

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
CANCELLATION DECISION
N° 3000555
16 July 2024

Claimant: **GENUPORT Trade GmbH**
Gutenbergring 60
22848 Norderstedt
Germany

Representative: **Arnold & Siedsma**
Meir 24
2000 Antwerpen
Belgium

against

Defendant: **ETI GIDA SANAYI VE TICARET ANONIM SIRKETI**
Organize Sanayi Bolgesi 11. Cadde
ESKISEHIR
Turkey

Representative: **Lydian cvba**
Tour & Taxis, Havenlaan 86 C, B113
1000 Brussel
Belgium

Contested trademark: **International registration 1203255**



I. FACTS AND PROCEEDINGS

A. Facts

1. On 31 January 2023, the claimant filed an application for cancellation in accordance with Article 2.30bis (1)(a) of the Benelux Convention on Intellectual Property (hereinafter: "BCIP") based on the ground for revocation set out in Article 2.27 (2) BCIP, namely that no genuine use has been made of the contested trademark in accordance with Article 2.23bis BCIP.

2. The cancellation application is directed against the international registration 1203255 designating, among others, the Benelux, filed and registered on 27 November 2013 for goods in Class 30, of the



combined word-/figurative trademark. The statement of grant of protection in the Benelux has been published on 4 September 2014.

3. The cancellation application is directed against all goods of the contested trademark, namely:

Class 30: Biscuits, chocolates, pastries, crackers, wafers, cakes, pastry and bakery products, chocolate bars, tarts, pies, breakfast cereals, bread, popcorn and rice crisp.

4. The language of the proceedings is English.

B. Course of the proceedings

5. The cancellation action is admissible and was notified by the Benelux Office for Intellectual Property (hereinafter: "the Office") to the parties on 20 February 2023. During the administrative phase of the proceedings both parties filed arguments. The course of the proceedings meets the requirements as stated in the BCIP and the Implementing Regulations (hereinafter: "IR"). As the application relates exclusively to a declaration of revocation for non-use, pursuant to Rule 1.31(2) of the IR, the defendant was first given the opportunity to react in writing by submitting proof of use or substantiating that there are proper reasons for not using the contested trademark, after which the claimant and, finally, the defendant were asked to react. The administrative phase was completed on 16 October 2023.

II. ARGUMENTS

A. Defendant's arguments

6. In order to demonstrate genuine use of the contested trademark, the defendant submits the following documents and comments:

- example of invoices for products sold under the contested trademark within the Benelux;
- example of clearance customs in view of delivery within the Benelux of products sold under the contested trademark together with a translation of the main terms;
- distribution contract between ETI EUROPEAN FOOD INDUSTRIES S.A. (a subsidiary of the defendant) and FATIH SULTAN BV dated 2020, for the Netherlands;

- example of invoices issued by the Benelux distributor FATIH SULTAN BV to its resellers for products under the contested trademark, in the Netherlands between March 2018 and March 2023.
- sales report for 2019-2023 for products under the contested trademark in Belgium and in the Netherlands;
- some images of the packaging of the products sold under the contested trademark within Benelux, namely for salty stick crackers, sesame stick crackers, cheese stick crackers, hers stick crackers and spicy stick crackers;
- example of e-shops that are selling products under the contested trademark in Belgium and in the Netherlands;
- some pictures taken of the products under the contested trademark sold in different stores within Benelux over the last years;
- export catalogues dated 2020 that are aimed notably for the Benelux market.

B. Claimant's arguments

7. Before going through the evidence of use filed by the defendant, the claimant affirms that he is one of Germany's largest and most advanced food importers and distributors, importing renowned food trademarks from over 20 countries. The claimant owns several distribution centers in Germany and plans to expand its operations in the Benelux and Europe. The claimant explains that his portfolio includes categories such as confectionery, breakfast products, and frozen foods, and that it owns several trademarks in multiple countries, including the word mark CRÄX, registered in Germany since 2006, and in the EU, Switzerland, and the United Kingdom since 2021. The claimant claims to have built a significant reputation based on this trademark.

8. The claimant references two other cancellation proceedings (nos. 3000553 and 3000554) against similar defendant's trademarks (Benelux registration nos. 1003495 and 1003496) and raises that in these cases, the defendant did not respond, leading to the presumption that it renounced its rights, and the registrations will be cancelled for all goods. The claimant suggests that if the defendant had been using the trademark in the Benelux, it would have submitted proof of use, which it did not. Despite these trademarks being different from the contested trademark, the claimant points out that the same stylized word elements are visible, and all three trademarks are registered for "crackers" in class 30. The claimant notes a striking difference in color use (yellow vs. green), suggesting the defendant acknowledges these colors as distinctive elements.

