fees and costs incurred by the other party.

Since the applicant is the losing party, it must bear the opposition fee as well as the costs incurred by the opponent in the course of these proceedings.

According to Article 109(1) and (7) EUTMR and Article 18(1)(c)(i) EUTMIR, the costs to be paid to the opponent are the opposition fee and the costs of representation, which are to be fixed on the basis of the maximum rate set therein.



The Opposition Division

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According to Article 67 EUTMR, any party adversely affected by this decision has a right to appeal against this decision. According to Article 68 EUTMR, notice of appeal must be filed in writing at the Office within two months of the date of notification of this decision. It must be filed in the language of the proceedings in which the decision subject to appeal was taken. Furthermore, a written statement of the grounds for appeal must be filed within four months of the same date. The notice of appeal will be deemed to have been filed only when the appeal fee of EUR 720 has been paid.