

**DECISION
of the Fourth Board of Appeal
of 14 December 2022**

In case R 543/2019-4

McDonald's International Property Company, Ltd.

110 N. Carpenter Street

Chicago Illinois 60607

United States of America

EUTM Proprietor / Appellant

represented by Bardehle Pagenberg Partnerschaft mbB Patentanwälte, Rechtsanwälte,
Prinzregentenplatz 7, 81675 München, Germany

v

Supermac's (Holdings) Ltd

Ballybrit Business Park,

Ballybrit Galway

Ireland

Cancellation Applicant / Defendant

represented by Tomkins & Co., 5 Dartmouth Road, 6, Dublin, Ireland

APPEAL relating to Cancellation Proceedings No 14 788 C (European Union trade
mark registration No 62 638)

THE FOURTH BOARD OF APPEAL

composed of N. Korjus (Chairperson and Rapporteur), A. Kralik (Member) and
J. Jiménez Llorente (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 1 April 1996, McDonald's International Property Company, Ltd. ('the EUTM proprietor') sought to register the word mark

BIG MAC

for the following goods and services, as amended on 10 February 1998 and 12 March 1998:

Class 29 - Foods prepared from meat, pork, fish and poultry products, meat sandwiches, fish sandwiches, pork sandwiches, chicken sandwiches, preserved and cooked fruits and vegetables, eggs, cheese, milk, milk preparations, pickles, desserts;

Class 30 - Edible sandwiches, meat sandwiches, pork sandwiches, fish sandwiches, chicken sandwiches, biscuits, bread, cakes, cookies, chocolate, coffee, coffee substitutes, tea, mustard, oatmeal, pastries, sauces, seasonings, sugar;

Class 42 - Services rendered or associated with operating and franchising restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive-through facilities; preparation of carry-out foods; the designing of such restaurants, establishments and facilities for others; construction planning and construction consulting for restaurants for others.

- 2 The application was published on 27 July 1998, the mark was registered on 22 December 1998 and renewed until 1 April 2026.
- 3 On 11 April 2017, the Supermac's (Holdings) Ltd ('the cancellation applicant') filed an application for a declaration of revocation of the registered mark for all the above goods and services.
- 4 The grounds of the request for a declaration of revocation were those laid down in Article 51(1)(a) of Regulation No 207/2009 (EU trade mark not put to genuine use for a continuous five-year period).
- 5 On 25 September 2017, the EUTM proprietor submitted evidence in order to establish genuine use of the contested mark, consisting of Annexes 1-5:
 - Annex 1: Affidavit of Mr D. B., the Senior Department Head Legal of McDonald's Deutschland LLC – Zweigniederlassung München, on use of the contested mark in Germany dated 31 August 2017, accompanied by examples of the packaging of the sandwich (boxes), promotional materials and brochures, appearing to be menus;
 - Annex 2: Affidavit of Mr F. B., General Counsel employed by McDonald's France Services, on use of the contested mark in France dated 1 September 2017, accompanied by numerous promotional materials and brochures;

- Annex 3: Affidavit of Ms S. H., Legal Counsel at McDonald’s Restaurants Limited on use of the contested mark in the United Kingdom dated 6 September 2017, accompanied by promotional materials and brochures;
 - Annex 4: Printouts from the EUTM proprietor’s websites in the EU Member States from January 2014 to October 2016;
 - Annex 5: A printout of an extract of Wikipedia article on ‘Big Mac’, accessed on 13 September 2017.
- 6 On 12 December 2017, the cancellation applicant filed observations in reply. It stated that the evidence provided by the EUTM proprietor ‘does in no way show genuine use of “BIG MAC” on anything other than a sandwich including a beef patty, lettuce, cheese, pickles, onions and a special sauce’. It emphasised that the evidence of use was extremely narrow and no evidence of use whatsoever had been provided in relation to the remaining goods and services. It further requested that ‘the application for revocation should be upheld’.
- 7 On 7 March 2018, the EUTM proprietor stated in its rejoinder that the use of the EUTM in Germany, France and the United Kingdom, which are three of the economically most important Member States, is sufficient to prove that the mark is used in the European Union. It further claimed that the use of the EUTM for a sandwich shall also be considered as use for its ingredients. Therefore, the use is shown at least to ‘foods prepared from meat products, meat sandwiches, preserved and cooked vegetables, cheese, pickles’ in Class 29 and ‘edible sandwiches, meat sandwiches, bread, sauces, seasonings’ in Class 30. Moreover, as commonly known and may be seen from Annex 5, the EUTM proprietor and its franchisees offer and sell their ‘BIG MAC’ product to consumers via fast food restaurants only. Hence, the EUTM has used properly also for ‘services rendered or associated with operating and franchising restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive- through facilities; preparation of carry-out foods; the designing of such restaurants, establishments and facilities for others’ in Class 42.
- 8 By decision of 11 January 2019 (‘the contested decision’), the Cancellation Division revoked the contested EUTM in its entirety as from 11 April 2017 and ordered the EUTM proprietor to bear the costs. It gave, in particular, the following grounds for its decision:
- The EUTM proprietor had to prove genuine use of the contested mark from 11 April 2012 until 10 April 2017 for all the registered goods and services.
 - The three affidavits, signed by the representatives/employees of the EUTM proprietor, claimed significant sales figures in relation to ‘Big Mac’ sandwiches for the period between 2011 and 2016 and attached examples of the packaging of the sandwich (boxes), promotional brochures and what appear to be menus. Such statements are given less weight than independent evidence. Therefore, the remaining evidence must be assessed in order to see whether or not the content of the affidavits is supported by the other items of evidence.

- Although some of the evidence refers to the relevant time period (e.g. some of the brochures and printouts from websites) and to some of the Member States of the EU, and the EUTM is referred to in relation to at least some of the relevant goods (e.g. sandwiches), the EUTM proprietor fails to prove the extent of use of its mark.
- All of the remaining evidence originates from the EUTM proprietor itself, including the printouts from the proprietor's own websites, promotional brochures and packaging. Part of the submitted evidence, that is, the printouts, originate from the internet. The presence of the trade mark on websites can show, inter alia, the nature of its use or the fact that products or services bearing the mark have been offered to the public. However, the mere presence of a trade mark on a website is, of itself, insufficient to prove genuine use unless the website also shows the place, time and extent of use or unless this information is otherwise provided.
- In particular, the value of the internet extracts in terms of evidence can be strengthened by evidence that the specific website has been visited and, in particular, that orders for the relevant goods and services have been made through the website by a certain number of customers in the relevant period and in the relevant territory (i.e. records that are generally kept when operating a business web page, for example, records relating to internet traffic and hits attained at various points in time or, in some cases, the countries from which the web page has been accessed). Neither of these, however, was provided by the EUTM proprietor.
- Although some of the printouts of the proprietor's web pages exhibit sandwiches (the prices are not provided), some of which marked with the EUTM, it could not be concluded whether, or how, a purchase could be made or an order could be placed. Even if the websites provided such an option, there is no information of a single order being placed. Therefore, a connection between the EUTM proprietor's websites (irrespective of the used country code top-level domains and languages) and the eventual number of items offered (sold) could not be established.
- Indeed, although the submitted packaging materials and brochures depict the EUTM, there is no information provided about how these brochures were circulated, who they were offered to, and whether they have led to any potential or actual purchases. Moreover, there is no independent evidence submitted that could show how many of the products for which the packaging was used (if that is the case) were actually offered for sale or sold.
- The evidence analysed above does not provide sufficient details concerning the extent of use. Other than exhibiting the sign in relation to goods which could be considered to be part of the relevant goods, these materials do not give any data for the real commercial presence of the EUTM for any of the relevant goods or services.

- It follows that the submitted brochures, packaging and printouts do not give sufficient information to support the sales and turnover figures claimed in the affidavits.
 - As far as the printout from en.wikipedia.org is concerned, Wikipedia entries cannot be considered as a reliable source of information, as they can be amended by Wikipedia’s users and therefore these could only be considered relevant as far as they are supported by other pieces of independent concrete evidence. In the case at issue, however, the remaining pieces of evidence which were submitted do not provide information about the extent of use.
 - Taking into account the submitted evidence as a whole, the documents do not provide conclusive information that the products marked with the EUTM are offered for actual sale, as there is no confirmation of any commercial transactions, either online, or via brick-and-mortar operations. Even if the goods were offered for sale, there is no data about how long the products were offered on the given web page or in other ways, and there is no information of any actual sales taking place or any potential and relevant consumers being engaged, either through an offer, or through a sale. Finally, as far as the relevant services are considered, there is no single piece of evidence that refers to any of the registered services being offered under the EUTM.
 - Since at least the extent of use has not been established, the contested mark was not genuinely used and it is not necessary to enter into the other requisites.
 - As a result, the application for a declaration of revocation is wholly successful and the contested EUTM is revoked in its entirety.
- 9 On 8 March 2019, the EUTM proprietor filed an appeal against the contested decision, requesting that the decision be entirely set aside. The statement of grounds of the appeal was received on 10 May 2019.
- 10 In its response received on 26 July 2019, the cancellation applicant requested that the appeal be dismissed.
- 11 On 9 August 2019, the EUTM proprietor requested, according to Article 114(4) EUTMR, to keep some of the documents submitted confidential.
- 12 On 24 October 2019, the Registry of the Boards of Appeal notified the parties that the appeal proceedings were suspended.
- 13 On 8 April 2022, the Registry of the Boards of Appeal notified the parties that the appeal proceedings had been resumed.

Submissions and arguments of the parties

- 14 The arguments raised in the EUTM proprietor’s statement of grounds may be summarised as follows:

- The Cancellation Division erroneously assessed that the contested mark had not been put into genuine use, as it examined each piece of evidence in isolation and failed to take into account the specific statements in the affidavits (Annexes 1 to 3) which referred to the evidence adduced. The evidence attached to the affidavits does not originate from the EUTM proprietor but from the advertising agencies involved. The product sold under the contested mark is a sandwich intended for immediate consumption and thus, it does not indicate the time and does not bear any ‘eat-by’ date on the packaging. The relevant year in which the submitted packaging and/or advertising material was actually used on the market appears as part of the copyright notice available on much of the advertising material and on the back of the packaging.
- The affidavit for France (Annex 2) includes the actual advertising expenditure for the contested mark between 2011 and 2016 and also refers to the annexes showing the relevant advertising material where the year is shown as part of the copyright notice on the material itself (e.g. on the advertising material used in connection with the 2014 FIFA World Cup).
- Since the EUTM proprietor belongs to the McDonald’s group of companies which does not only operate so-called company owned restaurants but is also running a franchise system with thousands of restaurants operated by franchisees, some copies of advertising materials and menu boards do not include prices for legal reasons. However, the affidavits confirm that the advertising material has actually been used on the German, the French and the UK markets.
- In view of the volume of labels and advertising material submitted and their spread throughout the relevant period, it is appropriate to support a claim as to the extent of use of the contested mark and not merely the nature of the use. Moreover, the contested mark is well known due to its actual presence on the market.
- Contrary to the Cancellation Division’s assessment, the website printouts (Annex 4) cannot be regarded as mere ‘internal’ material without any probative value. The excerpts were printed from the internet, as can be seen from the text line at the bottom of the printouts, which gives the URL. They were therefore publicly available and cannot be classified as ‘internal’.
- Opposing to the findings of the Cancellation Division, the excerpts from the EUTM proprietor’s websites clearly indicate the place of use, which maybe derived from the language of the websites and the top level domains included at the text line at the bottom of the print-outs, and the time of use which may be derived from the date of printing which is also included in the text line at the bottom of the print-outs.
- With regard to the Wikipedia article on ‘Big Mac’ (Annex 5), which was disregarded by the Cancellation Division as an unreliable source of information, this article was not written or edited by the EUTM proprietor and should be given the same value as any information taken from any third-

party source, such as articles in newspapers or magazines or in traditional encyclopaedias. In addition, all factual claims made in this Wikipedia article are supported by additional references that are specifically listed in Annex 5. Also, the use of ‘Big Mac’ in the index prepared by *The Economist* is a fact that cannot be seriously disputed, as it is widely used throughout the world and in all the Member States of the European Union.

- In addition, the table on page 4 of Annex 5, which lists the nutritional values of ‘Big Mac’, which vary slightly from country to country, lists almost all EU Member States, and in particular Germany, France and the United Kingdom, i.e. the countries covered by the affidavits (Annexes 1 to 3). This therefore provides further indisputable evidence of the extent of use.
- The cancellation applicant accepted that the contested mark was used for part of the contested goods in its observations dated 12 December 2017 (see paragraph 6 above).
- As the revocation proceedings are *inter partes* proceedings, the Office can only take a decision to the extent that the other party actually challenges the registration and the examination is limited to the facts provided by the parties.
- Therefore, the evidence submitted before the Cancellation Division is sufficient to prove use for the contested goods and services.
- The following additional evidence was filed upon appeal to demonstrate genuine use of the contested mark for all the contested goods and services, in particular:
 - Annex 6: Consumer surveys by GfK from February/March 2019 for Germany (Annex 6a), France (Annex 6b) and the United Kingdom (Annex 6c), giving information on, among others, awareness or knowledge of the term ‘Big Mac’ (i) among the general population at large and (ii) among those who purchase or consume fast food products in Germany, the United Kingdom and France. In addition, the product ‘Big Mac’ is almost universally identified as McDonald’s product;
 - Annex 7: Several online newspaper and magazine articles regarding the ‘Big Mac Index’, including an article from the weekly magazine *The Economist*, stating that ‘Big Mac Index’ is an informal way of measuring the purchasing power parity between two currencies and provides a test of the extent to which market exchange rates lead to goods costing the same in different countries;
 - Annex 8: Photographs of original packaging used in relation to the ‘Big Mac’ product, in particular, in Germany in 2012 and 2014 (Annex 8a), in France in 2012, 2013, 2015 and 2017 (Annex 8b) and in the United Kingdom in 2012 and 2014 (Annex 8c), with dates derived from the copyright notice on the back of the packaging;

