O/0233/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003988511

IN THE NAME OF MYCOPRO GLOBAL LIMITED

TO REGISTER THE FOLLOWING TRADE MARK:

MYCOPRO

IN CLASSES 1, 5, 29, 30, 31 AND 35

AND

IN THE MATTER OF OPPOSITION THERETO UNDER NO. OP000446586

BY THG NUTRITION LIMITED

Background and pleadings

1. On 6 December 2023, MycoPro Global Limited ("***the Applicant***") applied to register the trade mark shown on the cover page of this decision in the UK under number UK00003988511 ("***the Contested Mark***"). It was accepted and details of the application were published for opposition purposes in the Trade Marks Journal on 22 December 2023. Registration is sought for the following goods and services:

Class 1 Enzymes for use in protein hydrolysis; protein for use in the manufacture of foodstuffs; proteins for the food industry; proteins for use in the manufacture of food products; enzymes [other than for medical use] for labelling protein fractions; enzymes [other than for medical use] for measuring protein fractions; enzymes [other than for medical use] for detecting protein fractions; plant nutrients; plant foods; amino compounds; proteins for use in manufacture; proteins for use in the manufacture of food supplements.

Class 5 Protein powder dietary supplements; dietary supplements; nutritional supplements; dietary and nutritional supplements; protein supplement shakes; liquid dietary supplements; protein supplements; powdered nutritional supplement drink mix; vitamin and mineral supplements; dietary supplement drink mixes; protein synthesis inhibitors; protein dietary supplements; food supplements consisting of amino acids; dietary food supplements; vitamin supplements; meal replacement powders; food supplements; liquid nutritional supplements; herbal supplements; dietary supplements for humans; dietary supplement drinks; soy protein dietary supplements; dietary supplements in powder form; mineral dietary supplements; ganoderma lucidum spore powder dietary supplements.

Class 29 Dried edible mushrooms; mushrooms, preserved; mushrooms, prepared; dried funghi; processed peas; seeds, prepared; processed edible cordyceps.

Class 30 High-protein cereal bars.

Class 31 Unprocessed beans; hemp seeds, unprocessed; plants; unprocessed mushrooms.

Class 35 Wholesale services in relation to dietary supplements; retail services in relation to dietary supplements; providing consumer product information relating to food or drink products; product sampling.

2. On 22 March 2024, THG Nutrition Limited ("***the Opponent***") opposed the application in full under sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 ("***the Act***"). Under section 5(2)(b), the Opponent relies upon the following trade mark registrations:

UK Registration no. UK00003501260 ("***the first earlier mark***")
Earlier Mark: MYPRO
Filing date: 16 June 2020
Date of registration: 22 January 2021
Goods relied upon:

Class 5 Dietary supplements; dietary food supplements; nutritional supplements; mineral food-supplements; food-supplements based on vitamins, minerals and raw products from plants; health food supplements; vitamin preparations; slimming aids; herbal supplements and herbal extracts; herbal beverages meal replacement powders; nutritional drink mixes for use as a meal replacement; mineral supplements; nutritional powders; food supplements, tablets and capsules; carbohydrate supplements; amino acid supplements; dietetic and slimming substances; vitamin supplements; food supplements for dietetic use; herbal extracts for medical purposes; protein supplements; food supplements (non-mediated) being confectionery; dietetic and slimming foodstuffs and substances; nutrition food bars; food supplements for sports nutrition purposes, whey proteins, milk proteins; vitamin, protein and mineral enriched foods and foodstuffs; carbohydrate-based nutritional drink mix for use as a meal replacement; herbal extracts, other than those for medical purposes.

Class 29 Meat, poultry, game, fish and seafood; prepared meals and ready meals made principally of meat, poultry, game, fish or seafood; preserved, frozen, dried and cooked fruits and vegetables and food products prepared there from; salads; fruit salads; soup and soup preparations; preserved garden herbs; processed nuts; spreads; dips; crisps; snack foods; jellies, jams; eggs, milk and dairy products; milk drinks; protein enriched milk drinks; butter; peanut butter; milk shakes; powdered milk; liquid food shakes; cheese and cheese products; edible oils and fats; preserves; pickles; prepared meals; nutritional foodstuffs; protein-based nutritional drink mixes for use as a meal replacement; dried milk-based products for meal replacements; milk based beverages; beef jerky; edible nuts; egg whites; egg yolks; egg yolk solids.

Class 30 Cereals; preparations made from cereals; flour; preparations made from flour; sausage rolls; quiches; sandwiches; confectionery; confectionery bars; cookies; bread; pastry; ices; ice cream; ice cream products and frozen confections; preparations for making ices, ice cream, ice cream products and frozen confections; chocolate; chocolate confectionery; flapjacks; caramel confectionery; caramel and hazelnut confectionery; flavourings for food and beverages; confectionery snack bars; chocolate coated protein based confectionery; plain protein based confectionery; shortbreads; honey and treacle; sugar; puddings; flavourings other than non-essential oils; cheese cake; sauces; chutneys; tea products; tea beverages; fruit teas; iced tea; green tea; coffee; cocoa; rice; tapioca; spices; yeast; baking powder; biscuits; cakes; pasta; pastry and pastry products; meat pies, vegetable pies, fruit pies; fruit crumbles; snack foods; pie mixes; prepared meals containing pasta, bread, cereals, rice and /or pastry; desserts containing any of the above products; meringues.

Class 32 Non-alcoholic beverages; water, mineral water, sparkling water, fruit drinks and fruit juices, liquid and powdered beverage mixes; flavouring syrups for making beverages; beer; low-alcoholic and de-alcoholised beverages; nutritional, energy and protein drinks; pastilles for

effervescing beverages; vegetable juices; isotonic beverages; beverages for meal replacement.

UK Registration no. UK00002643896 ("***the second earlier mark***")

Earlier Mark: MYPROTEIN

Filing date: 28 November 2012

Date of registration: 08 March 2013

Goods and services relied upon:

Class 5 Nutritional supplements; amino acid supplements; vitamin supplements; food supplements; mineral supplements; food supplements for dietetic use; herbal extracts for medical purposes; meal replacement powders; nutritional drink mixes for use as a meal replacement; protein supplements; carbohydrate supplements; food supplements (non-mediated) being confectionery.

Class 29 Vitamin, protein and mineral enriched foods and foodstuffs; nutritional foodstuffs; protein-based nutritional drink mixes for use as a meal replacement; snack foods, processed nuts, meat based products, dried milk-based products for meal replacements; milk based beverages, edible oils and fats; beef jerky; edible nuts; egg whites; egg yolks; egg yolk solids.

Class 30 Confectionery; flapjacks; caramel confectionery; caramel and hazelnut confectionery; flavourings for food and beverages; carbohydrate-based nutritional drink mix for use as a meal replacement; snack foods; confectionery snack bars; herbal extracts other than for medical purposes; chocolate coated protein based confectionery; plain protein based confectionery.

Class 35 Retail services, online retail services connected with the sale of foodstuffs, drinks, nutritional supplements, vitamin supplements, food and drink supplements, meal replacement powders.

3. Under section 5(3) the Opponent relies exclusively on the second earlier mark relying upon the same goods and services outlined above.

4. The first earlier mark and the second earlier mark, hereafter defined jointly as the "***Earlier Marks***", by virtue of their earlier filing dates, both constitute earlier marks in accordance with section 6 of the Act. As the second earlier mark was registered more than five years before the filing date of the Contested Mark, this mark is subject to proof of use in accordance with section 6A of the Act. The first earlier mark was registered less than five years before the filing date of the Contested Mark and is therefore not subject to proof of use in accordance with section 6A of the Act. The Opponent can, therefore, rely upon all of the goods it has identified without having to demonstrate use of the mark.

5. Under section 5(2)(b), the Opponent claims that the respective goods and services are identical or highly similar and that the Earlier Marks are visually, aurally and conceptually highly similar to the Contested Mark especially because the relevant consumers will either not notice or forget the "CO" in the Contested Mark leading to a likelihood of confusion including likelihood of association (e.g., the consumer is likely to consider that the Contested Mark is a further product line of the Opponent).

6. Under section 5(3), the Opponent claims that its second earlier mark has a reputation in the UK for all the goods and services relied upon and that use of the Contested Mark, without due cause, would take unfair advantage of, or be detrimental to, the distinctive character or reputation of the second earlier mark.

7. On 03 June 2024 the Applicant filed a defence and counterstatement, denying all of the Opponent's claims under sections 5(2)(b) and 5(3) and requesting the Opponent to provide evidence of use.

8. The Applicant is represented by ip21 Limited. The Opponent is represented by HGF Limited.

Relevance of EU law

9. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying

assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Evidence and submissions

10. The Opponent filed evidence in chief in the form of a witness statement of Mark Foster, dated 14 August 2024, and exhibits MF1 – MF36. At the time of the statement, Mr Foster had been the Deputy General Counsel for two years at THG (the Opponent) and the Opponent's Legal Counsel for ten years.

11. The Applicant filed evidence in chief in the form of a witness statement by Cheryl Payne, dated 16 October 2024, and exhibits CP1 – CP9. Miss Payne is a trade mark attorney and acts as the Applicant's legal representative.

12. The Opponent filed evidence in reply in the form of a witness statement by Sean McDonagh, dated 12 December 2024, and exhibits SM1 – SM3. Mr McDonagh is a Director and Chartered trade mark attorney at HGF Limited (the Opponent's legal representative) and he has been a Chartered trade mark attorney since 2018.

13. All the witnesses are duly authorised to provide evidence on behalf of the respective parties.

14. Neither party requested a hearing, but the Opponent filed submissions in lieu of a hearing.

15. I confirm that I have taken all filed documents into account and will refer to and summarise them to the extent that I deem necessary.

Decision

Proof of use

Legislation

16. I will begin by assessing whether there has been genuine use of the second earlier mark. The relevant statutory provisions are as follows:

> "6A (1) This section applies where

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section "the relevant period" means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes –

(a) use of a trade mark includes use in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services."

