

**DECISION
of the Second Board of Appeal
of 10 March 2023**

In case R 1422/2022-2

Barry's Bootcamp Holdings, LLC

2214 NW 1st Place
Miami, Florida 33127
United States

Cancellation Applicant/ Appellant

represented by NOERR ALICANTE IP, S.L., Avenida México 20, 03008 Alicante, Spain

v

HUMMEL HOLDING A/S

Balticagade 20
8000 Aarhus C
Denmark

IR Holder / Defendant

represented by PATRADE A/S, Ceresbyen 75, 6, 8000 Aarhus C, Denmark

APPEAL relating to Cancellation Proceedings No 35 022 C (against International Registration No 915 962 designating the European Union)

THE SECOND BOARD OF APPEAL

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

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 On 13 December 2006, HUMMEL HOLDING A/S. ('the IR holder') designated the European Union in its international registration for the figurative mark



('the contested IR') for the following list of 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.

Class 18: Leather and imitations of leather and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery, bags including bags for sports, travelling sets (leatherware) and vanity cases (not fitted), rucksacks and cases (not included in other classes).

Class 25: Clothing, footwear, headgear; sports clothing, footwear and headgear; leisure clothing, footwear and headgear; business clothing, footwear and headgear; fashion clothing, footwear and headgear.

Class 28: Games and playthings; gymnastic and sporting articles not included in other classes; decorations for Christmas trees, balls for sports and games.

Class 35: Advertising; business management; business administration; office functions; the bringing together, for the benefit of others, of a variety of goods (excluding the transport thereof), enabling customers to conveniently view and purchase those goods; retail and online trade of clothing, footwear and headgear, sporting articles, bags and perfumery.

- 2 The contested IR was published on 9 April 2007 and registered on 13 December 2006.
- 3 On 13 May 2019, Barry's Bootcamp Holdings, LLC ('the cancellation applicant') filed a request for an application for a declaration of revocation of the contested IR for all the above goods and services.
- 4 The grounds of the application for a declaration of revocation were those laid down in Articles 58(1)(a) EUTMR, concerning a trade mark not put to genuine use for a continuous five-year period.

- 5 By decision of 1 June 2022 ('the contested decision'), the Cancellation Division partially refused the application for a declaration of revocation allowing the contested IR to remain registered for the following goods:

Class 18: *Bags namely bags for sports.*

Class 25: *Clothing, footwear, headgear namely sports clothing, footwear and headgear, leisure clothing, footwear and headgear and fashion clothing, footwear and headgear; sports clothing, footwear and headgear; leisure clothing, footwear and headgear; fashion clothing, footwear and headgear.*

Class 28: *Balls for sports and games.*

- 6 The contested IR was revoked for the European Union as from 13 May 2019 for the following contested 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.*

Class 18: *Leather and imitations of leather and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery, bags excluding bags for sports, travelling sets (leatherware) and vanity cases (not fitted), rucksacks and cases (not included in other classes).*

Class 25: *Clothing, footwear, headgear, except sports clothing, footwear and headgear, leisure clothing, footwear and headgear and fashion clothing, footwear and headgear; business clothing, footwear and headgear.*

Class 28: *Games and playthings; gymnastic and sporting articles not included in other classes; decorations for Christmas trees.*

Class 35: *Advertising; business management; business administration; office functions; the bringing together, for the benefit of others, of a variety of goods (excluding the transport thereof), enabling customers to conveniently view and purchase those goods; retail and online trade of clothing, footwear and headgear, sporting articles, bags and perfumery.*

- 7 The Cancellation Division gave, in essence, the following grounds for its decision:

- The IR holder had to prove genuine use of the contested IR during the five-year period preceding the date of the application for a declaration of revocation, that is, from 13 May 2014 to 12 May 2019 inclusive.
- The IR holder submitted the following evidence as proof of use:
 - Annex A: market survey, dated 3 November 2016, and carried out by *EPINION* in Denmark. It looks at awareness of chevrons, among which the contested IR is included. The background and methodology are provided.

- Annex B: list of catalogues produced and distributed for Hummel.
- Annex Ca-Cb: Hummel team-wear catalogue.
- Annex Da-Dg: Hummel team sport catalogue 2014-2018.
- Annex E: Hummel fashion footwear catalogue (spring/summer 2015).
- Annex F: Hummel 2015 sales folder.
- Annex G: Hummel Sport Footwear spring/summer 2015.
- Annex H: Hummel exclusives catalogue, 2015.
- Annex I: Hummel training catalogue (spring/summer 2015).
- Annex J: Hummel exclusives catalogue (spring/summer 2016).
- Annex K: prototype catalogue.
- Annex L: 'Lifestyle & Swimwear 2017' catalogue.
- Annex M: Hummel team sport 2017 catalogue.
- Annex N: Hummel team sport 2018-2019 catalogue.
- Annex O: 'Fire knight' campaign advertisement, 2015 (held in Qatar), and alleged feedback.
- Annex P: 'Trophy' campaign advertisements and alleged feedback in relation to this advertising campaign.
- Annexes Q to V: printouts from the Wayback Machine from Hummel's Spanish, Dutch, Croatian, French websites.
- Annex W: overview of the numbers of followers of Hummel's social media accounts.
- Annex X: excerpts from Hummel's Facebook page.
- Annex Y: excerpts from Hummel's Instagram pages.



- Annex Z: excerpts from Hummel's Polish Twitter page.
- Annex Aa: excerpts from Hummel's French Twitter page.
- Annex Bb: excerpts from Hummel's Spanish Twitter page.
- Annex Cc: excerpts from Hummel's UK & Ireland Twitter page.
- Annexes Da-Dg: Hummel catalogue showing the following items:



- Annex Ee: schedule showing visitors on Hummel's international website hummel.net in 2017.
- Annex Ff: printouts from the Wayback Machine copy of Hummel's international website hummel.net in 2017.



- Annex Gg: overview of invoices and featured products.

- Annex Hh: invoices from 2017.
 - Annex Ii: invoices from 2016.
 - Annex Jj: invoices from 2015.
 - Annex Kk: invoices from 2014.
 - Annex Ll: invoices from 2018.
- On 18 June 2020, the IR holder filed the following additional evidence. As the IR holder requested to keep certain commercial data contained in the evidence confidential *vis-à-vis* third parties, it will be described only in the most general terms without divulging any such data:
- Annex Mm: invoices relating to sales of the product CORE COTTON POLO.
 - Annex Nn: invoices relating to sales of the product CORE COTTON TEE.
 - Annex Oo: invoices relating to sales of the product OMNICOURT Z8 TROPHY.
 - Annex Pp: invoices relating to sales of the product HMLLOGAN T-SHIRT.
 - Annex Qq: invoices relating to sales of the product 3-PACK BASIC SOCK.
 - Annex Rr: invoices relating to sales of the product TECH SPORTS BAG.
 - Annex Ss: invoices relating to sales of the product CONCEPT PLUS FB.
 - Annex Tt: invoices relating to sales of the product PREMIER FB.
 - Annex Uu: visual representation of the product HMLLOGAN T-SHIRT.
 - Annex Vv: visual representation of the products CONCEPT PLUS FB, PREMIER FB. and SUPER TRIMM:



- Annex Ww: invoices relating to sales of the product SUPER TRIMM.
- Annex Xx: invoices relating to sales of the product HUMMEL CHEVRON HEADBAND.
- Annex Yy: overview of invoices and featured products.

- Annex Zz: market survey by Epinion (2016).
- Annex Aaa1: legal research, Hilbinger Rechtsforschung, 2020 (translated into English).
- Annex Aaa2: legal research, Hilbinger Rechtsforschung, 2020 (Original).
- Annex Bbb: Opposition Division decision in Hummel Holding A/S vs L'Atelier Sarl (11/07/2017, B 2 925 348).
- Annex Ccc: examples of other brands reproducing repetitions of the trade mark along the sides of clothing.
- Annex Ddd: Hummel's Annual Report for 01/01/2018-31/12/2018.
- Annex Eee: sales figures relating to the countries of Europe for 2015-2016.
- Annex Fff: sales figures for footwear relating to the countries of Europe for 2010-2016.
- Annex Ggg: excerpts from C.A. Osasuna's Instagram page.
- Annex Hhh: excerpts from SC Freiburg's Instagram page.
- Annex Iii: excerpts from Rangers FC's Instagram page.
- Annex Jjj: excerpts from AGF's Instagram page.
- Annex Kkk: invoice for royalties in relation to an agreement with House of Scandinavian Care ApS.
- Annex Lll: excerpts from sales of cosmetics and perfumes.
- Annex Mmm: excerpts from www.beglossy.pl.
- Annex Nnn: overview of IR No 915 962 in its exact registered form.
- Annex Ooo: examples of the use of hangtags and neck-tags on clothing and headgear.





- On 15 January 2021, the IR holder filed the following additional evidence.
 - Annex Ppp: visual representations of the Danish national men’s football team’s kits from 1984-2019. Facts relating to viewers of football matches from 1984-2018.
 - Annex Qqq: YouTube excerpts from the movie ‘Sommeren 92’.
 - Annex Rrr: Brøndby IF kits from 2001-2020.
 - Annex Sss: AGF kits from 1998-2020.
 - Annex Ttt: OB kits from 2016-2018.
 - Annex Uuu: AAB kits from 2014-2020.
 - Annex Vvv: Aalborg Håndbold kits from 2014-2020.
 - Annex Www: excerpts relating to the sponsorship of Mikkel Hansen.
 - Annex Xxx: article from *Alt for Damerne*, 2017.
 - Annex Yyy: article from BT, 2015.
 - Annex Zzz: article from *Børsen*, 2016.
 - Annex Aaaa: article from *Clubnews.dk*, 2012.
 - Annex Bbbb: article by the *Danish American Football Association*, 2019.
 - Annex Cccc: article from *Ringkøbing Skjern Dagbladet*, 2016.
 - Annex Dddd: article by the DBU, 2016.
 - Annex Eeee: article by the DBU, 2016.
 - Annex Ffff: article from *Dansk Fashion & Textile*, 2019.
 - Annex Gggg: article from *Lolland Falsters Folketidende*, 2016.
 - Annex Hhhh: article from *Ikast-Brande Nyt*, 2017.
 - Annex Iiii: article from *Jyllandsposten*, 2016.