- Annex 9: Various copies of receipts and/or excerpts from electronic cash registers originating from the relevant period from several ‘McDonald’s’ restaurants in Germany (Annex 9a), in the UK (Annex 9b) and in France (Annex 9c), all of which demonstrate the actual sale of ‘BIG MAC’ sandwiches during the relevant time period;
- Annex 10: Screenshots of television commercials broadcast during the relevant period, accompanied by affidavits from employees of the advertising agencies that created the commercials for McDonald’s and/or purchased the time slots from the television stations;
- Annex 11: Photographs showing the adverts used at bus stops in Dartford, Aldershot and Sunderland in the United Kingdom in November 2016, together with an affidavit signed by an employee of the agency that produced the adverts for McDonald’s confirming the date and location of use;
- Annex 12: Advertising material published or disseminated in the United Kingdom in 2012 and 2014 (Annex 12a), in Germany in 2012 to 2016 (Annex 12b), and in France in 2014 to 2016 (Annex 12c);
- Annex 13: Photographs of menus used in McDonald’s restaurants in the UK in 2013 and 2014 (Annex 13a) and in Germany from 2013 to 2016 (Annex 13b);
- Annex 14: News articles and third-party publications, namely:
 - Annex 14a: containing screenshots of YouTube videos referring to the ‘Big Mac’ mark posted by German consumers (i) on 29 January 2016 (YouTube video ‘McDonald’s - The Big Mac Party’ posted by a user called ‘GermanFoodReviews’) and (ii) on 5 November 2016 (YouTube video ‘Extreme Big Mac Challenge’ posted by an influencer called Ron Bielecki);
 - Annex 14b: containing news reports and screenshots of videos referring to the ‘Big Mac’ mark that have been published by consumers and/or newspaper publishers in the UK, namely screenshots from the YouTube video ‘Are McDonald’s burgers really 100% beef?’, which shows influencer Doug Armstrong going to a McDonald’s farm, to a McDonald’s supplier and then making his own ‘Big Mac’ in the restaurant to find out the truth about how the product is made (published 16 May 2015), screenshots of a BBC interview with a McDonald’s UK executive (published on the BBC website 10 May 2013), and a copy of the news article ‘As the Big Mac turns 40. (...)’ published by *The Sun* newspaper as part of its online edition on 13 November 2014;
- Annex 15: Google analytics reports relating to McDonald’s websites displaying the ‘Big Mac’ product, namely the German websites with a large number of page views in March 2017 and the French websites of

the company with a large number of page views for the years 2012 to 2017;

- Annex 16: A financial audit report prepared by the auditing firm together with an affidavit containing, inter alia, information on the ‘Big Mac’ units sold on the relevant local market in Germany and the United Kingdom between 2011 and 2016 and in France between 2013 and 2016 and (ii) the movement of ‘point of sale’ (‘POS’) data from restaurant cash registers to the EUTM proprietor’s financial reporting systems in Germany, the United Kingdom and France;
 - Annex 17: An affidavit signed by an employee of an IT company giving data on sales of ‘Big Mac’ sandwiches online and via the McDonald’s app for the years 2013 to 2017 for France;
 - Annex 18: Two affidavits attesting to advertising/media expenditure for ‘Big Mac’ in Germany between 2012 and 2017 (Annex 18a) and in the United Kingdom between 2014 and 2016 (Annex 18b);
 - Annex 19: A letter of confirmation from the Director General of the Bundesverband der Systemgastronomie (BdS), a German employers’ and trade association in the restaurant chain sector, of which McDonald’s Deutschland LLC (formerly McDonald’s Deutschland Inc.) since its founding in 1988, which confirms that the ‘Big Mac’ hamburger is one of McDonald’s best-selling products and has represented McDonald’s long-standing hamburger tradition like no other product for many years or even decades.
- The evidence submitted by the EUTM proprietor before the first instance and at the appeal stage demonstrates use of the contested mark at least for the following goods and services:
- Class 29 - Foods prepared from meat products, meat sandwiches, preserved and cooked vegetables, cheese, pickles;
- Class 30 - Edible sandwiches, meat sandwiches, bread, sauces, seasonings;
- Class 42 - Services rendered or associated with operating and franchising restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive- through facilities; preparation of carry-out foods.
- As regards the disputed services in Class 42, account must be taken of the fact that ‘Big Mac’ sandwiches are generally known as products available only in McDonald’s restaurants and are therefore inextricably linked to the restaurant services in Class 42.

15 The arguments raised in the cancellation applicant’s response may be summarised as follows:

- The additional evidence should be rejected in its entirety because it constitutes a significant and substantial part of the evidence of use and was

only submitted at the appeal stage without due cause. Additional evidence can only be accepted by the Office if it merely ‘strengthens and clarifies the prior evidence submitted within the time limit’.

- The cancellation applicant endorses the reasoning and the conclusions of the contested decision that the contested mark has not been genuinely used, as no single item of evidence has been submitted which relates to any of the contested goods and services.
- In any case, the additional evidence (Annexes 6 to 19), submitted by the EUTM proprietor at the appeal stage, is insufficient to prove genuine use of the contested mark.
- As regards Annex 6, it is a consumer survey from February/March 2019, falling outside the relevant period.
- The EUTM proprietor failed to specify which piece of evidence submitted before the Cancellation Division has to be supplemented by Annex 7. Only a vague reference to the Wikipedia article (Annex 5) is insufficient and thus, Annex 7 is inadmissible. In addition, most of the extracts are from 2019, i.e. outside the relevant period.
- Copyright notices on the product packaging in Annex 8 only show when the respective packaging could have been designed, but do not contain any indication when it was put on the market.
- As regards Annex 9 (copies of receipts and/or excerpts from electronic cash registers), they should have been submitted, in line with the Office’s Guidelines, during the proceedings before the Cancellation Division. In any case, they only refer (at best) to a meat filled sandwich, and nothing else.
- Annexes 10 and 11 (TV advertising screenshots) were available also during the proceedings before the Cancellation Division. However, they were not submitted in a due time. In addition, the screenshots in Annex 10 are from April 2019 and they do not contain any information about the number of their viewers in particular ‘jurisdictions’. They merely refer to use of ‘Big Mac on a meat filled sandwich only, and nothing else, within the United Kingdom, France and Germany’. For the same reasons, also Annex 12 (advertisements) and Annex 13 (photos of menu boards) should be rejected, as (i) they are entirely new pieces of evidence which are not supplementary in any way to Annexes 1 to 5 and (ii) they are undated.
- Annex 14 (third party news articles and publications) constitutes an entirely new piece of evidence that does not supplement any evidence submitted before the Cancellation Division and thus, it is inadmissible. Even if accepted, it only refers to ‘meat filled sandwiches’.
- Annex 15 (Google analytics reports) does not supplement the evidence submitted before the Cancellation Division. In addition, the sole fact that a certain amount of people viewed the EUTM proprietor’s websites does not

prove that they subsequently made a purchase. In addition, the evidence has not been translated from French and German. Use of a word as part of a domain name does not constitute genuine use of the contested mark.

- Annex 16 (financial audit report) should have been submitted before the Cancellation Division and it is not a supplementary evidence. The report does not state that the term ‘units’ refers to ‘sandwiches’, as it is interpreted by the EUTM proprietor itself in its statement of grounds.
- Annex 17 (affidavit of an IT company employee) and Annex 18 (affidavits relating to advertising expenses) are entirely new pieces of evidence without any link to the evidence submitted on 25 September 2017 (see paragraph 5 above).
- Annex 19 is not supplementary to the originally submitted evidence and it is only a subjective opinion of the witness, without any corroborating evidence.
- None of the evidence submitted at the appeal stage is admissible, as the late production of entirely new evidence of over 700 pages is unacceptable.
- The Cancellation Division correctly found that the evidence, consisting of Annexes 1 to 5, was insufficient to establish genuine use of the contested mark.
- The affidavits, signed by the EUTM proprietor’s internal representatives/employees are of a low probative value. The attachments to the affidavits (i) are only internal documents, and (ii) are either undated, or a year is handwritten, or contain a copyright notice indicating a year when the Big Mac package was designed, but not when the product ‘Big Mac’ was sold. A Wikipedia article (Annex 5) cannot be accepted as evidence and it does not come from an independent source.
- The Cancellation Division correctly reasoned that the extent of use of the contested mark was not proven.
- Contrary to the EUTM proprietor’s assertions in the statement of grounds, the Office does not have to accept the evidence on sale or turnover presented only in affidavits or by the EUTM proprietor itself. The burden of proof lies with the EUTM proprietor, and not with the Office. Whether or not something is generally known, is irrelevant for the purpose of proving genuine use of the contested mark in the revocation proceedings. Use of the contested mark has to be adduced from the evidence submitted by the EUTM proprietor, and not from the well-known facts or ‘common knowledge’, as the EUTM proprietor erroneously asserts.
- As regards the contested services, there is no single piece of evidence on use of the contested mark in relation to any of the services offered under the EUTM. A single sentence in the statement of grounds is insufficient and no use was proven, at least in relation to the contested services.

- To conclude, even if the additional evidence was admitted, its value is negligible, as it is either undated, falling outside the relevant period or irrelevant. Therefore, the contested decision has to be confirmed.
- 16 On 9 August 2019, the EUTM proprietor requested, according to Article 114(4) EUTMR to keep the following documents confidential (see paragraph 11 above):
- observations dated 25 September 2017;
 - affidavits submitted as Annexes 1 to 3;
 - statement of grounds of the appeal dated 10 May 2019;
 - consumer surveys, Google analytics reports, financial audit reports and affidavits submitted as Annexes 6, 15, 16, 17 and 18 to the statement of grounds of the appeal.

The EUTM proprietor reasoned that it has a special interest in keeping the above mentioned documents confidential, given that they include market shares, advertising spending and turnover and/or sales figures relating to one of the EUTM proprietor's core products. These figures are merely internal figures which have not yet been made available to any third parties or the public at large and their disclosure would potentially result in an undue competitive advantage for the EUTM proprietor's competitors.

Reasons

- 17 All references made in this decision should be seen as references to the EUTMR (EU) No 2017/1001 (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended (hereinafter 'EUTMR'), unless specifically stated otherwise in this decision.
- 18 In view of the date of submission of the application for a declaration of revocation at issue, that is to say 11 April 2017, which is decisive for the purpose of identifying the substantive law applicable, the present dispute is governed by the substantive provisions of Regulation No 207/2009 and Commission Regulation (EC) No 2868/95 ('CTMIR'), as amended. Therefore, the references made by the Cancellation Division in the contested decision and by the parties to Article 58(1)(a), Article 62(1) and Article 18 EUTMR must be understood as referring to Article 51(1)(a), Article 55 and Article 15 of Regulation No 207/2009, the wording of which is, in substance, the same (03/07/2019, C-668/17 P, Boswelan, EU:C:2019:557, § 3 and 25; 10/11/2021, T-758/20 & T-759/20, Monster and Monster energy, EU:T:2021:776, § 23).
- 19 Moreover, in so far as, according to settled case-law, procedural rules are generally held to apply on the date on which they enter into force (11/12/2012, C-610/10, Commission vs Spain, EU:C:2012:781, § 45), the dispute is governed by the procedural provisions of the EUTMR and EUTMDR. However, since the

application for a declaration of revocation was filed on 11 April 2017 and the Office invited the EUTM proprietor to submit proof of genuine use by 25 September 2017, pursuant to Article 82(2)(f), (g) and (i) EUTMDR, Articles 12 to 17 EUTMDR and Article 19 EUTMDR, in conjunction with Article 10(3), (4), (6) and (7) EUTMDR, shall not apply. Instead, the relevant provisions of the CTMIR shall apply (in particular Rule 22(2), (3) and (4) and Rule 40(5), CTMIR).

20 Since the appeal was filed on 8 March 2019, then pursuant to Article 82(2)(j) EUTMDR, Title V ‘Appeals’ of the EUTMDR shall apply to it.

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

22 The appeal is also partially well founded. The Board’s reasons are outlined hereunder.

Preliminary remark 1 – Admissibility of the evidence submitted by the EUTM proprietor for the first time before the Boards of Appeal

23 Together with the statement of grounds, the EUTM proprietor submitted, for the first time, further evidence (as specified in paragraph 14 above, Annexes 6 to 19) in response to the reasoning of the contested decision and to supplement the evidence submitted before the Cancellation Division (Annexes 1 to 5), which was intended to show that the contested mark had been genuinely used.

24 The cancellation applicant contested the admissibility of the additional evidence. It essentially argued that the additional evidence is wholly new and/or undated and that the EUTM proprietor failed to provide detailed reasons as to which piece of the evidence submitted before the Cancellation Division the additional evidence is allegedly supplementing.

25 It is, therefore, appropriate to examine whether this evidence can be considered as admissible.

26 Pursuant to Article 95(2) EUTMR, the Office may disregard facts or evidence which are not submitted in due time by the parties concerned. Pursuant to Article 27(4) EUTMDR, the Board of Appeal may accept facts or evidence submitted for the first time before it only where those facts or evidence are, on the face of it, likely to be relevant for the outcome of the case, and they have not been produced in due time for valid reasons, in particular where they are merely supplementing relevant facts and evidence which had already been submitted in due time, or are filed to contest findings made or examined by the first instance of its own motion in the decision subject to appeal.

27 Those same principles are reiterated in Article 54(1) BoA-RP, according to which such facts or evidence may also not be disregarded if they were not available before or at the time the contested decision was taken or are justified by any other valid reason.

- 28 Additional evidence filed for the first time at the appeal stage consists of consumer surveys (Annex 6), internet articles (Annexes 7 and 14), photographs of packaging (Annex 8), copies of receipts/excerpts from electronic cash registers (Annex 9), advertising materials (Annex 10 to 13), affidavits confirming advertising costs (Annex 18), Google analytics data (Annex 15), a financial audit report (Annex 16), an affidavit on online sale figures of the Big Mac in France (Annex 17) and an affidavit of a representative of a German gastronomy association on the market position of the EUTM proprietor and its 'Big Mac' product (Annex 19).
- 29 The Board considers that the conditions for accepting the additional evidence submitted by the EUTM proprietor together with the statement of grounds have been met. In particular, the evidence in question reacts to the Cancellation Division's findings (the assessment of the evidence of use of the contested mark). This additional evidence only supplements and builds on the evidence submitted in the proceedings before the Cancellation Division, and concerns use of the contested mark. Furthermore, it may also be relevant to the outcome of the case since it cannot be excluded that, if it had been taken into account by the Cancellation Division, it may have affected the Cancellation Division's assessment and its final conclusions.
- 30 As regards the cancellation applicant's arguments, the Board points out that the evidence of use is to be considered as a whole and not as separate items. In addition, the EUTM proprietor submitted miscellaneous types of evidence before the Cancellation Division (Annexes 1 to 5) which were intended to demonstrate all the specific factors of use, i.e. the time of use, the place of use, the nature of use and the extent of use. Contrary to the cancellation applicant's arguments, the EUTM proprietor has indicated for each individual piece of additional evidence which specific annex submitted before the first instance is being supplemented (Annexes 1 to 5) and for what reasons, although this is not even required by the relevant provisions. In fact, no material connection between the supplementary and the earlier evidence is required by the case-law (11/12/2014, T-235/12, Grass in bottle (other), EU:T:2014:1058, § 89-90).
- 31 Furthermore, the cancellation applicant has had a chance to examine this evidence and submitted its comments in this respect (see paragraph 15 above).
- 32 For these reasons, the Board considers that the requirements for taking into account the documents submitted in the appeal proceedings pursuant to Article 95(2) EUTMR and Article 27(4) EUTMDR are met and that this additional evidence is admissible.

