O/1208/25

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK REGISTRATION UK00914110936

IN THE NAME OF EVOXX TECHNOLOGIES GmbH

AND

APPLICATION 505610 BY EVOX THERAPEUTICS LIMITED

TO REVOKE THE AFORESAID REGISTRATION

Background and Pleadings

1. UK00914110936 ('the Contested Mark') stands registered in the name of evoxx technologies GmbH, the Registered Proprietor ('the RP'). Details of the Contested Mark are as follows:

Evoxx (Word mark) This is a comparable mark pursuant to Article 54 of the Withdrawal Agreement,[1] based on EUTM 014110936, which was registered prior to the withdrawal of the UK from the European Union. Filing date: 22 May 2015 Date of entry in register: 26 October 2015
Registered for the following goods and services: Class 1: *Chemicals used in industry; Chemical, biochemical and/or biotechnological preparations used in science; Chemical, biochemical and/or biotechnological preparations used in photography; Chemical, biochemical and/or biotechnological preparations used in agriculture; Chemical, biochemical and/or biotechnological preparations used in horticulture; Chemical, biochemical and/or biotechnological preparations used in forestry; Chemical, biochemical and/or biotechnological preparations for preserving foodstuffs; Chemical, biochemical and/or biotechnological preparations for conserving foodstuffs; Chemical, biochemical and/or biotechnological preparations for making foods and foodstuffs; Chemical, biochemical and/or biotechnological preparations for making beverages; Chemical, biochemical and/or biotechnological preparations for cosmetic purposes; Chemical, biochemical and/or biotechnological preparations for making hair and/or body care preparations; Chemical,*

[1] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

biochemical and/or biotechnological preparations for making pharmaceutical preparations and/or medicines; Enzymes for industrial purposes; Enzyme preparations for industrial purposes; Biochemical catalysts; Carbonic hydrates; Starch for industrial purposes; Artificial sweeteners; Emulsifiers; Unprocessed plastics; Adhesives used in industry.

Class 5:

Pharmaceutical and veterinary preparations; Adjuvants for medical purposes; Appetite suppressants for medical purposes; Medical preparation for slimming purposes; Constipation (Medicines for alleviating -); Laxatives; Dietetic preparations adapted for medical use; Diabetic bread; Dietetic beverages adapted for medical purposes; Dietetic substances adapted for medical use; Dietetic foods adapted for medical use; Nutritional supplements; Infant formula; Edible plant fibres; Nutritional supplements; Additives to fodder for medical purposes; By-products of the processing of cereals for medical purposes; Cellulose esters for pharmaceutical purposes; Starch for dietetic or pharmaceutical purposes; Capsules for medicines; Capsules for pharmaceutical purposes; Digestives for pharmaceutical purposes; Dietetic beverages adapted for medical purposes; Beverages adapted for medicinal purposes; Healthcare preparations; Disinfectants; Biotechnological preparations and products, namely proteins, enzymes for medical use; Enzymes for veterinary purposes; Enzyme preparations for medical purposes; Enzyme preparations for veterinary purposes; Bacterial production strains for medical use; Bacterial production strains for veterinary use; Micro-organism cultures for medical use; Cultures of micro-organisms for veterinary purposes; Ferments for pharmaceutical purposes; Ferments for veterinary use; Mediums (Bacteriological culture -); Dental impression materials.

Class 42:

Science and technology services; Research and services relating thereto; Industrial analysis and research services; performance of chemical analyses; Biological research; Chemical, pharmaceutical, biotechnological and/or genetic technology laboratories; Technical and scientific consultancy and support in the

field of chemistry, pharmacy, biotechnology and/or genetic technology, including via communications media, including the internet; Technical and scientific consultancy and support with regard to the introduction of chemical, pharmaceutical, biotechnological and/or genetic technology preparations and products; Research and development (for others).

2. On 8 December 2022, Evox Therapeutics Limited, the Cancellation Applicant ('the CA'), applied to revoke the Contested Mark in accordance with section 46(1)(a) of the Trade Marks Act 1994 ('the Act'). Revocation is sought in respect of the specification in its entirety. I note that the revocation action was filed without notice.[2]

3. The CA alleges that the RP has not used the Contested Mark within the period of five years following the date of completion of the registration process, i.e. 27 October 2015 to 26 October 2020 ('the First Relevant Period').[3] The earliest possible date from which the Contested Mark may be revoked is the day following the end of the aforementioned five-year period, i.e. 27 October 2020.

4. The RP filed a defence and counterstatement in which it denied the claim against it in its entirety.

5. Concessions were made by both parties, which are addressed at [23] to [27].

6. The CA is represented by JA Kemp LLP. The RP is represented by Potter Clarkson LLP. Only the RP filed evidence: evidence-in-chief during the first round; and evidence-in-reply during the second round. The CA filed written submissions during the first evidence round. A hearing was granted at the request of the CA, in advance of which both parties filed Skeleton Arguments.

