CANCELLATION No C 55 197 (REVOCATION)

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a g a i n s t

Rituals International Trademarks B.V., Herengracht 539, 1017 BW Amsterdam, Netherlands (IR holder), represented by **Novagraaf Nederland B.V.**, Hoogoorddreef 5, 1101 BA Amsterdam, Netherlands (professional representative).

On 19/10/2023, the Cancellation Division takes the following

DECISION

1. The application for revocation is partially upheld.

2. International trade mark registration No 914 438 is revoked for the European Union as from 28/06/2022 for some of the contested goods and services, namely:

Class 3: *Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; laundry products for woven fabrics; fabric softeners; essential oils; talcum powder for toiletry use; dentifrices; non-medicated mouthwashes, depilatory preparations.*

Class 4: *Wicks for candles and lamps; tallow; fuel for lighting; paper spills for lighting; beeswax; oils and waxes for preservation purposes.*

Class 21: *Brushes (except paint brushes); combs; sponges including so called "body loofah" (not for surgical and medical purposes); cosmetic brushes; toilet cases.*

Class 24: *Textiles and textile goods, not included in other classes; bed and table covers; bed clothes and bedding including sheets, bed mattress covers, loose covers, duvet covers, pillowcases, sleeves for decoration, children's bedding; quilts; bed covers; eiderdowns; bath linen (except clothing); towels of textile; textile for kitchen use; fabrics, for textile use; mosquito nets.*

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

Class 35: *Retail services and business intermediary services for the wholesale of bleaching preparations and other substances for laundry use, cleaning, polishing, scouring and abrasive preparations, soaps, laundry products for woven fabrics, fabric softeners, perfumery, essential oils, cosmetic preparations, colognes, eau de toilette, perfume body sprays, cosmetic oils, creams and lotions for skincare purposes, shaving foam, shaving gel, pre-shaving and after-shaving lotions, talcum powder for toiletry use, toiletries for the bath and shower use, hair lotions, dentifrices, non-medicated mouthwashes, deodorants, anti-perspirants for personal use, non-medicated toilet*

preparations, depilatory preparations, non-medicated massage preparations, wicks for candles and lamps, tallow, fuel for lighting, paper spills for lighting, beeswax, oils and waxes, all for household use and home decoration (not included in other classes), brushes (except paint brushes), combs, sponges and body loofah (not for chirurgical and medical purposes), cosmetic brushes and cosmetic removing paper, toilet cases, containers for household or kitchen use (except in precious metal), steelwool, candle holders and soap dishes, glassware, porcelain and earthenware not included in other classes, textiles and textile goods not included in other classes, bed and table covers, bed clothes and bedding including sheets, bed mattress covers, loose covers, duvet covers, pillowcases, sleeves for decoration, children's bedding, quilts, bed spreads, comforters, duvets, bath linen (except clothing), towels of textile, textile for kitchen use, fabrics, for textile use, mosquito nets, clothing, footwear, headgear, coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee, flour and preparations made from cereals, bread, pastry and confectionery, ices, honey, treacle, yeast, baking-powder, salt, mustard, vinegar, sauces (condiments), spices, ice; business management and economic consulting services related to franchising; advertising, sales promotion, market prospecting, market research and market analysis for the service industries and retail, wholesale and distribution companies; business intermediary services related to the import and export of consumer goods.

3. The international registration remains valid in the European Union for all the remaining goods, namely:

Class 3: *Soaps; perfumery, cosmetic preparations, colognes, eau de toilette, perfume body sprays; cosmetic oils, creams and lotions for skincare purposes; shaving foam, shaving gel, pre-shaving and after-shaving lotions; toiletries for the bath and shower use; hair lotions; deodorants for personal use, anti-perspirants (toiletries); non-medicated toilet preparations; non-medicated massage preparations (cosmetics); tissues impregnated with cosmetic lotions.*

4. Each party bears its own costs.

REASONS

On 28/06/2022, the applicant filed a request for revocation of international registration designating the European Union No 914 438 ‘RITUALS’ (word mark) (the international registration). The request is directed against all the goods and services covered by the international registration, namely:

Class 3: *Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; laundry products for woven fabrics; fabric softeners; perfumery, essential oils, cosmetic preparations, colognes, eau de toilette, perfume body sprays; cosmetic oils, creams and lotions for skincare purposes; shaving foam, shaving gel, pre-shaving and after-shaving lotions; talcum powder for toiletry use; toiletries for the bath and shower use; hair lotions; dentifrices; non-medicated mouthwashes, deodorants for personal use, anti-perspirants (toiletries); non-medicated toilet preparations; depilatory preparations; non-medicated massage preparations (cosmetics); tissues impregnated with cosmetic lotions.*

Class 4: *Wicks for candles and lamps; tallow; fuel for lighting; paper spills for lighting; beeswax; oils and waxes for preservation purposes.*

Class 21: *Brushes (except paint brushes); combs; sponges including so called "body loofah" (not for surgical and medical purposes); cosmetic brushes; toilet cases.*