Preliminary remark 2 – Confidentiality

- 33 The EUTM proprietor requested to keep some of the documents submitted confidential in compliance with Article 114(4) EUTMR. It reasoned in detail that it has a special interest in keeping these documents confidential, given they include market shares, advertising spend and turnover and/or sales figures relating to one of the EUTM proprietor's core products which had not been made publicly available (see paragraph 16 above).

- 34 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.
- 35 In the event that a special interest in keeping a document confidential in accordance with Article 114(4) EUTMR is invoked, the Office must check whether a special interest is sufficiently shown. Such a special interest must exist because of the confidential nature of the document or its status as a trade or business secret.
- 36 In the case at hand, such a special interest exists in respect of some of the evidence in question because of the confidential nature of those documents and their status, as containing a trade or business secret. Furthermore, the reasons of their confidential nature were sufficiently explained by the EUTM proprietor (24/04/2018, T-831/16, EU:T:2018:218, ZOOM, § 21-24).
- 37 The Board will keep certain business information included in the submissions and evidence of the EUTM proprietor related to financial and sales information confidential and will describe the evidence in most general terms without disclosing any such data.

Preliminary remark 3 – Language of the evidence

- 38 The cancellation applicant objected that Annex 15 (Google analytics data) had not been translated from French and German.
- 39 The Board points out that also some advertising materials and packaging relating to France or Germany and bills in Annex 9 are in French and German.
- 40 However, the Board observes that the EUTM proprietor is not under any particular obligation to translate the proof of use, unless it is specifically requested to do so by the Office according to Article 24 EUTMIR and Article 10(6) EUTMDR. The majority of the evidence was submitted in English, the language of the proceedings.
- 41 Whereas (i) Annex 15 contains Google analytics data comprising mainly numeral indicators relating to the particular website visits and (ii) the remaining evidence in languages different from English are advertising and packaging relating to France or Germany and bills in Annex 9, they have a self-explanatory character and there is no need to furnish a translation and such request would be exaggerated (15/12/2010, T-132/09, Epcos, EU:T:2010:518, § 51; 24/01/2017, T-258/08, DIACOR / DIACOL, EU:T:2017:22, § 21, 28).

Article 51(1)(a) of Regulation No 207/2009

- 42 In accordance with Article 51(1)(a) EUTMR of Regulation No 207/2009, the EUTM shall be declared to be revoked on application to the Office, if, within a continuous period of five years, the trade mark has not been put to genuine use in the European Union in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use. The burden of proof

for genuine use is on the part of the EUTM proprietor.

- 43 According to Rule 40(5) CTMIR, if the proprietor of the EUTM does not provide proof of genuine use of the contested EUTM within the time limit set by the Office, the EUTM shall be revoked.
- 44 The contested mark was registered on 1 April 1996, thus more than five years before the filing date of the application for a declaration of revocation on 11 April 2017. Under Article 51(1)(a) of Regulation No 207/2009, the EUTM proprietor had to show genuine use of its registered mark within the period of five years preceding the filing of the application for a declaration of revocation, that is, between 11 April 2012 to 10 April 2017.
- 45 According to the case-law, there is ‘genuine use’ of a trade mark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark (11/03/2003, C-40/01, *Minimax*, EU:C:2003:145, § 43; 19/12/2012, C-149/11, *Onel / Omel*, EU:C:2012:816, § 29). In addition, the condition relating to genuine use of the trade mark requires that the mark, as protected in the relevant territory, is used publicly and outwardly (11/03/2003, C-40/01, *Minimax*, EU:C:2003:145, § 37; 05/02/2020, T-44/19, *TC Touring Club (fig.) / TOURING CLUB ITALIANO et al.*, EU:T:2020:31, § 52).
- 46 In interpreting the notion of genuine use, account must be taken of the fact that the ratio for the requirement that the contested mark must have been put to genuine use is not to assess commercial success or to review the economic strategy of an undertaking, nor is it intended to restrict trade mark protection to the case where large-scale commercial use has been made of the marks (26/09/2013, C-609/11 P, *Centrotherm*, EU:C:2013:1449, § 72; 29/11/2018, C-340/17 P, *ALCOLOCK*, EU:C:2018:965, § 90).
- 47 When assessing whether use of the trade mark is genuine, regard must be taken to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create market share for the relevant goods or services, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark (11/03/2003, C-40/01, *Minimax*, EU:C:2003:145, § 38-39; 19/12/2012, C-149/11, *Onel / Omel*, EU:C:2012:816, § 29; 30/01/2020, T-598/18, *BROWNIE / BROWNIE*, *Brownie* (series mark), EU:T:2020:22, § 32).
- 48 In order to examine, in a particular case, whether an earlier trade mark has been put to genuine use, an overall assessment must be carried out, which takes into account all the relevant factors of the particular case. That assessment implies that a certain interdependence between the factors be taken into account. Thus, a low volume of goods marketed under the trade mark may be compensated for by a high intensity or a certain consistency over time of the use of that trade mark or vice versa. In addition, the turnover and the volume of sales of goods marketed

under the contested mark cannot be assessed in absolute terms but must be looked at in relation to other relevant factors, such as the volume of business, production or marketing capacity or the degree of diversification of the undertaking using the mark and the characteristics of the products or services on the relevant market. As a result, use of the mark at issue need not always be quantitatively significant in order to be deemed genuine. Even minimal use can therefore be sufficient to be deemed genuine, provided that it is viewed as warranted in the economic sector concerned in order to maintain or create a market share for the goods or services protected by the mark (08/07/2004, T-203/02, Vitafruit, EU:T:2004:225, § 42; 02/02/2016, T-171/13, MOTOBIB PESARO, EU:T:2016:54, § 72).

- 49 Genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (13/06/2019, T-398/18, DERMAEPIL SUGAR EPIL SYSTEM (fig.) / dermépil Perron Rigot (fig.), EU:T:2019:415, § 56; 23/09/2020, T-677/19, Syrena, EU:T:2020:424, § 44).
- 50 Pursuant to Rule 40(5) in conjunction with Rule 22(4) CTMIR, the evidence shall be limited to the submission of supporting documents and items such as packages, labels, price lists, catalogues, invoices, photographs, newspaper advertisements, and statements in writing as referred to in Article 78(1)(f) of Regulation No 207/2009.
- 51 As regards affidavits, in order to assess the probative value of a document, it is necessary to check the plausibility and truthfulness of the information which it contains. In that regard, account must be taken of, inter alia, the origin of the document, the circumstances of its preparation, the person to whom it was addressed, and whether it seems from the content to be sensible and reliable (07/06/2005, T-303/03, Salvita, EU:T:2005:200, § 42; 15/12/2005, T-262/04, Briquet à Pierre, EU:T:2005:463, § 78; 18/11/2015, T-813/14, Cases for Portable computers, EU:T:2015:868, § 26).
- 52 The statement in writing is one of the forms of evidence explicitly foreseen in Article 78(1)(f) of Regulation No 207/2009 and Rule 22(4) CTMIR, and cannot be ignored. However, when it is made by an employee of the EUTM proprietor or persons acting on behalf of the EUTM proprietor, it must be treated as merely indicative and needs to be corroborated by other evidence (21/11/2012, T-338/11, PHOTOS.COM, EU:T:2012:614, § 51).
- 53 In relation to the probative value of Wikipedia extracts the General Court has ruled that information from collective encyclopaedias, such as Wikipedia, lacks certainty, because their content may be amended at any time and, in certain cases, by any visitor, even anonymously (10/02/2010, T-344/07, Homezone, EU:T:2010:35, § 46; 16/11/2011, T-500/10, DORMA, EU:T:2011:679, § 55; 18/06/2013, T-338/12, K9 products, EU:T:2013:327, § 32; 16/10/2018, T-548/17, ANOKHI, EU:T:2018:686, § 131). However, it must be noted that information contained on Wikipedia may be accepted if it has confirmatory value and simply corroborates the information from other sources (25/09/2018, T-180/17, EM, EU:T:2018:591, § 79).

- 54 The items of evidence taken together may establish the necessary facts, even though each of those items of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (16/11/2011, T-308/06, Buffalo Milke, EU:T:2011:675, § 61; 24/05/2012, T-152/11, Mad, EU:T:2012:263, § 33-34).
- 55 There is no obligation to present specific types of evidence, but rather a comprehensive assessment of the evidence as a whole has to be made (16/11/2011, T-308/06, Buffalo Milke, EU:T:2011:675, § 61; 24/05/2012, T-152/11, Mad, EU:T:2012:263, § 33-34), in the sense that use on the market not only appears credible or likely, but is positively established (12/12/2002, T-39/01, Hiwatt, EU:T:2002:316, § 47).

Evidence of use submitted by the EUTM proprietor

- 56 The documents submitted as evidence of proof of use of the contested mark by the EUTM proprietor in the revocation proceedings are summarised as follows:
- i. Evidence submitted by the EUTM proprietor on 25 September 2017 before the Cancellation Division:
 - Annex 1: Affidavit of the Senior Department Head Legal of McDonald's Deutschland LLC – Zweigniederlassung München, on the use of the contested mark in Germany dated 31 August 2017, giving information (i) on the use of the contested mark in Germany since its launch in the year 1973 in connection with 'a sandwich with beef, salad and cheese' and (ii) on the number of 'Big Mac' sandwiches sold in Germany per year from 2011 to 2016, in the amount of several tens of millions of units sold per year. The affidavit is accompanied by 26 pages of examples of sandwich packaging (box clamshells), promotional materials and brochures in German which appear to be menus depicting the contested mark as 'BIG MAC[®]', 'Big Mac[®]', 'BIGGER BIG MAC[®]' or 'BIG MAC[®] McMENÜ[®]', some of which show the price in euro and refer to either 'McDonald's', 'McDonald's Promotions GmbH' or 'Restaurant in Musterstadt', Germany, and at the same time refer to the possibility of being consumed in McDonald's restaurants;
 - Annex 2: Affidavit of the General Counsel employed by McDonald's France Services, on the use of the contested mark in France dated 1 September 2017, giving information (i) on the use of the contested mark in France since its launch in the year 1979 in connection with 'a sandwich with beef, salad and cheese'; (ii) on the number of 'Big Mac' sandwiches sold in France per year from 2011 to 2016, in the amount exceeding over hundred millions of units sold per year and (iii) on advertising expenditure related to 'Big Mac' in France in each of the years 2013 to 2016, which in total exceeded several million euros. The affidavit is accompanied by 34 pages of examples of sandwich packaging (box clamshells), promotional materials and brochures in French which appear to be menus from September 2011 to

November 2016 depicting the contested mark as ‘BIG MAC[®]’, ‘Big Mac[®]’, ‘GRAND BIG MAC[®]’, some of them show the euro currency without a specific price, which seems to be a pattern of menus where the price needs to be completed;

- Annex 3: Affidavit of the Legal Counsel at McDonald’s Restaurants Limited in the United Kingdom on the use of the contested mark in the United Kingdom dated 6 September 2017, giving information (i) on the wide use of the contested mark in the United Kingdom in connection with the product sold under the mark ‘Big Mac’ and (ii) the number of ‘Big Mac’ products sold in the United Kingdom per year from 2011 to 2016, in the amount of several tens of millions of units sold per year. The affidavit is accompanied by 8 pages of examples of promotional materials from 2009 to 2014 in English depicting the contested mark as ‘The Big Mac[®]’;
- Annex 4: Printouts from the EUTM proprietor’s websites in the EU Member States from January 2014 to October 2016, including:
 - Annex 4a: A printout from the German version of the EUTM proprietor’s website <http://www.mcdonalds.de/produkte/alle-produkte> from January 2014, displaying miscellaneous products, including the ‘Big Mac’ sandwich;
 - Annex 4b: 22 pages of printouts from the EUTM proprietor’s websites www.mcdonalds.de (for Germany), www.mcdonalds.at (for Austria), www.mcdonalds.be (for Belgium), www.mcdonalds.cz (for the Czech Republic), www.mcdonalds.dk (for Denmark), www.mcdonalds.es (for Spain), www.mcdonalds.fi (for Finland), www.mcdonalds.fr (for France), www.mcdonalds.hu (for Hungary), www.mcdonalds.ie (for Ireland), www.mcdonalds.it (for Italy), www.mcdonalds.nl (for the Netherlands), www.mcdonalds.pl (for Poland), www.mcdonalds.ro (for Romania), www.mcdonalds.se (for Sweden), www.mcdonalds.si (for Slovenia), www.mcdonalds.sk (for Slovakia), www.mcdonalds.co.uk (for the United Kingdom), displaying miscellaneous products, including the ‘Big Mac’ sandwich, from September 2016;
 - Annex 4c: A printout from the German version of the EUTM proprietor’s website <http://www.mcdonalds.de/produkte/alle-produkte> from October 2014, displaying miscellaneous products, including the ‘Big Mac’ sandwich;
- Annex 5: A printout of an extract of Wikipedia article on ‘Big Mac’, accessed on 13 September 2017, stating, among others, that the Big Mac is ‘a hamburger sold by international fast food restaurant chain McDonald’s’ and that it is ‘one of the company’s signature products’.