EVIDENCE AND WRITTEN SUBMISSIONS

[2] No 'Revocation notification date' has been input at [6] of the Form TM26(N) Application to revoke a registration or protected International trade mark (UK) for reasons on non-use.
[3] There is a Second Relevant Period, which will be addressed later in the decision.

7. The RP's evidence comes from Martina Döring, 'joint CEO' of the RP company. Ms Döring's First Witness Statement ('Döring 1') is dated 12 May 2023, and is accompanied by thirty-five exhibits: MD-1 to MD-35. Ms Döring's Second Witness Statement ('Döring 2') is dated 5 December 2023, and is accompanied by three further exhibits: MD-36 to MD-38. The RP's evidence is intended to demonstrate evidence of use of the Contested Mark.

8. The CA's written submissions are dated 7 August 2023, and address the RP's evidence filed.

9. I confirm that I have read all of the evidence and written submissions, to which I will refer to the extent that they are relevant.

HEARING

10. A hearing took place before me, via video conference, on 3 October 2024, attended by both parties. Mr John Eldridge of Counsel, Serle Court, appeared for the CA. Ms Becky Knott of Counsel, Hogarth Chambers, appeared for the RP. I will not repeat the parties' Skeleton Arguments or oral submissions here, but will refer to them, as appropriate, in my decision.

RELEVANCE OF EU LAW

11. 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.

The relevant legislation

12. Section 46 of the Act states:

‘46. - (1) The registration of a trade mark may be revoked on any of the following grounds-

(a) that within the period of five years following the date of completion of the registration procedure it has not 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, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c) […]

(d) […]

(2) For the purpose of subsection (1) 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 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.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as in referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

> Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) […]

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from-

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.'

13. Given that the Contested Mark is a comparable mark, the following provisions of Schedule 2A, Part 1 of The Trade Marks (Amendment etc.) (EU Exit) Regulations 2019 are relevant:

'**8.**—(1) Sections 11A and 46 apply in relation to a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the period of five years referred to in sections 11A(3)(a) and 46(1)(a) or (b) (the "five-year period") has expired before IP completion day—

(a) the references in sections 11A(3) and (insofar as they relate to use of a trade mark) 46 to a trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in sections 11A and 46 to the United Kingdom include the European Union.

(3) Where IP completion day falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day—

(a)the references in sections 11A(3) and (insofar as they relate to use of a trade mark) 46 to a trade mark, are to be treated as references to the corresponding EUTM ; and

(b)the references in sections 11A and 46 to the United Kingdom include the European Union.'

14. Section 100 of the Act provides that:

'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.'

The relevant case law

15. 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 Court of Justice of the European Union ('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].'

16. 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.

17. When considering the matter of genuine use of a comparable EU trade mark prior to and including IP Completion Day (31 December 2020), use in the EU remains relevant.[4] In this regard, I bear in mind the guidance laid down by the CJEU in the case of *Leno Merken BV v Hagelkruis Beheer BV.*[5]

[4] Kerly's Law of Trade Marks and Trade Names, 17th Ed., [12-073].
[5] Case C-149/11, at [36], [50] and [55].

Relevant Periods

18. The First Relevant Period has already been defined (above at [3]). I repeat it here for ease of reference: 27 October 2015 to 26 October 2020.

19. Section 46(3) of the Act prevents revocation of a mark pursuant to sections 46(1)(a) or (b) if use of the mark in question commenced or resumed *after* expiry of the fiver-year period but *before* the revocation action is lodged. The RP has filed evidence, intended to demonstrate use, which post-dates the First Relevant Period and precedes the filing of the revocation claim. I, therefore, remind myself of the proviso at section 46(3), according to which: should the aforementioned commencement/resumption occur within the three months prior to the filing of the revocation action, then such use is to be disregarded, unless preparations for the commencement/resumption began before the RP became aware of the impending action.[6]

20. As already noted, the revocation action was instituted without notice: it was filed on 8 December 2022. Consequently, should any use be shown in the five years preceding this date, any use up to and including 7 December 2022 may be taken into account. The relevant five-year period in this regard is, therefore, 8 December 2017 to 7 December 2022 ('the Second Relevant Period'). At the start of the hearing, I indicated that I would presume that the RP first had notice of the revocation proceedings on 14 December 2022, being the date upon which the action was served. I then gave the parties to understand that I proposed to look at evidence of use up to 13 December 2022. However, upon review of section 46(3) of the Act, I note the explicit reference to the date of the application for revocation. This indicates that the Second Relevant Period must end on the day preceding the CA's filing of the revocation action, rather than the date on which the RP had actual notice of it. My erroneous calculation of the Second Relevant period at the time of the hearing is hereby acknowledged. In the event, however, this oversight is of no real consequence.