- Annex Jjjj: article from *Kvindesport.dk*, 2019.
 - Annex Kkkk: excerpt from *Mit-babyudstyr.dk*.
 - Annex Llll: article from *Ombold.dk*, 2017.
 - Annex Mmmm: article from *Ritzau*, 2012.
 - Annex Nnnn: article from *Sæby Avis*, 2019.
 - Annex Oooo: article from *Sæby Folkeblad*, 2019.
 - Annex Pppp: article from *Tipsbladet*, 2008.
 - Annex Qqqq: article from *Ugeavisen*, 2016.
 - Annex Rrrr: statement from Dansk Fashion & Textile, 2020.
 - Annex Ssss: statement from SPORTMASTER (Sport Denmark A/S), 2020.
 - Annex Tttt: statement from Brøndby IF, 2020.
 - Annex Uuuu: statement from AGF, 2020.
 - Annex Vvvv: statement from Dansk Boldspil Union (DBU), 2020.
 - Annex Wwww: Wikipedia, Instagram pages, Flickr pictures, etc. about Mikkel Hansen
 - Annex Xxx: press article from www.alt.dk.
 - Annex Yyy: press article from www.bt.dk.
 - Annex Zzz: press article from www.borsen.dk.
 - Reference to evidence previously filed and four black chevrons filed in cancellation proceedings No C 39 541.
- The evidence complied with Article 55(2) EUTMDR as an index was sent and completed with each submission.
 - The IR holder submitted evidence relating to the UK with a view to demonstrate use of the contested IR. All the evidence relates to a period prior to 1 January 2021. On 1 February 2020, the UK withdrew from the EU subject to a transition period until 31 December 2020. During this transition period EU law remained applicable in the UK. Therefore, use in the UK prior to the end of the transition period constituted use ‘in the EU’. Consequently, the evidence relating to the UK and to a period prior to 1 January 2021 is relevant and will be taken into account for the assessment of genuine use of the contested IR.

- The IR holder filed evidence of use on 20 September 2019 within the extended first time-limit to file evidence. The IR holder submitted a second batch of evidence on 18 June 2020, while the proceedings were open, and the cancellation applicant commented on them. The IR holder filed a third batch of evidence on 15 January 2021, after which the Cancellation Division closed the proceedings. Nevertheless, it was decided to reopen the proceedings in order to give the cancellation applicant the possibility to comment on the additional evidence. After the fourth round of observations, the adversarial part of proceedings was closed. On 15 February 2022, after the final closure, the IR holder filed a final round of observations which were sent to the cancellation applicant for information only. As the IR holder submitted relevant evidence within the time-limit initially set by the Office, the later evidence is considered to be additional, including the submission, filed on 15 January 2021. The additional evidence is likely to be relevant to the outcome of the proceedings and the stage at which it was submitted does not preclude the evidence from being taken into account. The additional evidence is not only about the extent of use, and it merely strengthens and clarifies the evidence submitted initially, as it does not introduce new elements of evidence but enhances the conclusiveness of the evidence submitted within the time-limit. In the exercise of its discretion pursuant to Article 95(2) EUTMR, the additional evidence submitted on 18 June 2020 and 15 January 2021 is taken into account.
- Further observations and evidence filed on 15 February 2022, after the new closure of the proceedings on 7 December 2021, relates to an EUIPO Cancellation Division decision dated 1 February 2022, in case No C 39 541, which by definition could not have been filed before the final closure of proceedings. The Cancellation Division does not need to decide on the admissibility of this evidence as it can *ex-officio* base a decision on case-law provided it is relevant to the case at hand.
- The cancellation applicant argued that not all the items of evidence indicate genuine use in terms of time, place, extent, nature and use for the goods for which the contested IR is registered. However, the cancellation applicant's argument is based on an individual assessment of each item of evidence regarding all the relevant factors. When assessing genuine use, the evidence in its entirety must be considered. Even if some relevant factors are lacking in some items of evidence, the combination of all the relevant factors in all the items of evidence may still indicate genuine use.
- *Time and place of use:* The evidence provided shows that the contested IR has been exposed to customers in several countries within the European Union. This can be inferred from the languages of the documents, the currencies mentioned and some addresses in Denmark and in other Member States such as Germany and Spain. The evidence relates to the relevant territories. The geographical area shown is sufficient to prove the territorial extent of use of the contested IR within the European Union. Most of the evidence is dated within the relevant period, although some predates or post-dates the relevant period or is not dated. The evidence of use contains sufficient indications concerning the time and place of use.
- *Nature of use as a trade mark:* When examining all the pieces of evidence in conjunction with each other, it cannot be denied that, although not always affixed to the goods, the contested IR, in its figurative form and as registered, appears throughout the evidence. The contested IR has clearly been used as a trade mark in


relation to certain goods identifying their commercial origin. It is used as a trade mark. Consumers can distinguish the goods from those of different providers.

- *Nature of use as registered:* The contested IR, consists of a double-chevron device in black on a white background, with the chevrons pointing downward (vertical chevrons). They are characterised by 90-degree angles, identical space between the two chevrons, and flat vertical sides. Most of the evidence displays two chevrons with the same proportions and the chevrons pointing downwards. The fact that the IR holder owns several registrations that are variants of the contested IR does not alter the principle according to which Article 15(1) EUTMR expressly allows a mark to be used in a form which differs from the registered form provided its distinctive character is not altered and even where the form actually used is also registered as a trade mark. The cancellation applicant considered that the contested IR has only a minimal degree of distinctiveness. The contested IR is more complex than marks characterised as ‘extremely simple’. This is because it comprises two black devices characterised by their specific shape, position, and the strong contrast offered by the use of black and white. It is not considered weak. This will cause the public to recognise use of the contested IR with minor variations – namely different contrast – as originating from the same undertaking. Consequently, evidence presenting the contested IR in said variations is to be considered genuine use.

- The cancellation applicant quoted case-law that it considered relevant to the present case. The cited case-law presents differences with this case. In two cases (13/04/2011, T-202/09, Footwear, EU:T:2011:168, § 43-54; 26/04/2012, C-307/11 P, Footwear, EU:C:2012:254), there was only one chevron and it cannot be compared with the contested IR, which is more complex. In another case (02/11/2017, R 1232/2017-2, POSITIONSMÆRKE) the chevron within the contested IR was a position mark situated in a very specific position on shirt sleeves, whereas in the present case it is a figurative mark. In another case (08/06/2016, R 1828/2015-2, DEVICE OF POINTING ARROWS (fig.)), the facts and legal questions are different from the case in question because the contested chevrons show stronger contrasts. It should also be stressed that registration practice can evolve over time. As to decision 15/02/2019, R 2604/2017-5, FORM AF EN SPORTS SKO (fig.), the mark applied for was made up of two chevrons and was described as follows ‘[a]lthough it was a figurative mark, the sign was represented on a sport shoe in such a way that the chevrons span the entire area ‘between the snow or the bulb on the shoe and down to the sole and arranged in such a way as to point back to the mist of the shoe, the whole mark being situated immediately in front of the shoe’s collar’. The contested chevrons on the contrary are not represented on goods and are not necessarily used as a decorative design. In addition, a decorative or ornamental design can still have sufficient character in order to overcome the obstacle of registration pursuant to Article 7(1)(b) EUTMR. Finally, unlike EUTM No 12 442 166 (19/06/2019, T-307/17, DEVICE OF THREE PARALLEL STRIPES (fig.), EU:T:2019:427, § 70-73), the contested IR is not extremely simple and minor alterations to that mark – namely the use of the mark with opposite contrast (white chevrons on black background) – does not constitute a significant change. In addition, considerations applicable to acquired distinctiveness are not the same as those applicable to use of a mark as registered. The distinctive

character of the contested IR is mostly created by the depiction of two specific black chevrons pointing downwards over a contrasting white background.

- The contested IR is sometimes directly affixed to the goods themselves but it is also used in social media and in catalogues offering its different products, including balls,

bags and caps, identifying their origin . The use of black chevrons over a round white background is considered use as registered because the distinctive characteristics of the contested IR are reproduced. The addition of the verbal element 'hummel' over a black square does not alter the distinctive character of the sign as consumers are used to seeing different marks used together. The use sometimes shows white chevrons over a black square as in



(Annex Da-Dg). However, whether the chevrons or the background are used in black or white does not alter the distinctive character of the contested IR where the chevrons strongly contrast against the background. This is the case in part of the evidence. In fact, it takes some effort not to identify the mark even when it is not used as black chevrons over a white background. When perceiving the contested IR in a reversed contrast scheme, the relevant consumers will notice the characteristic shape of the chevrons, and will thereby be able to distinguish the goods and services from those of other undertakings. Use of the contested IR in a reversed contrast scheme is to be considered as use as registered. Even if part of the evidence is discarded, there is sufficient evidence which show use of the sign as registered for part of the goods within the meaning of Article 18(1)(a) EUTMR.

- *Extent of use:* The numerous catalogues (for example in Annex Ca-Cd, Annex G, Annex M) regularly supplied to various clients throughout the European Union, screenshots from various websites, invoices, annual reports, and surveys prove sufficient volume of sales, as well as regularity and frequency of use of the contested IR within the relevant period. Moreover, they prove a large territorial extent of use of the contested IR. Consequently, the proof of use is sufficient in respect of the required extent of use, at least in relation to some of the goods.
- *Use in relation to the registered goods and services:* The evidence filed by the IR holder does not show genuine use of the trade mark for all the goods and services for which it is registered. In connection to *bags*, (see Annexes Da-Dg) the contested IR has been used only for *bags for sports* in Class 18, and in Class 28 for *balls for sports*. As the contested IR is protected for *bags including bags for sports*, the term 'including' will be replaced by 'namely' in the list of goods protected in that class and by 'excluding' in the list of refused goods.
- In Class 25, the contested IR has been used for sports/leisure or fashion T-shirts, sweaters, shorts, trousers, socks, shoes, hats and caps, covering a sufficiently broad

spectrum of sport clothing, footwear, headgear. Sports clothing, footwear and headgear, leisure clothing footwear and headgear and fashion clothing, footwear and headgear are covered by the contested IR and are indistinguishable. It is therefore considered that the evidence (in particular in the catalogues and screenshots from websites, market survey, social media and invoices) show use for *sports, leisure and fashion clothing, footwear and headgear*. Conversely, there is no use for the covered *business clothing, footwear and headgear*.