It further states that ‘the Big Mac consists of two 1.6 oz (45.4 g) (0.0454 kg) beef patties, “special sauce” (a variant of Thousand Island

dressing), iceberg lettuce, American cheese, pickles and onions, served in a three-part sesame seed bun. The Big Mac is known worldwide and is often used as a symbol of American capitalism. *The Economist* has used it as a reference point for comparing the cost of living in different countries – the Big Mac Index – as it is so widely available and is comparable across markets.’

ii. Evidence submitted by the EUTM proprietor together with the statement of grounds:

- Annex 6: Consumer surveys by GfK from February/March 2019 for Germany (Annex 6a), France (Annex 6b) and the United Kingdom (Annex 6c), giving information on, among others, awareness or knowledge of the term ‘Big Mac’ on an extremely high level with McDonald’s fast food product (i) among the general population at large and (ii) among those who purchase or consume fast food products in Germany, the United Kingdom and France. In addition, the product ‘Big Mac’ is almost universally identified as McDonald’s product and thus, the degree of assignability with respect to the company ‘McDonald’s’ is on a very high level;
- Annex 7: Several online newspaper and magazine articles regarding the ‘Big Mac Index’, including (i) an article ‘The Big Mac index’ from the weekly magazine *The Economist* from 10 January 2019, stating that ‘the Big Mac index was invented by *The Economist* in 1986 as a light-hearted guide to whether currencies are at their “correct” level’; (ii) an article ‘The Big Mac index shows currencies are very cheap against the dollar’ from the weekly magazine *The Economist* from 12 January 2019, stating that ‘the Big Mac, the flagship burger of the McDonald’s fast-food chain, is a model of consistency. Composed of seven ingredients, the double-decker sandwich is produced in nearly identical fashion across more than 36 000 restaurants in over 100 countries. This consistency is the secret sauce in the Big Mac index, *The Economist’s* light-hearted guide to exchange rates. (...)’; (iii) an article ‘Big Mac Index in its 30th year’ from the website <https://www.statista.com> from November 2016, showing, among others, global prices for a Big Mac in selected countries in 2016, including France, Ireland, Germany and the United Kingdom and stating that ‘30 years ago, in 1986, Big Mac Index was introduced by Pam Woodall, a journalist for the British magazine “*The Economist*”. Published once a year, it is still an informal way of measuring the purchasing power parity between two currencies’ and provides a test of the extent to which market exchange rates lead to goods costing the same in different countries; and (iv) a Wikipedia article on ‘Big Mac Index’ accessed on 6 May 2019, stating, among others, that ‘the Big Mac was chosen because it is available to a common specification in many countries around the world as local McDonald’s franchisees at least in theory have significant responsibility for negotiating input prices (...)’;

- Annex 8: Photographs of original packaging used in relation to the ‘Big Mac’ product, in particular, in Germany in 2012 and 2014 (Annex 8a), in France in 2012, 2013, 2015 and 2017 (Annex 8b) and in the United Kingdom in 2012 and 2014 (Annex 8c), with dates derived from the copyright notice on the back of the packaging;
- Annex 9: Various copies of receipts and/or excerpts from electronic cash registers originating from the relevant period from several ‘McDonald’s’ restaurants in Germany from 10 April 2012 to 5 April 2017 (Annex 9a), in the UK from January 2017 to March 2017 (Annex 9b) and in France, providing a full cash record as a representative sample for the period from 1 January 2017 to 15 January 2017 from (Annex 9c), all of which demonstrate the actual sale of ‘Big Mac’ sandwiches during the relevant time period;
- Annex 10: Screenshots of television commercials broadcast during the relevant period, accompanied by affidavits from employees of the advertising agencies that created the commercials for McDonald’s and/or purchased the time slots from the television stations, namely:
 - screenshots of the two television commercials ‘Umzug’ (‘Move’) and ‘Supermarkt’ (‘Supermarket’) broadcast in Germany in 2013 (Annex 10a);
 - screenshots of three versions of the television advertisement ‘Austausch’ (‘Exchange’) broadcast in Germany in 2014 (Annex 10b);
 - screenshots of the television advertisement (‘Hunter Gatherer’) broadcast in the United Kingdom from 6 June 2014 onwards (Annex 10c);
 - screenshots of the television advertisements (‘BIG MAC + Grand BIG MAC Chicken’ and ‘BIG MAC + Grand BIG MAC Chicken bis’) broadcast in France in 2016 (Annex 10d);
- Annex 11: Photographs showing the advertisements for ‘Big Mac’ used at bus stops in Dartford, Aldershot and Sunderland in the United Kingdom in November 2016, together with an affidavit signed by an employee of the agency that produced the adverts for McDonald’s confirming the date and location of use;
- Annex 12: Advertising material published or disseminated in the United Kingdom in 2012 and 2014 (Annex 12a, displaying, among others, a ‘Big Mac’ sandwich with price in the British pounds), in Germany in 2012 to 2016 (Annex 12b, showing, among others, a ‘Big Mac’ sandwich with price in euro), and printouts from the Facebook account ‘McDonald’s France’ from 2014 to 2016, displaying a ‘Big Mac’ meat and chicken sandwich in relation to ‘McDonald’s France’ (Annex 12c);
- Annex 13: Photographs of menus used in McDonald’s restaurants in the UK in 2013 and 2014 (Annex 13a) and in Germany from 2013 to 2016

(Annex 13b), comprising ‘Big Mac[®]’ as one of the sandwiches offered at McDonald’s;

- Annex 14: News articles and third-party publications, namely:
 - Annex 14a containing screenshots of YouTube videos referring to the ‘Big Mac’ mark posted by German consumers (i) on 29 January 2016 (YouTube video ‘McDonald’s - The Big Mac Party’ posted by a user called ‘GermanFoodReviews’) and (ii) on 5 November 2016 (YouTube video ‘Extreme Big Mac Challenge’ posted by an influencer called Ron Bielecki, including ‘McDrive’);
 - Annex 14b containing news reports and screenshots of videos referring to the ‘Big Mac’ mark that have been published by consumers and/or newspaper publishers in the UK, namely screenshots from the YouTube video ‘Are McDonald’s burgers really 100% beef?’, which shows an influencer going to a McDonald’s farm, to a McDonald’s supplier and then making his own ‘Big Mac’ in the restaurant to find out the truth about how the product is made (published 16 May 2015), screenshots of a BBC interview with a McDonald’s UK executive (published on the BBC website 10 May 2013), and a copy of the news article ‘As the Big Mac turns 40. Here are 40 facts about the Golden Arches’ published by *The Sun* newspaper as part of its online edition on 13 November 2014;
- Annex 15: Google analytics reports relating to McDonald’s websites, namely the German websites with a large number of page views in March 2017 and the French websites of the company with a large number of page views for the years 2012 to 2017;
- Annex 16: A financial audit report prepared by the auditing firm together with an affidavit containing, inter alia, (i) information on the ‘Big Mac’ units sold on the relevant local market in Germany and the United Kingdom between 2011 and 2016 and in France between 2013 and 2016; (ii) confirmation that ‘Big Mac’ units sold from the UK, German and French reporting system were equal to or exceeded data provided in the affidavits submitted as Annexes 1 to 3; (iii) information on the movement of ‘point of sale’ (‘POS’) data from restaurant cash registers to the EUTM proprietor’s financial reporting systems in Germany and in the United Kingdom;
- Annex 17: An affidavit signed by an employee of the IT company giving data on sales of ‘Big Mac’ sandwiches online and via the McDonald’s app for the years 2013 to 2017 for France;
- Annex 18: Two affidavits attesting to advertising/media expenditure for ‘Big Mac’ in Germany between 2012 and 2017 (Annex 18a) and in the United Kingdom between 2014 and 2016 (Annex 18b);

- Annex 19: A letter of confirmation from the Director General of the Bundesverband der Systemgastronomie (BdS), a German employers' and trade association in the restaurant chain sector, of which McDonald's Deutschland LLC (formerly McDonald's Deutschland Inc.) since its founding in 1988, which confirms that the 'Big Mac' hamburger is one of McDonald's best-selling and most significant core products and has represented McDonald's long-standing hamburger tradition like no other product for many years or even decades.

Evaluation of the evidence of use

- 57 According to Rule 40(5) in conjunction with Rule 22(3) CTMIR, the indications and evidence of use shall establish the place, time, extent and nature of use of the contested mark for the goods and services in respect of which it is registered.
- 58 An overall assessment of all the pieces of evidence must be made, taking account of all the relevant factors in the particular case, which entails a degree of interdependence of the factors presented (18/01/2011, T-382/08, *Vogue*, EU:T:2011:9, § 30; 05/03/2019, T-263/18, *MEBLO* (fig.), EU:T:2019:134, § 38). In particular, Rule 22(2) CTMIR does not state that each piece of evidence must necessarily give information about all four elements to which proof of genuine use must relate, namely the place, time, extent and nature of use. An accumulation of evidence may allow the necessary facts to be established, even though each of those pieces of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (16/11/2011, T-308/06, *Buffalo Milke*, EU:T:2011:675, § 61; 05/03/2019, T-263/18, *MEBLO* (fig.), EU:T:2019:134, § 84).
- 59 The EUTM proprietor is McDonald's International Property Company, Ltd. Part of the evidence refers in relation to:
- Germany to 'Mc Donald's Deutschland Inc' (Annex 9a, Annex 19), or 'Mc Donald's in Germany' (Annex 8a), or to 'Mc Donald's Promotions GmbH&Co. KG' (Annex 12a);
 - France to 'Mc Donald's France' (Annex 10c, 12c, 17), or 'Mc Donald's Ouest Parisien d'Antony' (Annex 9c);
 - The United Kingdom to 'Mc Donald's in the UK' (Annex 11, 18b), or 'Mc Donald's Restaurants Limited' (Annex 9b).
- 60 As regards use by licensees, the Board notes that, despite the absence of evidence of a written licence agreement, *de facto* consent for the use of the contested mark by all the above mentioned entities is established. This conclusion is confirmed by the fact that it is unlikely that the EUTM proprietor, as the proprietor of the contested mark, would be in a position to submit evidence if the contested mark had been used against its wishes (08/07/2004, T-203/02, *Vitafruit*, EU:T:2004:225, § 25). In addition, the EUTM proprietor asked an independent auditing company to prepare a financial audit report on the sale of Big Mac

products in Germany, France and in the United Kingdom and explicitly confirmed that it operates restaurants in these countries where 'Big Mac' is available.

- 61 Use by licensees is considered to be use of the mark with the consent of the proprietor in compliance with Article 15(2) of Regulation No 207/2009 and it is deemed to constitute use by the EUTM proprietor.
- 62 The use of the contested mark by all the above mentioned entities, which are economically related to the EUTM proprietor, is similarly to be considered as authorised use with the consent of the EUTM proprietor (30/01/2015, T-278/13, now, EU:T:2015:57, § 38) and is therefore deemed to constitute use by the EUTM proprietor.
- 63 As regards the affidavits submitted by the EUTM proprietor (Annexes 1-3, 16-19), the Board recalls that in order to assess the probative value of a document, it is necessary to check the plausibility and truthfulness of the information which it contains and that the statement in writing is one of the forms of evidence explicitly foreseen in Article 78(1)(f) of Regulation No 207/2009 and Rule 22(4) CTMIR, and cannot be ignored (see paragraphs 51-52 above).
- 64 In the present case, the probative value of the affidavits is supported by all the other evidence, including the evidence on the sale, marketing and restaurant services provided by the EUTM proprietor or by its subsidiaries, online articles, different prints of receipts from cash registers in relation to fast food, including the 'Big Mac' sandwich, extensive advertising campaigns, numerous articles on the importance of the 'Big Mac Index' and its relevance for the currency parity measuring and financial audit reports by a reputed audit company, confirming the accuracy of the 'Big Mac' sandwiches numbers stated in the affidavits (Annexes 1 to 3).
- 65 As regards the affidavits submitted by employees of the advertising agencies that created the commercials for McDonald's and/or purchased the time slots from the television stations as parts of Annexes 10a, 10b, 10c, 11 and 18) the Board points out that all of them are supported by the screenshots from the specific television advertisements.
- 66 A financial audit report prepared by an independent auditing firm (Annex 16) verifies the data on the sold numbers of the 'Big Mac' products provided by the affidavits (Annexes 1 to 3).
- 67 The witness statement in Annex 19 is provided by the representative of a German employers' and trade association in the restaurant chain sector on the definition of the 'Big Mac' product and its importance for the EUTM proprietor's business (as one of its best-selling and most significant core products). It is supported by miscellaneous evidence submitted, including extensive advertising campaigns, financial reports, customer surveys as well as financial documentation related to the sale of the 'Big Mac' hamburger.
- 68 The Board will next examine the four factors relevant for the assessment of the genuine use of the contested mark.

(i) *Place of use*

- 69 The territorial scope is only one of several factors that have to be taken into account in assessing whether use of an EU trade mark is genuine and a *de minimis* rule for establishing whether that factor is satisfied cannot be laid down. A mark needs not be used in an extensive geographic area for use to be deemed genuine, since this will depend on the characteristics of the goods or services concerned on the corresponding market and, more generally, on all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered. Moreover, for use of an EU trade mark to be deemed genuine, it is not required that that mark be used in a substantial part of the European Union. Furthermore, the possibility that the mark in question may have been used in the territory of a single Member State must not be ruled out, since the borders of the Member States must be disregarded, and the characteristics of the goods or services concerned must be taken into account. Use in a single Member State of the European Union is sufficient to satisfy the criterion of territorial scope (07/11/2019, T-380/18, INTAS / INDAS (fig.) et al., EU:T:2019:782, § 80-81; 01/06/2022, T-316/21, SUPERIOR MANUFACTURING (fig.), EU:T:2022:310, § 76).
- 70 In the present case, the contested mark's territorial scope comprises the territory of the European Union. By applying the principles laid down in the previous paragraph, it is sufficient that the contested mark has been used in one of the Member States.
- 71 The Board notes that the majority of the evidence relates to:
- Germany (Annexes 1, 4a, 4b, 6a, 8a, 10a, 10b, 12b, 13b, 14a, 15, 16, 18a, 19);
 - France (Annexes 2, 4b, 6b, 8b, 9c, 10d, 12c, 15, 16, 17);
 - the United Kingdom (Annexes 3, 4b, 5, 6c, 8c, 9b, 10c, 11, 12a, 13a, 14b, 16, 18b).
- 72 The use of contested mark in the United Kingdom before its effective withdrawal from the EU (i.e. 1 February 2020 with a transition period until 31 December 2020) constitutes use 'in the Union' for the purpose of establishing genuine use of those marks (09/03/2022, T-766/20, Stones, EU:T:2022:123, § 21-31). It is therefore necessary to take into account the use of the contested trade mark in the United Kingdom throughout the relevant period (i.e. from 11 April 2012 until 10 April 2017).
- 73 The references are made to trade in numerous EU states (Annexes 4b and 5), including Austria, Belgium, the Czech Republic, Denmark, Spain, Finland, France, Hungary, Ireland, Italy, the Netherlands, Poland, Romania, Sweden, Slovakia.
- 74 The evidence is predominantly in English, German and French.