9. According to the claimant, the contested trademark consists of the stylized verbal elements "ETi" and "CRAX", a figurative element, and the color green, all considered distinctive and together forming the registered trademark. The claimant emphasizes the importance of the visual impact of the trademark, particularly the color green, stating that its absence would alter the distinctive character of the trademark. The claimant also argues that both verbal elements "ETi" and "CRAX" must appear together in the proof of use, as separate references would alter the distinctive character of the trademark. In support of this, the claimant cites an EU opposition case where isolated use of one verbal element altered the distinctive character of the trademark.

10. The claimant states that genuine use should be demonstrated for the five years prior to the application for cancellation. As the application was filed on January 31, 2023, the defendant must show use of the trademark from January 31, 2018, to January 31, 2023.

11. The claimant points out that the evidence does not meet the Office's requirements as the table of contents does not describe the facts each piece of evidence proves, an explicit requirement since January 1, 2021.

12. Regarding the invoices provided by the defendant, the claimant states that they do not relate to the contested trademark but rather to an altered form, specifically the term "CRAX". This is evidenced by the description of the invoices, such as "CRAX PRETZEL, CHEESE& ONION, HERBS, SALTY". The claimant explains that this use modifies the distinctive character of the contested trademark, as shown in comparisons between the invoices and the registered trademark, indicating a lack of use of the contested trademark as registered. Furthermore, the claimant highlights that none of the invoices are written in any of the national languages of the Benelux countries (Dutch or French). Instead, they are predominantly in Turkish, suggesting that the target market is outside the Benelux. The claimant supports this by showing a screenshot from the defendant's website, which targets regions such as Turkey, the Balkans, the Middle East, Africa, and Asia. Additionally, the claimant points out that the invoice lines do not clearly specify which goods are being referred to. The contested trademark is for various products, including biscuits, chocolates, pastries, and more. However, the invoices list items like "pretzel cracker", "salty sticks", "sesame sticks" and similar terms. The claimant argues that only "pretzel cracker" can be linked to the registered products ("crackers"), and the rest cannot be linked to the majority of the registered goods.

13. The claimant references established case law, explaining that low turnover and sales, in absolute terms, of a medium- or low-priced product might support the conclusion that the use of the trademark in question is not genuine. The claimant emphasizes that the registered goods in class 30 are low-priced consumption goods that require high turnover and sales figures to demonstrate genuine use. However, the claimant argues that the yearly sales figures and turnover demonstrated by the evidence submitted are far too low for such inexpensive consumption goods to demonstrate genuine use in the Benelux. Specifically, the products are sold for around 1 euro per piece, and the total sales figures amount to an average of only approximately 5448 euros per year from 2018 to 2022, indicating that the defendant has not seriously attempted to acquire a commercial position in the relevant market.

14. The claimant notes that the defendant has listed examples of customs clearance for deliveries within the Benelux under the contested trademark. However, no document identified as number 2 can be found among the provided evidence. The claimant states that this appendix should be disregarded due to non-compliance with submission requirements. Additionally, the claimant emphasizes that these documents are written entirely in Turkish, making them incomprehensible and therefore invalid. This lack of clarity means the claimant cannot determine the relevant territory, period, extent, or nature of use related to the contested trademark.

15. The claimant mentions that the defendant has listed a distribution agreement between ETI EUROPEAN FOOD INDUSTRIES S.A. and FATIH SULTAN BV for the Netherlands, dated 2020. The claimant states that the agreement does not clearly refer to the contested trademark, instead mentioning "products" without specifying which trademarks are involved. Moreover, the claimant points out that the agreement is only signed by the distributor and not the supplier, making it invalid as evidence of genuine use.

16. The claimant concludes that the defendant's submissions and exhibits are insufficient to demonstrate genuine use of the contested trademark for the relevant goods within the relevant period and territory. The claimant asserts that there is no solid, objective, clear, and actual proof of use of the

trademark for biscuits, chocolates, pastries, crackers, wafers, cakes, pastry and bakery products, chocolate bars, tarts, pies, breakfast cereals, bread, popcorn, or rice crisps.

17. Therefore, the claimant requests the Office to cancel the Benelux designation of the contested trademark concerning all registered goods in class 30 and to order the defendant to pay the costs.