Class 24: *Textiles and textile goods, not included in other classes; bed and table covers; bed clothes and bedding including sheets, bed mattress covers, loose covers, duvet covers, pillowcases, sleeves for decoration, children's bedding; quilts; bed covers; eiderdowns; bath linen (except clothing); towels of textile; textile for kitchen use; fabrics, for textile use; mosquito nets.*

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

Class 35: *Retail services and business intermediary services for the wholesale of bleaching preparations and other substances for laundry use, cleaning, polishing, scouring and abrasive preparations, soaps, laundry products for woven fabrics, fabric softeners, perfumery, essential oils, cosmetic preparations, colognes, eau de toilette, perfume body sprays, cosmetic oils, creams and lotions for skincare purposes, shaving foam, shaving gel, pre-shaving and after-shaving lotions, talcum powder for toiletry use, toiletries for the bath and shower use, hair lotions, dentifrices, non-medicated mouthwashes, deodorants, anti-perspirants for personal use, non-medicated toilet preparations, depilatory preparations, non-medicated massage preparations, wicks for candles and lamps, tallow, fuel for lighting, paper spills for lighting, beeswax, oils and waxes, all for household use and home decoration (not included in other classes), brushes (except paint brushes), combs, sponges and body loofah (not for chirurgical and medical purposes), cosmetic brushes and cosmetic removing paper, toilet cases, containers for household or kitchen use (except in precious metal), steelwool, candle holders and soap dishes, glassware, porcelain and earthenware not included in other classes, textiles and textile goods not included in other classes, bed and table covers, bed clothes and bedding including sheets, bed mattress covers, loose covers, duvet covers, pillowcases, sleeves for decoration, children's bedding, quilts, bed spreads, comforters, duvets, bath linen (except clothing), towels of textile, textile for kitchen use, fabrics, for textile use, mosquito nets, clothing, footwear, headgear, coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee, flour and preparations made from cereals, bread, pastry and confectionery, ices, honey, treacle, yeast, baking-powder, salt, mustard, vinegar, sauces (condiments), spices, ice; business management and economic consulting services related to franchising; advertising, sales promotion, market prospecting, market research and market analysis for the service industries and retail, wholesale and distribution companies; business intermediary services related to the import and export of consumer goods.*

The applicant invoked Article 58(1)(a) EUTMR.

SUMMARY OF THE PARTIES' ARGUMENTS

The **applicant** argues that the contested mark was not put to genuine use for a continuous period of five years.

The **IR holder** submits evidence of use of the mark (listed below). It explains that it is an internationally active retailer of cosmetics and related products. It describes the documents submitted and presents an overview of general principles regarding genuine use of a trade mark. It concludes that the mark was used during the relevant time period, in significant part of the EU, in a large extent for the goods and services in all the classes for which it is registered.

The **applicant** puts forward that the evidence shows use only for limited number of cosmetic goods in Class 3 and not for the rest of the goods and services. She provides particularly elaborate arguments, including quotations from the EUIPO's Guidelines, regarding genuine use of retail services in Class 35. She concludes that the IR holder only sells goods under its own brand and that this does not constitute genuine use for retail services in Class 35. In addition, the applicant contends that the mark as used is different from the mark as registered.

The **IR holder** submits several invoices in addition to the documents submitted previously. It argues that the applicant's statement that the documents only show use for some goods in Class 3 shows that the applicant did not review the documents. It argues extensively that the mark was also genuinely used for retail services and points to the photographs of the outside and inside of its shops. It puts forward, in essence, that the text in the EUIPO's Guidelines is a misunderstanding of the judgment on which the text is based. It points out that the approach taken by the applicant contradicts previous decisions of the Office. Regarding the use of the mark as registered, it contends that the mark is not only used in the figurative form on the products but its verbal form can also be found abundantly throughout the evidence.

The **applicant** did not submit any further observations despite an express invitation by the Office to do so.

GROUNDS FOR THE DECISION

According to Article 58(1)(a) EUTMR, the rights of the proprietor of the European Union trade mark will be revoked on application to the Office, if, within a continuous period of five years, the trade mark has not been put to genuine use in the Union for the goods or services for which it is registered, and there are no proper reasons for non-use. Pursuant to Article 198 EUTMR the same applies to international registrations as far as validity in the European Union is concerned.

According to Article 182 EUTMR, unless otherwise specified, both the EUTMR and the EUTMIR apply to applications for international registrations. As regards the application of Article 58(1) EUTMR to international registrations designating the Union, Article 203 EUTMR establishes that the date of publication pursuant to Article 190(2) EUTMR will take the place of the date of registration for the purpose of establishing the date as from which the mark must be put to genuine use in the Union.

Genuine use of a trade mark exists 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 requires actual use on the market of the registered goods and services and does not include token use for the sole purpose of preserving the rights conferred by the mark, nor use which is solely internal (11/03/2003, C-40/01, Minimax, EU:C:2003:145, in particular § 35-37 and 43).