- Reflected in the list of goods and services covered, this corresponds to the following:

Class 18: *Bags, namely bags for sports.*

Class 25: *Clothing, footwear, headgear namely sports clothing, footwear and headgear, leisure clothing, footwear and headgear and fashion clothing, footwear and headgear; sports clothing, footwear and headgear; leisure clothing, footwear and headgear; fashion clothing, footwear and headgear.*

Class 28: *Balls for sports and games.*

- However, there is no indication in the documents that the contested IR was used for services or for the remaining goods and the IR holder did not offer any justifications for non-use with respect to these goods and services. The IR holder failed to prove use in relation to the remaining goods and services.
- 8 On 1 August 2022, the cancellation applicant filed an appeal against the contested decision, requesting that the decision be partially set aside to the extent that application for a declaration of revocation was not upheld. The statement of grounds of the appeal was received on 6 October 2022.
 - 9 On 3 November 2022, the IR holder submitted its observations in reply.
 - 10 On 25 November 2022, the cancellation applicant submitted additional observations which were forwarded to the IR holder for information only.

Submissions and arguments of the parties

- 11 The cancellation applicant refers to its submissions filed during the cancellation proceedings. The arguments raised in the statement of grounds may be summarised as follows:

Infringement of the obligation to state reasons

- The contested decision's reasoning does not allow the cancellation applicant to understand why the Cancellation Division reached the conclusion that the contested IR has been genuinely used for the remaining goods in Classes 18, 25 and 28. In particular, it is unclear on which specific use evidence the Cancellation Division based its decision. A general statement that use has been proven does not satisfy the obligation to state reasons. In the contested decision, the Cancellation Division did not refer to any specific use evidence or annexes for the time and place of use and

the use as a trade mark. Further, for the ‘use of the mark as registered’, the Cancellation Division only refers to ‘Annex Da-Dg’. However, that annex has 657 pages, containing countless different marks and signs consisting of chevrons or other signs and it is not possible to deduce on which use evidence the Cancellation Division relied upon.

- While the Cancellation Division confirmed that ‘part of the evidence is discarded’, it did not indicate which specific form of use in which annexes were considered acceptable for it to base its finding of genuine use of the mark as registered. The only (indirect) indication of accepted use is found on p. 19 of the contested decision as two signs are not contained in the Annex Da-Dg and/or shown affixed to the relevant goods in Classes 18, 25 and 28, it remains open, on which specific use evidence the Cancellation Division relied upon when assessing the factors of genuine use. Consequently, the Cancellation Division’s action constituted a substantial procedural violation which must lead to the annulment of the contested decision.

Infringement of Article 58(1)(a) EUTMR

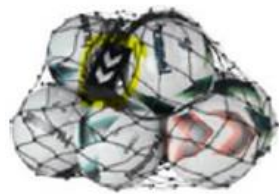
- None of the submitted documents show trade mark use in the exact form as registered, i.e. two black downward facing chevrons on a white background on bags for sports, leisure and fashion clothing, footwear and headgear, as well as balls for sports and games. In particular, the evidence depicted in the contested decision on pages 10, 11 and 13 do not correspond to the form of the contested IR as registered:



- The chevrons on the various bags and caps are depicted in a white colour on a black background and not in a black colour on a white background.
- The design element affixed to the socks is not visible (Annex Da-Dg).



- The chevrons are depicted in a white colour on a black background and not in a black colour on a white background. In addition, the chevrons are incorporated in another figurative element (Annex Gg).



- The chevrons are depicted in a white colour on a black background and not in a black colour on a white background (Annex Gg).



- The hang tags use a different colour scheme: The chevrons are depicted in a grey colour on a light grey background, instead of in a black colour on a white background (Annex Ooo).
- The evidence submitted by the IR holder does not fulfil the necessary requirements for an acceptable use of a variation of the contested IR as registered.
- The Cancellation Division held that the contested IR is inherently distinctive to an average degree with regard to the remaining goods in Classes 18, 25 and 28. That conclusion is neither plausible, nor correct.
- The contested IR is purely figurative and does not contain any word element. It has no other characteristics other than two black carets against a white background, facing downwards and symmetrically separated by a space corresponding to the size of one caret. As a whole it is, therefore, extremely simple and will most likely be perceived as a decorative pattern, commonly used in trade for the remaining goods in Classes 18, 25 and 28 (the cancellation applicant cited several EUIPO and Board of Appeal decisions in support of its claim).
- The mere repetition of a banal figurative element does not lead to a higher than low degree of distinctiveness of the contested IR as a whole.
- Consumers in the field of fashion, clothing and sports are regularly confronted with basic geometric shapes as design elements. In fact, the evidence submitted by the IR holder shows that it used a chevron pattern nearly exclusively as a design element rather than as a trade mark. The symmetric repetition of this basic geometric shape will add to the impression that the contested IR is a common design element and not

an indication of origin. The number of times a basic geometric element is repeated, is in itself not a factor that gives distinctive character to a sign (30/03/2022, T-280/21, DARSTELLUNG VON DREIZACKIGEN ELEMENTEN AUF SCHWARZEM HINTERGRUND III (fig.), EU:T:2022:197, § 33).

- During the cancellation proceedings the cancellation applicant referred to the judgement of the General Court of 19/06/2019, T-307/17, DEVICE OF THREE PARALLEL STRIPES (fig.), EU:T:2019:427, however, the Cancellation Division is, apparently, of the opinion that any mark that is ‘more complex’ than Adidas’ three-parallel-stripes mark, is automatically to be considered to have an average degree of distinctive character. This conclusion is based on a logical fallacy. Whether or not the contested IR is ‘more complex’ than the Adidas mark, can, in itself, not justify an average degree of distinctiveness as there are marks with various degrees of low distinctive character. Even if it were true that the contested IR is ‘more complex’ than the Adidas mark, it can – and must – still be considered to be very simple and have a low degree of distinctive character.

No trade mark use of the contested IR as registered

- Given that the contested decision contains visual representations of the Annexes Y, Da-Dg, Gg, Vv and Ooo, the Cancellation Division might have considered those to be of relevance. Apart from not containing acceptable variations of the contested IR as registered, these annexes do not show its trade mark use. The mere decorative use of a trade mark is not sufficient to prove genuine use of the contested IR.
- Also in its decision of 02/11/2019, R 1232/2017-2, the Second Board of Appeal held



that EUTM application No 15 370 877 did not have distinctive character (§ 15). Consequently, if that trade mark is not registrable due to the lack of distinctive character, its use can also not constitute genuine trade mark use, even less for a different mark, such as the contested IR. Therefore, the use of chevrons along the sleeve, such as shown in the Annexes Vv and Ooo, cannot be considered genuine use, as it essentially corresponds to the rejected trade mark No 15 370 877



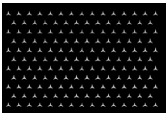
. The same applies to the shoes contained in Annex Y, as well as the bags, caps, headgear and socks in Annexes Da-Dg, Vv and Ooo. Also for the fashion and clothing articles, the use of two banal graphic elements will not be perceived as an indicator of origin (08/06/2016, R 1828/2015-2, DEVICE OF POINTING ARROWS (fig.)).


- 12 The IR holder makes reference to its submissions filed during the cancellation proceedings. The arguments raised in reply to the appeal by the IR holder may be summarised as follows:

The contested decision presents clear and unequivocal reasons

- The proceedings have been unnecessarily prolonged and overcomplicated to an extreme extent by the cancellation applicant. The evidence presented in every submission by the IR holder leaves absolutely no doubt that its chevron-based marks, including the contested IR, have been put to genuine use within the EU to a significant extent. A considerable amount of recent practice confirms that the chevron marks are distinctive to an average degree, and that genuine use has been proven. The IR holder has repeatedly been forced to dispute and argue against countless farfetched and poorly founded arguments by the cancellation applicant.
- The cancellation applicant argued that the use of the contested IR on the hangtag does not constitute genuine *per se*, as the background is light grey and not white. However, the cancellation applicant ignored the fact that the contested IR is literally displayed as black chevrons on a white background on the clothing item that the hangtag is affixed to. The cancellation applicant attempts to overcomplicate the matter with the purpose of removing attention from the obvious fact that the IR holder's chevron trade marks have been put to genuine use within the EU to an extent significantly surpassing the minimum requirements of Article 18 EUTMR and Article 58(1)(a) EUTMR.
- The cancellation applicant claimed that the contested decision's reasoning did not allow them to understand why such a conclusion was reached, as the reasoning was not presented in a clear and unequivocal manner. This claim is highly disputed as it is completely unfounded and simply another farfetched argument used to overcomplicate the matter. The purpose of the genuine use requirement is to simply confirm that a trade mark is in fact being used. The Office cannot be expected to list which specific parts of which specific pages of which specific annexes show genuine use in accordance with the relevant criteria, when the vast amount of evidence, as a whole, leaves absolutely no doubt that the contested IR has in fact been genuinely used. Describing every single relevant part of the vast amount of evidence would be unnecessarily time consuming when the conclusion is quite clear. As can be seen from the contested decision, the claim that the Office did not refer to specific evidence is incorrect.
- The use of the contested IR in the form as registered was correctly assessed in the contested decision. It makes no sense to dispute that the examples presented by the Cancellation Division should not be considered genuine use. Moreover, these are mere examples, thus confirming that the submitted evidence presents way more genuine use (see as examples, but not limited to: Annex Yy page 4; Annex Ooo page 2 and 8, Annex Df page 7, Annex V page 12 and Annex Y page 86). The submitted evidence presents a highly significant amount of evidence showing use of the contested IR in its registered form, and the cancellation applicant's claim must be dismissed as unfounded.

- There is a considerable amount of recent practice confirming that the IR holder's chevron trade marks, including the contested IR, are distinctive to an average degree (see attached examples of recent decisions). The Cancellation Division performed a thorough analysis of the distinctive characteristics of the contested IR concluding that the degree of distinctiveness is average. This assessment is repeated without variation in all of the examples of recent decisions, following which there is no legitimate reason to question such.
- The contested IR does not consist of a 'repetition of a banal element' that 'does not deviate significantly from the norm and customary in the sector' in the sense of the judgment of 30/03/2022, T-280/21, DARSTELLUNG VON DREIZACKIGEN ELEMENTEN AUF SCHWARZEM HINTERGRUND III (fig.), EU:T:2022:197, § 33 as claimed by the cancellation applicant. It goes without saying that there are absolutely no similar traits between the contested IR and the subject of the

mentioned judgment . The relevant EUTM application No 18 206 085 was refused based on non-distinctiveness because of the repetition of a figure arranged in one of thousands of possible arrangements as a decorative pattern. The contested IR does not consist of such elements arranged in a seemingly random pattern. On the contrary, a main characteristic of the contested IR is the specific positioning of the chevrons. The fact that the figure repeated in EUTM application

No 18 206 085  is in itself inherently distinctive proves that it is the random pattern-like arrangement of the figure, and not the figure itself, that makes EUTM application No 18 206 085 non-distinctive. Consequently, judgment T-280/21 is not in any way comparable to the present proceedings.