75 The evidence containing financial information (menus, advertising and invoices, the EUTM proprietor's turnover) refers either to (British) pounds sterling or to euros.

76 Since the evidence, viewed in its entirety, sufficiently proves use at least in Germany, the United Kingdom and France, it fulfils the condition relating to the place of use.

(ii) Time of use

77 The EUTM proprietor had to show genuine use of its registered mark between 11 April 2012 to 10 April 2017 (see paragraph 44 above).

78 It is sufficient that a trade mark has been put to genuine use during a part of the relevant period (16/12/2008, T-86/07, Deitech, EU:T:2008:577, § 52; 22/04/2022, T-181/21, SmartThinQ, EU:T:2022:247, § 63).

79 Circumstances preceding or subsequent to the relevant point of time may make it possible to confirm or better assess the extent to which the trade mark was used during the relevant period and the real intentions of the proprietor during that time (27/01/2004, C-259/02, Laboratoire de la mer, EU:C:2004:50, § 31).

80 Indeed, the vast majority of the evidence fall within the relevant period (the majority of attachments to Annexes 1 to 3 – except several printouts which are either undated or from 2011, Annexes 4a, 4b, 4c, 5, 8-15).

81 The Board observes that, even if some documents predate the beginning of the relevant period (e.g. some packages bear the copyright notice from 2011) or postdate the end of the relevant period (Annexes 6a, 6b, 6c, 7), the vast majority of the evidence filed by the EUTM proprietor falls within the relevant period and sufficiently indicates the time of use within the relevant period.

82 As regards cancellation applicant's arguments that the market surveys (Annexes 6a, 6b and 6c) do not date from the relevant period, the Board notes that it would be unreasonable, rigorous and highly economically burdensome to require the proprietor of each mark to have consumer surveys covering all periods of the EUTM's registration available for the entire duration of the EUTM's validity. Moreover, it is supplementary evidence which reflects the degree of awareness of the relevant public of that particular mark, which, particularly in the case of such an extensive awareness of the 'BigMac' mark in the relevant market, is built up over a long period of time, in the order of years. For instance, the evidence shows that the 'Big Mac' sandwich is present more than 40 years in the UK (Annex 14). Therefore, the fact that the market surveys are dated February/March 2019 and the relevant period ended on 10 April 2017 is not material to the assessment of the evidence as a whole. The market survey is corroborative evidence that complements the wide range of evidence submitted by the EUTM proprietor that dates back to the relevant period (e.g. advertising material and box prints - attachments to Annexes 1 to 3, invoices in Annex 9, etc.).

- 83 With respect to the cancellation applicant's criticism that it is not possible to infer the date of the copyright notice as the relevant date, the Board notes that all of the evidence must be evaluated as a whole and in context with each other.
- 84 Firstly, the fact that the products were also actually promoted during the relevant period is supported by other additional evidence besides the copyright notices (e.g. printouts from the website such as Annex 4, Annex 5, Annex 9, Annex 14, Annex 16).
- 85 Secondly, the goods and services in question concern fast moving foodstuffs which are consumed on a daily basis and must be supplied fresh. It is therefore highly likely that the menus or promotion materials will be printed relatively shortly before their actual distribution. This fact is confirmed, for example:
- By various copies of receipts and/or excerpts from electronic cash registers originating from several 'McDonald's' restaurants in Germany from 10 April 2012 to 5 April 2017 (Annex 9a), in the UK from January 2017 to March 2017 (Annex 9b) and in France, providing a full cash record as a representative sample for the period from 1 January 2017 to 15 January 2017 from (Annex 9c);
 - By the printout of the menu for the UK (Annex 13a), stating that 'the selection of products on offer at this restaurant may vary from the menu, and may be restricted at different times'. However, it explicitly says that it is 'correct at time of printing' (August 2013);
 - By the printout from Annex 12b, which shows the 2016 copyright notice and also states that McDonald's is a sponsor of UEFA 2016:



- 86 Furthermore, several online articles regarding 'Big Mac Index' (Annex 7) are dated from January 2019. However, they prove that 'the Big Mac index was invented by *The Economist* in 1986' (an article 'The Big Mac index' from the weekly magazine *The Economist* from 10 January 2019), what means that the

‘Big Mac’ product as the basic measure of this index is still provided. Also, the article ‘The Big Mac index shows currencies are very cheap against the dollar’ from the weekly magazine *The Economist* from 12 January 2019 states that ‘Big Mac, the flagship burger of the McDonald’s fast-food chain, is a model of consistency. Composed of seven ingredients, the double-decker sandwich is produced in nearly identical fashion across more than 36 000 restaurants in over 100 countries. This consistency is the secret sauce in the Big Mac index, *The Economist’s* light-hearted guide to exchange rates. (...)’. It follows that ‘Big Mac’ is a highly recognised product of the EUTM proprietor, and its use falls within the entire relevant period.

- 87 In addition, evidence relating to dates preceding the relevant period and following the relevant period contributes to the overall picture that there was continuous and real use of the contested mark, as it makes it possible to confirm or better assess, at least in relation to the territory of Germany, the United Kingdom and France, the extent to which the mark was used and the actual intentions of the EUTM proprietor during that period. It follows that this evidence can be taken into consideration, as a significant amount of evidence falling within the relevant period was produced (16/06/2015, T-660/11, POLYTETRAFLON / TEFLON, EU:T:2015:387, § 54; 03/10/2019, T-666/18, ad pepper (fig.), EU:T:2019:720, § 65-69; 13/10/2021, T-1/20, Instinct, EU:T:2021:695, § 44-45; 10/11/2021, T-353/20, ACM 1899 AC MILAN (fig.) / Milan et al., EU:T:2021:773, § 36).
- 88 In sum, the Board finds that the evidence, taken as a whole, fulfils the condition of the time of use.

(iii) Nature of use

- 89 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 15(1)(a) of Regulation No 207/2009, and of its use for the goods and services for which it is registered.

a) Use as a trade mark in the course of trade

- 90 With regard to the first requirement, it must be borne in mind that as a trade mark has, *inter alia*, the function of operating as a link between the goods and services concerned and the person responsible for their marketing, the proof of use must establish a clear link between the use of the mark and the relevant goods and services (11/09/2007, C-17/06, Céline, EU: C:2007:497, § 23).
- 91 In this regard, it should be recalled that, according to case-law, the affixing of a mark to a magazine, periodical, journal, newspaper or catalogue is, in principle, capable of constituting ‘valid use of the sign’ as a trade mark, for the goods and services designated by it, if the content of those publications confirms the use of the sign for the goods and services covered by that trade mark (09/02/2022, T-589/20, Maimai made in Italy / Yamamay, EU:T:2022:59, § 94).
- 92 The Board therefore considers that the presence of the contested mark on miscellaneous advertising materials (Attachments to Annexes 1, 2 and 3;

Annexes 10, 11, 12, 14) and printouts of the EUTM proprietor's websites (Annexes 4a to 4c), photos of menus and original packaging (Annexes 8, 13, 14) and online articles (Annexes 5, 7, 14b) on the sale of the EUTM proprietor's emblematic sandwiches called 'Big Mac' in its restaurants is likely to establish that link (06/03/2014, T-71/13, Annapurna, EU:T:2014:105, § 60; 29/03/2017, T-638/15, ALCOLOCK, EU:T:2017:229, § 82).

93 In detail, consumer surveys by GfK from February/March 2019 for Germany (Annex 6a), France (Annex 6b) and the United Kingdom (Annex 6c) give information that the awareness or knowledge of the term 'Big Mac' is on an extremely high level with McDonald's fast food product (i) among the general population at large and (ii) among those who purchase or consume fast food products in Germany, the United Kingdom and France. In addition, according to these surveys, the product 'Big Mac' is almost universally identified as McDonald's product and thus, the degree of assignability with respect to the company 'McDonald's' is on a very high level.

94 It follows that this use is consistent with the essential function of a trade mark.

b) Use of the mark as registered

95 Turning to the second requirement, in accordance with Article 15(1)(a) of Regulation No 207/2009, genuine use of a trade mark also includes use of the mark in a form differing in elements which do not alter the distinctive character of that mark in the form in which it was registered, whether or not the trade mark in the form as used is also registered in the name of the proprietor.

96 The purpose of this provision, which avoids imposing strict conformity between the form of the trade mark as used and the form in which the mark was registered, is to allow its proprietor, in the commercial exploitation of the sign, to make variations which, without altering its distinctive character, enable it to be better adapted to the marketing and promotion requirements of the goods or services concerned. In such situations, where the sign used in trade differs from the form in which it was registered only in negligible elements, so that the two signs can be regarded as broadly equivalent, the above mentioned provision envisages that the obligation to use the trade mark registered may be fulfilled by furnishing proof of use of the sign which constitutes the form in which it is used in trade (23/02/2006, T-194/03, Bainbridge, EU:T:2006:65, § 50; 29/04/2020, T-78/19, green cycles (fig.), EU:T:2020:166, § 66).

97 The contested mark is a word mark 'BIG MAC'.

98 Upon examination of the evidence submitted by the EUTM proprietor, the Board notes that it is used at least in the following forms:

(i) 'BIG MAC[®]';

(ii) 'Big Mac[®]';

(iii) 'Great Big Mac[®]';

- (iv) 'BIGGER BIG MAC®';
- (v) 'BIG MAC® McMENÜ®';
- (vi) 'Grand Big Mac®';

The Big Mac: There's a McDonald's for everyone.

- (vii) Served after 10:30am, 7 days a week. ;



- (viii)

99 The protection offered by the registration of a word mark applies to the word in the application for registration and not to the specific figurative or stylistic characteristics which that mark might have. As a result, the font which the word sign might be presented in must not be considered. It follows that a word mark may be used in any form, in any colour or font type (23/03/2022, T-146/21, Deltatic / Delta, EU:T:2022:159, § 56).

100 The Board remarks that the evidence shows use in the same form as registered (see forms of use as, e.g. (i), (ii) and (viii) as defined in paragraph 98 above).

101 Also, since the elements used together with the earlier mark (e.g. 'MENÜ', referring to the offer in relation to the goods and services concerned, or 'BIGGER', 'Great' or 'GRAND', referring to the size of the 'Big Mac' sandwich) refer to the components or properties of the goods and services at issue and are non-distinctive, they are not capable of altering the distinctive character of the contested mark (30/11/2009, T-353/07, Coloris, EU:T:2009:475, § 29-33; 23/03/2022, T-146/21, Deltatic / Delta, EU:T:2022:159, § 70).

102 To conclude, the evidence submitted as a whole is sufficient to confirm that the contested mark was used in the form in which it was registered.

c) Use in relation to the registered goods and services

103 Turning to the third requirement, in accordance with Article 15 of Regulation No 207/2009, the mark must be used for the goods or services for which it is registered in order to be enforceable.

104 The list of goods and services must be interpreted on the basis of the literal meaning the terms have under Article 28(2) and (5) of Regulation No 207/2009 (see 19/06/2012, C-307/10, IP Translator EU:C:2012:361, § 48, 64).

105 In the case at hand, the contested mark is registered for:

Class 29 - Foods prepared from meat, pork, fish and poultry products, meat sandwiches, fish sandwiches, pork sandwiches, chicken sandwiches, preserved and cooked fruits and vegetables, eggs, cheese, milk, milk preparations, pickles, desserts;

Class 30 - Edible sandwiches, meat sandwiches, pork sandwiches, fish sandwiches, chicken sandwiches, biscuits, bread, cakes, cookies, chocolate, coffee, coffee substitutes, tea, mustard, oatmeal, pastries, sauces, seasonings, sugar;

Class 42 - Services rendered or associated with operating and franchising restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive-through facilities; preparation of carry-out foods; the designing of such restaurants, establishments and facilities for others; construction planning and construction consulting for restaurants for others.

106 The EUTM proprietor claimed that the evidence shows use of the contested mark at least for the following goods and services:

Class 29 - Foods prepared from meat products, meat sandwiches, preserved and cooked vegetables, cheese, pickles;

Class 30 - Edible sandwiches, meat sandwiches, bread, sauces, seasonings;

Class 42 - Services rendered or associated with operating and franchising restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive-through facilities; preparation of carry-out foods.

107 Before the Cancellation Division, the cancellation applicant stated in its observations in reply, submitted on 12 December 2017, that the evidence provided ‘does in no way show genuine use of “BIG MAC” on anything other than a sandwich including a beef patty, lettuce, cheese, pickles, onions and a special sauce’. It emphasised that the evidence of use is extremely narrow and that ‘the application for revocation should be upheld’.

108 In its response to the statement of grounds, the cancellation applicant stated that some of the additional evidence (namely, Annexes 9, 10, 11 and 14) only refer to ‘a meat filled sandwich, and nothing else’.

109 With regard to goods or services in a broad category of goods or services, which may be sub-divided into several independent subcategories identified in a sufficiently precise and narrow manner and based on the criterion of the purpose and intended use of the goods or services at issue, it is necessary to require the proprietors of the earlier marks to adduce proof of genuine use of these marks for each of those autonomous subcategories. Indeed, if the proprietors of the earlier marks have registered their trade marks for a wide range of goods or services which they may potentially market, but which they have not done during the relevant period, their interest in enjoying the protection of the earlier mark for those goods or services cannot prevail over their competitors’ interest in registering their trade mark for those goods or services (16/07/2020, C-714/18 P,

tigha / TAIGA, EU:C:2020:573, § 42-43; 14/07/2005, T-126/03, Aladin, EU:T:2005:288, § 45-46; 15/06/2018, R 2595/2015-G, PELLICO (fig.), § 43; 26/02/2020, R 1615/2018-4, FALKE, § 34;).

- 110 A consumer who wishes to purchase a product or service in a category that has been defined particularly precisely and narrowly, but within which it is not possible to make any significant sub-divisions, will associate all the goods or services belonging to that category with the earlier mark, such that that trade mark will fulfil its essential function of guaranteeing the origin of those goods or services. In those circumstances, it is sufficient to require the proprietor to adduce proof of genuine use of that trade mark in relation to part of the goods or services in that homogeneous category (16/07/2020, C-714/18 P, tigha / TAIGA, EU:C:2020:573, § 42).
- 111 If, alongside the broad generic term or the general indication in the class headings, the trade mark also explicitly claims specific goods or services covered by the generic term or the general indication in the class headings, it also has to have been used for these specific goods or services in order to remain registered for them (02/12/2008, R 1295/2007-4, LOTUS, § 25).