When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a market share for the goods or services protected by the mark (11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 38). However, the purpose of the provision requiring that the mark must have been genuinely used '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).

According to Article 19(1) EUTMDR in conjunction with Article 10(3) EUTMDR, the indications and evidence of use must establish the place, time, extent and nature of use of the contested trade mark for the goods and/or services for which it is registered.

In revocation proceedings based on the grounds of non-use, the burden of proof lies with the IR holder as the applicant cannot be expected to prove a negative fact, namely that the mark has not been used during a continuous period of five years. Therefore, it is the IR holder who must prove genuine use within the European Union, or submit proper reasons for non-use.

In the present case, the IR was published in accordance with Article 190(2) EUTMR on 04/02/2008. The revocation request was filed on 28/06/2022. Therefore, the IR had been published for more than five years at the date of the filing of the request. The IR holder had to prove genuine use of the contested international registration during the five-year period preceding the date of the revocation request, that is, from 28/06/2017 until 27/06/2022 inclusive, for the contested goods and services listed in the section 'Reasons' above.

On 06/09/2022 the IR holder submitted the following evidence as proof of use:

- Annex 1: invoices issued by the IR holder to its distributors in Belgium, the Netherlands, Germany and France, dated between 2017 and 2021 for the following goods: perfumes, shaving products, shaving gels and creams, aftershaves, cosmetic and massage oils, shower gels, hair products, shampoos, conditioners, face creams, body moisturizers, face exfoliators, face masks, cosmetic cleansers, various cosmetic skin care products, body lotions, anti-perspirant sprays, fragrance sticks, bath foams, eau de toilette, soaps and hand washes, body scrubs, scented candles, make up removers, cosmetic sets, shower oils, hair & body mists, hair waxes, bathrobes, bath towels, kimonos, perfume cartridges, candle holders, toothbrush holders, soap dispensers.

- Annex 2: invoices for marketing and advertising issued by companies in the Netherlands, Germany, Belgium, Spain and Poland, to Ritual Cosmetics, dated between February 2021 and May 2022, for what seems to be advertisements in magazines and television, and Christmas cards; prices are undisclosed.

- Annex 3a: brand perception report from 2017 carried out by Brandtracker in 12 countries (EU and non-EU) showing considerable awareness of the mark 'Rituals', in some regions, among the female 18-40 year-old population (e.g. 90% in the Netherlands, 40 % in Germany, 60 % in Sweden, 37 % in Spain etc.).

- Annex 3b: brand awareness search report carried out by Hoyng Rokh Monegier in September 2021 in the Netherlands, Belgium, Germany and Sweden, showing spontaneous awareness of the mark 'Rituals' ranging between 7.5 % and 52 % (in the different countries) and aided awareness ranging between 40 % and 93 %.

- Annex 4: financial statements from 2018, 2019, 2020 and 2021 (showing annual net profits of millions of Euros) and an extract from the Dutch Chamber of Commerce showing that Rituals Cosmetics Enterprise B.V. is the Board Member of the IR holder.

- Annex 5: company presentation dated in 2018, containing many motivational quotations and exotic photographs and some information about the IR holder. The

products presented are cosmetic and fragrance products. The distribution strategy of the products is also explained in detail.

- Annex 6: articles concerning the Rituals branded products, in publications of the IR holder entitled Express Your Soul (2017), Open Your Heart (2017), Namaste (2018), I wish winter (2018), The Art of Attention (2019), Give Rise to Happiness (2019), The Art of Soulful Living and Heart of Rituals (2022). Cosmetic and perfumery products are presented. Occasionally other products are also presented, namely clothing, tea bags, travel bags and make up bag, a toiletry bag, a towel, candles, a yoga mat, tea cups, cushions, candle holders, soap dispensers, toothbrush holders, cotton jars, bed textiles. Prices are in GBP in the English versions and in EUR in the Dutch versions. Printouts from the rituals.com website from March 2022, informing that the 2022 version of Rituals magazine is available in stores and online as of 01/03/2022.

- Annexes 7a-o: printouts from the IR holder's website showing articles published within the relevant period illustrated by products bearing the contested mark, namely cosmetic brushes, cosmetics, toiletry case, clothing, tea and tea cups, shaving products, home fragrances and candles. There is also a mention of towels.

- Annex 7p: printouts from the IR holder's online shop showing cosmetics, hair products and perfumery products, soaps, tea, candles, advent calendars and clothing and yoga accessories offered for sale, prices are in Euros on the websites related to EU countries where Euros are used and in Polish zlotys, Romanian Leus, Swedish Kronas and Hungarian Forints in the respective websites.

- Annex 7q: printouts from the 'store locator' section of the IR holder's website showing that shops with the IR holder's products are located in many EU countries.