- The cancellation applicant claimed that lack of inherent distinctiveness of the contested IR has been confirmed in previous decisions. However, this is highly disputed. The previously refused chevron-based applications highlighted by the cancellation applicant are not applicable to the present proceedings, as all of the applications are either: applied for in different classes for completely different goods, and/or applied for in respect of different trade mark types, namely position marks, and/or for far more chevrons in continuation or outlined chevrons, both factors of which have been added weight in the reasons for refusal. Reference is made to the attached list of recent decisions and the further registered chevron-based trade marks that the cancellation applicant has conveniently ignored (see attached list of decisions). There is absolutely no practice that indicates that the contested IR is not inherently distinctive for the registered goods.
- Despite raising the issue on their own initiative as to whether the contested IR is 'more complex' than Adidas' stripes (19/06/2019, T-307/17, DEVICE OF THREE PARALLEL STRIPES (fig.), EU:T:2019:427) and arguing heavily on the matter for more than three years, wasting the time of both parties and the Office, the cancellation applicant now claims that it is irrelevant whether the contested IR is 'more complex' than Adidas' stripes. The fact that the contested IR is not 'extremely simple' means that the premises of the Adidas decision do not apply to the present matter. The Office correctly analysed the characteristic traits of the contested IR and

found that it is distinctive to an average degree and, on this basis, determined that the contested IR is not ‘extremely simple’ in the sense of the Adidas decision.

Reasons

- 13 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible. However, the appeal is not successful.

Scope of the appeal

- 14 To the extent that the Cancellation Division ordered the contested IR designating the EU to be revoked in part due to non-use pursuant to Article 58(1)(a) EUTMR, the decision has already become final since the IR holder did not file an appeal or cross appeal. Only the contested goods for which the IR was ordered to remain on the Register, namely those as listed in paragraph 5, form the subject-matter of the cancellation applicant’s appeal.

Preliminary remarks

- 15 On 25 November 2022, the cancellation applicant submitted additional observations which were forwarded to the IR holder for information only. This submission is not admissible as it does not comply with Article 26(1) EUTMDR in conjunction with Article 22(1) of the Rules of Procedure of the Boards of Appeal. There is essentially no request by the cancellation applicant to supplement the statement of grounds of the appeal. The cancellation applicant stated that it did not consider it necessary to request a second round of written submissions according to the aforementioned articles. As this submission has not been taken into account by the Board, the IR holder was not invited to respond to it.
- 16 In any event, the cancellation applicant refers to decisions and the practice of the Office. The Board of Appeal can *ex officio* base its decision on case-law provided this is relevant to the case at hand.

Confidentiality

- 17 The IR holder requested that certain commercial data filed in its submissions both before the Cancellation Division and the Board of Appeal be kept confidential.
- 18 In accordance with Article 114(4) EUTMR, files may contain certain documents which are excluded from public inspection, e.g. parts of the file which the party concerned showed a special interest in keeping confidential (also Article 6 of the Rules of Procedure of the Boards of Appeal).
- 19 In the event that special interest in keeping a document confidential, in accordance with this provision, is invoked, the Office must check whether that special interest is sufficiently shown. Such special interest exists because of the confidential nature of the document or its status as a trade or business secret.

- 20 While part of the evidence marked as confidential is also available on internet sites or social media and does not appear to be sensitive or secret, other items of evidence contain business-related information and figures, and invoices.
- 21 The Board will thus treat that evidence marked by the IR holder as confidential with the appropriate degree of care and refer to it in general terms, not disclosing information which may be considered sensitive from a business perspective, and which is not accessible from other publicly available sources.
- 22 The information in the tables in paragraphs 33, 58, and 63 below is taken from invoices and catalogues submitted by the IR holder to demonstrate use of the contested IR. The Board emphasises that the disclosure of this information complies with the confidentiality standard. The Board only refers to article codes taken from the IR holder's catalogues, which do not qualify as confidential documents because they are intended for distribution to consumers. The number of specific items sold, the invoice number and date, and the territory in which the undertaking to which the invoices were sent are also mentioned. However, there is no mention of the precise company to which the invoices were issued or their addresses. These are considered sensitive information from a business perspective. The price per unit or total invoiced amount also remains confidential.

Evidence related to the United Kingdom

- 23 The parties have not contested the decision of the Cancellation Division to take into account the evidence related to the UK which relates to a period prior to the UK's withdrawal day of 1 January 2021. The Board confirms that such evidence should be considered for the assessment of the genuine use of the contested IR.


Article 58(1)(a) EUTMR

- 24 Pursuant to Article 58(1)(a) EUTMR, the rights of the proprietor of the EU trade mark shall be declared revoked on application to the Office, if, within a continuous five-year period, the trade mark has not been put to genuine use in the Union in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use; however, no person may claim that the proprietor's rights in an EU trade mark should be revoked where, during the interval between expiry of the five-year period and filing of the application, genuine use of the trade mark has been started or resumed; the commencement or resumption of use within a period of three months preceding the filing of the application which began at the earliest on expiry of the continuous period of five years of non-use shall, however, be disregarded where preparations for the commencement or resumption occur only after the proprietor becomes aware that the application may be filed.
- 25 According to Article 19(1) EUTMDR, if the proprietor of the EU trade mark does not provide proof of genuine use of the contested EUTM within the time-limit set by the Office, the EU trade mark shall be revoked.

Assessment of the evidence of use

- 26 Pursuant to Article 19(1) EUTMDR in conjunction with Article 10(3) EUTMDR, the indications of evidence of use shall establish the place, time, extent, and nature of use of the contested EUTM for the goods in respect of which it is registered. Thus, the sufficiency of the indications and proof as to the place, time, extent, and nature of use has to be considered in view of the entirety of the evidence submitted.



- 27 The contested IR is a purely figurative mark: . According to the description of the Cancellation Division, this consists of a double-chevron device in black on a white background, with the chevrons pointing downward (the vertical chevrons). They are characterised by 90-degree angles, identical space between the two chevrons, and flat vertical sides. This description has not been contested by the parties.
- 28 The cancellation applicant mainly challenges the nature of use of the contested IR. Essentially, the cancellation applicant argues that the IR holder's mark is at most distinctive to a low degree (statement of grounds of the appeal – page 2) and that therefore, evidence of use showing even minor alterations of the contested IR as registered must be disregarded when assessing the genuine use of the contested IR. More specifically, the cancellation applicant argues that use of the IR holder's sign is depicted in a white colour against a black background and not in a black colour against a white background like the contested IR (reversed colour scheme). According to the cancellation applicant, the IR holder's sign is also depicted in another figurative element, the sign is depicted with different colour schemes, it is depicted as a repetitive pattern, or with a different orientation. According to the cancellation applicant none of these signs presented in the evidence submitted can show the genuine use of the contested IR. Finally, the cancellation applicant challenges the findings in relation to the time, place, and extent of use of the contested IR.
- 29 The IR holder has submitted thousands of pages of evidence, including invoices from 2014 to 2019, catalogues for the years 2015, 2016, 2017, 2018, 2019, written statements, online articles, excerpts from its social media accounts, and printouts from its websites retrieved through the online archive *Wayback Machine*.
- 30 The Board observes that, inter alia, the following versions of the contested IR appear in this evidence: (i) the sign appears as registered, (ii) the sign appears in white against a black background, (iii) the sign appears as two black chevrons against a coloured bright background. Each form will be analysed below:

The sign appears in its registered form

- 31 The sign appears as registered, in particular, in the market research, catalogues, and pictures of athletes wearing the IR holder's goods during sport events. For instance, the contested IR appears in the 'Summer Sport 2016' catalogue on pages 21, 35, etc.:

◀ SILVIO HENEVETTER HUMMEL SIRIUS LS JERSEY 04-614-2114 HUMMEL SIRIUS POLY PANTS 37-124-2921	MIKKEL HANSEN HUMMEL SIRIUS SS JERSEY 03-631-8596 HUMMEL SIRIUS SHORTS 10-797-1618
◀ DANIEL NARCISSE HUMMEL SIRIUS SS JERSEY 03-631-6241 HUMMEL SIRIUS SHORTS 10-797-2114	SIMONE BÖHME HUMMEL SIRIUS SS JERSEY WOMEN 03-632-9124 HUMMEL SIRIUS SHORTS WOMEN 10-798-2114



®
35

; the contested IR appears as registered on socks worn by



an athlete

(see pictures posted on *Twitter* submitted on



20 September 2019); shorts with the contested IR

and



appear in Annex Ca;



blanc/noir

BN



blanc/noir
405CLBN

appears in Annex N;



page 52

and

socks appear worn by a football player in Annex Df -
Annex X - page 125;

CORE COTTON POLO 02-431

- 220gm2 100% cotton pique
- Printed chevrons & logo

116/128 140/152 164/176
S M L XL XXL XXXL



2001
BLACK



3062
TRUE RED



6140
EVERGREEN



7026
MARINE



9001
WHITE

many of the IR holder's

clothing apparel appear in its catalogues, such as in Annex Df - page 62;

BASIC 3-PACK SOCK 22-030

- 80% cotton/20% polyester
- Mid-calf length with contrasting chevrons

8 (32-35) 10 (36-40) 12 (41-45) 14 (46)



appears in Annex Df - page 123; the sign appears on the



sole of sports shoes in Annex Df - page 154

, as well as at the



heel counter of sports shoes

as shown in Annex Y;

CORE FUNCTIONAL POLO WOMAN

- Main: 100% polyester / Rib: polyester, elastane
- Main: Piqué fabric / Rib: flat knit rib
- Placket with buttons CF
- Waterbased printed logo and chevrons
- Regular fit

203448: XS S M L XL 2XL

DKK 200






appears in Annex Dg - page 60; examples of use of hangtags and neck-tags on clothing appear as







in Annex Ooo.