Interpretation of the list of goods in Class 29

- 112 The contested mark was registered for the following goods in Class 29:

Class 29 - Foods prepared from meat, pork, fish and poultry products, meat sandwiches, fish sandwiches, pork sandwiches, chicken sandwiches, preserved and cooked fruits and vegetables, eggs, cheese, milk, milk preparations, pickles, desserts.

- 113 The Board remarks that the contested goods in Class 29 are registered without semicolons, and thus, they could be interpreted in two ways: (i) separated terms, that would require use for any particular goods mentioned (e.g. separately for cheese, pickles, etc., see paragraph 111 above); or (ii) as a single term, whereas the opening three words ‘foods prepared from’ will refer to the individual components that are contained in these foods.
- 114 The General Court has observed that the proprietor of an EU trade mark should not gain from the infringement of its obligation to indicate the goods or services with clarity and precision (26/06/2018, T-739/16, COSIMO / COSIFLOR, EU:T:2018:387, § 48; 18/10/2018, T-533/17, nuuna (fig.) / NANU et al., EU:T:2018:698, § 62; 17/10/2019, T-279/18, AXICORP ALLIANCE / ALLIANCE et al., EU:T:2019:752, § 54).
- 115 The Board of Appeal must interpret the list of goods and services in respect of which an earlier EU trade mark is registered and with regard to which proof of genuine use has been requested, in order to ascertain the extent of the protection of that mark and to settle the issue of its genuine use. However, in so doing, it must interpret the wording of the list of goods and services covered in the most coherent manner, in the light not only of its literal meaning and its grammatical construction, but also, if there is a risk of an absurd result, of its context and the actual intention of the mark’s proprietor as regards its scope (17/10/2019, T-279/18, AXICORP ALLIANCE / ALLIANCE et al., EU:T:2019:752, § 50).

- 116 Having regard to (i) the structure of the list of the contested goods in Class 29 (as final products are mixed with particular ingredients, such as eggs, cheese, milk, pickles) and (ii) its meaning in line with the principles defined in paragraphs 114 and 115 above, particularly the fact that the list in Class 29 contains various kinds of final products such as ‘meat sandwiches’, ‘fish sandwiches’, ‘pork sandwiches’, ‘preserved and cooked fruits and vegetables’ and ‘milk preparations’, the terms in Class 29 have to be interpreted as the following subcategories (i.e. as if a semicolon was placed after each of the terms):

Foods prepared from meat, pork, fish and poultry products;
 meat sandwiches;
 fish sandwiches;
 pork sandwiches;
 chicken sandwiches;
 preserved and cooked fruits and vegetables;
 eggs;
 cheese;
 milk;
 milk preparations;
 pickles;
 desserts.

c(1) Use for ‘foods prepared from meat and poultry products’, ‘meat sandwiches’, ‘chicken sandwiches’ in Class 29 and ‘edible sandwiches’, ‘meat sandwiches’, ‘chicken sandwiches’ in Class 30

- 117 The vast majority of the evidence (Annexes 1-14, 16-19) shows use of the contested mark in relation to the EUTM proprietor’s ‘flagship’ meat sandwich, consisting of two beef patties, sauce, iceberg lettuce, cheese, pickles and onions, served in a three-part sesame seed bun:

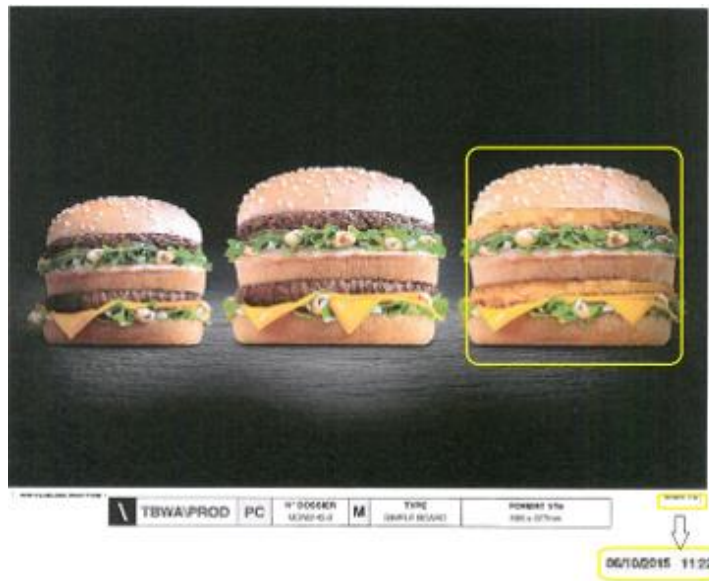


118 In fact, the cancellation applicant has also admitted that the contested mark was used for ‘meat sandwiches’ (see paragraphs 107 and 108 above).

119 Since ‘meat sandwiches’ are included in the broader category of ‘foods prepared from meat products’, use of the contested mark is also shown for the latter, in line with the case-law cited in paragraphs 109-111 above.

120 Furthermore, the evidence also shows use of the chicken sandwiches in France:

- Attachments to Annex 2, showing that the pattern designs were printed in October 2015 and from September to November 2016:



Big Mac™, Grand Big Mac™, Grand Big Mac™ Chicken

Big Mac™ _____ , € Best Of™ Big Mac™ _____ , €

Grand Big Mac™ Chicken _____ , € Best Of™ Grand Big Mac™ Chicken _____ , €

Grand Big Mac™ _____ , € Best Of™ Grand Big Mac™ _____ , €

Maxi Best Of™ _____ + _____ , €

Clicker u specializirane pozice za prodaju

TBWA/PROD	PC	N° DOSSIER 12/01/2015	TYPE M	FORMAT 17s 300 x 217px
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06/10/2015 11:22

POUR CHAQUE ENVIE, IL Y A UN BIG MAC™

BIG MAC™ GRAND BIG MAC™ GRAND BIG MAC™ CHICKEN

September - November 2016

DURÉE LIMITEE Clicker u specializirane pozice za prodaju

TBWA/PROD	PC	N° DOSSIER 12/01/2015	TYPE PROGRAM	FORMAT 17s 300 x 217px
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- Annex 10d shows screenshots of the television advertisements ‘BIG MAC + Grand BIG MAC Chicken’ and ‘BIG MAC + Grand BIG MAC Chicken bis’ broadcast in France in 2016:



- Annex 12c shows printouts from the Facebook account 'McDonald's France', showing the offer of 'Grand Big Mac Chicken' in 2016:



121 Taking into account the fact that miscellaneous kinds of evidence (Annexes 2, 10d and 12c) show use of the contested mark for the chicken sandwiches in France from 2015 to 2016 (i.e. within a significant part of the relevant period), including advertising materials (Annexes 2, 10d, 12), print samples of menus with the prices in euro (Annex 2), indicating real and outward commercialisation of the chicken sandwiches offered to the customers and extensive TV campaigns

promoting ‘Grand Big Mac Chicken’ (Annex 12c), the Board concludes that the use was shown also in relation to ‘chicken sandwiches’.

122 As regards ‘foods prepared from poultry products’, the Board notes that ‘poultry products’ comprise products from domestic fowl, including chickens (information extracted from *Oxford English Dictionary* on 11 October 2022 at <https://www.oed.com/view/Entry/149003?redirectedFrom=poultry#eid>). Since ‘chicken sandwiches’ are included in the broader category of ‘foods prepared from poultry products’, use of the contested mark is also shown for the latter, in line with the case-law cited in paragraphs 109-111 above.

123 As regards ‘edible sandwiches’, the Board notes that ‘edible’ means, e.g. ‘eatable, fit to be eaten’ (information extracted from *Oxford English Dictionary* on 11 October 2022 at <https://www.oed.com/view/Entry/59524?redirectedFrom=edible#eid>). Since use is shown for ‘meat sandwiches’ and ‘chicken sandwiches’, which are both eatable and, thus, edible sandwiches, the use is also shown for ‘edible sandwiches’ (see case-law cited in paragraphs 109-111 above).

124 The evidence therefore demonstrates that the contested mark was used for:

- ‘foods prepared from meat and poultry products’; ‘meat sandwiches’ and ‘chicken sandwiches’ in Class 29; and
- ‘edible sandwiches’; ‘meat sandwiches’ and ‘chicken sandwiches’ in Class 30.

c(2) Use for the remaining goods in Classes 29 and 30

125 Firstly, the Board remarks that there is no evidence for use of the contested mark in relation to:

- ‘foods prepared from pork and fish products, fish sandwiches, pork sandwiches, preserved and cooked fruits, eggs, milk, milk preparations, desserts’ in Class 29; and
- ‘pork sandwiches, fish sandwiches, biscuits, cakes, cookies, chocolate, coffee, coffee substitutes, tea, mustard, oatmeal, pastries, sugar’ in Class 30.

126 Secondly, the Board notes that the EUTM proprietor claimed that the contested mark was used, among others, for ‘preserved and cooked vegetables’, ‘cheese’ and ‘pickles’ in Class 29; and ‘bread’, ‘sauces’ and ‘seasonings’ in Class 30. In essence, it argued that these are the main ingredients that make up a ‘Big Mac’ sandwich.

127 It follows from the case-law that when the trade mark is claimed to be used for both the ingredient and the final product, the two-step test has to be applied. First, it must be examined whether a component and the final product incorporating it can be regarded as falling within the same group of goods. Second, the essential function of a trade mark must be taken into account, which is to identify the

commercial origin of the goods it designates (16/06/2015, T-660/11, POLYTETRAFLON / TEFLON, EU:T:2015:387, § 66).

128 As regards the first step, in the present case, the final product (meat (or chicken) sandwich) and its ingredients (vegetables, pickles, cheese, bread, sauce and seasonings) are foodstuffs and therefore belong to the same group of goods.

129 As regards the second step, the essential function performed by the contested mark can be found only where that mark is used to guarantee the identity of origin of the goods and services for which it was registered (16/06/2015, T-660/11, POLYTETRAFLON / TEFLON, EU:T:2015:387, § 70).

130 The Board points out that ‘Big Mac’ is recognised by the customers as the ultimate ready-to-eat fast food product, i.e. the meat sandwich.

131 There is nothing in the file to show that the general public identifies particular ingredients, such as vegetables, cheese, pickles, bread, sauces and seasonings, with the EUTM proprietor as the source of their origin. There is no evidence about ‘Big Mac vegetables’, ‘Big Mac cheese’, ‘Big Mac pickles’ or ‘Big Mac seasonings’. When customers wish to obtain a raw ingredient, they commonly visit grocery stores rather than fast food providers.

132 As regards, more particularly, sauces, the Board remarks that the term ‘Big Mac Sauce’ appears on the German ‘Big Mac’ package located on its lateral edge as part of its composition (Annexes 1 and 8a):



However, it is not a separate product that could be found on menu lists or independently ordered by the customers.

133 A Wikipedia article on ‘Big Mac’ (Annex 5) mentions how ‘Big Mac Sauce’ is delivered to the McDonald’s restaurants in sealed canisters. However, (i) it displays as the source of this information reference number 7, linking to an article ‘Sealright designs sauce system for McDonald’s in South Africa, China’ and thus, it is outside the relevant territory. In addition, it does not show that ‘Big Mac Sauce’ is offered or sold as a separate product on a menu list.

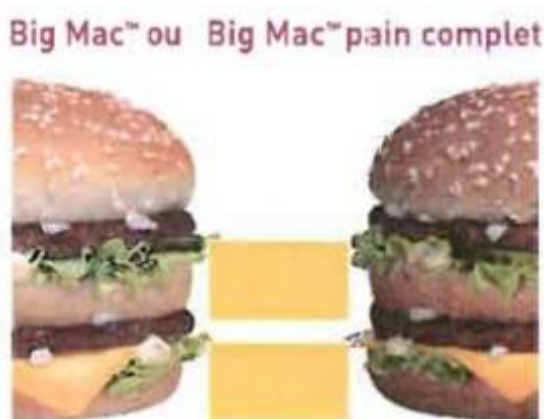
134 Also, Annex 14b contains a news article ‘As the Big Mac turns 40. Here are 40 facts about the Golden Arches’ published by *The Sun* newspaper, which, among others, provides the following information:

‘9. To make the nation’s favourite burger every year they use (...)

11. And 1,820,000 litres of Big Mac Sauce...’.

However, it does not show that the ‘Big Mac Sauce’ is promoted, offered or sold separately as an ingredient on a menu list and in any case, it is insufficient to establish use of the contested mark for ‘sauces’.

135 As regards ‘bread’, Annex 2 displays pictures with the term ‘Big Mac® pain complet’ from September 2011:



However (i) it does not fall within the relevant period and (ii) it does not show use for bread as a separate ingredient.

136 Also, a Wikipedia article on ‘Big Mac’ (Annex 5) mentions the term ‘Big Mac buns’, however in relation to the McDonald’s operators in New York City that ran out of ‘Big Mac buns’. The Board notes that (i) it does not refer to the relevant territory, as it is outside the European Union, and (ii) it does not show that the ‘Big Mac Bun’ is promoted, offered or sold as an independent product.

137 Even if the EUTM is used for a particular final product (in the present case, a meat (or chicken) sandwich), it does not automatically show use for its particular ingredients (e.g. sauces, seasonings, bread, pickles, cheese) (03/05/2004, R 68/2003-2, SWEETIE/SWEETY, § 20), as genuine use of a mark can be established only where that mark is used to guarantee the identity of origin of the goods for which it was registered (03/05/2012, T-270/10, KARRA / KARA et al., EU:T:2012:212, § 53-54, 58). In the present case, it is not possible to determine

the origin of individual ingredients, such as bread, sauce, seasonings, pickles, cheese, etc.

138 It follows that the requirement of the second step is not met, since the contested mark does not fulfil the essential function in relation to the particular ingredients of the ‘Big Mac’ sandwich.

139 Therefore, the contested mark was not genuinely used in relation to the remaining goods in Classes 29 and 30.

c(3) Use for restaurant services in Class 42

140 The contested mark was registered for, inter alia, ‘services rendered or associated with operating restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive- through facilities’ and ‘preparation of carry-out foods’ in Class 42.