C. Defendant's last arguments

18. The defendant considers that the use of the contested trademark in a slightly different form constitutes genuine use. Contrary to the claimant's arguments, the defendant is of the opinion that the use of the contested trademark without the green background does not alter its distinctive character. The removal of the green background does not make the sign used different from the contested trademark, as the distinctive character is dominated by the words "ETİ" and "CRAX". According to the defendant, the combined use of materials bearing either "ETİ CRAX" or "CRAX" sufficiently demonstrates genuine use of the contested trademark during the relevant period.

19. Regarding the invoices, the defendant points out that 28 invoices for deliveries to Belgium and the Netherlands were submitted, showing use within the relevant period, product names, and the words "ETİ" and "CRAX". The defendant states that it is common for figurative marks not to appear as such on invoices, which must be concise. According to the defendant, the use of Turkish on the invoices does not negate the genuine use in the Benelux, as the defendant is a Turkish company, and the invoices are understandable regardless of language. The defendant believes that the invoices demonstrate use of "crackers" which fall under the broader category of "foodstuff" and "preparations made from cereals", covering a wide range of registered goods. Contrary to the claimant's argument about insufficient sales amounts, the defendant states that genuine use does not require quantitatively significant use, and the submitted invoices represent only a portion of total sales.

20. According to the defendant, the customs declarations documents include translations of key terms for clarity, detailing information such as consignee details, destination country (Belgium), total invoice amount in euros, commercial description of the products (flavored/salted snacks), authorized economic operator, as well as the date and location of the customs declaration. The defendant argues that these customs declarations demonstrate the sale of products within the appropriate territory, specifically the Benelux region. In conjunction with other submitted evidence (such as invoices, images of product packaging in stores, brochures/catalogs), the defendant asserts that they can substantiate the genuine use of the contested trademark in class 30.

21. According to the defendant, while the distribution agreement does not list products and trademarks explicitly, it provides contextual evidence supporting the genuine use of the contested trademark during the relevant period. This is substantiated by invoices, customs clearance documents, packaging samples, and other evidence demonstrating continuous distribution and sale of ETİ CRAX products. The defendant asserts that the relationship between the parties predates 2020 but he chose to limit the number of exhibits for clarity. The distribution agreement contributes to a comprehensive assessment of the trademark's use in commerce, alongside other evidence, reinforcing the genuine use of the contested trademark in class 30.

22. The defendant indicates that the additional invoices, issued by the Benelux distributor FATIH SULTAN BV to its resellers for ETİ CRAX products in the Netherlands between March 2018 and March 2023, provide detailed transaction records, including product descriptions, quantities sold, prices, and dates of

transactions. The defendant maintains that these invoices, when considered in conjunction with other evidence, such as customs declarations, sales reports, packaging samples, and marketing materials, collectively demonstrate the continuous and genuine use of the contested trademark within the Benelux region.

23. Contrary to the claimant's argument, the defendant argues that the sales report, combined with other evidence like invoices, customs declarations, packaging samples, and online marketing efforts, offers a comprehensive view of the contested trademark's commercial use within the Benelux market.

24. The defendant contends that while packaging designs may vary slightly, the core elements of the contested trademark – such as the words "ETI" and "CRAX" – remain prominent and identifiable.

25. Regarding the claimant's argument that the screenshots of two e-commerce websites selling ETI CRAX products lack specific details about the location and authenticity of the online stores, the defendant asserts that while these screenshots may lack explicit geographic markers, they are part of a broader strategy to market ETI CRAX products in the Benelux region.

26. The defendant also argues that the product labels visible in the photographs, featuring prices in euros and product descriptions in multiple languages including English and Turkish, clearly indicate their placement within the Benelux market.

27. According to the defendant, while the catalogues may not be regionally specific in every detail, they are part of a broader marketing strategy aimed at promoting ETI CRAX products in the Benelux region.

28. In any event, the defendant indicates that these documents, when considered together, establish the genuine use of the contested trademark within the Benelux market.

29. The defendant concludes that the contested trademark has been put to genuine use in the Benelux during the relevant period. The defendant requests the cancellation application be rejected, the registration of the contested international trademark be upheld, and the claimant be declared liable for the costs.

III. DECISION

A.1 Legal framework

30. Pursuant to Article 2.30bis (1)(a) in conjunction with Article 2.30quater (1) BCIP an application for revocation may be filed with the Office based on the grounds set out in Article 2.27 (2) BCIP. It is in that case up to the defendant to provide proof that genuine use has been made of the contested trademark in accordance with Article 2.23bis BCIP in a period of five years prior to the date of the application for revocation in the Benelux territory or that there are proper reasons for non-use.