- 32 It cannot be contested that these examples above show the contested IR in the form it is registered. Even though the IR holder's evidence is not perfectly organised, the contested IR as such appears in many annexes throughout the IR holder's submissions.
- 33 The IR holder has submitted hundreds of invoices as Annexes Hh, Ii, Jj, Kk, Ll, Mm, Nn, Oo, Pp, Qq, Rr, and Ss. The sign in question as such does not appear on any of these invoices. However, this fact cannot strip the invoices from their probative value. All the goods of the IR holder that appear in its catalogues have a unique model code and the respective colour code. When read in connection with the IR holder's multiple catalogues, the invoices demonstrate sales of different commodities bearing the contested IR. These are the following:

Article code	Volume	Invoice and date	Territory
Fundamental football sock 22137-9124  (Annex Df)	200 items	11004189 – 18/01/2017	Denmark
	1 890 items	11004842 – 20/01/2017	Denmark
	195 items	4488766 – 31/10/2016	Lithuania
	157 items	4450755 – 12/07/2016	Denmark
	180 items	4454094 – 21/07/2016	Denmark
	50 items	4511066 – 08/02/2017	Denmark
	198 items	11113652 – 04/01/2018	Denmark
Total:	2 870 items		
Classic Football Sock 22—111/9124 (Annexes Cd, Ff)  9124 WHITE/ BLACK	160 items	4329188– 26/04/2015	Lithuania
Total:	160 items		

Basic 3-Pack Sock 022030-9001 (Annexes Ca-Cd) 	30 items	11028063 – 30/03/2017	Greenland
	600 items	11036401 – 04/05/2017	Hungary
	29 items	11037157 – 08/05/2017	Finland
	2150 items	11144535 – 19/03/2018	Denmark
	200 items	11154152 – 19/04/2018	Denmark
	150 items	11176656 – 29/06/2018	Denmark
	1200 items	11178094 – 04/07/2018	Norway
	5 items	11211173 – 08/10/2018	Denmark
	2100 items	11283057 – 11/04/2019	Denmark
	150 items	11303629 – 04/06/2019	Denmark
	250 items	11056612 – 27/07/2017	Hungary
Total:	6 864 items		
Core Cotton Tee 09541-9001 (Annex Dg-page 62) 	50 items	4433496 – 17/03/2016	Czech Republic
	66 items	4512206 – 08/02/2017	Serbia
	5 items	4490508 – 06/09/2016	Poland
	137 items	4433418 – 29/04/2016	Slovenia
	50 items	4437546 – 24/03/2016	Czech Republic
	75 items	4476757 – 30/08/2016	Hungary
	1 229 items	4485828 – 30/09/2016	Denmark
	280 items	11125971 – 01/02/2018	Hungary
	7 items	11154380 – 19/04/2018	Hungary
	80 items	11186779 – 06/08/2018	Hungary
Total:	1 979 items		
Core Cotton Polo 002431-9001 (Annex Df-page 52) 	150 items	11033643 – 24/04/2017	Poland
	20 items	11063841 - 21/08/2017	Poland
	7 items	11137906 – 27/02/2018	Poland
	80 items	11125971 – 01/02/2018	Hungary
	15 items	4454926 – 27/06/2016	Lithuania
	1 584 items	4465251 – 08/06/2016	Denmark
	105 items	11219371 – 01/11/2018	UK
	33 items	11048815 – 30/06/2017	Hungary
	36 items	11186779 – 06/08/2018	Hungary
Total:	2 030 items		

Hummel Hmllogan T-shirt 203422-1009 (Annex Uu) 	32 items	21205930 – 28/01/2019	Germany
	91 items	11277015 – 01/04/2019	Slovenia
	26 items	11273448 – 21/03/2019	Denmark
	71 items	11267003 – 06/03/2019	Slovenia
	168 items	11266694 – 05/03/2019	Denmark
	18 items	11260356 – 19/02/2019	Slovenia
Total:	406 items		
Omnicrot Z8 Trophy 60248-9001 (Annex Df-page 154) 	400 items	4399966 – 18/12/2015	France
	406 items	4404359 – 29/12/2015	Germany
	188 items	4404872 – 01/01/2016	Germany
	192 items	4405742 – 04/11/2015	Poland
	155 items	4409649 – 18/01/2016	Germany
	96 items	4411704 – 29/02/2016	Slovenia
	191 items	4413954 – 05/02/2016	Germany
	135 items	4423635 – 15/03/2016	Germany
	139 items	4431403 – 04/04/2016	Germany
	154 items	4438066 – 24/04/2016	Germany
	58 items	4513579 – 01/01/2017	France
	12 items	11019720 – 02/03/2017	France
	19 items	11070175 – 04/09/2017	France
21 items	11072945 – 12/09/2017	France	
Total:	2 166 items		
Hummel Hive – Super Trimm Black 64386-2001 (Annex Vv) 	8 items	11017150 – 24/02/2017	France
	36 items	11017951 – 27/02/2017	Italy
	8 items	11021408 – 08/03/2017	France
	11 items	11035144 – 27/04/2017	Denmark
	8 items	11039731 – 17/05/2017	Germany
Total:	71 items		
Hummel Chevron Headband 202635-9001	20 items	11116218 – 10/01/2018	Denmark
	30 items	11121735 – 23/01/2018	Denmark

(Annex Xx) 	18 items	11121773 – 23/01/2018	Denmark
	15 items	11121798 – 23/01/2018	Denmark
	150 items	11122632 – 24/01/2018	Denmark
	15 items	11123007 - 24/01/2018	Denmark
	50 items	11123433 – 25/01/2018	Denmark
	150 items	11125911 – 01/02/2018	Denmark
	1 item	11130100 – 09/02/2018	Denmark
	30 items	11138260 – 28/02/2018	Denmark
	5 items	11143318 – 14/03/2018	Denmark
	12 items	11143656 - 14/03/2018	Denmark
	200 items	11144077 – 15/03/2018	Denmark
	10 items	11152158 – 12/04/2018	Denmark
	15 items	11154152 – 19/04/2018	Denmark
	40 items	11169241 – 08/06/2018	Denmark
	30 items	11173903 – 21/06/2018	Denmark
	3 items	11174909 – 25/06/2018	Denmark
	10 items	11176656 – 29/06/2018	Denmark
	200 items	11178094 – 04/07/2018	Denmark
	25 items	11182696 – 23/07/2018	Denmark
	100 items	11187711 – 07/08/2018	Denmark
30 items	11191972 – 17/08/2018	Denmark	
10 items	11211173 – 08/10/2018	Denmark	
5 items	11215899 – 22/10/2018	Denmark	
36 items	11222992 – 13/11/2018	Denmark	
7 items	11238078 – 12/12/2018	Denmark	
2 items	11238413 – 13/12/2018	Denmark	
100 items	11269384 – 13/03/2019	Denmark	
100 items	11283057 – 11/04/2019	Denmark	
10 items	11303629 – 04/06/2019	Denmark	
Total:	1 329 items		

34 The table above shows that a variety of the IR holder's goods bearing the contested IR have been sold to various entities in the EU.

The sign appears in white against a black background.

35 The cancellation applicant argues that this is not an acceptable alteration of the contested

IR. For example, the IR holder's sign appears on training hats



in Annex M-page 124, on gloves



in Annex Dg-page 109, on a ball net



, a ball



bag, a soccer bag



, a toiletry bag



in Annex Cd-

pages 162-136, on a pair of shorts with padding



, bermuda shorts



cotton pants, women shorts



and tights



in Annex Dg-pages 61, 74, 83, 87, 90, on football socks



and



in Annex Annex Dg-page 106, on a football ball



and on



football kits



- 36 According to Article 18(1)(a) EUTMR, proof of genuine use of a trade mark also includes proof of use of the trade mark in a form which differs in elements which do not alter the distinctive character of the trade mark in the form in which it was registered.
- 37 The cancellation applicant argues that the sign presented in this reversed colour scheme alters the distinctive character of the contested IR (see paragraph 3.1. of the statement of grounds of the appeal) and cannot be relied upon to show genuine use of the latter. It argues that when a mark has a low degree of distinctive character, adding even a non-distinctive or weakly distinctive element may alter its distinctive character.
- 38 In support of its argument the cancellation applicant invokes the judgment of 19/06/2019, T- 307/17, DEVICE OF THREE PARALLEL STRIPES (fig.), EU:T:2019:427, which concerned absolute grounds for invalidity and the distinctive character acquired by use pursuant to Articles 7(3) and 59(2) EUTMR. That judgment also referred to the form that differs from the form under which the mark has been registered by significant variations.
- 39 The Court held that unlike Article 18(1)(a) EUTMR, Articles 7(3) and 59(2) EUTMR did not explicitly provide for the use of the mark in forms which differ from the form in which that mark was submitted for registration and, where relevant, registered (§ 55). That difference in wording was explained by the fact that these provisions were based on a different rationale. Article 18(1)(a) EUTMR only applies to a mark which has already been registered and whose distinctive character is not disputed. That article thus enables preserving the protection of the mark by evidence of its use, where appropriate, under some forms that differ from the form in which it was registered. By contrast, Articles 7(3) and 59(2) EUTMR are based on the assumption that use of an inherently

non-distinctive sign and of a trade mark which has been erroneously registered despite its lack of distinctive character, respectively, may in some cases, allow that sign or mark to be registered or to remain registered. In other words, Article 18(1)(a) EUTMR has the registration of the mark as its starting point and, subsequently, the examination of its use, whereas Article 7(3) and Article 59(2) EUTMR have the use of a sign as their starting point, in order to proceed to, where appropriate, its registration or to maintain its registration (§ 56).

- 40 The Court found that the fact remained that the need to make certain changes to a mark for the purposes of its commercial exploitation was also valid for the period during which that mark acquired distinctive character following its use. Therefore, the criterion of use could be judged by the yardstick of different considerations according to whether that criterion was capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of that sign, that same form of use must also be capable of ensuring that such protection is preserved. Therefore, as regards the forms of use, the requirements that apply to verification of the genuine use of a mark are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration. It follows that the forms of use of a mark referred to in Article 18(1)(a) EUTMR, including those which differ only by ‘elements which do not alter the distinctive character of [that] mark’, must be taken into account not only in order to determine whether that trade mark has been put to genuine use within the meaning of that provision, but also for the purpose of determining whether that mark has acquired distinctive character through the use which has been made of it. The Court held that the concept of use of a trade mark, within the meaning of Articles 7(3) and 59(2) EUTMR, must be interpreted as referring not only to use of the mark in the form in which it was submitted for registration and, where relevant, registered, but also to the use of the trade mark in forms which differ from that form solely by insignificant variations and that are able, therefore, to be regarded as broadly equivalent to that form (§ 62).
- 41 Indeed, the simpler the mark, the less likely it is to have a distinctive character and the more likely it is for an alteration to that mark to affect one of its essential characteristics and the perception of that mark by the relevant public (13/09/2016, T- 146/15, Representation of a polygon, EU:T:2016:469, § 33 and 52).
- 42 The sign in question in that judgment inherently lacked distinctive character and was found ‘extremely simple’. The sign had minimal characteristics, namely the use of three black stripes against a white background. The Court highlighted that exactly because of the extreme simplicity of the mark at issue, the act of reversing the colour scheme, even if a sharp contrast between the three stripes and the background was preserved, could not be described as an insignificant variation as compared to the registered form of the mark (§ 77).
- 43 A finding that the distinctive character of the mark as registered has been altered requires an examination of the distinctive and dominant character of the added elements on the basis of the intrinsic qualities of each of those elements and the relative position of the various elements in the configuration of the mark (12/03/2014, T- 381/12, PALMA MULATA, EU:T:2014:119, § 30).