17. Section 100 of the Act is also relevant, which states that:

"100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

Case law

18. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

"105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial raison d'être of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark,

including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32]."

19. The onus is on the Opponent to prove that genuine use of the registered trade mark was made in the relevant period. Pursuant to section 6A of the Act, the relevant period for assessing whether there has been genuine use of the second earlier mark is the five-year period ending with the filing date of the Contested Mark, i.e., **7 December 2018 to 6 December 2023**.

20. Proven use of a mark which fails to establish that "the commercial exploitation of the mark is real" because the use would not be "viewed as warranted in the

economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark" is, therefore, not genuine use.[1]

Summary of the evidence of use

21. As a preliminary matter, I note that Mr Foster refers to evidence of use in the EU as being relevant and he provides evidence accordingly. It is worth noting that as the second earlier mark is a UK trade mark (rather than a UK comparable mark derived from a previous EU trade mark registration), for the purposes of the proceedings at hand, exclusively evidence that concerns the UK is relevant. Hence, any evidence of use in the EU (excluding the UK) will not form part of my assessment.

22. Myprotein is an English online retailer and sports nutrition manufacturer based in Northwich (Cheshire).[2] Mr Foster, in his witness statement, reports that "Myprotein.com" was established in 2004 and it has been used in the UK since that date. In 2011 it was acquired by the Hut Group.[3] Mr Foster clarifies that the parent company "The Hut Group" wholly owns "The Hut.com limited" and "Cend Limited" and that "The Hut Group" operates under three core businesses: THG Beauty, THG Nutrition (the Opponent) and THG Ingenuity.[4]

Recognitions and awards

23. Mr Foster lists a series of awards the Opponent received over the years:[5]

- Growing Business of the Year in 2007
- Regional Award for Small to Medium Sized Business of the Year in the Northwest of England at the National Business Awards in 2009.
- Judges' Special Award in the Best Factory Awards for their Warrington facility in 2015.

[1] *Intermar Simanto Nahmias v Nike Innovate C.V.*, BL O/222/16.
[2] Exhibit MF4, page 3.
[3] Mr Foster's witness statement dated 14 August 2024, at [3].
[4] Exhibit MF1 and exhibit MF2.
[5] Exhibits MF4, MF5 and MF6.

- Greater Manchester Ward Hadaway Fastest 50 growing companies in 2015 (listed).
- International Growth Retailer of the Year at the Retail Week Awards in 2017.
- Queen's Award for Enterprise in 2018.
- Most Exciting Partnership Award for partnership with Hotel Chocolat in 2022.
- Inspired Innovation Brand Licensing Product or Range award in 2023 for the collaboration between Myprotein and Jelly Belly.
- (Nominated) International Best Licensed Product award again for its Jelly Belly collaboration (undated).[6]

24. Regarding the history of the Opponent's company, the evidence features an online article from "www.foodchainid.com", dated 14 September 2015, reporting that the Opponent's premium sports supplements "Myprotein", manufactured in Warrington (UK), placed as the number one sports nutrition brand in Europe and the Opponent was the first sports nutrition brand in the UK to secure the British Retail Consortium (BRC) Global Food Safety Standard for Myprotein.[7]

Goods sold under the marks MYPROTEIN and MYPRO

25. Mr Foster states, in his witness statement, that the Opponent sells over 2000 products on its website (i.e., "www.myprotein.com") and provides supporting evidence. **Exhibit MF7** contains a series of pictures of "MYPROTEIN" products with prices in pounds sterling. Although part of the evidence is dated outside of the relevant period (21 June 2024), the evidence features several extracts from the Wayback Machine database, dated between October 2019 and November 2023, showing the following products available to purchase: whey protein, diet whey, whey isolate and creatine powder, clear whey isolate protein, protein bars and snacks (including peanut butter), protein brownies, vitamins, all-natural peanut butter, multivitamins gummies, flavour drops and vegan protein.

[6] Exhibit MF6 does not mention this nomination, conversely to what is reported by Mr Foster in his witness statement.
[7] Mr Foster's witness statement at [3] and exhibit MF3.

26. Mr Foster, in his witness statement, reports that the "MYPROTEIN" "Impact" whey protein is the Opponent's bestselling product and it has been reviewed 29,793 times and trusted by 2.4 million consumers.[8] This is confirmed by **Exhibit MF8** featuring screenshots from the Opponent's website where the "Impact" whey protein powder is offered for sale (prices are shown in pounds sterling). The evidence indicates the product received 30,125 reviews. Although I appreciate that the reviews featured in the evidence are dated a few months after the relevant period (May 2024), given the high number of reviews, it is likely that part of the thousands of reviews fall within the relevant period.

27. Mr Foster reports that the Opponent sells various other products for nutrition and performance. **Exhibit 9** and **Exhibit 10** feature screenshots from the "myprotein.com" website with such products for sale with prices in pounds sterling. The evidence is dated outside of the relevant period (21 June 2024).

28. The evidence (**Exhibit MF11**) also features an article, dated 12 March 2020, from "www.runnea.co.uk" where the writer promotes the "MYPROTEIN" BCAA supplement (i.e., an ergogenic aid product containing a combination of amino acids) to runners. The evidence contains pictures of the "MYPROTEIN" BCAA product and refers the readers to the Opponent's website to purchase this product.

29. Mr Foster reports that the Opponent markets its products also under the "MYPRO" mark. The evidence (**Exhibit MF12**) features one extract from the Wayback Machine database, dated 15 September 2022, showing a few pages of the "MYPRO" website ("www.mypronutrition.com") where some of the Opponent's sport nutrition products are offered for sale such as the "Pre-workout" and "Whey" lines of products. All the prices are in pounds sterling. **Exhibit MF13** features screenshots from the "myprotein.com" website where the Opponent markets "MYPRO" sport nutrition products under the product lines "THE Whey", "THE Pre-workout", "THE EAA" and "THE Pump". The evidence describes the ingredients of the product lines listed above that are marketed under the "MYPRO" mark. Accordingly, the "THE Whey" products consist of a blend of whey proteins, leucine, glutamine and enzymes. The "THE Pre-Workout" products are a blend of creatine, caffeine, Bio Perine and Caspimax. The "THE Diet" products are a combination of

[8] Mr Foster's witness statement at [8].

protein, CLA, matcha green tea powder and pantothenic acid.[9] The evidence does not clarify the contents for "THE EAA" and the "THE Pump" product lines. All the prices are in pounds sterling, but all the evidence is undated.

30. Mr Foster also reports that the Opponent's MYPROTEIN products are distributed in the UK (distribution numbers are not provided).[10] **Exhibit MF14** shows a few, undated, screenshots from the Opponent's website detailing the products' country shipping list. The evidence shows that delivery is available for the UK.

31. Mr Foster's witness statement contains a table outlining the Opponent's turnover for the "MYPROTEIN" mark in the UK as reproduced below:

Gross revenue (£'s)	2016	2017	2018	2019	2020	Grand Total
United Kingdom	£85,391,731	£87,286,122	£84,784,981	£89,772,194	£109,576,165	£456,811,193

32. The evidence (**Exhibit MF17**) contains a series of invoices relating to the Opponent's marketing activities for "MYPROTEIN" as well as the retail of "MYPROTEIN" products in the UK. With regard to the marketing spend figures, Mr Foster clarifies that some of the invoices show the spending to promote the Opponent's products in stores, such as Asda, as well as digital and online PR.[11] I separated the invoices for the marketing activities and for the retail of goods into two tables as reproduced below.

Marketing spending (invoices)

Date	Service type	Total value
1 December 2022	Paid Search Software 250 keywords / 24x Daily	£2,226.00
20 December 2022	MyProtein Brand World & Pack (Creative Concept Refinement Creative Concept Refinement)	£48,360.00
7 December 2022	CY2 GMR due Jan23	£75,833.33
20 December 2022	MyProtein Brand World & Pack (Motion and Film)	£34,200.00
1 January 2023	Digital PR	£6,000.00

[9] Exhibit MF13, page 3.
[10] Mr Foster's witness statement at [14].
[11] Mr Foster's witness statement at [18].

4 September 2023	The Hoot marketing Support (Leeds Festival Sponsorship)	£1,200.00
29 August 2023	• My Protein - Week 34 in Asda (21.08.23) • My Protein - Week 34 in Asda (25.08.23)	£1,032.16
15 October 2023	• MYPROTEIN MEDIA PR (August 16 - September 15 2023) • MYPROTEIN MEDIA PR (September 16 – October 15 2023)	£1,580
22 November 2023	Boots Concept Store	£7,632.00
19 December 2023	NXTGEN Ambassador Campaign Management (Sept – Dec 2023)	£7,874.70
20 December 2023	Layered Bar (Master Artwork Elements & Artwork Creation Master Artwork Elements & Artwork Creation)	£5,160.00
25 December 2023	Listing Q1 2024	£7,200.00

MYPROTEIN product retail in the UK (invoices)

Date	Product type (qty)	Total value	Address
22 October 2021	• Protein Filled Cookie (434) • Retail Layer Bar (792)	£16,062.34	UK
29 November 2022[12]	• Protein Filled Cookie (1,260) • Oat Bakes (1,260)	£33,944.40	Pontyclun (UK)
28 November 2023[13]	• Protein Filled Cookie (180) • Vegan Carb Crusher (50) • Clear Whey Drink (orange/mango) (90) • Clear Whey Drink (Peach Tea) (90)	£4,367.64	Pontyclun (UK)

Online presence

[12] Exhibit MF17 (pages 15 and 16) contains the same invoice twice. This is demonstrated by the same invoice number SINS0100221131140. I reproduced the invoice only once in my summary.
[13] Exhibit MF17 (pages 14 and 17) contains the same invoice twice. This is demonstrated by the same invoice number SINT09102311000157. I reproduced the invoice only once in my summary.