[6] Kerly's Law of Trade Marks and Trade Names, 17th Ed., [12-095].

21. Overall, the period to be considered is 27 October 2015 to 7 December 2022.

Relevant territories

22. The relevant territories for assessing genuine use are as follows:

i. The entirety of the First Relevant Period pre-dates IP Completion Day.[7] The relevant territory is, therefore, the EU (which will necessarily include the UK, then an EU Member State).

ii. EU use is relevant for the portion of the Second Relevant Period up to and including 31 December 2020. From 1 January 2021 to 7 December 2022, only UK use may be taken into account.

Concessions and the scope of the revocation action

CA's concessions regarding use:

23. The revocation action was initially directed to the RP's specification in its entirety. The CA amended its position a short time before the hearing, by way of conceding that the Contested Mark had been put to genuine use as follows:[8]

Class 1: *Chemicals used in industry; Chemical, biochemical and/or biotechnological preparations used in science; Enzymes for industrial purposes; Enzyme preparations for industrial purposes; Biochemical catalysts*

24. I note the following from Ms Knott's Skeleton Argument:

'[19] The Applicant has conceded, in its written submission, that the Proprietor has put the Mark to genuine use for chemical products […]. As a result, the

[7] 31 December 2020.
[8] CA's Skeleton Argument, at [1] and [6].

Proprietor understands that the Applicant has conceded the Cancellation Action for all goods in Class 1 other than "*Carbonic hydrates; Starch for industrial purposes; Artificial sweeteners; Emulsifiers; Unprocessed plastics; Adhesives used in industry".*'

25. The submission of the CA to which Ms Knott is referring is as follows:[9]

'[20] The Proprietor's evidence of use only supports that it has supplied chemical products to UK based companies (goods falling under Class 1).'

26. I respectfully disagree with the inference that the RP has drawn from the CA's submission. To my mind, the CA's submission is to be read as an argument that, where the evidence features goods supplied to UK-based companies, those goods fall within Class 1 of the Nice Classification System ('the Nice System'), rather than Class 5. I do not consider the CA's submission to go so far as to say that the evidence has demonstrated use for all of the Class 1 goods in respect of which the Contested Mark is registered. In my view, this construction is borne out by Mr Eldridge's main arguments, which will be addressed later in this decision (from [65]).

RP's concessions regarding <u>non-use</u>:

27. The RP has conceded non-use of the Contested mark for the following terms:[10]

Class 1: *Starch for industrial purposes; Unprocessed plastics; Adhesives used in industry.*
Class 5: *Adjuvants for medical purposes; Appetite suppressants for medical purposes; Medical preparation for slimming purposes; Constipation (Medicines for alleviating -); Laxatives; Dietetic preparations adapted for medical use; Diabetic bread; Dietetic beverages adapted for medical purposes; Dietetic substances*

[9] CA's written submissions of 7 August 2023, [20].
[10] RP's Skeleton Argument, at [20].

adapted for medical use; Dietetic foods adapted for medical use; Infant formula; Edible plant fibres; Additives to fodder for medical purposes; By-products of the processing of cereals for medical purposes; Cellulose esters for pharmaceutical purposes; Capsules for medicines; Capsules for pharmaceutical purposes; Dietetic beverages adapted for medical purposes; Beverages adapted for medicinal purposes; Disinfectants; Dental impression materials; […] veterinary preparations; Enzymes for veterinary purposes;* Enzyme preparations for veterinary purposes;* Bacterial production strains for veterinary use;* Cultures of micro-organisms for veterinary purposes;* Ferments for veterinary use*.* *During the hearing, Ms Knott submitted that the RP conceded non-use of the Contested Mark in respect of these terms.
Class 42: *Technical and scientific consultancy and support in the field of […] genetic technology, including via communications media, including the internet; Technical and scientific consultancy and support with regard to the introduction of […] genetic technology preparations and products.*

Goods and services for which the revocation action remains 'live':