31. The application for revocation was submitted on 31 January 2023. Therefore, the defendant is required to show genuine use of the contested trademark, during the period from 31 January 2018 to 31 January 2023 ("the relevant period").

A.2 Proof of use

In general

32. In accordance with the case-law of the European Court of Justice (“CJEU”) there is genuine use of a trademark if the mark, 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, is used in order to create or preserve an outlet for those goods or services, not including token use for the sole purpose of preserving the rights conferred by the mark.¹ When assessing whether use of the trademark is genuine, must be taken into account all the facts and circumstances relevant to establishing whether the commercial use of the mark is real, particularly the practices regarded as warranted in the relevant economic sector as a means of maintaining or creating market shares for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark.² In that regard, the condition relating to genuine use of the trademark requires that the mark, as protected in the relevant territory, be used publicly and outwardly.³

33. The General Court held that use of the earlier mark need not always be quantitatively significant for it to be deemed genuine.⁴ In interpreting the concept of genuine use, account should be taken of the fact that the *ratio legis* of the requirement that the 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 to restrict trademark protection to the case where large-scale commercial use has been made of the marks.⁵

34. Genuine use of a trademark cannot be proven by means of probabilities or suppositions but must be demonstrated by solid and objective evidence of effective and sufficient use of the trademark on the market concerned.⁶

35. Following rule 1.41 io. 1.25 IR the proof of use should contain evidence of the place, duration, extent, and manner of use of the contested trademark for the goods concerned.

Analysis of the proof of use

36. The defendant submitted the exhibits to demonstrate genuine use of the contested trademark (see paragraph 6).

37. The Office establishes that the contested trademark has been registered for goods in class 30, namely *biscuits, chocolates, pastries, crackers, wafers, cakes, pastry and bakery products, chocolate bars, tarts, pies, breakfast cereals, bread, popcorn and rice crisp*.

¹ CJEU 3 July 2019, C-668/17, ECLI:EU:C:2019:557, point 38 (Viridis) and CJEU 11 March 2003, C-40/01, ECLI:EU:C:2003:145, point 43 (Ansul).

² CJEU 31 January 2019, C-194/17, ECLI:EU:C:2019:80, point 83 (Pandalis) and CJEU 11 March 2003, C-40/01, ECLI:EU:C:2003:145, point 43 (Ansul).

³ General Court (EU) 4 April 2019, T-910/16 and T-911/16, ECLI:EU:T:2019:221, point 29 and the case-law mentioned there (Testa Rossa).

⁴ General Court (EU) 8 July 2004, T-334/01, ECLI:EU:T:2004:223, point 36 (Hipoviton) and General Court (EU) 30 April 2008, T-131/06, ECLI:EU:T:2008:135, point 41 (Sonia Rykiel).

⁵ General Court (EU) 4 April 2019, T-910/16 and T-911/16, ECLI:EU:T:2019:221, point 28 and the case-law mentioned there (Testa Rossa).

⁶ EGC 8 July 2020, T-686/19, ECLI:EU:T:2020:320, point 35 (GNC LIVE WELL).

38. After examination of the submitted exhibits, the Office notes that two signs appear in the documents (mainly packaging) submitted, namely:

- A representation of the word "ETI" alone, as graphically stylised in the contested trademark as registered, but without the green background and without the representation of the word "CRAX":



- A representation of the words "ETI" and "CRAX" as depicted in the contested trademark, without



the green background:

39. In this respect, the Office recalls that the use of a trademark in a form differing from the registered form is regarded as genuine use, provided the distinctive character of the trademark in its registered form is not altered.⁷

40. Considering that when a sign is composed of verbal and figurative elements, the former should, in principle, be regarded as more distinctive than the latter⁸, the Office establishes that the distinctive and dominant elements of the contested trademark are the words "ETI" and "CRAX", and their graphical layout. The public generally attaches more importance to words, and coloured backgrounds for food products typically relate to the colour of the packaging, conferring a less distinctive character. Therefore, the Office finds that the representation of the trademark without the green background does not alter the distinctive character of the contested trademark as registered. However, the omission of an element contributing to the distinctive character of the mark as registered is likely to alter its distinctive character. Thus, the use of the graphical representation of the word "ETI" alone alters the distinctive character of the contested trademark and therefore cannot constitute genuine use of it.