33. The evidence shows that the website "myprotein.co.uk" has been registered on the 6 November 2003 and it has been operating since (**Exhibit MF19** and **Exhibit MF20**). **Exhibit MF20** features screenshots from the "www.myprotein.co.uk" and the "www.myprotein.com" websites between 2007 and 2016 showing a variety of the Opponent's products for sale. The evidence also indicates that the website "myprotein.co.uk" has been redirecting to "myprotein.com" since 13 May 2010 (**Exhibit MF21**).

34. Mr Foster also provides a table (and related chart) indicating the average monthly search volume in the UK for "MYPROTEIN".[14] The evidence reports data per each month between 1 December 2019 and a 1 December 2023. On average, the evidence shows the following search volume per year:

2019	92,616
2020	1,437,910
2021	1,418,855
2022	2,397,850
2023	1,842,824

Social media and related activities

35. Mr Foster reports that most of the Opponent's promotion and advertising occurs via social media.[15] To this regard, evidence is provided (**Exhibit MF22**) to show that the "MYPROTEIN" Facebook account has 2.3 million likes and 2.3 million followers. The evidence features a few posts in English and some engagement from consumers responding to the posts. The evidence also indicates that The Hut Group is the entity responsible for the Facebook account and that it is based in the UK.

36. Regarding the Opponent's Instagram account, Mr Foster provides a table breaking down the respective number of followers and posts by the Opponent for each Instagram account in the EU. I note that the table shows a country extension next

[14] Mr Foster's witness statement at [21].
[15] Mr Foster's witness statement at [22].

to each “Myprotein” Instagram account (e.g. Myprotein-fr or Myprotein-es). The table contains one “Myprotein” account without the country specification indicating 1 million followers and 11,6 thousand posts. Bearing in mind that the evidence shows that the Opponent was launched, is based in and operates from the UK I find reasonable to conclude that the social media account that does not feature a country extension, and which has the largest following and activity, is the Opponent’s UK account. In the eventuality I am mistaken, the “Myprotein” account without the country specification may refer to the Opponent’s global account and, thus, in accordance with the rest of the Opponent’s evidence, it is likely that a proportion of the platform’s engagement is from within the UK. **Exhibit MF23** features a series of screenshots from the “myprotein” Instagram account showing a series of posts where the Opponent’s goods are advertised. The evidence all seems to concern exclusively the “myprotein” account showing posts in English. In particular, I note one post, dated 17 August 2021, where the caption refers to pounds sterling (i.e., “WIN £50 SITE CREDIT IF YOUR COMMENT […]”).[16] The evidence shows the posts received thousands of likes, hundreds of comments and were shared multiple times.

37. The evidence also shows the Opponent has an Official “Myprotein” YouTube channel where it advertises its products (e.g., presenting healthy recipes for “Myprotein” ingredients). The channel was created on 22 July 2010 (**Exhibit MF25**) and it has 292 thousand subscribers and 881 videos (**Exhibit MF24**). Although I appreciate that the evidence does not show clearly that the YouTube channel targets the UK consumers, I note that the evidence indicates “United Kingdom” in the information box relating to the channel. Furthermore, in assessing this evidence I must bear in mind that YouTube channels have a worldwide reach and, thus, the evidence at hand likely also encompasses the UK as part of its viewers. This shows exposure of the “MYPROTEIN” to UK consumers via this social media channel.

38. Mr Foster also states that the Opponent advertises its products via influencers on social media platforms. The evidence (**Exhibit MF26**) shows a series of screenshots from influencers’ Instagram accounts reporting they collaborate with “Myprotein” as brand ambassadors. Some posts also advertise the Opponent’s

[16] Exhibit MF23, page 5.

products. The evidence features a few posts from the brand ambassadors Zoe Hague (from Manchester), Graham Halliday (brand ambassador for Puma UK, Hyrox UK as well as "Myprotein"), Jake Dearden (Hyrox UK master trainer), Lucy Haldon (second best in the world for Hyrox and competing for the UK team),[17] Kate Davey, Dylan Scott and Jon Wynn. The evidence is undated (or not clearly dated).

39. The evidence (**Exhibit MF27**) also contains a table outlining the Opponent's marketing expenditure (namely, advertising and customer engagement) under the "MYPROTEIN" brand (as stated by Mr Foster in his witness statement). The table provides the data for various parts of Europe, as well as the UK, for the years 2020 – 2024. Neither Mr Foster nor the table clarifies the currency of the reported spending. In the table below I summarised the relevant data exclusively concerning the UK with regard to the relevant period.

Section/Title	2020	2021	2022	2023	Grand Total
PPC					
Display	14,786	36,821	27,399	15,279	94,285
Paid Search	631,857	734,116	883,765	1,083,976	3,333,714
Paid Social	165,970	212,259	195,657	234,322	808,208
(blank)	N/A	N/A	11,394	N/A	11,394
Influencer					
Affiliate Costs	64,878	46,683	3,963	1,970	117,494
Offline Influencer Costs	11,423	52,230	219,054	150,986	433,693
Affiliate					
Bonus	1,063	213	N/A	39,730	41,005
Normal	43,406	51,687	35,276	68,274	198,643
Offline Marketing					
C&R	819	N/A	N/A	N/A	819
Events	N/A	10,016	N/A	N/A	10,016
CRM					
Email	4,697	6,640	6,792	3,757	21,886
Mobile App	N/A	N/A	9,386	50,336	59,722
SMS	878	1,240	N/A	N/A	2,118
SMS					
SMS	N/A	8,844	9,980	971	19,795
Paid Social					

[17] This is indicated by a small UK flag placed next to the words "Hyrox worlds, 2nd fastest girls!" in Miss Haldon's Instagram bio.

Paid Social	5,300	N/A	N/A	N/A	5,300

40. The above table shows that, overall, the Opponent has spent, between 2020 and 2023, a grand total of 5,158,092 averaging a total spend of around 1,289,523 per year in marketing and consumer engagement activities. The evidence does not clarify the currency of these figures. Since the table lists the expenditure for various European countries (including the UK), the figures could be either meant to be in euro or pounds sterling.

Collaborations and partnerships

41. Mr Foster states that "MYPROTEIN" collaborated with Hyrox to organise a global fitness event that took place in Manchester in 2024 (**Exhibit MF28** and **Exhibit MF29 pages 6 and 7**). The evidence is dated outside of the relevant period (i.e., 27 and 28 January 2024). The Opponent was also the official sponsor of the "Hyrox World Championships" in Nice (France). **Exhibit MF29** shows examples of nutritional products displayed at the "Hyrox World Championships" featuring the cobranding between "Myprotein" and "Hyrox". The evidence also shows other instances of online advertising where such collaboration is communicated. In the evidence it is reported that "*the collaboration will provide nutrition for competitors in the European heats throughout the 2022-23 season*".[18] Thus, I can safely assume that the evidence concerning the collaboration at hand falls within the relevant period.

42. The evidence also shows the Opponent collaborated with different third parties to advertise it products. **Exhibit MF30** and **Exhibit MF31** report on a 2023 collaboration between the Opponent and UFC Middleweight Champion Israel Adesanya to market, under the "MYPRO" mark, a limited-edition box containing protein[19] and supplement (i.e., a blend of essential amino acids, caffeine and electrolytes)[20] products. The products are available for purchase on the Opponent's website. The evidence (**Exhibit MF32**) also shows a collaboration between "MYPROTEIN" and "Jimmy's Iced Coffee" to market protein-enriched milk beverages in the UK. The evidence is dated March 2024 (outside of the relevant

[18] Exhibit MF29, page 2.
[19] Marketed under the "THE Whey" product line.
[20] Marketed under the "THE EEA Boost" product line.

period). A further collaboration being evidenced is between “MYPROTEIN” and MARVEL. The evidence (**Exhibit MF33**) consists of a screenshot from the opponent’s website (“www.myprotein.com”) displaying protein products with their packaging showing the cobranding in object. The prices are in pounds sterling. The evidence also contains an article dated 16 April 2024 reporting that the collaboration begun in that year. Thus, the evidence falls outside of the relevant period.

Third-party reviews and mentions

43. Mr Foster, in his witness statement, reports that the “MYPROTEIN” receives exposure also by third-party reviews and recommendations. To this regard and with regard to the relevant period, the evidence (**Exhibit MF34)** features:

- One article from “endurance.biz”, dated 10 August 2023, refers on “Myprotein” becoming the UK partner of course event brands “Tough Mudder” and “Spartan” for part of 2023 (and beginning of 2024). The article reports that Myprotein’s products will be staged as on-course food offerings for the “*tens of thousands of participants still expected at 2023 events*”.[21]

- One article from “thegrocer.co.uk”, dated 13 June 2023, reports that the supermarket Iceland started distributing “Myprotein” protein-packed ice creams. The evidence features a picture of the ice cream containers clearly displaying the “MYPROTEIN” mark.

- A few screenshots from the “womenshealthmag.com” website, dated 27 November 2023, where the “Myprotein” products (protein powder, peanut butter, diet whey powder, protein brownies, vegan protein blend) are offered for sale at discounted prices.