- Annex 7r: website printouts from the IR holder's website, printed on 30/08/2022, with no reference to an earlier date, showing laundry products (detergent, fabric softener and scent booster), dish washes, soaps, cosmetic and massage oils and other cosmetic products, eau de cologne and perfums, wipes, a candle wick trimmer, candles, soap dispensers, cotton jars and toothbrush holders, jewelery boxes and toiletry bags, tea and tea cups, bed sheets and pillow cases, quilts, bath mats, towels, clothing and shower caps under the mark 'Rituals' offered for sale.

- Annex 7s: a printout from Similarweb showing a report regarding the traffic on the website rituals.com with data for May, June and July 2022, showing roughly 4.5 millions of visits per months, mostly from the Netherlands, Germany, the UK, France and Belgium.

- Annex 8: a presentation regarding the IR holder's social media according to which the 'Rituals Cosmetics' Facebook profile has 1.3 million of followers, mostly from the EU countries, and Instagram page nearly 0,5 million of followers; Several Facebook and Instagram posts from Rituals Cosmetics profile dated between 2019 and February 2022 showing a mascara, deodorant, clothing and bed linen and towels. An overview of the Facebook profile showing the same goods as displayed in previous documents; Ritual Cosmetics profile on Pinterest, Twitter, YouTube.

- Annex 9: online articles from various Dutch websites and magazines as well as other websites such as www.airport-business.com or 'Cosmetics Business' regarding the IR holder and its business, informing for example about the expansion of the Rituals outlets or about replacement of a certain skin care range with vegan products. The articles are dated between 05/04/2017 and 2020. An article from 'vtwonen',

seemingly undated, which contains a mention of 'Rituals' pillow case. An undated printout from bol.com showing 'Rituals' cosmetic products being offered for sale, in Dutch, with prices in Euro.

- Annex 10a: overview of a part of the Rituals assortment with a launch date in the period 2013-2022; a table seemingly from IR holder's resources.

- Annex 10b and e: printouts from the website www.bol.com showing a soap dish, towels and a blanket (as well as cosmetic products) under the contested mark being offered for sale. The page is undated but there is a copyright note 1999-2022. The blanket seems to have some reviews from clients dated in 2019, 2020 and 2021.

- Annex 10c: screenshots from a YouTube video posted on the IR holder's website in 2018 showing a model doing her make up while using a cosmetic brush and Rituals-labelled mascara.

- Annex 10d: print screen from a website Beste.nl showing sale of Rituals towel, undated.

- Annex 10f: press clippings showing products under the contested mark being advertised in renowned magazines of various EU countries dated between 2019 and 2021. The products are cosmetics and perfumery, candles and occasionally clothing, tea, a candle, cosmetics wipes.

- Annex 10g: screenshots from a YouTube video regarding 'the first Rituals flagship store', dated in 2020; candles, pillows, bed linen, perfume bottles, clothing, toiletry bags, laundry products and towels are visible in the shop.

- Annex 10h: printout from www.spydeals.nl showing a mascara under the mark Rituals being offered for sale.

- Annex 10i: online order confirmation from Rituals dated in 2021 showing cosmetics products and also two cosmetic brushes.

- Annex 10j: declaration of R.C., CEO of the IR holder, in which it is stated that 'RITUALS' is a worldwide famous brand for personal and home care items, home accessories and clothing, that it was launched in 2000 and it has been used on the forefront of the stores as well as on the products. Mr R.C. declares that the brand is present in many countries of the EU and provides annual turnover figures for 2016, 2017 and 2018, which reach many millions of Euros, in the Benelux region hundreds of millions. He also lists awards obtain by the brand.

- Annex 10K: hotel booklet showing hotel amenitites with the 'Rituals' brand.

- Annex 10l: a presentation displaying inside of Rituals stores showing, in addition to the fragrance and cosmetics products also towels, bathrobes and candles; a table with Powerpoint Properties is included which shows that the presentation was created in 2021 and last saved on 31/08/2022.

- Annex 10m: printouts from the IR holder's website showing toiletry and make up cases, eyebrow pencil and scrub glove labelled with the contested mark being offered for sale, undated; an article from dfnionline.com dated in August 2017 informing that Rituals launched travel-friendly cosmetics sets, a screenshot from haarspullen.nl showing a cosmetic set of Rituals packed in a bag; an article from

Rituals magazine on make-up tips with a picture of cosmetic brushes labelled with the contested mark (they do not seem to be for sale), dated in 2018.

- Annex 10n: documents submitted in view of proving use of the mark for goods in Class 30, which consist mainly of the recipe section of the IR holder's website containing recipes for soulful meals and of a menu of House of Rituals containing tea and coffee, desserts and side dishes.

- Annex 10o: photographs from inside of Rituals shops.

Additionally, on 03/02/2023 the IR holder submitted further invoices to its distributors in France and Germany dated between 2017 and 2021 for cosmetic, hair and perfumery products, antiperspirants, candles, cosmetic oils and hair waxes.

Preliminary remark on the belated evidence

On 03/02/2023, after expiry of the time limit, the IR holder submitted additional evidence.