- 44 Where the sign used in the course of trade differs from the form in which it was registered only in negligible respects, so that the two signs can be regarded as broadly equivalent, the obligation to use the registered trade mark may be fulfilled by providing evidence of use of the sign which constitutes its form used in the course of trade (13/09/2007, C- 234/06, *Bainbridge (fig.) / Bridge et al.*, EU:C:2007:514, § 50; 10/10/2018, T- 24/17, *D-TACK / TACK et al.*, EU:T:2018:668, § 45).
- 45 By avoiding imposing a requirement for strict conformity between the form used in trade and the form in which it was registered, Article 18(1)(a) EUTMR is intended to allow the holder, in the commercial exploitation of the sign, to make variations in the sign, which, without altering its distinctive character, enable it to be better adapted to the marketing and promotion requirements of the goods or services concerned (18/07/2013, C- 252/12, *Specsavers International Healthcare and Others*, EU:C:2013:497, § 29).

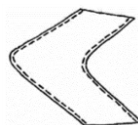


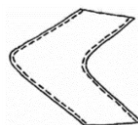
- 46 In the present case, it should be examined whether the use of the sign  alters the distinctive character of the contested IR .

- 47 First, the contested IR enjoys a presumption of validity (24/05/2012, C-196/11 P, *F1-Live*, EU:C:2012:314, § 40, 41). It therefore cannot be considered as lacking distinctive character in relation to the goods in question.

- 48 The distinctive character of figurative elements that resemble chevrons has been discussed in several Boards of Appeal decisions and Court judgments.

- 49 In the judgment of 26/04/2012, C- 307/11, *Device of orthopaedic footwear (fig.)*, EU:C:2012:254, the Court of Justice confirmed the judgment of the General Court that



found that the sign  lacked distinctive character, because due to its rectangular shape and the representation of stitches of a seam, it could be an appliqué intended to reinforce or simply to decorate the toe, the top, the outside or the heel of the shoe and that it therefore did not depart in any way from the norm or from what is customary in the footwear sector. However, the contested IR in question in the present proceedings consists of two identical chevrons pointing downwards and they have no stitches that could imply that it is intended to decorate shoes or clothing. The subject matter of the aforementioned judgment is considerably simpler than the contested IR.

- 50 In the decision 5 November 2021, R 349/2021-5, *BARRY'S (fig.) / DEVICE OF TWO BLACK CHEVRONS POINTING DOWN* (fig.), the Board found that signs highly similar to the contested IR in question have an inherent low degree of distinctive character (§ 27).



- 51 The Board rejected the sign with the reasoning that this would be perceived as a decorative element, in particular due to its position along the sleeve (02/11/2017, R 1232/2017-2, POSITION MARK, § 17-19). However, the contested IR differs in that it is not a position mark showing a sequence of chevrons, but it is a figurative mark consisting of two identical chevrons.








- 52 The sign was rejected in relation to *footwear* in Class 25 (15/02/2019, R 2604/2017-5, FORM AF EN SPORTS SKO). By citing the judgment of 26/04/2012, C- 307/11, Device of orthopaedic footwear (fig.), EU:C:2012:254, the Board found that




that sign was a basic non-distinctive position mark. However, the sign was allowed to proceed to publication as the Board found that it had acquired distinctiveness through use in the EU (07/10/2022, R 208/2022-1, LOCATION OF TWO STRIPES ON ONE SIDE OF A SHOE).

- 53 However, the contested IR in the present appeal is not extremely simple unlike the aforementioned case with three parallel black lines, that did not even have the minimum degree of distinctive character. It is not denied that the distinctiveness of the two-chevron device is somewhat below average. Nevertheless, the sign in question consists of two identical chevrons, which are not basic geometric shapes (by analogy, 07/09/2022, R 615/2022-2, Gelber Strich mit linkem Knick (fig.), § 14). What characterises this sign is the outline of the two chevrons, their equal thickness and width and the equal distance between them. Chevrons or V-shaped marks can be presented in multiple ways showing different characteristics (as shown for instance in the examples of registered EUTMs


provided by the IR holder on 18 June 2020: , , , , etc.). In contrast, the thickness of the lines and the space between them are the sole features that set a sign made of three vertical lines apart from others. Consequently, even minor changes are able to change the distinctive character of three vertical lines. Following

from the above, the Board is of the opinion that the use of the sign  does not


alter the distinctive character of the contested IR . This is because the chevrons maintain the same outline, the same distance between them, they have an identical thickness and width.

54 Moreover, according to Common Communication on the Common Practice of the Scope of Protection of Black and White Marks of 15 April 2014 a change only in colour does not alter the distinctive character of the trade mark, as long as (a) the figurative elements coincide and are the main distinctive elements; (b) the contrast of shades is respected; (c) colour or combination of colours does not possess distinctive character in itself and; (d) colour is not one of the main contributors to the overall distinctiveness of the mark. In the present case, the two chevrons are the main distinctive elements of the mark, the contrast is maintained, the black and white combination is not in itself a distinctive element of the mark.


55 The Board's conclusion that the sign  does not alter the distinctive character of the


contested IR  is also in line with the judgment of 15/10/2019, T- 582/18, X BOXER BARCELONA (fig.) / X (fig.) et al., EU:T:2019:747, where the General Court found that


the following signs   did not alter the distinctive character

of the mark  (§ 42). The Court also found that since the earlier mark was registered without particular colour claims, the colour representation with red in the arrowheads framing the central letter 'x', cannot, in itself, affect the distinctive character of that mark in the form in which it was registered, which covers all possible colour combinations (§ 44). This applies by analogy to the present appeal. As long as the chevrons are clearly distinguished against a contrasting background the distinctive character of the contested IR is not affected.

56 Finally, the Board refers to the decision of 12/11/2020, R 2557/2019-5, NICOBOCO (fig.) / DEVICE OF TWO CHEVRON SHAPES (fig.) which concerned opposition proceedings based on various figurative marks consisting of two chevrons. This case is particularly relevant as it compared the distinctiveness of the 'two-chevron device' with the 'three vertical lines device' and concluded that the former is somewhat more complex than the latter and therefore the colour variation cannot change its distinctive character. In that case, the vast majority of the evidence showed exactly the same 'two


chevron device' as protected by No VR 2015 00888  and in the same position of the


sports shoes and sneakers as protected by the marks No VR 2016 01286  and

No VR 2016 01285 . The Board found that the fact that the 'two chevron device' was in blue or black in the registered marks whereas the evidence showed the device in all sorts of colours did not mean that the reputation of the marks could not be established on the basis of the presented evidence. The element that differentiated those two marks from the used form (different colour) did not prevent the relevant public from continuing to perceive the goods at issue as originating from a particular undertaking (§ 36) [emphases added]. In particular, the Board found that that

result could not be called into question by the judgment of 19/06/2019, T-307/17, three parallel stripes, EU:T:2019:427. In that judgment, the Court held that evidence relating to two black stripes against a white background (or three white stripes against a black background) could not be used as evidence of acquired distinctiveness under Article 7(3) EUTMR of three parallel black stripes. Firstly, the issue in the case R 2557/2019-5 was whether a trade mark which had already been registered and whose distinctive character was not disputed enjoyed an enhanced scope of protection and not, as in case T-307/17, whether an inherently non-distinctive sign could be registered on the basis of acquired distinctiveness. The cases dealt with different thresholds (enhanced scope of protection versus minimum protection). Secondly, the standard for ‘permissible variations’ had to be stricter for inherently non-distinctive signs than for signs that functioned *per se* as trade marks. Whereas the sign applied for in the case relating to judgment T-307/17 was considered to have ‘an extremely simple character’ (and thus being *per se* non-distinctive), the ‘two chevron devices’ were more ‘complex’ and had been accepted by the Danish Trade Mark Office as being inherently distinctive. The fact alone that the colours of the chevrons were different was a ‘permissible variation’ of the registered marks which did not entitle the Office to dismiss the evidence of reputation.










- 57 Therefore, the Board considers the evidence that shows the contested IR as  should also be taken into account.
- 58 When read in connection with the IR holder’s multiple catalogues, the invoices demonstrate sales of different commodities bearing the contested IR. These are listed below:


Article code	Volume	Invoice and date	Territory
Training beanie 89441-2001 (Annex Cd-page 148) 	143 items	11048815 – 30/06/2017	Hungary
	50 items	11063841 - 21/08/2017	Poland
	10 items	11125971 - 01/02/2018	Poland
	40 items	4488766 – 31/10/2016	Lithuania
	200 items	11186779 – 06/08/2018	Hungary
	121 items	11219371 – 01/11/2018	UK
	6 items	11028063 – 30/03/2017	Greenland
Total:	570 items		
Training hat 89061-2001	5 items	11143318 – 14/03/2018	Denmark
	100 items	4488766 – 31/10/2016	Lithuania
	60 items	4491768 – 07/11/2016	Lithuania
	190 items	4490508 – 06/09/2016	Poland
	10 items	4259436 – 30/08/2014	Hungary

	10 items 40 items 150 items 94 items	11125971 – 01/02/2018 11237695 – 12/12/2018 11063841 - 21/08/2017 11033622 – 24/04/2017	Hungary Norway Poland Spain
Total:	659 items		
Light Weight Player Gloves 41441-2001 (Annex Dg-page 109)  	175 items 75 items 115 items 210 items 139 items 135 items 120 items 24 items 232 items 15 items	11004189 – 18/01/2017 11033622 – 24/04/2017 4488766 – 31/10/2016 4443829 – 16/03/2016 4450755 – 12/07/2016 4454094 – 21/07/2016 4511066 – 08/02/2017 4505776 – 31/10/2016 11113652 – 04/01/2018 11237695 – 12/12/2018	Denmark Spain Lithuania Denmark Denmark Denmark Denmark Denmark Denmark Norway
Total:	1 240 items		
Cold Winter Player Gloves 41442-2001 (Annex Dg-page 109) 	200 items 180 items 210 items 164 items 130 items 415 items 80 items 18 items	11004189 – 18/01/2017 4488766 – 31/10/2016 4443829 – 16/03/2016 4450755 – 12/07/2016 4454094 – 21/07/2016 4511066 – 08/02/2017 4505776 – 31/10/2016 11237695 – 12/12/2018	Denmark Lithuania Denmark Denmark Denmark Denmark Denmark Norway
Total:	1 397 items		
Core Cotton Polo 002431-2001	23 items 20 items 30 items 2 items 36 items	11048815 – 30/06/2017 11063841 – 21/08/2017 11125971 – 01/02/2018 11137906 – 27/02/2018 11186779 – 06/08/2018	Hungary Poland Hungary Poland Hungary