- An article from “ultimatesupsg.com”, dated 4 December 2023, comparing the “Myprotein” brand to one of the Opponent’s competitors in the retail of nutrition supplement products (Optimum Nutrition). The article concludes referring to the “Myprotein” brand as one of “*the most popular and trusted brands in the protein*

[21] Exhibit MF34, page 19.

supplement industry, and […] offer[s] high-quality products that can help you achieve your fitness goals".[22]

44. The evidence also features a few articles dated outside of the relevant period.

45. Mr Foster provides a list of third-party retail outlets that offer the Opponent's products for sale in addition to the Opponent's official website. These retailers are Amazon UK, Tropicana Wholesale, Idealo UK, Tesco, Sainsbury's, Asda, Morrisons, Boots UK, Ocado, Co-Op, Nisa, Iceland, Costco, Decathlon, Valli Forecourts, Occastore, Prolife Limited, To Go Micro Kitchen, Brodericks Vending, Meridian Coffee, Nutrivend and Boost UK. **Exhibit MF35** features a collection of screenshots from some of the mentioned websites (e.g., Amazon UK, Tropicana Wholesale, Idealo UK, Boots, Ocado, Sainsbury's). The screenshots from Boost UK and Food & Drink Technology are, respectively, dated 11 January 2019 and 26 November 2019. The rest of the evidence is undated. I also note that the screenshots from Tropicana Wholesale indicate as the products' "best before" date some in 2025 and a couple in January 2026. Therefore, this seems to indicate that the evidence concerns at least 2024 (outside of the relevant period), although this is not clear from the evidence. The evidence dated within the relevant period refers to iced smoothies (containing protein), peanut butter and protein bars/snacks.[23]

46. Mr Foster concludes his witness statement providing evidence to show the reputation the Opponent had in the UK in 2023. **Exhibit MF36** features an online article, dated 25 October 2023, analysing the changing landscape for sports nutrition retailing in Western Europe. The article reports that (my emphasis) "*One of the key reasons for e-commerce's dominance in Western Europe is that brands in markets like the UK and Germany are heavily focused on online sales, with some being pure-play online retailers. These include The Hut Group's MyProtein brand which is ranked the number one sports nutrition brand across the region*". The article also reports that (my emphasis) "*compared with other top Western European countries in sports nutrition, UK consumers preferred discounted products instead of trading down in 2023. […] According to Euromonitor's E-*

[22] Exhibit MF34, page 22.
[23] Exhibit MF35, pages 9 and 10.

commerce tool, Amazon is the UK's leading online retailer, followed by MyProtein and Power Body".

47. This concludes the summary of the Opponent's relevant evidence.

Assessment of the sufficiency of use

48. Following from the evidence summarised above, I must consider whether, or the extent to which, the evidence shows genuine use of the second earlier mark, within the relevant period, in relation to the goods and services for which it was registered.

49. I note that the Applicant filed written submissions commenting on the Opponent's evidence of use and/or reputation. The Applicant's criticism essentially is that certain parts of the Opponent's evidence improperly refer to the EU and/or are dated outside the relevant period. I confirm that I have read the Applicant's submissions regarding the Opponent's evidence and I have taken them into account in my assessment of the Opponent's evidence of use.

50. Mr Foster explains that "MYPROTEIN" has been used for around two decades, with "Myprotein.com" operating since 2004 to market the Opponent's goods. Exhibit MF20 shows various products of the Opponent have been offered on sale since at least 2007. The evidence demonstrates that the Opponent's company has received various awards or nominations for its sports nutrition products. Throughout the relevant period, the Opponent offered a range of goods on its website, including whey protein products, peanut butter, protein snacks, vitamins, flavour drops, and an ergogenic aid product.[24] Revenue figures for "MYPROTEIN" in the UK between 2018 and 2020 average approximately £94.7 million per year. Although turnover is not broken down by product, three invoices within the relevant period show sales of over 4,000 protein-related products (e.g., protein cookies, bars and drinks) totalling around £54,373. The revenue figures and the invoices sufficiently demonstrate use of the mark. The Opponent also invested nearly £200,000 in promoting "MYPROTEIN" between December 2022 and December 2023 (as shown by the invoices) alongside social media marketing and engagement expenditure of about 5.16 million euro/pounds sterling from 2020 to

[24] Exhibit MF11.

2023. This leads to around 5.36 million in marketing expenditure over most of the relevant period.

51. The evidence further indicates a substantial online presence, with a total UK search volume for “MYPROTEIN” of 7,190,055 between 2019 and 2023. Notably, in 2022 the Opponent registered 2,397,850 searches averaging to over 6,500 searches per day. The Opponent also collaborated with “HYROX” during the relevant period, and with “Jimmy’s Iced Coffee” and “MARVEL”. Although the latter two collaborations fall just outside the relevant period, they nonetheless attest to the Opponent’s earlier brand growth which enabled such co-branding initiatives. Additional third-party mentions include partnerships with “Tough Mudder” and “Spartan” in 2023. Finally, the evidence shows wide retail distribution, with “Iceland” launching “MYPROTEIN” ice creams in 2023 and other major retailers (including Amazon UK, Tesco, Sainsbury’s, Asda and Boost UK), offering “MYPROTEIN” products such as protein powders, snacks, and vegan protein smoothies.

52. Following from the above considerations, I am satisfied that the Opponent has made genuine use of its second earlier mark in the UK within the relevant period for some of the goods (and related retail services) for which it is registered as I will further detail below.

Form of the mark

53. The evidence mostly shows the second earlier mark “MYPROTEIN” used in plain font as a word mark (all capitalised or with only the capital “M”). Irrespective of the mark’s capitalisation,[25] these are clearly uses of the mark as registered.

54. Additionally, I note that, in various instances, the second earlier mark has been used alongside a geometric logo (Figure 1).

[25] *LA Superquimica v EUIPO*, Case T-24/17, [39].

Figure 1

55. Whilst I find that use of the logo alone would not constitute an acceptable variant form of the second earlier mark, I consider that the use of "MYPROTEIN" along with the logo, does not prevent the element "MYPROTEIN" from being viewed independently to indicate the origin of the goods (and related retail services).[26] Therefore, I find that "MYPROTEIN", even when shown in combination with the geometric logo, remains an acceptable use of the second earlier mark.

Fair specification

56. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. (as he then was) as the Appointed Person summed up the law as being:

> "In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there

[26] As per *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12

has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned."

57. In *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2017] EWCA Civ 1834 the Court of Appeal set out the proper approach to partial revocation, as follows:

"245. First, it is necessary to identify the goods or services in relation to which the mark has been used during the relevant period.

246. Secondly, the goods or services for which the mark is registered must be considered. If the mark is registered for a category of goods or services which is sufficiently broad that it is possible to identify within it a number of subcategories capable of being viewed independently, use of the mark in relation to one or more of the subcategories will not constitute use of the mark in relation to all of the other subcategories.

247. Thirdly, it is not possible for a proprietor to use the mark in relation to all possible variations of a product or service. So care must be taken to ensure this exercise does not result in the proprietor being stripped of protection for goods or services which, though not the same as those for which use has been proved, are not in essence different from them and cannot be distinguished from them other than in an arbitrary way.

248. Fourthly, these issues are to be considered having regard to the perception of the average consumer and the purpose and intended use of the products or services in issue. Ultimately it is the task of the tribunal to arrive at a fair specification of goods or services having regard to the use which has been made of the mark.

249. This approach does strike an appropriate balance. It gives effect to the clear intention of the EU legislature that marks must actually be used or, if not used, be subject to revocation. […] It is also fair to proprietors for it does not require a proprietor to prove that he has used his mark in relation to all possible

variations of the goods or services covered by its registration but only those which are sufficiently distinct to constitute coherent categories or subcategories. I am also satisfied that it gives appropriate protection to the legitimate interest of a proprietor in being able in the future to extend his range of goods or services within the scope of the terms describing the goods or services for which its mark is registered."

58. This was approved by the Supreme Court in *Skykick*,[27] with the following qualification:

> "261. I would mention two other matters in this context. First, there can be no doubt that an application to register a mark in respect of a broad category of goods or services may be made partly in bad faith in so far as the broad description includes distinct sub-categories of goods or services in relation to which the applicant never had any intention to use the mark, whether conditionally or otherwise. In my view that emerges clearly from the decision of the CJEU in this case. The approach to be adopted in such a case was explored and explained by the Court of Appeal in *Merck KGaA v Merck Sharp & Dohme Corp* [2017] EWCA Civ 1834; [2018] ETMR 10, at paras 241-249 and, so far as I am aware, that approach has proved workable and appropriate and has stood the test of time, save that it must now be seen in light of the more recent guidance given by the CJEU in, for example: *Ferrari SpA v DU* (Joined Cases C-720/18 and C-721/18) EU:C:2020:854; [2021] Bus LR 106, at paras 36-53. There the CJEU explained, at para 40, that the essential criterion to apply for the purposes of identifying a coherent subcategory of goods or services capable of being viewed independently is their purpose and intended use."

59. From the evidence it emerges that the sport nutrition products, marketed by the Opponent, primarily consist of protein and creatine powders (nutritional supplements), protein-based snacks and confectionery (i.e., cookies, brownies, ice creams and bars containing protein), protein drinks, vitamins and amino acids (i.e., BCAA products). The Opponent also markets vegan alternatives to these products which are encompassed by the wider terms in the specification. I appreciate that

[27] *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36.

the evidence also shows a few instances where flavourings are marketed (e.g., flavouring drops); however, the evidence is insufficient to warrant a finding of use for this type of products.

60. Therefore, bearing in mind the Opponent's specification, as registered, and the nature of the use shown, I find the fair specification for the second earlier mark in classes 5, 29, 30 and 35 to be:

Class 5 Nutritional supplements containing protein or creatine; amino acid supplements; vitamin supplements; meal replacement powders; nutritional drink mixes for use as a meal replacement; protein supplements; food supplements (non-mediated) being confectionery.

Class 29 Vitamin, protein and mineral enriched foods and foodstuffs; protein-based nutritional drink mixes for use as a meal replacement; snack foods containing protein.

Class 30 Protein-based snack foods; protein-based confectionery snack bars; chocolate coated protein based confectionery; plain protein based confectionery.

Class 35 Retail services, online retail services connected with the sale of drink supplements, meal replacement powders, nutritional supplements containing protein or creatine, vitamin supplements.

61. The Opponent may rely upon the specification above for its section 5(2)(b) ground and for the section 5(3) ground, dependent upon the existence of a qualifying reputation in the case of the latter ground.