141 The EUTM proprietor claimed that as regards the disputed services in Class 42, account must be taken of the fact that ‘Big Mac’ sandwiches are generally known as products available only in McDonald’s restaurants and are therefore inextricably linked to the restaurant services in Class 42.

142 The Board notes that numerous pieces of evidence submitted by the EUTM proprietor demonstrate that the ‘Big Mac’ sandwich and the ‘Big Mac McMENÜ’ (composed of ‘Big Mac’ sandwich, side dish and a drink, see Annex 1 – menus from 2011, 2012, 2013; Annex 2 – menus from September 2011 to September 2014; Annex 10a displaying in advertising the ‘Big Mac McMENÜ’; Annexes 12b and 13b displaying the ‘Big Mac McMENÜ’ in the promotional material) is exclusively available in and intrinsically linked to McDonald’s restaurants (30/11/2016, T-2/16, Pret | A | Diner / PRET A MANGER (fig.) et al., EU:T:2016:690, § 39-40):

- Attachments to the affidavit submitted as Annex 1 and Annex 2 refer to the possibility of eating ‘Big Mac’ sandwiches or the ‘Big Mac McMENÜ’ (composed of ‘Big Mac’ sandwich, side dish and a drink at McDonald’s restaurants and show the intrinsic link between the ‘Big Mac’ sandwich and ‘Mc Donald’s restaurants’:

GEWINNE WIE VERRÜCKT!



BIG MAC[®]
McMENÜ

€
McMENÜ SMALL
€

McMENÜ[®]
WAHLWEISE MIT

0,5l KALTGETRÄNK



UND

GROSSE POMMES



ODER

GARTEN SALAT



McMENÜ[®] SMALL:
0,4l KALTGETRÄNK UND MITTLERE POMMES

Größe 142 WRN: 97298-612

NOS MENUS BEST OF™ Menu Maxi Best Of⁺

moyenne frite - moyenne boisson grande frite - grande boisson

1



6 Chicken McNuggets™



McChicken™



Filet-O-Fish™



Royal Bacon™



Royal Cheese™



Royal Deluxe™



Big Mac™



CBO™

NOUVEAU
McWrap Poisson



McWrap Poisson™

McWrap Poulet & Bacon



McWrap Poulet & Bacon™

McWrap Chèvre™



2

Frites



Deluxe Potatoes™



P'tite salade de saison



3



*Prix indicatif de référence. **Prix conseillé. Prix actualisés au point de vente. ***Spécial avec sauce de fromage de chèvre.

- Printouts from Annex 3, showing an advertising slogan displaying the contested mark 'Big Mac' in conjunction with 'McDonald's':

The Big Mac: There's a McDonald's for everyone.

Served after 10:30am, in some areas.

- Consumer surveys by GfK from February/March 2019 for Germany (Annex 6a), France (Annex 6b) and the United Kingdom (Annex 6c) give information that the awareness or knowledge of the term 'Big Mac' is on an extremely high level with McDonald's fast food product (i) among the general population at large and (ii) among those who purchase or consume fast food products in Germany, the United Kingdom and France. In addition, according to these surveys, the product 'Big Mac' is almost universally identified as McDonald's product and thus, the degree of assignability with respect to the company 'McDonald's' is on a very high level;
- An article 'The Big Mac index shows currencies are very cheap against the dollar' from the weekly magazine *The Economist* (Annex 7) states that 'the Big Mac, the flagship burger of the McDonald's fast-food chain, is a model of consistency' and it 'is produced in nearly identical fashion across more than 36 000 restaurants in over 100 countries';
- Printouts from the Facebook account 'McDonald's France' from 2014 to 2016, displaying a 'Big Mac' sandwich in relation to 'McDonald's France' (Annex 12c);



- The menu offerings (containing 'BigMac') from the UK restaurant (Annex 13b) states that they are available after 10:30a.m., and the menu offerings at that restaurant may vary. It also states that it is possible to pay by contactless payment;



- Various advertising materials confirm that ‘Big Mac’ is promoted as an integral part of restaurant services. Advertisements in Germany, for example in Annex 12b, promote ‘McDonald’s’ and ‘Big Mac’ sandwiches side by side, with the advertising slogan ‘I LOVE BIG MAC’ appearing prominently on the top of the page and inviting customers to a McDonald’s restaurant to enjoy a ‘Big Mac’ burger:





143 It is also apparent from the evidence submitted, that the contested mark was used

in conjunction with ‘McDonald’s®’ or



144 The evidence also shows use of the contested mark for drive-through facilities and preparation of carry-out foods:

- Annex 12b:



- Annex10c: screenshots of the television advertisement (‘Hunter Gatherer’) broadcast in the United Kingdom from 6 June 2014:



- Annex 3: comprising advertising on ‘drive-through’ facility:



- Annex 14a: contains screenshots of YouTube video referring to the 'Big Mac' mark posted on 5 November 2016 under the title 'Extreme Big Mac Challenge', posted by an influencer called Ron Bielecki, comprising a depiction of a car 'Drive in' next to 'Mc Donald's' in conjunction with the 'Big Mac' sandwich as its emblematic flagship product:



145 The Board remarks that 'McDONALD's' is a famous brand name for fast foods and fast-food outlets. It is, in fact, one of the best known brand names worldwide. The case-law confirms that it enjoys reputation for fast-food restaurant services and also, fast-food products on the menu of fast-food establishments (05/07/2016, T-518/13, MACCOFFEE, EU:T:2016:389, § 57). Also, 'BIG MAC' as one of McDonald's sub-brands are well known to the general public, as it is listed as an exclusive product of 'McDONALD's'. Consumer surveys (Annex 6) show not only a high degree of recognition of the 'Big Mac' sandwich by the relevant German, French and British public, but also that fast food 'Big Mac' is automatically associated with 'McDonald' restaurant services.

- 146 Furthermore, according to *Oxford English Dictionary*, the term ‘Big Mac’ is defined as ‘a proprietary name for: the largest in a range of hamburgers sold by McDonald’s fast-food outlets’. Moreover, the term ‘Big Mac index’ is defined as ‘any of various economic indexes comparing the cost of a Big Mac hamburger in different countries’ (information extracted from *Oxford English Dictionary* on 11 October 2022 at <https://www.oed.com/view/Entry/271603?redirectedFrom=bigmac#eid>, see also Annexes 5, 6, 7 and 14b).
- 147 The evidence submitted by the EUTM proprietor shows that the contested mark ‘Big Mac’ was not only used to identify a specific sandwich, but also to promote the food provider. The extensive amount of evidence shows that ‘Big Mac’ is an iconic ‘flagship’ product, intrinsically linked to ‘McDonald’s’ for more than 40 years (Annexes 5, 6a, 6b, 6c, 7, 14b, 19). The ‘Big Mac’ sandwich cannot be bought in any other restaurant than at the EUTM proprietor’s establishments. It is therefore apparent from the evidence that the use of the contested mark was used in such a way that it did not only identify the specific sandwich provided by the EUTM proprietor, but the use of ‘Big Mac’ was intended to distinguish the restaurant services provided by the EUTM proprietor from similar services of third parties (13/05/2009, T-183/08, Jello Schuhpark II, EU:T:2009:156, § 32).
- 148 The evidence (see paragraphs 142 to 144 above) clearly shows that the EUTM proprietor uses the contested mark in such a way as to establish a link between the contested mark ‘Big Mac’ and the restaurant services provided (see, by analogy, 13/05/2009, T-183/08, Jello Schuhpark II, EU:T:2009:156, § 22).
- 149 To conclude, the contested mark was genuinely used also for ‘services rendered or associated with operating restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive-through facilities; preparation of carry-out foods’.

Use for franchising restaurants in Class 42

- 150 As regards use for the restaurant franchising services in Class 42 (‘services rendered or associated with franchising restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive-through facilities’), the Board remarks that the evidence does not prove that the contested mark was used for franchising restaurants.
- 151 Franchising restaurants are services based on the contractual basis between a restaurant’s corporate owner (franchisor) and the restaurant’s current operator (franchisee). Based on this relationship, the brand’s owner licenses out a restaurant to be owned and operated by the franchisee that pays for use of the intellectual property owned by the brand, the trade mark, and marketing plan. This co-dependency allows a franchisee to be able to open a restaurant with an already existing business model, operating procedures, and support and management training, while the corporate proprietors succeed by instituting fees to license and expand the brand.

- 152 However, the EUTM proprietor failed to submit any direct and convincing evidence that franchise services were offered, promoted or actually provided by the EUTM proprietor, in particular, franchise agreements, royal fee payment system or a list of franchisees, offer of franchising restaurants, licence agreements for the use of individual objects of intellectual property rights or the evidence on the business model or the proprietary structure of the EUTM proprietor (e.g. specification of the subsidiaries and franchisees), etc.
- 153 For the sake of completeness, the Board adds that Annex 5 mentions a US franchise, which is, however, outside the relevant territory:

History

The Big Mac was created by Jim Delligatti, an early Ray Kroc franchisee, who was operating several restaurants in the Pittsburgh area. It was invented in the kitchen of Delligatti's first McDonald's franchise, located on McKnight Road in suburban Ross Township.¹¹¹ The Big Mac had two

- 154 A Wikipedia article on 'Big Mac Index' in Annex 7 contains a vague statement about McDonald's franchisees:

'the Big Mac was chosen because it is available to a common specification in many countries around the world as local McDonald's franchisees at least in theory have significant responsibility for negotiating input prices (...).'

However, it does not provide any information about the relevant territory, time or any detailed information on the conditions of franchise services.

- 155 Also, Annex 14b contains a news article 'As the Big Mac turns 40. Here are 40 facts about the Golden Arches' published by *The Sun* newspaper, which, among others, provides the following information:

'4. Around 70 per cent of our restaurants in the UK are owned and operated by local businessmen and women. (...)

20. The Queen owns a McDonald's next Windsor Castle'.

However, there is no specific information as to whether the restaurants are operated under franchise.

- 156 Therefore, the use of the contested mark for the franchising restaurants in Class 42 was not proven.

c(5) Use for the designing of restaurants; construction planning and construction consulting for restaurants for others in Class 42

- 157 There is no evidence on use of the contested mark in relation to the remaining contested services in Class 42, namely:

the designing of such restaurants, establishments and facilities for others; and

construction planning and construction consulting for restaurants for others,

and therefore no use of these services has been demonstrated.

Interim conclusion on nature of use

158 As regards the nature of use of the contested mark, use of the contested mark was sufficiently demonstrated for the following goods and services in Classes 29, 30 and 42:

Class 29 - Foods prepared from meat and poultry products, meat sandwiches, chicken sandwiches;

Class 30 - Edible sandwiches, meat sandwiches, chicken sandwiches;

Class 42 - Services rendered or associated with operating restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive-through facilities; preparation of carry-out foods.

(iv) Extent of use

159 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). 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).

160 The purpose of the proof of use is not to assess commercial success or to review the economic strategy of an undertaking, nor is it intended to restrict trade mark protection to the case where large-scale commercial use has been made of the marks (08/07/2004, T-203/02, Vitafruit, EU:T:2004:225, § 38). 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).

161 Although the requirement as to the extent of use does not mean that the EUTM proprietor has to reveal the entire volume of sales or turnover figures, however, the EUTM proprietor does have to submit evidence which proves at least that the minimum threshold for a finding of genuine use has been passed (11/05/2006, C-416/04 P, Vitafruit, EU:C:2006:310, § 72; 12/11/2021, R 1312/2020-1, airtours a sphere (fig.) / Sfera et al., § 33).

162 Moreover, account must be taken of the fact that, in certain circumstances, even circumstantial evidence, such as catalogues, but also, as in the present case, online promotional activities, extensive marketing activities and the EUTM proprietor's position in the market as a leading fast food provider, although not providing direct information as to the quantity of goods actually sold and services actually provided, may, by itself, suffice to show the extent of use in the context of an overall assessment (15/07/2015, T-398/13, TVR Italy, EU:T:2015:503, § 57-58).

- 163 It should be noted that, in principle, the production of examples of sandwich packaging (box clamshells), promotional materials, brochures and other documents by the EUTM proprietor of the contested mark may be sufficient to prove genuine use, even where the existence of direct sales has not been established by means of invoices (08/07/2010, T-30/09, Peerstorm, EU:T:2010:298, § 38-45; 22/06/2022, T-329/21, Fraas, EU:T:2022:379, § 90). In fact, invoices are only one of the means of proof of use.
- 164 In this respect, it is sufficient to point out that it is not necessary to determine the exact number of goods sold and services provided in order to establish whether a trade mark has been put to genuine use (22/06/2022, T-329/21, Fraas, EU:T:2022:379, § 88, 91).
- 165 For the assessment of the extent of use, it is crucial how examples of sandwich packaging (box clamshells), the brochures, and other analogous advertisements were distributed by the EUTM proprietor and whether they led to potential or actual purchases (22/06/2022, T-329/21, Fraas, EU:T:2022:379, § 88, 91).
- 166 The Cancellation Division revoked the contested mark in its entirety for failure to prove the extent of use on the basis of the evidence adduced in the proceedings before it, i.e. Annexes 1 to 5. Therefore, the Board will first focus on the analysis of the extent of use in relation to the evidence adduced at first instance (Annexes 1 to 5) and then also in relation to the evidence adduced on appeal (Annexes 6 to 19).

Extent of use on the basis of the evidence submitted before the Cancellation Division (Annexes 1 to 5)

- 167 Firstly, as stated above, the extent of use can be provided by miscellaneous kinds of evidence, and not only by means of invoices, proving sale of the goods or provision of the services concerned.
- 168 Contrary to the conclusions of the Cancellation Division, the three affidavits submitted as Annexes 1 to 3 cannot be disregarded as merely internal documents deriving from the EUTM proprietor and without their full assessment in relation to their attachments (consisting of miscellaneous advertising materials and package patterns) and Annexes 4 and 5 (see paragraphs 51, 52, 63 and 64 above).
- 169 Annex 1 is an affidavit of an employee of McDonald's Deutschland LLC giving information (i) on the use of the contested mark in Germany since its launch in the year 1973 in connection with 'a sandwich with beef, salad and cheese' and (ii) on the number of 'Big Mac' sandwiches sold in Germany per year from 2011 to 2016, in the amount of several tens of millions of units sold per year.
- 170 The affidavit submitted as Annex 1 is accompanied by 26 pages of examples of sandwich packaging (box clamshells), promotional materials and brochures in German which appear to be menus depicting the contested mark as 'BIG MAC[®]', 'Big Mac[®]', 'BIGGER BIG MAC[®]' or 'BIG MAC[®] McMENÜ[®]', some of which show the price in euro and refer to either 'McDonald's', 'McDonald's

Promotions GmbH' or 'Restaurant in Musterstadt', Germany, and at the same time refer to the possibility of being consumed in McDonald's restaurants:



*unverbindliche Preisempfehlung
in allen teilnehmenden Restaurants.