 <p>2001 BLACK</p>	119 items 20 items 29 items 35 items 41 items 73 items 1 item	11219371 – 01/11/2018 11063841 - 21/08/2017 4439587 – 01/04/2016 4512206 – 08/02/2017 11000600 – 05/01/2017 11125971 – 01/02/2018 11216668 – 24/10/2018	UK Poland USA Serbia Denmark Hungary Poland
Total:	429 items		
Hummel Ball Bag 40919-2250 	10 items 20 items 4 items 8 items 100 items 20 items 10 items 12 items 25 items 30 items 30 items 20 items 25 items 25 items	4348008 – 27/06/2015 4356136 – 01/08/2015 4370779 – 29/08/2015 4402157 – 25/11/2015 4324990 – 14/04/2015 4391897 – 28/11/2015 4358502 – 11/07/2015 4364194 – 08/08/2015 4374366 – 07/09/2015 4376164 – 13/09/2015 4396820 – 06/11/2015 4412263 – 01/01/2016 4359234 – 19/09/2015 4381269 – 10/10/2015	Lithuania Lithuania Spain Spain Japan Lithuania Spain Spain Spain Spain Spain Spain Norway Norway
Total:	339 items		
Hummel Back Pack 40916-2250 	200 items 100 items 15 items 150 items 200 items 30 items	4356136 – 01/08/2015 4348008 – 27/06/2015 4319016 – 29/04/2015 4349456 – 30/07/2015 4391897 – 28/11/2015 4376164 – 13/09/2015	Lithuania Lithuania Slovenia Qatar Lithuania Spain
Total:	695 items		
STORM Match & Training Ball	800 items 110 items	4459398 – 12/05/2016 4424751 – 07/03/2016	Denmark Norway

91-794-9274 (Annex Df- page 149) 	200 items	4425907 – 10/03/2016	Norway
	200 items	4429560 – 18/03/2016	Norway
	100 items	4444250 – 01/05/2016	Norway
	100 items	4450573 – 23/05/2016	Norway
	400 items	4451231 – 27/05/2016	Norway
	400 items	4463092 – 11/07/2016	Norway
	200 items	4470137 – 22/08/2016	Norway
	155 items	4485916 – 21/09/2016	Denmark
	250 items	4311744 – 01/03/2015	Norway
	166 items	4321831 – 28/03/2015	Norway
	306 items	4358868 – 30/07/2015	Norway
100 items	4359234 – 19/09/2015	Norway	
100 items	4381269 – 10/10/2015	Norway	
Total:	3 437 items		
Blade professional match ball 91793-9099 	23 items	4424751 – 07/03/2016	Norway
	100 items	4470137 – 22/08/2016	Norway
	40 items	4311744 – 01/03/2015	Norway
	64 items	4321831 – 28/03/2015	Norway
	140 items	4358868 – 30/07/2015	Norway
Total:	367 items		
Essential Goalkeeper Shorts with Padding 010816-2001 	7 items	11137906 – 27/02/2018	Poland
	4 items	11028063 – 30/03/2017	Greenland
Total:	11 items		
Tech Move All Weather Jacket	26 items	11186779 – 06/08/2018	Hungary
	105 items	11219371 – 01/11/2018	UK

200027-2001 (Annex Dg) 			
Total:	131 items		
Core Polyester Tee 003756-2001 (Annex Dg)  2001 BLACK	15 items	11137906 – 27/02/2018	Poland
Total:	15 items		
Tech Move Poly Pants 200015-2001 	105 items 9 items	11219371 – 01/11/2018 11174909 – 25/06/2018	UK Denmark
Total:	114 items		
Tech Move Training Shorts 200025-2001 	105 items	11219371 – 01/11/2018	UK
Total:	105 items		

Core Hipster Woman 203525-2001 	220 items	11283057 – 11/04/2019	Denmark
Total:	220 items		

59 The table above shows that a variety of the IR holder's goods bearing the contested IR have been sold in various entities in the EU.

The sign appears as two black chevrons against a coloured bright background



60 The sign appears as two black chevrons against a bright background throughout the evidence submitted:



61 The Board is of the opinion that these are also acceptable variations of the contested IR. The contrast of the black chevrons against a light background is maintained, unchanged in the coloured form of use. The elements of which the contested IR is composed remain visible in the same arrangement and proportions in these representations (by analogy, 19/07/2021, R 1821/2020-4, DEVICE OF A FOOTBALL PLAYER HITTING A BALL (fig.), § 56).


62 The Board also refers to the decision of 24/09/2019, R 1814/2017-4, GEOMETRIC FIGURE/ GEOMETRIC SHAPE, where it was found that the use of the registered mark



() in colour () did not alter the distinctive character, because the contrast of light and dark between white lines and a dark background is maintained, unchanged in the coloured form of use (§ 22).

63 When read in connection with the IR holder's multiple catalogues, the invoices demonstrate sales of different commodities bearing the contested IR. These are the following:

Article code	Volume	Invoice and date	Territory
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Classic Football Sock 22111-5115 	180 items 30 items	4356136 – 01/08/2015 4329188– 26/04/2015	Lithuania Lithuania
Total:	210 items		
Tech Backpack 40963-8632 	40 items	4488766 – 31/10/2016	Lithuania
Total:	40 items		
Technical backpack 40921-1015 	30 items	4319016 – 29/04/2015	Slovenia
Total:	30 items		

- 64 The table above shows that a variety of the IR holder's goods bearing the contested IR have been sold in various entities in the EU.

Place of use

- 65 It is not necessary that the mark should be used in an extensive geographic area for use to be deemed genuine, since such a qualification will depend on the characteristics of the goods concerned on the corresponding market (19/12/2012, C-149/11, Leno, EU:C:2012:816, § 54-55).

- 66 The Board confirms that most of the pieces of evidence refer to the relevant territory. The invoices have been issued to many commercial entities in various Member States, such as Denmark, Slovenia, Lithuania, the UK (until 01/01/2021), Hungary, Poland, Spain, Italy, France, Germany, the Czech Republic and Finland. Also, the majority of the invoices use the euro or the Danish krone as the currency.
- 67 The invoices also show the sale of goods in third countries, such as Norway, Greenland, Japan and Qatar. According to Article 18(1)(b) EUTMR, the affixing of the EUTM (or in the present case the contested IR designating the EU) to goods or to the packaging thereof in the European Union solely for export purposes also constitutes use within the meaning of Article 18(1) EUTMR. The mark has to be used (i.e. affixed to goods or their packaging) in the relevant market — that is, the geographical area where it is registered.
- 68 All of the invoices have been issued by the IR holder in Aarhus, Denmark. Many of these invoices show that the goods originate from within the EU and are delivered to third countries. For instance, many invoices show that the warehouse location of the IR holder is in Handewitt, Germany and the delivery addresses of various entities in Norway. The invoices issued to entities in Japan and Qatar include a reference to a ‘handling fee export’, which indicates the export of the goods outside of the EU. To conclude the Board will consider the invoices issued to entities outside the EU, as the IR holder in its commercial activity exports its goods to third countries (by analogy, 14/07/2010, R 602/2009-2, RED BARON, § 42; 19/01/2017, R 901/2016-1, WINCHESTER / WINCHESTER, § 47-48).
- 69 In any event, only a few of the invoices that refer to the sale of goods bearing the contested IR have been issued to entities located outside the EU. The fact remains that the Board has enough indications showing that use of the contested IR has taken place in the EU.

Time of use

- 70 According to the Cancellation Division, the registration of the contested IR was published in accordance with Article 190(2) EUTMR on 18 February 2008. The application for a declaration of revocation was filed on 13 May 2019. Therefore, the registration of the contested IR had been published for more than five years at the date of the filing of the request. The IR holder had to prove genuine use of the contested IR during the five-year period preceding the date of the application for a declaration of revocation, that is, from 13 May 2014 to 12 May 2019 inclusive. Neither of the parties has contested this finding. The Board will proceed accordingly.
- 71 It is not a matter of examining whether the trade mark has been put to continuous use over the course of the relevant period, but one of ensuring that the mark has been put to genuine use during that period, and more particularly of assessing whether the scale and frequency of the use of that mark was such as to demonstrate the presence on the market in an actual and consistent manner over time (05/06/2013, T-495/12, T-496/12 & T-497/12, Dracula Bite, EU:T:2014:423, § 34-35 and the case-law cited therein).
- 72 Furthermore, it is not required that all the evidence submitted provides information as to the time of use of the contested IR. It suffices that the criterion of time of use is proven

following an overall assessment of the evidence (05/10/2022, T- 429/21, ALDIANO / ALDI, EU:T:2022:601, § 38).

- 73 There is ample information confirming the time of use of the contested IR. As shown in the tables above, the vast majority of the invoices submitted fall within the relevant period of time. These invoices provide direct indications that prove the time of the use of the contested IR. Moreover, the IR holder has submitted entire catalogues for its clothing collections from 2015, 2016, 2017, 2018 and 2019. The contested IR is affixed to some of the clothing articles of the IR holder. Finally, the contested IR appears in online archive *Wayback Machine* snippets (Annexes Q-V), which pertain to the relevant time period.

Nature of use

- 74 In the context of Article 10(3) EUTMDR, the expression ‘nature of use’ includes evidence of the use of the sign as a trade mark in the course of trade, of the use of the mark as registered, or of a variation thereof according to Article 18(1)(a) EUTMR, and of its use for the goods for which it is registered.

Use as a trade mark

- 75 The proof of use must establish a clear link between the use of the mark and the relevant goods, as required by Article 10(3) EUTMDR. Genuine use requires that use is made as a trade mark in accordance with its essential function, which is to guarantee the identity or the origin of the goods for which it is registered (11/03/2003, C-40/01, *Minimax*, EU:C:2003:145, § 43; 14/04/2016, T-20/15, *Piccolomini*, EU:T:2016:218, § 42).
- 76 The contested IR is presented as an indicator for the goods provided by IR holder. The mark has been placed consistently on the IR holder’s product catalogues. In the clothing sector, it is usual to place the mark on both the exterior of the goods and the labels sewn on the inside of them (12/09/2019, C- 541/18, *#darferdas?*, EU:C:2019:725, § 29), as well as the price tags. The Board observes that the evidence submitted shows that the contested IR has been used on the price tags of clothing articles, on the front of headwear, where the consumer usually expects to see the brand logo, on the sides of sports socks, etc. Therefore, the Board concludes that the evidence shows that the IR holder has used the contested IR as a trade mark and in accordance with its essential function.