Section 5(2)(b)

62. Sections 5(2)(b) and 5A of the Act read as follows:

> "5(2) A trade mark shall not be registered if because –
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade

mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

"5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

The Principles

63. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; and

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

64. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the CJEU in *Canon,* Case C-39/97, the court stated at paragraph 23 that:

"In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be

taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.

65. Guidance on this issue has come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

    a. The respective uses of the respective goods or services;

    b. The respective users of the respective goods or services;

    c. The physical nature of the goods or acts of service;

    d. The respective trade channels through which the goods or services reach the market;

    e. In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;

    f. The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

66. Annex A to this decision shows a table detailing the goods and services for comparison. Having carefully considered the respective specifications, I find that some of the terms are identical (or very highly similar). I have provided below an example of such identical (or very highly similar) terms.

67. The Earlier Marks' specifications in class 5 feature the same terms "*meal replacement powders; vitamin supplements; protein supplements*". They are identically reproduced in the Applicant's class 5 specification.

68. In class 30 the first earlier mark features the term "*confectionery snack bars*" and the second earlier mark contains "*protein-based confectionery snack bars*". These terms are self-evidently identical to the Applicant's "*High-protein cereal bars*" in class 30. In case I am mistaken, the respective terms are very highly similar.

69. The second earlier mark features the term "*Retail services, online retail services connected with the sale of […] nutritional supplements containing protein or creatine*" in class 35. The Applicant features in class 35 "*Wholesale services in relation to dietary supplements*". The respective services are identical or, in case I am mistaken, I find them to be at least very highly similar to each other.

70. In light of these findings, and for reasons which will later become apparent, I will first assess the likelihood of confusion with regard to these terms.

Average consumer and the purchasing act

71. It is necessary for me to determine who the average consumer is for the goods and services in question; I must then determine the manner in which the goods and services are likely to be selected by the average consumer in the course of trade.

72. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

73. In *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25, the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that:

> (a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;
>
> (b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;
>
> (c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average

consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;

(d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by and enabling courts and tribunals to determine such issues so far as possible without the need for evidence;

(e) The average consumer's level of attention varies according to the category of goods or services in question; and

(f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

74. The average consumer of the goods is a member of the general public as well as for the class 35 services as these services focus on the actual sale of goods to end-users. Although consumers who purchase the goods (and access the services) might be particularly attentive to their dietary needs and lifestyle, the goods are relatively low in price and frequently purchased, and the degree of attention is likely to be medium or slightly above medium. Even in the eventuality that the relevant public for the class 35 services were professionals (businesses offering for sale nutritional/dietary supplements), the likelihood of confusion must be assessed from the perspective of the former (the general public) since they are the group who will pay the lower degree of attention.[28] The purchasing process is likely to be predominantly visual, with the goods (and related retail services) predominantly being purchased/accessed through websites, or bricks-and-mortar premises. However, as word-of-mouth recommendations may also play a part, I do not discount that there will also be an aural component to the purchase.

Comparison of trade marks

[28] Case T-356/14, [25] – [26].

75. It is clear from *Sabel BV v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

76. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

> "[...] it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion".

77. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the trade marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the trade marks.

78. The respective trade marks to be compared are as follows:

<table>
<tr><th>Opponent's earlier marks</th><th>Applicant's contested mark</th></tr>
<tr><td>MYPRO
("the first earlier mark")</td><td rowspan="2">MYCOPRO</td></tr>
<tr><td>MYPROTEIN
("the second earlier mark")</td></tr>
</table>

Overall impression

79. The Opponent submits that the respective marks' overall impression lies in the word combination of which each mark is composed (respectively "MY – PRO" / "MY – PROTEIN" and "MY - CO - PRO"), and the relevant consumers will perceive them as a whole. [29] The Applicant did not provide submissions on this point.

80. I agree with the Opponent in so far as the overall impression of the Earlier Marks lies in the respective word combinations "MY - PRO" and "MY - PROTEIN" that form the marks. With regard to the second earlier mark, the words "MY" and "PROTEIN", whilst being two separate words conjoined, create a unitary meaning because the determiner "MY" simply emphasizes that the protein belongs to the user. In both Earlier Marks I find that each element composing the marks equally contributes to the marks' overall impression without one dominating.

81. In the Contested Mark, the overall impression lies in the single word (or letter combination) "MYCOPRO" as a whole, without any part of the mark being predominant.

The first earlier mark

Visual similarity

82. The first earlier mark consists of five letters; the Contested Mark is comprised of seven letters. The respective marks coincide in their first two letters/word "MY" and in the last three letters "-PRO". The Contested Mark features the additional letters "-CO-" in the middle of the mark. The Opponent argues that the respective marks are highly similar as they overlap in their beginnings and ends and that the relevant consumers will not notice "CO" in the Contested Mark.[30] The Applicant did not submit arguments on this point. Although I appreciate that the beginning of words tends to have more visual impact,[31] I find both marks are relatively short. The fact that the respective marks are quite short word (or letter) combinations means that any difference is more noticeable than it may have been had both marks been longer, despite the marks sharing the same first two and last three letters.

[29] Opponent's submissions in lieu dated 21 January 2025 at [25].
[30] Opponent's submissions in lieu dated 21 January 2025 at [29].
[31] Joined Cases T-183/02 and T-184/02, *El Corte Ingles, SA v OHIM*.

83. Overall, I find a medium degree of visual similarity between the Contested Mark and the first earlier mark.

Aural similarity

84. When perceiving a verbal sign, consumers may break it down into elements that suggest a concrete meaning, or that resemble words that they already know.[32] It is possible for the consumer to break down a word mark even if only one of the elements making up that mark is familiar to the consumer.[33] The Opponent contends that the relevant consumers will perceive "MYPRO" as the combination of "MY" and the "PRO" whereas they will perceive the Contested Mark as the word combination of "MY-CO-PRO".[34] The Applicant provided evidence and submissions to support the argument that the relevant consumers will split the Contested Mark into "MYCO-" and "PRO" as further discussed below with regard to the marks' conceptual similarity. I agree with the Opponent that the relevant consumers will read the first earlier mark as the two-syllable combination "MY-PRO" and pronounce it accordingly. Regarding the Contested Mark, as the relevant consumers break down signs into elements they know even if only one (or more) of the elements making up that mark is familiar to the consumer, I find that the relevant consumers may extract "MY" and "PRO" from the Contested Mark even if "CO" does not have a clear meaning, as I further discuss below. Thus, they will perceive the Contested Mark as the combination of "MY – CO – PRO" and voice it accordingly. I find that the relevant consumers may also isolate only one word known to them and read the mark either as "MYCO- PRO" or "MY- COPRO" and voice either of such combinations accordingly. I also note that the addition of "CO" in the middle of the mark may lead a significant proportion not to break down the mark and read it as a one single word (or string of letters). In any case, the respective marks overlap in their pronunciation of "my" and "pro", notwithstanding the way consumers will read the Contested Mark, whilst differing in the addition of "co" in the middle part of the Contested Mark. Overall, the marks have a below-medium degree of aural similarity.

[32] Case T-256/04, Respicur, at [57]; Case T-146/06, Aturion, at [58].
[33] Case T-585/10, Penteo, at [72]; Case T-356/02, Vitakraft / krafft (fig.), at [51].
[34] Opponent's submissions in lieu dated 21 January 2025 at [26].

Conceptual similarity

85. The Opponent submits that the combination of "MY" and "PRO" evokes the notion of possession ("MY") and a "favourable advantage", a "professional" or a "protein molecule" ("PRO") and that the combination "MYPRO" forms a neologism.[35] The Applicant did not file specific submissions concerning the meaning of "MYPRO". Above in this decision, I found that the relevant consumers will extract from the first earlier mark words they are familiar with and read the mark as the combination of "MY" and "PRO". Taking into consideration that "PRO" is the common abbreviation for "professional",[36] I agree with the Opponent's submission that the relevant consumers will understand the first earlier mark as the combination of the possessive "MY" and the abbreviation of "professional". Additionally, whilst I appreciate that conceptual comparisons are usually done without reference to the goods at issue,[37] the consumer does look to the goods to inform the meaning of the mark, particularly where there is a link between the conceptual meaning of the mark and the goods to which it is affixed.[38] I find this to be the case here and, thus, I agree with the Opponent that a significant proportion of the relevant consumers is also likely to understand "PRO" as the abbreviation of "protein".

86. The Applicant contends that the relevant consumers will understand "myco-" in the Contested Mark as indicating "mushroom" (i.e., "mushroom-related" goods). The Applicant provided extracts from the Collins dictionary reporting that "myco-" is used in combination with other words (or part of words) to "indicate fungus" (e.g., mycology or mycobacteria).[39] The Applicant's evidence also contains extracts from the Applicant website indicating that the contested goods contain mushrooms (e.g., mushroom protein powders).[40] The Applicant also provided some examples of companies marketing products containing mushrooms (e.g., tinctures, plant-based burgers, extracts, supplements) and being marketed under brand names

[35] Idem at [25].
[36] See the Collins English dictionary for "PRO" at https://www.collinsdictionary.com/dictionary/english/pro.
[37] EMILIANA, Case BL O/052/22.
[38] LIGHT VITAMIN, Case BL O/1174/25.
[39] Exhibit CP1.
[40] Exhibit CP2.

containing “myco-” such as, for example, “MYCOLOGIC”, “MyCo Foods”, “MycoTonics” or “Myco Nutri”.[41]

87. The Opponent contends that at least a significant proportion of the relevant public will not perceive “myco” as being representative of mushrooms or fungus-derived goods.[42] To this end, the Opponent provides evidence showing that there are various registered trade marks consisting of or including “myco” that are registered for goods and/or services that do not relate to mushrooms.[43] The Opponent also provides extracts from a Google search showing that there are companies using “myco” and marketing goods and/or services that are not mushroom-related.[44] Conversely to what the Applicant argues, the Opponent contends that the element “CO” in the Contested Mark is commonly used as forming a noun or adjective to indicate a joint or mutual undertaking (e.g. co-driver or coequal) or as the short form for the word “company”. Thus, the Opponent argues that the Contested Mark is likely to be perceived as a combination of words evoking the concept of possession (“MY”), a joint undertaking or a company (“CO”) and a “favourable advantage”, a “professional” or a “protein molecule” (“PRO”).[45]

88. I acknowledge both parties’ submissions. I found that different and equally significant proportions of the relevant consumers are likely to either break down the Contested Mark in different ways (“MY - CO - PRO”, “MYCO-PRO” or “MY-COPRO”) or read it as a string of letters forming a unit. However, even when the relevant consumers will read the mark as “MYCO-PRO”, for a concept to be relevant, it must be capable of immediate grasp by the relevant consumer.[46] I am not convinced that the average consumer would understand “MYCO” as a descriptive reference to mushrooms. Furthermore, although I find that the relevant consumers will extract “MY” and “PRO” from the Contested Mark, I find it illogical for the relevant consumers to understand “CO” as indicating “a joint or mutual undertaking” or as the short for “company”. [47]

[41] Exhibits CP3 – CP6.
[42] Opponent’s submissions in lieu dated 21 January 2025 at [28].
[43] Exhibit SM1.
[44] Exhibits SM2 and SM3.
[45] Opponent’s submissions in lieu dated 21 January 2025 at [26].
[46] *The Picasso Estate v OHIM*, Case C-361/04 P.
[47] Opponent’s submissions in lieu dated 21 January 2025 at [26].