Even though, according to Article 19(1) EUTMDR, the IR holder has to submit proof of use within a time limit set by the Office, Article 10(7) EUTMDR (applicable to cancellation proceeding by virtue of Article 19(1) EUTMDR) expressly invites the Office to exercise its discretionary power if relevant evidence was submitted in time and, after the expiry of the time limit, supplementary evidence was filed.

According to Article 10(7) EUTMDR, where, after the expiry of the time limit set by the Office, indications or evidence is filed that supplement prior relevant indications or evidence submitted within the time limit, the Office may take into account the evidence submitted out of time as a result of exercise of the discretion conferred on it by Article 95(2) EUTMR. When exercising its discretionary power, the Office must take into account, in particular, the stage of proceedings and whether the facts or evidence are, prima facie, likely to be relevant for the outcome of the case and whether there are valid reasons for the late submission of the facts or evidence.

In this regard, the Cancellation Division considers that the IR holder did submit relevant evidence within the time limit initially set by the Office and, therefore, the later evidence can be considered to be additional.

The fact that the applicant disputed the initial evidence submitted by the IR holder justifies the submission of additional evidence in reply to the objection (29/09/2011, T-415/09, Fishbone / FISHBONE BEACHWEAR (fig.), EU:T:2011:550, § 30 and 33, upheld by judgment of 18/07/2013, C-621/11 P, Fishbone / FISHBONE BEACHWEAR (fig.), EU:C:2013:484, § 36).

The additional evidence merely strengthens and clarifies the evidence submitted initially, as it does not introduce new elements of evidence but merely enhances the conclusiveness of the evidence submitted within the time limit.

For the above reasons, and in the exercise of its discretion pursuant to Article 95(2) EUTMR, the Cancellation Division therefore decides to take into account the additional evidence submitted on 03/02/2023.

For the sake of completeness, it is noted that the Office forwarded these additional documents to the applicant and invited her to submit observations but the applicant did not take the opportunity.

ASSESSMENT OF GENUINE USE – FACTORS

Time of use

The evidence must show genuine use of the contested international registration within the relevant period.

Most of the evidence is dated within the relevant period, in particular the invoices, the publications of IR holder promoting its products, some of the social networks posts and online articles. Therefore, the evidence of use filed by the IR holder contains sufficient indications concerning the time of use.

Place of use

The evidence must show that the contested international registration has been genuinely used in the European Union (see Article 18(1) EUTMR and Article 58(1)(a) EUTMR).

The invoices show sales of products to companies based in Belgium, the Netherlands, Germany and France, the marketing expenses demonstrate that advertising of the mark took place in several EU countries, the IR holder's online shop has sections with prices in Euros and several other EU state currencies, many of the publications are in Dutch, the brand awareness reports show significant awareness of the contested mark in several EU countries or regions. Overall, the evidence shows that the mark was present in a significant part of the EU territory.

Nature of use: use as a trade mark

Nature of use requires, inter alia, that the contested international registration is used as a trade mark, that is, for identifying origin, thus making it possible for the relevant public to distinguish between goods and services of different providers.

The mark was evidently used directly on the goods to identify their commercial origin as is clear from the many publications, photographs, articles, online shops etc. It was used as a trade mark.

Nature of use: use of the mark as registered

'Nature of use' in the context of Article 10(3) EUTMDR further requires evidence of use of the mark as registered, or of a variation thereof which, pursuant to Article 18(1)(a) EUTMR, does not alter the distinctive character of the contested international registration.

The purpose of Article 18(1)(a) EUTMR, which avoids imposing strict conformity between the form in which the trade mark is used and the form in which it was registered, is to allow its proprietor, when exploiting it commercially, to vary it in such a way that, without altering its distinctive character, enables it to be better adapted to the marketing and promotion requirements of the goods or services concerned (23/02/2006, T-194/03, Bainbridge (fig.) / Bridge et al., EU:T:2006:65, § 50).

The mark is registered as a word mark. The evidence shows it used mostly as  on the goods, sometimes as  . Within text it is used as a word mark. In any event, whilst the word 'rituals' may create some pleasant associations when used in relation to cosmetics and perfumery, it is not specific enough to constitute a description of any kind and sufficiently uncommon to maintain a normal degree of inherent distinctiveness. Even in the use on the square decorative background, the word is clearly legible. There are no word elements added or omitted. The three dots are inconclusive and will not be given an extra thought by the consumers. The separation in different lines and placement against a decorative square will not go unnoticed but will be perceived, in the Cancellation Division's opinion, within the limits of distinctiveness-unaltering decoration. Consequently, the mark was used in compliance with Article 18(1)(a) EUTMR.

Use in relation to the registered goods and services and extent of use

Before assessing the remaining factors of use, it is useful to clarify in relation to which goods or services the mark was used.

Article 58(1)(a) EUTMR and Article 10(3) EUTMDR require that the IR holder proves genuine use for the contested goods and services for which the international trade mark registration is registered.