41. The Office notes that, of all the documents communicated by the defendant, only certain packaging, namely for crackers, contains the elements "ETI" and "CRAX" together as graphically represented in the registration of the contested trademark. The Office reminds that it is settled case-law that a body of evidence may establish the facts to be proved, even though each element, taken on its own, would be incapable of proving the accuracy of those facts.⁹ In that regard, these packaging items, assessed in conjunction with the invoices and sales reports in which the sign ETI and the reference to goods called "CRAX" are visible, show that the contested trademark has been used, albeit to a limited extent. An overall reading of these documents enables the Office to establish that the turnover achieved per year under the contested trademark for crackers fluctuated between approximately EUR 50,365.00 and EUR 304,555.00 between 2019 and 2023, in Netherlands and Belgium. It is, therefore, only by considering all the factors submitted for the Office's assessment that proof of the contested trademark's genuine use for crackers can be established. For the rest of the goods, the documents provided do not demonstrate any use of the contested trademark.

⁷ CJEU 11 October 2017, C501/15 P, ECLI:EU:C:2017:750, point 65 and case law cited there (Cactus).

⁸ General Court (EU) 14 July 2005, T-312/03, ECLI:EU:T:2005:289, point 37 (SELENIUM-ACE).

⁹ CJEU 17 April 2008, C-108/07 P, ECLI:EU:C:2008:234, not published in the ECR, point 36 (FERRO).

42. Contrary to the defendant's argument that use of the contested trademark for "crackers" constitutes use for the other goods because they belong to the general category of "foodstuffs" and "preparations made of cereals" (see paragraph 19), the Office finds that, based on the contentions and evidence submitted, it cannot be established that there has also been genuine use for the other goods for which the contested trademark is registered. If a trademark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the trademark has been put to genuine use in relation to a part of those goods or services affords protection only for the sub-category or sub-categories to which the goods or services for which the trade mark has actually been used belong.¹⁰ The Office finds that the defendant has provided evidence of genuine use of the contested trademark in a form that does not alter its distinctive character only for *crackers*, whose other goods covered by the contested trademark, namely *biscuits, chocolates, pastries, wafers, cakes, pastry and bakery products, chocolate bars, tarts, pies, breakfast cereals, bread, popcorn and rice crisp*, do not constitute a sub-category of *crackers*. The Office therefore concludes that genuine use of the contested trademark can only be assumed for *crackers*, and not for other food-related goods.

B. Other factors

43. The claimant's argument that the defendant has not responded in other 'related' cancellations (see paragraph 8) has no bearing on this case. Each case is decided on its own merits. The choices and rationale of the defendant in other proceedings is therefore irrelevant.

44. Regarding the claimant's assertion that the evidence of the defendant does not meet the Office's requirements (see paragraph 11), the Office establishes that the list of documents and the highlighting of relevant passages in the documents were sufficiently clear to allow the evidence to be read.

45. Regarding the argument of the claimant that none of the invoices are written in any of the national languages of the Benelux countries (see paragraph 12), the Office reminds that evidence serving to support arguments or to prove the use of a trademark do not necessarily need to be submitted in the language of the proceedings but may be submitted in their original language. The evidence will only be considered if the Office judges that it can be sufficiently understood, in the light of the reason for their submission. Invoices, for instance, are usually comprehensible as such; the same applies to advertising in most cases.

C. Conclusion

46. Based on the foregoing the Office concludes that the defendant did only provide sufficient proof of use of the contested trademark in the Benelux within the relevant period for part of the goods in class 30, namely *crackers*, but not for the remaining services in class 30.

IV. DECISION

47. The cancellation application with number 3000555 is partially justified.

¹⁰ General Court (EU) 14 July 2005, T-126/03, ECLI:EU:T:2005:288, point 45 (Aladin); CJEU 16 July 2020, C-714/18 P, ECLI:EU:C:2020:573, point 43 (TAIGA); CJEU 22 October 2020, C-720/18 and C-721/18, ECLI:EU:C:2020:854, points 38-40 (Ferrari).

48. Benelux designation of the international registration 1203255 will only remain registered for part of the goods for which genuine use has been demonstrated in class 30, namely *crackers*.

49. Benelux designation of the international registration 1203255 will be cancelled for *biscuits, chocolates, pastries, wafers, cakes, pastry and bakery products, chocolate bars, tarts, pies, breakfast cereals, bread, popcorn and rice crisp*.

50. Neither of the parties shall pay the costs in accordance with article 2.30ter (5) BCIP in conjunction with rule 1.44 (2) IR, as the cancellation application is only partly justified.

The Hague, 16 July 2024



Flavie Rougier
(*rapporteur*)

Eline Schiebroek

Pieter Veeze

Administrative officer: Celine Vandelook