89. It is my view that the relevant consumers will perceive “MY” and “PRO” in the Contested Mark with the meanings of a possessive and the short for “professional” or “protein” as indicated above but only in those instances where such words/abbreviations are read individually without the addition of “CO” (“**MY** – COPRO” or “MYCO – **PRO**”), without attaching any meaning to “MYCO-” or “-COPRO” in such marks as well as giving any meaning to the letter combination “CO” placed in the middle of the mark.

90. I find that both marks evoke the meaning of the possessive “MY” and the short for “professional” or “protein” (when read in isolation from “CO” in the Contested Mark) with the Contested Mark adding the letters “CO” in the middle of the mark which will be perceived as devoid of any clear meaning (by itself or in combination with “MY” or “PRO”). This detracts from the marks’ conceptual similarity. Overall, I find the marks share a below-medium conceptual similarity.

The second earlier mark

Visual similarity

91. The considerations carried out for the Contested Mark at paragraph [82] apply. The second earlier mark consists of the nine-letter word combination “MYPROTEIN”. I agree with the Opponent that the relevant consumers will perceive the mark as the combination of the words “MY” and “PROTEIN”. The marks coincide in their first word “MY” and in the three letters “PRO-” whereas they differ respectively in the additional letters “CO” in the Contested Mark (placed between “MY-” and “-PRO”) as well as the additional “-TEIN” in the second earlier mark (forming the word “PROTEIN”). In light of the above considerations and taking into account the further difference introduced by the addition of “-TEIN”, I find the marks have a below-medium degree of visual similarity.

Aural similarity

92. According to my findings in the paragraph above, the relevant consumers will read the second earlier mark as the combination of the English dictionary words “MY” and “PROTEIN” and they will voice them accordingly. Bearing in mind my findings at paragraph [84], the marks overlap in the pronunciation of their first word “MY”

and partially overlap in the letters “PRO” although I account for the fact that in the second earlier mark the consumers will pronounce “PRO-” in conjunction with the second syllable “-TEIN” focusing on the pronunciation of the word “PROTEIN” as a whole. Therefore, I find the marks to have a low aural similarity.

Conceptual similarity

93. The Opponent submits that the second earlier mark evokes the meaning of the possessive (“MY”) and of a protein molecule (“PROTEIN”).[48] Given the respective English dictionary meanings of “MY” and “PROTEIN”, I agree with the Opponent. With regard to the Contested Mark’s meaning, I refer to my findings at paragraphs [85] – [88]. For the section of consumers who will understand “PRO” as short for “professional”, both marks evoke the meaning of the possessive “MY” whereas they differ in all the other elements composing them, namely, the addition of “CO” (devoid of a clear meaning) and the word “PRO” (perceived as the short for “professional”) in the Contested Mark and the word “PROTEIN” (intended as the substance found in food and drink) in the second earlier mark. Thus, I find the marks have a low degree of conceptual similarity. Regarding the section of consumers who will understand “PRO” as short for “protein” in the Contested Mark, the respective marks will overlap exclusively in the meaning of “protein” if the Contested Mark is read as “MYCO – PRO” as I found that “myco-” will not be understood as having any meaning. In this case the marks have a low degree of conceptual similarity. The same degree of similarity is found in case the Contested Mark is read as “MY – COPRO” as the marks would overlap only in the meaning of the possessive. In the eventuality the Contested Mark is read as “MY – CO – PRO”, the marks will share the meaning of the possessive “MY” and “protein” but differ in the additional “CO”. In this case the marks have a below-medium conceptual similarity.

Distinctive character of the earlier trade marks

94. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

[48] Opponent’s submissions in lieu dated 21 January 2025 at [25].

"22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *WindsurfingChiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)."

95. Dealing first with the inherent distinctiveness of the Earlier Marks, the Opponent submitted that the Earlier Marks are inherently distinctive.[49] The Opponent did not particularise further on this point. The Applicant did not submit any argument in this regard. The first earlier mark "MYPRO" is the combination of the possessive "MY" and the letters "PRO". I found that the relevant consumers are likely to understand "PRO" as the short form of "professional" or "protein". In the former instance the word combination "MYPRO" does not have any semantic correlation with the goods for which it is registered. I find the first earlier mark to have a medium degree of inherent distinctiveness. In the latter instance, the mark has a clearer semantic connection with the protein (or protein related) goods at hand and, thus, I find the mark has a below-medium degree of inherent distinctiveness. Regarding those goods that are not protein (or protein related), the mark, when understood as "my

[49] Opponent's submissions in lieu dated 21 January 2025 at [20].

protein" does not have a clear semantic correlation with such goods and, hence, I find it has a medium inherent distinctiveness.

96. The second earlier mark conveys the meaning of a possessive ("MY") and the protein molecule found in food and drink ("PROTEIN"). Regarding the protein or protein-related goods (and related retail services) for which the mark has been registered, while bearing in mind that registered marks must be granted at least some degree of distinctiveness,[50] the mark is in part descriptive of its goods (and related retail services). Thus, I find the mark has a very low inherent distinctive character. Regarding the goods and services that are not protein or protein related, the mark nonetheless conveys the meaning of a personalised ("MY") nutritional supplement ("PROTEIN"). Therefore, for goods (and related retail services) such as creatine, vitamins or amino acids that consist of nutritional supplements, the mark has a below-medium degree of inherent distinctive character.

97. Turning to the question of whether the inherent distinctiveness of the Earlier Marks has been enhanced through use, the Opponent submits that the Earlier Marks enjoy an enhanced degree of distinctive character in light of the extensive use of the marks as demonstrated by the evidence provided.[51]

98. With regard to "MYPRO", the evidence features a few extracts from the Opponent's websites "mypronutrition.com" and "myprotein.com" showing some "MYPRO" products (protein and creatine products) being marketed.[52] The evidence also reports on a marketing collaboration between "MYPRO" and the UFC Middleweight Champion Israel Adesanya in 2023 to market the Opponent's "MYPRO" products.[53] Although I appreciate that "MYPRO" had some exposure online and that it was the object of one marketing collaboration, I note that the evidence does not show any revenue figures, marketing expenditure, goods distribution within the UK or other marketing communication activities (e.g., on social media) relating to "MYPRO" products. Thus, overall, the evidence is insufficient to support any finding of enhanced distinctive character acquired through use.

[50] *Formula One Licensing BV v OHIM,* Case C-196/11P.
[51] Ibid at [21].
[52] Exhibits MF12 and MF13.
[53] Exhibit MF30.

99. Regarding “MYPROTEIN”, the Opponent’s company is a long-established business that has been active for nearly two decades. The website “myprotein.co.uk” was registered in 2003, followed by “Myprotein.com” in 2004, and both have been used in the UK since their creation. “MYPROTEIN” benefits from extensive retail distribution, with its products available through major national retailers such as Amazon UK, Tesco, Sainsbury’s, Asda, Boost UK and Iceland.

100. The evidence includes extracts from the Opponent’s website showing its products available for sale from 2007. The company’s growth and marketing initiatives led to numerous nominations and awards between 2007 and 2023. In 2015, the Opponent’s premium sports supplements “Myprotein” were ranked as the number one sports nutrition brand in Europe, and the company became the first UK sports nutrition brand to secure the British Retail Consortium (BRC) Global Food Safety Standard for “Myprotein”.

101. The “MYPROTEIN” “Impact” whey protein is the Opponent’s bestselling product, having received 29,793 reviews and earned the trust of 2.4 million consumers. Between 2016 and 2020, the Opponent’s UK turnover for “MYPROTEIN” amounted to £456,811,193. Total marketing expenditure for “MYPROTEIN” reached £/€5,358,092, including spending on social media and consumer engagement.

102. “MYPROTEIN” has a strong online presence. The evidence shows a total UK search volume of 7,190,055 for “MYPROTEIN” between 2019 and 2023, with 2,397,850 searches in 2022, averaging over 6,500 per day. Regarding social media, the “MYPROTEIN” Facebook page has 2.3 million likes and 2.3 million followers, while the “Myprotein” Instagram account has 1 million followers and 11.6 thousand posts, which attract significant engagement, including thousands of likes, hundreds of comments, and multiple shares. The Opponent also operates an official “Myprotein” YouTube channel, created on 22 July 2010, which features advertisements and recipe content using “Myprotein” ingredients; the channel has 292 thousand subscribers and 881 videos. Additionally, “MYPROTEIN” is promoted through collaborations with various brand ambassadors and testimonials.