The contested trade mark is registered for the goods and services in Classes 3, 4, 21, 24, 30 and 35, as listed above. However, the evidence filed by the IR holder does not show genuine use of the trade mark for all those goods and services.

According to Article 58(2) EUTMR, where there are grounds for revocation in respect of only some of the goods or services for which the contested mark is registered, the proprietor's rights will be revoked for those goods and services only.

The core of products for which the mark was used are cosmetic, personal care and perfumery products, which appear abundantly through all the documents, particularly in the invoices, websites, social media, IR holder's publications, in the online shops (both IR holder's and third parties') and IR holder's presentations. More specifically, these goods are *perfumes, shaving products, shaving gels and creams, aftershaves, cosmetic and massage oils, shower gels, hair products, shampoos, conditioners, face creams, body moisturizers, face exfoliators, face masks, cosmetic cleansers, various cosmetic skin care products, body lotions, anti-perspirant sprays, fragrance sticks, bath foams, eau de toilette, soaps and hand washes, body scrubs, make up removers, cosmetic sets, shower oils, hair & body mists, hair waxes.*

From the registered goods, use of the mark for the above products constitutes use for the following goods in Class 3: *soaps; perfumery, cosmetic preparations, colognes, eau de toilette, perfume body sprays; cosmetic oils, creams and lotions for skincare purposes; shaving foam, shaving gel, pre-shaving and after-shaving lotions; toiletries for the bath and shower use; hair lotions; deodorants for personal use, anti-perspirants (toiletries); non-medicated toilet preparations; non-medicated massage preparations (cosmetics); tissues impregnated with cosmetic lotions.*

Concerning extent of use, it is settled case-law that account must be taken, in particular, of the commercial volume of the overall use, as well as of the length of the period during which

the mark was used and the frequency of use (e.g. 08/07/2004, T-334/01, Hipoviton / HIPPOVIT, EU:T:2004:223, § 35).

As regards the extent of use for these goods, it is evident that it passes the conditions of genuine use. The invoices show sales of hundreds or thousands of the individual items regularly throughout the entire relevant period. Moreover, the considerable brand awareness demonstrated by the reports in Annex 3 and the high figures in the annual financial reports in Annex 4 imply that the presence of the brand and the extent of its use is large scale, at least regarding its core products as are those listed above. Therefore, the Cancellation Division considers that the evidence shows genuine use of the contested trade mark for the above listed goods in Class 3.

Furthermore, the evidence mentions other registered goods, namely laundry products, cosmetic brushes, toilet cases, towels, bed linen and tea. However, these goods appear in the evidence overall only occasionally and with little or no information on extent of use. From these goods, only towels appear in the invoices with roughly 130 pieces sold on one occasion. There is also one email regarding order confirmation of order of two cosmetic brushes. There is no other direct evidence of any sales of these products and they appear only marginally, if at all, in the documents originating from the IR holder such as its website, online shop, presentations and magazines. The documents regarding the largescale use of the mark in general such as the brand awareness, high turnover figures, traffic on the website, articles regarding the brand in general, the affidavit etc. cannot be used to argue for the extent of use regarding these products, because, unlike its core goods that clearly form the basis of the use leading to those high numbers, it is absolutely unclear which of these goods, if any, contributed to that large scale of use, and how much, if at all, they did so. Although there are certain documents that show these goods being offered for sale during the relevant period (articles in the IR holder's magazines and website, posts on social media, presence on a third party online shop and photographs and videos from several IR holder's stores), these documents do not provide indications regarding the extent of use of the mark related to these goods. These goods appear only very marginally among the avalanche of cosmetic and fragrance products in the other documents and the IR holder was not able to submit evidence of any actual sales of these goods (or in case of towels and cosmetic brushes sales that would not be an isolated instance of an insignificant amount of goods sold) or of any serious marketing initiatives regarding these goods. Therefore, these circumstantial documents cannot be considered sufficient to demonstrate that the IR holder genuinely attempted to gain a market share for the goods listed above.

The mark is also registered for a variety of food products in Class 30. Apart from *tea*, which actually appears as a product offered for sale under the contested mark in some of the documents (as explained in the previous paragraph), there is no trace of use of the mark for any of these goods in any of the documents. The IR holder describes Annex 10n as documents showing use for goods in Class 30. These documents consist of a menu of The House of Rituals, which is, as can be inferred from other documents, an IR holder's shop, and of a series of printouts of the section of the IR holder's website which contains recipes. The menu could be considered a document supporting use of the mark 'The House of Rituals' for restaurant services, which are, however, not among the services for which the mark is registered so this aspect is irrelevant. As regards the goods, it is not a common practice for a restaurant or cafeteria to serve coffee or tea of their own brand, unless this is explicitly stated. The same is true about bread and pastry, unless the cafeteria is associated with a bakery. When the cafeteria/restaurant is situated in a cosmetics shop, consumers would not expect the pastry, let alone any ingredients such as flour or sugar, to be produced under the mark of the cosmetic products, unless it is explicitly stated otherwise. Nowhere in the menu it is declared that any of the goods served are 'Rituals' brand and the consumers have no reason to believe so. As regards the websites with recipes, which form the bulk of Annex 10n, the Cancellation Division is uncertain if this is a serious attempt to prove use of

the contested mark for goods in Class 30. The printouts do not show that the recommended ingredients for the recipes are products of the contested mark. It is mind-boggling how the IR holder considers these documents should prove use of the mark 'Rituals' for goods in Class 30.