The box clamshells are depicted as model designs to be entered into print, together with the date of their design in 2011, 2012 and 2014, including information on 'EUROPE NUTRITION REDESIGN 2014' for Germany and Austria:



171 Annex 2 is an affidavit of an employee of McDonald's France Services giving information (i) on the use of the contested mark in France since its launch in the year 1979 in connection with 'a sandwich with beef, salad and cheese'; (ii) on the number of 'Big Mac' sandwiches sold in France per year from 2011 to 2016, in the amount exceeding hundred millions of units sold per year and (iii) on advertising expenditure related to 'Big Mac' in France in each of the years 2013 to 2016, which in total exceeded several million euros.

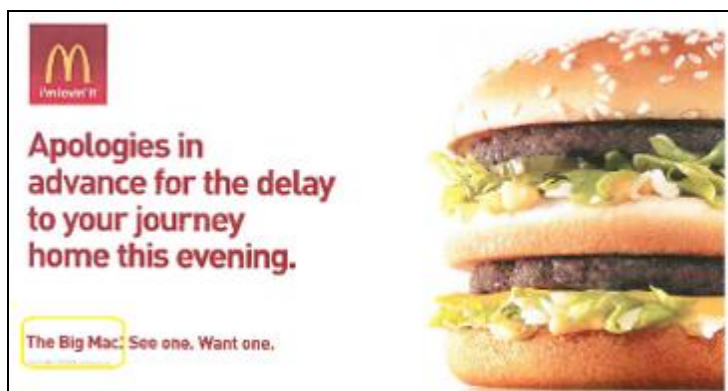
172 The affidavit submitted as Annex 2 is accompanied by 34 pages of examples of sandwich packaging (box clamshells), promotional materials and brochures in French which appear to be menus from September 2011 to November 2016 depicting the contested mark as 'BIG MAC[®]', 'Big Mac[®]', 'GRAND BIG MAC[®]', some of them show the euro currency without a specific price, which seems to be a pattern of menus where the price needs to be completed:



173 Annex 3 is an affidavit of the Legal Counsel at McDonald's Restaurants Limited in the United Kingdom on the use of the contested mark in the United Kingdom dated 6 September 2017, giving information (i) on the wide use of the contested mark in the United Kingdom in connection with the products sold under the mark 'Big Mac' and (ii) the number of 'Big Mac' products sold in the United Kingdom per year from 2011 to 2016, in the amount of several tens of millions of units sold per year.

174 The affidavit submitted as Annex 3 is accompanied by 8 pages of examples of promotional materials from 2009 to 2014 in English depicting the contested mark as 'The Big Mac®'





- 175 The Board remarks that the attachments to Annexes 1 and 3 continuously cover the entire relevant period and clearly show use of the ‘Big Mac’ mark in relation to specific sandwiches sold in the EUTM proprietor’s restaurants and miscellaneous promotional materials showing the offer of the goods in question. The probative value of the attachments is increased by the fact that some of them contain the price specified in euro and show that they can be consumed at McDonald’s restaurants (see Annex 1). It follows that these advertising materials contained specific information about the goods offered for sale, such as their price and the way in which they were marketed (08/09/2021, T-493/20, Sfora wear / Sfera (fig.) et al., EU:T:2021:540, § 33).
- 176 Furthermore, Annex 4 contains printouts from 18 EU language versions of the EUTM proprietor’s website from January 2014 to October 2016, displaying miscellaneous products, including the ‘Big Mac’ sandwich, including the EUTM proprietor’s websites www.mcdonalds.de (for Germany), www.mcdonalds.at (for Austria), www.mcdonalds.be (for Belgium), www.mcdonalds.cz (for the Czech Republic), www.mcdonalds.dk (for Denmark), www.mcdonalds.es (for Spain), www.mcdonalds.fi (for Finland), www.mcdonalds.fr (for France), www.mcdonalds.hu (for Hungary), www.mcdonalds.ie (for Ireland), www.mcdonalds.it (for Italy), www.mcdonalds.nl (for the Netherlands), www.mcdonalds.pl (for Poland), www.mcdonalds.ro (for Romania), www.mcdonalds.se (for Sweden), www.mcdonalds.si (for Slovenia), www.mcdonalds.sk (for Slovakia) and www.mcdonalds.co.uk (for United Kingdom).
- 177 As regards Annex 5 (a printout of an extract of Wikipedia article on ‘Big Mac’), the Cancellation Division failed to analyse its content due to its low probative value. However, information contained in Wikipedia may be accepted if it has confirmatory value and simply corroborates the information from other sources (see paragraph 53 above).
- 178 In this particular case, this Wikipedia article contains more than 30 references and external links, including references to reputable sources such as:
- *the Associated Press* (reference number 2), linking to the online article ‘Woman Who Named Big Mac Finally Recognized’ from 31 May 1985 and retrieved on 22 February 2013;

- *the Daily Mail* (reference number 8), linking to the online article ‘Make a Big Mac at home! Mc Donald’s top chef explains the secret to chain’s burger but why doesn’t it look quite like what you get at the counter?’ from *the Daily Mail* from 10 July 2012;
- *the BBC* (reference number 12), linking to the online article ‘Return of the Mac - coming soon’ from *the BBC News* from March 2005 and retrieved on 26 March 2010;
- *the Guardian* (reference number 17), linking to the online article ‘G2: McDonald’s and the World’ from 6 April 2001 and retrieved on 18 May 2011;
- *the CNN* (reference number 23), linking to the online article ‘McDonald’s just tweaked the Big Mac’ from *the Cable News Network* from 18 January 2017; and
- *the Economist*: a link to the article linking to the article ‘The Big Mac Index’ from *the Economist* (<http://www.economist.com/markets/bigmac>).

179 In terms of referencing techniques, within the text of the Wikipedia article there is a link to the original source:

Wikipedia text:

Ribbon Burger. The third name, Big Mac, was created by Esther Glickstein Rose, a 21-year-old advertising secretary who worked at McDonald's corporate headquarters in Oak Brook, Illinois.^[2] The Big

Link to the reference:

^[2] "Woman Who Named Big Mac Finally Recognized" (<http://www.apnewsarchive.com/4338738fbc4ed82ddfd5700c17d6ebd>). Associated Press. May 31, 1985. Retrieved F

180 The Wikipedia article states that the ‘Big Mac is a hamburger sold by international fast food restaurant chain McDonald’s’ and that it is ‘one of the company’s signature products’. It further states that the ‘Big Mac is known worldwide and is often used as a symbol of American capitalism. *The Economist* has used it as a reference point for comparing the cost of living in different countries – the Big Mac Index – as it is so widely available and is comparable across markets.’

181 Also, the fact mentioned in Annex 5 that the ‘Big Mac’ burger is now sold in a collapsible cardboard box is supported by the evidence attached to Annexes 1 to 3, showing a collapsible cardboard box displaying the mark ‘BIG MAC’.

182 In terms of the extent of use, the Board points out that the ‘Big Mac’ as a product is widespread and macroeconomically so significant that it is used as a benchmark for comparing the cost of living in different countries – the ‘Big Mac Index’.

183 The extent of use is indicated also from the fact that Annex 5 contains a detailed comparison of the standard nutritional values of the ‘Big Mac’ product in various

EU states, including Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Sweden, and the United Kingdom.

184 In the present case, the affidavits are corroborated by other credible and objective evidence, as explained above (22/09/2021, T-591/19, HealiOS (fig.) / HELIOS, EU:T:2021:606, § 32, 41, 47, 53-54, 61).

185 The EUTM proprietor's use has taken place clearly and unambiguously externally; otherwise the newspapers and magazines, mentioned in references in the Wikipedia article, would not report on it.

186 The advertising material and menus accompanying the affidavits (Annexes 1 to 3, containing specific information about the goods offered for sale, such as their price and the way in which they were marketed, i.e. at McDonald's), the various websites showing the 'Big Mac' sandwich on offer in 18 EU languages (Annex 4), and the Wikipedia article (Annex 5), listing the 'Big Mac' as a basic macroeconomic indicator known as the 'Big Mac Index' and referring to various recognised sources (such as economic publications and newspaper articles), taken as a whole, are already sufficient to establish the extent of use of the contested mark for the 'Big Mac' sandwich and related restaurant services.

Extent of use on the basis of all the evidence submitted (Annexes 1 to 16)

187 At the appeal stage, the EUTM proprietor submitted various additional evidence, to prove the extent of use of the contested mark, including:

- Consumer surveys showing that the degree of the awareness of the term 'Big Mac' in relation to McDonald's fast food products is on an extremely high level for the general public in Germany (Annex 6a), France (Annex 6b) and the United Kingdom (Annex 6c);
- Various copies of receipts and/or excerpts from electronic cash registers from several 'McDonald's' restaurants in Germany from 10 April 2012 to 5 April 2017 (Annex 9a), in the UK from January 2017 to March 2017 (Annex 9b) and in France, providing a full cash record as a representative sample for the period from 1 January 2017 to 15 January 2017 (Annex 9c), all of which demonstrate the actual sale of 'Big Mac' sandwiches during the relevant time period;
- A financial audit report (Annex 16) containing (i) information on the 'Big Mac' units sold on the relevant local market in Germany and the United Kingdom between 2011 and 2016 and in France between 2013 and 2016, (ii) confirmation that 'Big Mac' units sold from the UK, German and French reporting system were equal to or exceeded data provided in the affidavits submitted as Annexes 1 to 3; and (iii) information on the movement of 'point of sale' ('POS') data from restaurant cash registers to the EUTM proprietor's financial reporting systems in Germany and in the United Kingdom;

- A letter of confirmation provided by the representative of a German employers' and trade association in the restaurant chain sector (Annex 19) regarding the company 'McDonald's Deutschland LLC (formerly McDonald's Deutschland Inc.), in particular that its product, the 'Big Mac' hamburger is one of their best-selling and most significant core products and has represented McDonald's long-standing hamburger tradition like no other product for many years or even decades;
- Articles on the use of the 'Big Mac Index' since 1986 as a model of consistency because it is produced 'in nearly identical fashion across more than 36 000 restaurants in over 100 countries' (Annex 7) and an article 'As the Big Mac turns 40. Here are 40 facts about the Golden Arches' published by *The Sun* newspaper (Annex 14b);
- Miscellaneous advertising material (Annexes 10, 11, 12, 14) and affidavits related to advertising expenditure in relation to the contested mark (Annex 18), supported by the specific advertising campaigns attached as screenshots;
- Photographs of original packaging used in relation to the 'Big Mac' product (Annex 8) and photographs of menus used in McDonald's restaurants in the UK and in Germany from 2013 to 2016, comprising 'Big Mac[®]' as one of the sandwiches offered at McDonald's (Annex 13).

188 The EUTM proprietor has also provided evidence of marketing efforts, with advertisements, social media accounts, promotional YouTube videos and articles from the reputed UK newspapers and websites.

189 At the appeal stage, the EUTM proprietor provided evidence proving direct sales of the goods concerned (Annex 9) and also verified the information on the volume of the 'Big Mac' sandwiches sold, originally set out in Annexes 1 to 3, by providing a financial audit report (Annex 16) confirming the accuracy of the data provided in the affidavits (Annexes 1 to 3). Also, in relation to the chicken sandwiches, the acts of advertising, offering for sale and extensive TV campaigns (see paragraphs 120-121 above) establish the extent of genuine use (08/07/2010, T-30/09, Peerstorm, EU:T:2010:298, § 38-45; 22/06/2022, T-329/21, Fraas, EU:T:2022:379, § 90; 13/07/2022, T- 768/20, The standard (fig.), EU:T:2022:458, § 35, 42).

190 The evidence also shows that the contested mark, 'Big Mac', is the flagship burger of the EUTM proprietor's fast-food chain and as an emblematic sandwich sold globally and representing a model of consistency it is used as the basic unit of 'Big Mac Index' to measure purchasing power parity between currencies, i.e. how much of a given currency can buy one 'Big Mac' sandwich (Annexes 5 and 7).

191 The evidence as a whole proves that the EUTM proprietor has seriously tried to acquire, and actually keeps a significant commercial position in relation to the contested mark in the relevant market. In fact, the Board confirms that this is also common knowledge.

192 Therefore, when assessed as a whole, the evidence suffices to meet the condition of the extent of use in relation to part of the contested goods and services in Class 29, 30 and 42 specified in paragraph 158 above.

Conclusion

193 It follows from the foregoing, after an overall assessment of the evidence, that it is sufficient to show the place, time, nature and extent of use and, thus, genuine use of the contested EUTM for the following goods and services:

Class 29 - Foods prepared from meat and poultry products, meat sandwiches, chicken sandwiches;

Class 30 - Edible sandwiches, meat sandwiches, chicken sandwiches;

Class 42 - Services rendered or associated with operating restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive- through facilities; preparation of carry-out foods.

194 The appeal is therefore partially well founded as regards these goods and services and the contested decision must be annulled to the extent that the contested EUTM was revoked in relation to these goods and services.

195 However, after an overall assessment of the evidence, it is not sufficient to show genuine use of the contested EUTM as regards the remaining goods and services and the appeal is therefore not well founded with respect to these goods and services.

Costs

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

197 As to the costs of the cancellation proceedings, it is appropriate that, for the same reasons, each party bears its own costs there as well.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision to the extent that EUTM No 62 638 was revoked for the following goods and services:**

Class 29 - Foods prepared from meat and poultry products, meat sandwiches, chicken sandwiches;

Class 30 - Edible sandwiches, meat sandwiches, chicken sandwiches;

Class 42 - Services rendered or associated with operating restaurants and other establishments or facilities engaged in providing food and drink prepared for consumption and for drive- through facilities; preparation of carry-out foods.

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

Signed

N. Korjus

Signed

A. Kralik

Signed

J. Jiménez Llorente

Registrar:

Signed

H. Dijkema