103. The brand has taken part in several collaborations. “Myprotein” served as the UK partner for the course event brands “Tough Mudder” and “Spartan”, with evidence showing that its products were provided as on-course nutrition to *“tens of thousands of participants […]”*.Further evidence shows collaborations between “MYPROTEIN” and “Hyrox” for a global fitness event in Manchester in 2024, as well as partnerships with “Jimmy’s Iced Coffee” and “MARVEL”.

104. The evidence also features third-party reviews and recommendations that further enhance “MYPROTEIN”’s exposure. One notable review refers to “Myprotein” as one of *“the most popular and trusted brands in the protein supplement industry […]”*. Moreover, additional evidence shows that “MYPROTEIN” clear whey protein received the “Men’sHealth Sports Nutrition Awards 2024”. A listing on “www.bbcgoodfood.com” includes “MYPROTEIN” among *“The best protein powders 2024, tried and tested”*, and an article from “The Telegraph” (“www.thetelegraph.co.uk”) names the “MYPROTEIN” “Impact” whey protein the *“best protein powder overall”*.

105. Therefore, taking all these factors into account, despite some gaps in the evidence, I find that the second earlier mark’s distinctiveness, in relation to protein and protein related goods and services, has been enhanced by way of the use made of it, though given its very low level of inherent distinctiveness, as outlined at paragraph [60], to no more than a medium degree.

Likelihood of confusion

106. There is no simple formula for determining whether there is a likelihood of confusion. The factors considered above have a degree of interdependency (*Canon* at [17]). I must make a global assessment of the competing factors (*Sabel* at [22]), considering the various factors from the perspective of the average consumer and deciding whether the average consumer is likely to be confused. In making my assessment, I must keep in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

107. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other. The concept of indirect confusion was explained by Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10 as follows:

> "16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark
>
> 17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:
>
> > (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ("26 RED TESCO" would no doubt be such a case).
> >
> > (b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as "LITE", "EXPRESS", "WORLDWIDE", "MINI" etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ("FAT FACE" to "BRAT FACE" for example)."

108. I have already elected to proceed by considering the likelihood of confusion where the marks are used in relation to identical (or very highly similar) goods and services. The consumer is likely to pay a medium (or slightly above medium) level of attention in their selection of the goods and services at issue. Part of the relevant public for the services at issue could be businesses that would pay a higher level of attention, but I will assess the likelihood of confusion from the perspective of the general public since they are the group who will pay the lower degree of attention. The inherent distinctiveness of the first earlier mark is below medium for protein (or protein related) goods and medium for the other goods. The second earlier mark has a very low inherent distinctiveness for protein (or protein related) goods/services and a below-medium distinctiveness for non-protein goods/services. The first earlier mark does not have enhanced distinctiveness whilst the Opponent has enhanced through use the second earlier mark's distinctiveness to a medium degree for the protein (or protein related) goods and services. With regard to the first earlier mark, the respective marks have a medium degree of visual similarity and a below-medium aural and conceptual similarity. Regarding the second earlier mark, the marks have a below-medium degree of visual similarity and a low aural similarity. The conceptual similarity is either low or below-medium according to the meaning consumers will attach to "PRO" in the Contested Mark (i.e., "professional" or "protein"). The purchasing process of the contested goods and services is considered to be mainly visual but the potential for aural use also bears some relevance.

109. The Opponent contends that due to the high degree of visual and phonetic similarity between the marks, and the high/medium degree of conceptual similarity along with imperfect recollection and the identity or high degree of similarity between the goods and services at issue there exists a likelihood of direct confusion. The Opponent also contends that indirect confusion is alternatively likely to arise as the respective marks coincide in the words "MY" and "PRO" and the relevant consumers will understand "CO" in the Contested Mark with the meaning of "company" and, thus, as an indication of a joint undertaking with the result that

the relevant consumers will likely interpret the Contested Mark as designating different lines of business and/or a different product line/offering stemming from the Opponent.[54] The Applicant denies the Opponent's submissions and rejects any argument of likelihood of confusion.[55]

The first earlier mark

110. I acknowledge that the marks share their beginning "MY" and their ends "PRO". The Contested Mark contains the additional letters "CO" in the middle of the mark (between "MY" and "PRO"). The respective marks are both fairly short and the consumers will recognise the combination of the two-syllable "MY – PRO" in the first earlier mark whereas they will perceive the Contested Mark either as the three-syllable combination "MY-CO-PRO", (irrespective of whether they will break down the mark or read it as a whole string of letters), or as the two-syllable "MYCO-PRO" / "MY-COPRO". Bearing in mind that in shorter signs the consumers are able to perceive all the single elements, it is my view that the relevant consumers will pay attention to the additional "CO" in the Contested Mark (by itself or combined with "PRO" or "MY") and, therefore, I do not find that the competing marks will be mistaken or misremembered for one another. Rather, the aforementioned difference will be sufficient to enable consumers to differentiate between them. Therefore, in my judgement, taking all the above factors into account, the difference between the competing trade marks is likely to enable consumers, paying a medium level of attention, to avoid mistaking the marks for one another, even when factoring in the principles of imperfect recollection, interdependency and the identity between the goods and services. As a result, I find that there is no likelihood of direct confusion.

111. I turn to consider the likelihood of indirect confusion. The three categories identified in *L.A. Sugar* are not exhaustive; rather, they were intended to be illustrative of the general approach, as has been confirmed by the Court of Appeal.[56] I recognise that a finding of indirect confusion should not be made merely because the competing marks share a common element. In this connection, it is

[54] Opponent's submissions in lieu dated 21 January 2025, at [41], [44] and [45].
[55] Applicant's counterstatement dated 3 June 2024 at [3] – [6].
[56] *Liverpool Gin Distillery and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207.

not sufficient that a mark merely calls to mind another mark: this is mere association not indirect confusion.[57] The Court of Appeal has also emphasised that, where there is no direct confusion, there must be a "proper basis" for finding indirect confusion.[58]

112. With regard to the first earlier mark, I found that the consumers will notice the addition of "CO" in the middle of the Contested Mark forming a three-syllable letter (or word) combination. I disagree with the Opponent in so far as consumers will understand "CO" in the Contested Mark with the meaning of "company". This especially given the syntactic structure of the Contested Mark that integrates "CO" into the mark forming a combination with "MY" (at the beginning) and "PRO" (at the end). Therefore, I see little reason for them to consider that such addition of letters would be an intentional step taken by the same undertaking, and I do not consider it would form a proper basis for a finding of indirect confusion between the marks.

The second earlier mark

113. Following from my considerations above, the fact that the second earlier mark contains the word "PROTEIN" makes any direct confusion even less likely to occur. I find this especially in light of the fact that in case the consumers will perceive "PRO" individually in the Contested Mark, this is partially lost in the second earlier mark as forming part of the word "PROTEIN" which the consumers will read as a whole and attach its dictionary definition. I appreciate that a significant part of the consumers is likely to understand "PRO" in the Contested Mark as "protein". However, I found that "protein" is low in distinctiveness (especially in relation to protein-related goods and services) and I remind myself that a coincidence of an element with a low level of distinctiveness will not usually lead to a likelihood of confusion.[59] Overall, I do not find any likelihood of direct confusion would occur.

114. Turning to indirect confusion, the same reasoning outlined at paragraph [112] applies here, especially the fact that consumers will notice the addition of "CO" in the Contested Mark and they will not perceive it as an intentional step taken by the same undertaking. I reach this conclusion also taking into consideration the second

[57] *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17.
[58] *Liverpool Gin Distillery*.
[59] *Face2FaceHR Partners Limited v Peninsula Business Services Limited*, O/0368/23.

earlier mark's enhanced distinctive character to a medium degree. Therefore, I do not see how the consumers, upon noticing the differences between the marks (especially the addition of "CO" in the Contested Mark and the word "PROTEIN" in the second earlier mark) would perceive the Contested Mark as originating from the Opponent's "MYPROTEIN".

115. Having reached that conclusion in respect of identical (or very highly similar) goods and/or services, the Opponent would be in an inferior position were I to assess the likelihood of confusion based on goods and/or services with a lower degree of similarity. Therefore, it follows that there is no likelihood of confusion (both direct and indirect) for the remaining goods and services at hand.

Outcome of the section 5(2)(b) opposition

116. The opposition fails in its entirety under section 5(2)(b) of the Act.

117. I will now consider the section 5(3) ground of opposition.

Section 5(3)

118. Section 5(3) states:

> "(3) A trade mark which –
>
> > is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark".

119. Section 5(3A) states:

> "(3A) Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected."

120. The relevant case law in relation to section 5(3) can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, [1999] ETMR 950, Case

252/07, *Intel*, [2009] ETMR 13, Case C-408/01, *Adidas-Salomon*, [2004] ETMR 10 and Case C-487/07, *L'Oreal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows:

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Salomon*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel*, paragraph 42.

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel*, paragraphs 76 and 77.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel*, paragraph 74.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact on the earlier mark; *L'Oreal v Bellure NV*, paragraph 40.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oreal v Bellure*).

121. For a successful claim under section 5(3), cumulative conditions must be satisfied by the Opponent: a qualifying reputation in the earlier mark; similarity between the marks; a link between the marks (the earlier mark will be brought to mind on seeing the later mark); and one (or more) of the claimed types of damage. It is not necessary that the goods (or services) be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the relevant public will make a link between the marks. In this case, I found at least some of the goods (and related services) to be identical or highly similar.

Reputation

122. The first hurdle that the Opponent must overcome under section 5(3) of the Act is to show that the second earlier mark had a reputation in the UK on the filing date of the Contested Mark. The relevant date in these proceedings is, therefore, 6 December 2023. If the evidence does not establish the existence of such a reputation, the Opponent's case must fail. This is because, without a qualifying reputation in the UK, there can be no link made in the consumer's mind between the respective marks and no unfair advantage taken of, or damage caused to, the second earlier mark.