As far as the rest of the contested goods are concerned, there is no indication in the evidence that the mark was used in relation to them.

For the sake of completeness, it is noted that there are some indications of use of the mark in relation to goods which are not registered such as candles, bath robes, soap dispensers, toothbrush holders, clothing and others. The evidence of use of the mark in this regard is irrelevant to the present case, as the contested mark is not registered for these goods.

Finally, the mark is registered for *retail services and business intermediary services for the wholesale.* There is no dispute between the parties that the IR holder operates shops with its own goods. However, they argue fervently about whether or not this constitutes use of the contested mark for retail services. The applicant quotes the EUIPO's Guidelines in support of her arguments that sales of the IR holder's goods do not constitute use of the mark for retail services, whereas the IR holder in essence argues that the Guidelines misinterpret the CJEU and should not be followed. The IR holder claims that it is not merely selling its own goods but competing on the market of retail with other companies selling similar goods. It emphasizes that the mark appears at the front of shops and inside of them, on the packaging bags and cash receipts. It argues that customers are treated to a unique experience in the shops, being offered tea and hand massages.

Retail services in Class 35 are defined in the explanatory note of the Nice Classification as 'the bringing together, for the benefit of others, of a variety of goods (excluding the transport thereof), enabling customers to conveniently view and purchase those goods'. The IR holder mentions that the explanatory note includes 'in particular' which, according to it, has some implications to this definition. It is evident that the term 'in particular' clearly refers to the entire list of services enumerated as classified in Class 35 to indicate the list is not exhaustive, not that the definition of retail is somehow incomplete.

To be able to define whether or not the IR holder's activity can be considered retail, it is important to establish who 'the others' are in the above definition. According to the Office's interpretation of the Burlington judgment (04/03/2020, C-155/18 P, C-156/18 P, C-157/18 P & C-158/18 P, BURLINGTON / BURLINGTON ARCADE et al., EU:C:2020:151), 'the others' are the manufacturers or trade mark owners looking for an outlet for their goods. The IR holder argues that this is not what the Court stated in the mentioned judgment. However, it can be implied from it and it was accepted as the EUIPO's current practice. For example, in paragraph 130 of the said judgment, the Court states that *the concept of 'retail services' includes a shopping arcade's services aimed at the consumer with a view to enabling him or her to conveniently view and purchase those goods, for the benefit of the businesses occupying the arcade concerned.*

In the model in which the IR holder operates, there is no business, manufacturer or trade mark owner other than IR holder itself that would benefit from the IR holder's activity. All the activities carried out in the IR holder's shops have one aim, which is to sell the IR holder's goods. That the mark is placed at the front of the stores, inside the stores and on cash receipts, that the purchased products are packed in a bag with the trade mark printed on it, none of that changes the fact that the only purpose of all this is to sell the IR holder's products. The mark at the front of the store informs consumers that goods under the mark 'Rituals' are sold inside. Similarly as other services in Class 35 (and not only in that class) have to be provided to third parties to constitute trade mark use, so do retail services. In the present case, the only beneficiary of the activities related to the IR holder's shops is the IR

holder itself. The IR holder is not competing with retailers on the market of retail services but with other producers of cosmetic and fragrance products. The consumers do not choose between shopping in 'Rituals' shop or in a cosmetic retail shop with a variety of cosmetic products of different brands, they choose between purchasing 'rituals' cosmetics or products of other trade marks.

The question whether the offer of hand massages and tea could be considered ancillary services falling outside of the scope of mere sale of goods or whether they form an integral part of it may be left open as the IR holder did not provide sufficient information to this effect. It is not clear from the IR holder's statements if this happens in all the 'Rituals' shops or only in the flagship store 'The House of Rituals'. Moreover, the only evidence to this statement is a few photographs of shop employees with a tray of paper cups (supposedly containing tea) and employees applying the IR holder's products on clients' hands. These photographs do not demonstrate that the tea offering and hand massages is something happening regularly in a significant number of its shops.

Consequently, the activity of the IR holder connected to its shops has to be considered to be a mere sales of its own goods, which is an activity covered by the protection conferred by registration for the goods, not an independent service of retail. The IR holder failed to demonstrate use of the contested mark for retail services. There is also no indication in the evidence that the mark was used for business intermediary services for the wholesale. Therefore, the mark must be revoked for the entire Class 35.