Use as registered

- 77 It has been extensively analysed above in paragraphs 31, 46 to 57 and 61 to 62, that the contested IR has been used in its registered form and in forms that do not alter its distinctive character.

Extent of use

- 78 Concerning the extent of use made of the contested mark, account must be taken, in particular, of the commercial volume of all the acts of use on the one hand and the

duration of the period in which those acts of use occurred, and the frequency of those acts, on the other (08/07/2004, T-334/01, Hipoviton, EU:T:2004:223, § 35).

- 79 The assessment of use maintaining the right entails a degree of interdependence between the factors taken into account. Thus, the fact that commercial volume achieved under the mark was not high may be offset by the fact that use of the mark was extensive or very regular, and vice versa (08/07/2004, T-203/02, Vitafruit, EU:T:2004:225, § 42; 16/05/2013, T-353/12, Alaris, EU:T:2013:257, § 35).
- 80 This is confirmed by settled case-law, according to which, the use of the earlier mark need not always be quantitatively significant in order to be deemed genuine (11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 39; 16/11/2011, T-308/06, Buffalo Milke, EU:T:2011:675, § 51). When it serves a real commercial purpose, even minimal use of the trade mark can be sufficient to establish genuine use (11/05/2006, C-416/04 P, Vitafruit, EU:C:2006:310, § 72). It must also be noted that the requirement for the extent of use does not mean that the IR holder has to reveal the entire volume of sales or turnover figures (08/07/2004, T-203/02, Vitafruit, EU:T:2004:225, § 37).
- 81 In the present case, the IR holder has submitted numerous entire product catalogues dated from 2014 to 2019. They use euro or Danish krone as currency. In this regard, it must be borne in mind that, under Article 10(4) EUTMDR, the evidence produced to show genuine use of the mark at issue may include catalogues. The cancellation applicant has not cast doubt on the authenticity of these catalogues. It is therefore common ground that they are genuine and reliable (see, by analogy, 08/07/2010, T-30/09, Peerstorm, EU:T:2010:298, § 38).
- 82 The catalogues showing the contested IR in its registered form or in a form that does not alter its distinctive character present a wide range of clothing articles, footwear, and accessories, including socks, T-shirts, sweatpants, shorts, bags, balls, gloves, and headwear, which are provided with prices in euro or Danish krone and with a code number for each article and the respective colour code. The contested IR is shown both on the clothing articles, footwear, and accessories themselves, as well as on the covers and the pages of the catalogues. The catalogues also contain the history of the IR holder's company and highlights of the company throughout the years (up until 2019), showing a continued activity with respect to sportswear items. It follows from the case-law that the commercial life of a product generally extends over a period of time and continuity of use is one of the indications to be taken into account in order to establish that the use was objectively intended to create or maintain a market share (10/11/2021, T-353/20, ACM 1899 AC MILAN (fig.) / Milan et al., EU:T:2021:773, § 36).
- 83 These catalogues show that the use of the contested IR was public and outward, and constant in time. In this regard, it must be remembered that the purpose of the requirement for genuine use of the earlier marks is not to assess commercial success of the undertaking in question, but must also have regard of the regularity, the publicity and the commercial purpose of the use, amongst others (see, by analogy, 08/07/2010, T-30/09, Peerstorm, EU:T:2010:298, § 43 and the case-law cited).
- 84 Even though there is indeed no proof of distribution of the catalogues, the evidence must be seen as a whole. In particular the submitted invoices, viewed in relation to the period and frequency of use, indicate that the volume of sales is certainly not so low so as to be

considered merely token, minimal or notional for the sole purpose of preserving the rights conferred by the mark (09/12/2019, R 1322/2019-4, Sensorwarm / Sensor, § 24).

- 85 The Board is of the opinion that the evidence, in particular the numerous invoices provide sufficient information about the extent of use of the contested IR (reference is made to the correlation tables in paragraphs 33, 58, and 63). It is true that the value of the goods sold, as well as the total of the amounts invoiced have been redacted. However, the invoices evidence sales of hundreds of clothing articles, footwear, and accessories under the contested IR. The catalogues show the code for each article that bears the contested IR, as well as the corresponding colour code. These same codes appear in the invoices submitted by the IR holder. This allows the Board to assess the extent of use of the contested IR.
- 86 By way of reference, in 13/11/2019, R 2352/2018-5, Keen utility / UTILITY DIADORA (fig.) et al., the Board of Appeal found that sales of 350 pairs of socks and approximately 1 500 pairs of shoes were sufficient to show use of the earlier mark. Overall, the number of articles sold, in the present case, are considered enough to prove a minimum extent of use of the contested IR.
- 87 It is also important that the invoice numbers are non-sequential, which confirms that these invoices are merely by way of example and the IR holder has issued far more invoices than those submitted (24/09/2019, R 1814/2017-4, GEOMETRIC FIGURE / GEOMETRIC SHAPE, § 19; 13/05/2022, R 1191/2021-2, BUZZ / buzz (fig.), § 77; 09/12/2019, R 1322/2019-4, Sensorwarm / Sensor, § 23).
- 88 Here, it should be added that the fact that some of the invoices have been submitted in Danish does not change the conclusion above. Considering the nature of these documents, the Board notes that they are self-explanatory, and their content as regards the goods sold and the quantity are easily recognisable. The same applies to the indication of the territory to which they are addressed (29/07/2022, R 91/2022-5, Spezia la voglia (fig.) / Specia et al., § 46). The Board highlights that even in the invoices that are in Danish, the IR holder's goods are described in English.
- 89 Moreover, the written statement, dated 10 September 2020 and signed by the CEO and the creative director of the Dansk Fashion and Textile organisation, confirms that the contested IR has been used, at least, in Demark for several decades (Annex Rrrr).
- 90 In addition, the IR holder submitted a written statement by the Head of Purchasing department of Sport Danmark A/S, where he confirms that goods bearing, inter alia, the contested IR have been sold via their network of stores for several decades, in particular, during the period 2012-2017 (Annex Ssss). Here the Board points out that the company name Sport Danmark A/S also appears in some of the invoices submitted.
- 91 Furthermore, in the statement of the CEO of the sports club Brøndby, it is confirmed that the IR holder has served as the official sponsor and provider of kits, clothing and sports equipment bearing the contested IR for the professional team. This is confirmed by

screenshots taken from the social media profiles of the sports club, where the contested



IR is shown:

- 92 Finally, the Deputy Director of the Danish Football Association also confirmed that the IR holder has used the contested IR on kits, clothing, and equipment of the Danish national football teams as well as top tier Danish football clubs resulting in a vast amount of national exposure.
- 93 The cancellation applicant argues that these statements have low probative value as they were signed by representatives of entities that are commercially connected to the IR holder and not by independent parties. Even assuming that these statements do not come from independent sources, at least part of the information provided therein is corroborated by objective evidence, such as invoices, photographs, etc. In any event, the Board has not relied on this evidence to conclude that the IR holder has used the contested IR to a sufficient extent. This evidence merely strengthens the Boards opinion regarding the extent of use of the contested IR.
- 94 To conclude, the evidence provided is sufficient to prove that the contested IR's use serves a real commercial purpose since it allows it to be inferred that the IR holder has tried to acquire a commercial position in the relevant market.

Use for the registered goods

- 95 In accordance with Article 58(1)(a) EUTMR, the mark must be used for the goods or services for which it is registered in order to remain on the register.
- 96 The goods that fall within the scope of the present appeal are the following:

Class 18: *Bags namely bags for sports.*

Class 25: *Clothing, footwear, headgear namely sports clothing, footwear and headgear, leisure clothing, footwear and headgear and fashion clothing, footwear and headgear; sports clothing, footwear and headgear; leisure clothing, footwear and headgear; fashion clothing, footwear and headgear.*

Class 28: *Balls for sports and games.*

- 97 The IR holder has submitted enough evidence showing genuine use of the contested IR in relation to various types of bags for sports, in particular *backpacks* and *ball bags*. The Board agrees with the Cancellation Division in that the sub-category *bags namely bags for sports* in Class 18 can be viewed independently.
- 98 Likewise, the IR holder has provided sufficient evidence to show the genuine use in relation to the sub-category of *balls for sports and games* in Class 28.

- 99 On the other hand, the use for a whole category has to be accepted if there are examples of different kinds of products belonging to this category and there is no other subcategory that covers the different products. This is the case in relation to the goods in Class 25. The IR holder has proven use of the contested IR in relation to at least *socks, sports shorts, sport pants, jackets, T-shirts and polo shirts, hats, beanies and headbands, gloves, and sports shoes*.
- 100 It is in practice many times impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods concerned (14/07/2005, T-126/03, Aladin, EU:T:2005:288, § 46; 18/10/2016, T-367/14, Fruitfuls, EU:T:2016:615, § 40).
- 101 The Board confirms the conclusion of the Cancellation Division that these goods in Class 25 cover a sufficiently broad spectrum of *sport clothing, footwear and headgear. Sports clothing, footwear and headgear, leisure clothing footwear and headgear and fashion clothing, footwear and headgear* are covered by the mark and are indistinguishable (by analogy, 29/08/2022, R 1829/2021-5, Amity / amitié, § 95-96; 09/12/2019, R 1299/2019-4, Sensordry / Sensor, § 49).

Conclusion

- 102 The evidence as a whole shows use for the registered goods that fall within the scope of the appeal.
- 103 The appeal is dismissed.

Costs

- 104 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the cancellation applicant, as the losing party, must bear the IR holder's costs of the appeal proceedings. These consist of the IR holder's costs of professional representation of EUR 550.
- 105 As to the cancellation proceedings, the Cancellation Division ordered each party to bear its own costs. This decision remains unaffected. The total amount for both proceedings is, therefore, EUR 550.

Order

On those grounds,

THE BOARD

hereby:

- 1. Dismisses the appeal.**
- 2. Orders the cancellation applicant to bear the IR holder's costs of the appeal proceedings, which are fixed at EUR 550.**

Signed

S. Stürmann

Signed

H. Salmi

Signed

C. Negro

Registrar:

Signed

H. Dijkema