123. In *General Motors,* Case C-375/97, the CJEU held that:

> "25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.
>
> 26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.
>
> 27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.
>
> 28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it."

124. I have already summarised the Opponent's evidence of use earlier in this decision when I considered the matter of genuine use. I also referred to it again when I considered whether the distinctiveness of the second earlier mark had been enhanced through use from the perspective of the average UK consumer. I found

that it had, enhancing the second earlier mark's inherent distinctiveness to a medium degree.

125. Bearing in mind my earlier comments on the evidence of use and enhanced distinctiveness as outlined at paragraphs [48] – [52] and paragraphs [99] – [105], I find that the level of use before me shows, overall, that the Opponent had, at the date of application of the Contested Mark, a reasonable reputation for the second earlier mark in the UK for at least some of its goods and services as indicated below:

Class 5 "*vitamin supplements; protein supplements*"

Class 30 "*protein-based confectionery snack bars*"

Class 35 *"Retail services, online retail services connected with the sale of […] nutritional supplements containing protein or creatine*"

126. On the basis of such reputation, I will move to assess whether the relevant consumer will make a mental "link" between the respective marks for the goods and services at hand.

Link

127. As I noted above, my assessment of whether the public will make the required mental 'link' between the marks must take account of all relevant factors. The factors identified in *Intel* are:

- The degree of similarity between the conflicting marks

128. In *Adidas-Salomon*, the CJEU held that the similarity of signs must be assessed in the same way for sections 5(2) and 5(3) of the Act. As such, my findings at paragraphs [113] – [115] are equally applicable here and I adopt them accordingly.

- The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public

129. I found that at least some of the goods and services at hand are identical (or very highly similar).

130. The relevant public for such goods and services is a member of the general public.

- The strength of the second earlier mark's reputation

131. The second earlier mark has established a reasonable reputation for some of its goods and services.

- The degree of the earlier mark's distinctive character, whether inherent or acquired through use

132. The second earlier mark has a very low degree of inherent distinctiveness, which has been enhanced to a medium degree through use.

- Whether there is a likelihood of confusion

133. I have found that there is no likelihood of confusion (whether direct or indirect).

134. I have found no likelihood of confusion under section 5(2). However, I bear in mind that the level of similarity required for the public to make a link between the marks for the purposes of section 5(3) may be less than the level of similarity required to create a likelihood of confusion under section 5(2): *Intra-Presse SAS v OHIM*.[60] The CJEU stated (at paragraph 72 of its judgement) that:

> "The Court has consistently held that the degree of similarity required under Article 8(1)(b) of Regulation No 40/94, on the one hand, and Article 8(5) of that regulation, on the other, is different. Whereas the implementation of the protection provided for under Article 8(1)(b) of Regulation No 40/94 is conditional upon a finding of a degree of similarity between the marks at issue so that there exists a likelihood of confusion between them on the part of the relevant section of the public, the existence of such a likelihood is not necessary for the protection conferred by Article 8(5) of that regulation. Accordingly, the types of injury referred to in Article 8(5) of Regulation No 40/94 may be the

[60] Joined cases C-581/13P & C-582/13P.

consequence of a lesser degree of similarity between the earlier and the later marks, provided that it is sufficient for the relevant section of the public to make a connection between those marks, that is to say, to establish a link between them (see judgment in *Ferrero v OHIM*, C-552/09 P, EU:C:2011:177, paragraph 53 and the case-law cited)."

135. For a link to be found, the burden is on the Opponent to show enough of a reputation which can overcome the differences between the marks and cause the earlier mark to be brought to mind by the later mark.

136. The respective marks overlap in the word 'my', which is low in distinctiveness, and share the letters "pro" which, even if seen as short for "protein", this is also low in distinctive character. When considering the combination of the common elements (which are low in distinctiveness) and the differing element "CO", the Opponent's reputation in "MYPROTEIN" will not cause consumers to see "MYCOPRO" and bring to mind the second earlier mark.

137. As the conditions for section 5(3) are cumulative, without a link there can be no damage.

138. The opposition under section 5(3) fails.

Conclusion

139. The opposition is unsuccessful and, subject to any appeal, the application may proceed to registration.

Costs

140. The Applicant has been successful and is entitled to an award of costs. The relevant scale is contained in Tribunal Practice Notice ("TPN") 1/2023. Bearing that scale in mind, I award costs to the Applicant as follows:

Considering the notice of opposition and preparing the counterstatement	£250
Preparing evidence and considering and commenting on the other side's evidence	£600
Total:	**£850**

141. I order THG Nutrition Limited to pay MycoPro Global Limited the sum of **£850**. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 19th day of March 2026

Andrea Rossi

For the Registrar

Annex A – competing goods and services

Opponent's goods and services	Applicant's goods and services
The first earlier mark Class 5 Dietary supplements; dietary food supplements; nutritional supplements; mineral food-supplements; food-supplements based on vitamins, minerals and raw products from plants; health food supplements; vitamin preparations; slimming aids; herbal supplements and herbal extracts; herbal beverages meal replacement powders; nutritional drink mixes for use as a meal replacement; mineral supplements; nutritional powders; food supplements, tablets and capsules; carbohydrate supplements; amino acid supplements; dietetic and slimming substances; vitamin supplements; food supplements for dietetic use; herbal extracts for medical purposes; protein supplements; food supplements (non-mediated) being confectionery; dietetic and slimming foodstuffs and substances; nutrition food bars; food supplements for sports nutrition purposes, whey proteins, milk proteins; vitamin, protein and mineral enriched foods and foodstuffs; carbohydrate-based nutritional drink mix for use as a meal replacement; herbal extracts, other than those for medical purposes. Class 29 Meat, poultry, game, fish and seafood; prepared meals and ready meals made principally of meat, poultry, game, fish or seafood; preserved, frozen, dried and cooked fruits and vegetables and food products prepared there from; salads; fruit salads; soup and soup preparations; preserved garden herbs; processed nuts; spreads; dips; crisps; snack foods; jellies, jams; eggs, milk and dairy products; milk drinks; protein enriched	Class 1 Enzymes for use in protein hydrolysis; protein for use in the manufacture of foodstuffs; proteins for the food industry; proteins for use in the manufacture of food products; enzymes [other than for medical use] for labelling protein fractions; enzymes [other than for medical use] for measuring protein fractions; enzymes [other than for medical use] for detecting protein fractions; plant nutrients; plant foods; amino compounds; proteins for use in manufacture; proteins for use in the manufacture of food supplements. Class 5 Protein powder dietary supplements; dietary supplements; nutritional supplements; dietary and nutritional supplements; protein supplement shakes; liquid dietary supplements; protein supplements; powdered nutritional supplement drink mix; vitamin and mineral supplements; dietary supplement drink mixes; protein synthesis inhibitors; protein dietary supplements; food supplements consisting of amino acids; dietary food supplements; vitamin supplements; meal replacement powders; food supplements; liquid nutritional supplements; herbal supplements; dietary supplements for humans; dietary supplement drinks; soy protein dietary supplements; dietary supplements in powder form; mineral dietary supplements; ganoderma lucidum spore powder dietary supplements. Class 29

milk drinks; butter; peanut butter; milk shakes; powdered milk; liquid food shakes; cheese and cheese products; edible oils and fats; preserves; pickles; prepared meals; nutritional foodstuffs; protein-based nutritional drink mixes for use as a meal replacement; dried milk-based products for meal replacements; milk based beverages; beef jerky; edible nuts; egg whites; egg yolks; egg yolk solids. Class 30 Cereals; preparations made from cereals; flour; preparations made from flour; sausage rolls; quiches; sandwiches; confectionery; confectionery bars; cookies; bread; pastry; ices; ice cream; ice cream products and frozen confections; preparations for making ices, ice cream, ice cream products and frozen confections; chocolate; chocolate confectionery; flapjacks; caramel confectionery; caramel and hazelnut confectionery; flavourings for food and beverages; confectionery snack bars; chocolate coated protein based confectionery; plain protein based confectionery; shortbreads; honey and treacle; sugar; puddings; flavourings other than non-essential oils; cheese cake; sauces; chutneys; tea products; tea beverages; fruit teas; iced tea; green tea; coffee; cocoa; rice; tapioca; spices; yeast; baking powder; biscuits; cakes; pasta; pastry and pastry products; meat pies, vegetable pies, fruit pies; fruit crumbles; snack foods; pie mixes; prepared meals containing pasta, bread, cereals, rice and /or pastry; desserts containing any of the above products; meringues. Class 32 Non-alcoholic beverages; water, mineral water, sparkling water, fruit drinks and fruit juices, liquid and powdered	Dried edible mushrooms; mushrooms, preserved; mushrooms, prepared; dried funghi; processed peas; seeds, prepared; processed edible cordyceps. Class 30 High-protein cereal bars. Class 31 Unprocessed beans; hemp seeds, unprocessed; plants; unprocessed mushrooms. Class 35 Wholesale services in relation to dietary supplements; retail services in relation to dietary supplements; providing consumer product information relating to food or drink products; product sampling.

beverage mixes; flavouring syrups for making beverages; beer; low-alcoholic and de-alcoholised beverages; nutritional, energy and protein drinks; pastilles for effervescing beverages; vegetable juices; isotonic beverages; beverages for meal replacement.	
The second earlier mark	
Class 5 amino acid supplements; vitamin supplements; meal replacement powders; nutritional drink mixes for use as a meal replacement; protein supplements; food supplements (non-mediated) being confectionery. Class 29 Vitamin, protein and mineral enriched foods and foodstuffs; protein-based nutritional drink mixes for use as a meal replacement; snack foods containing protein. Class 30 Protein-based snack foods; protein-based confectionery snack bars; chocolate coated protein based confectionery; plain protein based confectionery. Class 35 Retail services, online retail services connected with the sale of drink supplements, meal replacement powders, nutritional supplements containing primarily protein or creatine, vitamin supplements.	