Conclusion

In order to examine, in a given case, whether use of the mark is genuine, an overall assessment must be made taking account of all the relevant factors in the particular case. That assessment implies a certain interdependence between the factors taken into account. Thus, a low volume of goods marketed under that trade mark may be compensated for by high intensity of use or a certain constancy regarding the time of use of that trade mark or vice versa (08/07/2004, T-334/01, Hipoviton / HIPPOVIT, EU:T:2004:223, § 36).

The evidence demonstrated that the mark has been used in relation to some of the contested goods during the relevant period, in the relevant territory, to an extent sufficient to indicate that the use made was genuine. Moreover, it was used as a trade mark and in a form not altering the distinctive character of the mark. Considering all the above, the Cancellation Division concludes that the evidence, as a whole, is sufficient to demonstrate that the contested mark was genuinely used during the relevant period, in the relevant territory, for *soaps; perfumery, cosmetic preparations, colognes, eau de toilette, perfume body sprays; cosmetic oils, creams and lotions for skincare purposes; shaving foam, shaving gel, pre-shaving and after-shaving lotions; toiletries for the bath and shower use; hair lotions; deodorants for personal use, anti-perspirants (toiletries); non-medicated toilet preparations; non-medicated massage preparations (cosmetics); tissues impregnated with cosmetic lotions* in Class 3.

It follows from the above that the IR holder has not proven genuine use of the international trade mark registration for the following goods and services, for which it must, therefore, be revoked:

Class 3: *Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; laundry products for woven fabrics; fabric softeners; essential oils; talcum powder for toiletry use; dentifrices; non-medicated mouthwashes, depilatory preparations.*

Class 4: *Wicks for candles and lamps; tallow; fuel for lighting; paper spills for lighting; beeswax; oils and waxes for preservation purposes.*

Class 21: *Brushes (except paint brushes); combs; sponges including so called "body loofah" (not for surgical and medical purposes); cosmetic brushes; toilet cases.*

Class 24: *Textiles and textile goods, not included in other classes; bed and table covers; bed clothes and bedding including sheets, bed mattress covers, loose covers, duvet covers, pillowcases, sleeves for decoration, children's bedding; quilts; bed covers; eiderdowns; bath linen (except clothing); towels of textile; textile for kitchen use; fabrics, for textile use; mosquito nets.*

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

Class 35: *Retail services and business intermediary services for the wholesale of bleaching preparations and other substances for laundry use, cleaning, polishing, scouring and abrasive preparations, soaps, laundry products for woven fabrics, fabric softeners, perfumery, essential oils, cosmetic preparations, colognes, eau de toilette, perfume body sprays, cosmetic oils, creams and lotions for skincare purposes, shaving foam, shaving gel, pre-shaving and after-shaving lotions, talcum powder for toiletry use, toiletries for the bath and shower use, hair lotions, dentifrices, non-medicated mouthwashes, deodorants, anti-perspirants for personal use, non-medicated toilet preparations, depilatory preparations, non-medicated massage preparations, wicks for candles and lamps, tallow, fuel for lighting, paper spills for lighting, beeswax, oils and waxes, all for household use and home decoration (not included in other classes), brushes (except paint brushes), combs, sponges and body loofah (not for chirurgical and medical purposes), cosmetic brushes and cosmetic removing paper, toilet cases, containers for household or kitchen use (except in precious metal), steelwool, candle holders and soap dishes, glassware, porcelain and earthenware not included in other classes, textiles and textile goods not included in other classes, bed and table covers, bed clothes and bedding including sheets, bed mattress covers, loose covers, duvet covers, pillowcases, sleeves for decoration, children's bedding, quilts, bed spreads, comforters, duvets, bath linen (except clothing), towels of textile, textile for kitchen use, fabrics, for textile use, mosquito nets, clothing, footwear, headgear, coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee, flour and preparations made from cereals, bread, pastry and confectionery, ices, honey, treacle, yeast, baking-powder, salt, mustard, vinegar, sauces (condiments), spices, ice; business management and economic consulting services related to franchising; advertising, sales promotion, market prospecting, market research and market analysis for the service industries and retail, wholesale and distribution companies; business intermediary services related to the import and export of consumer goods.*

The application is not successful as regards the goods in Class 3 as listed above, for which genuine use was proven.

According to Article 62(1) EUTMR, the revocation will take effect from the date of the application for revocation, that is, as of 28/06/2022.

COSTS

According to Article 109(1) EUTMR, the losing party in cancellation proceedings must bear the fees and costs incurred by the other party. According to Article 109(3) EUTMR, where

each party succeeds on some heads and fails on others, or if reasons of equity so dictate, the Cancellation Division will decide a different apportionment of costs.

Since the cancellation is successful only for part of the contested goods and services, both parties have succeeded on some heads and failed on others. Consequently, each party has to bear its own costs.

The Cancellation Division

Martin LENZ Michaela SIMANDLOVA Jessica N. LEWIS

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