28. The goods and services for which the revocation action remains 'live' are as follows:

Class 1: *Chemical, biochemical and/or biotechnological preparations used in photography; Chemical, biochemical and/or biotechnological preparations used in agriculture; Chemical, biochemical and/or biotechnological preparations used in horticulture; Chemical, biochemical and/or biotechnological preparations used in forestry; Chemical, biochemical and/or biotechnological preparations for preserving foodstuffs; Chemical, biochemical and/or biotechnological preparations for conserving foodstuffs; Chemical, biochemical and/or*

biotechnological preparations for making foods and foodstuffs; Chemical, biochemical and/or biotechnological preparations for making beverages; Chemical, biochemical and/or biotechnological preparations for cosmetic purposes; Chemical, biochemical and/or biotechnological preparations for making hair and/or body care preparations; Chemical, biochemical and/or biotechnological preparations for making pharmaceutical preparations and/or medicines; Carbonic hydrates; Artificial sweeteners; Emulsifiers.
Class 5: *Pharmaceutical […] preparations; Nutritional supplements; Nutritional supplements;*[11] *Starch for dietetic or pharmaceutical purposes; Healthcare preparations; Biotechnological preparations and products, namely proteins, enzymes for medical use; Enzyme preparations for medical purposes; Bacterial production strains for medical use;; Micro-organism cultures for medical use; Ferments for pharmaceutical purposes; Mediums (Bacteriological culture -).*
Class 42: *Science and technology services; Research and services relating thereto; Industrial analysis and research services; performance of chemical analyses; Biological research; Chemical, pharmaceutical, biotechnological and/or genetic technology laboratories; Technical and scientific consultancy and support in the field of chemistry, pharmacy, biotechnology […] including via communications media, including the internet; Technical and scientific consultancy and support with regard to the introduction of chemical, pharmaceutical, biotechnological […] preparations and products; Research and development (for others).*

The RP's evidence

29. Ms Knott's preliminary oral submission i. alerted the Registrar to a number of errors in the referencing of the CA's evidence; and ii. made an oral request for redactions from content within Exhibit MD26. These are recorded in the hearing transcript.[12]

[11] This term is duplicated in the registered specification.
[12] At pages [24] to [26].

A general comment on the RP's evidence

30. Much of the evidence filed is highly technical and I have been given very little assistance by the RP as to how it is to be interpreted. I do not profess to be an expert in the field in which the RP operates, which renders the evidential assessment somewhat difficult. I will, therefore, summarise the evidence to the extent that I deem it necessary to do so. I take this approach because there are some exhibits that are so technical, that their probative value is not obvious to me. Further, some exhibits are in a foreign language, and others do not appear to target a relevant territory. For the avoidance of doubt, I confirm that I have given due consideration to the entire body of evidence.

31. At the beginning of the hearing, I requested that Ms Knott structure her submission in such a way that, for each exhibit, she explained what it was intended to demonstrate and how it bolstered the RP's case.

32. I note the following from the RP's evidence:

a) Ms Döring has given narrative evidence that the RP is the European Subsidiary of a company called Advanced Enzyme Technologies Ltd ('the Parent Company').[13] The RP is described as a globally active biotechnology company with a 'product portfolio of enzymatic solutions for human nutrition, animal nutrition, bio-processing, and for the pharma industry'.[14]

In Döring 1, the RP's goods offering is said to include the following:

> The RP's own enzyme products, as well as selected products from the Parent Company;[15]
> [T]ransaminases, alcohol hydrogenases, and lipases for biocatalytic processes e.g. in production of pharmaceutical intermediates and active ingredients but also flavours and fragrances, fine chemicals and […] food products.'[16]

[13] First Witness Statement of M. Döring, [7].
[14] As above, [8].
[15] First Witness Statement of M. Döring, [11].
[16] As above, [12].

The services said to be provided by the RP are as follows:

> [Providing] research and development services with respect to enzymes and biocatalytic processes to various industry partners, including the food industry, personal health care and cosmetics industry, pharmaceutical industry, and chemical industry.'[17]

(b) The following revenue figures have been provided:

i. Döring 1 and Döring 2 include the following table showing the RP's revenue worldwide, although the portion of the First Relevant Period from 27 October 2015 to March 2018 is not covered.[18]

Financial Year	**Revenue**
04/2018 – 03/2019	2.048.077,85 EUR
04/2019 – 03/2020	3.408.576,04 EUR
04/2020 – 03/2021	3.296.915,41 EUR
04/2021 – 03/2022	2.566.412,15 EUR
04/2022 – 03/2023	Approx. 2.9 million EUR (Döring 2 provides the precise figure of 3.027.180,50 EUR)

ii. Döring 2 includes the following table with a breakdown of the global figures to show sums referable to EU Member States and the UK, in € EURO:

Financial Year	**Total revenue worldwide**	**thereof revenue in the EU**	**thereof revenue in the UK**
04/2018 – 03/2019	2,048,077,85	573,081	82,535
04/2019 – 03/2020	3,408,576	1,336,833	336,401
04/2020 – 03/2021	3,296,915,41	1,147,344	174,105
04/2021 – 03/21022 [sic]	2,566,412	1,047,259	34,179

[17] First Witness Statement of M. Döring, [9].
[18] First Witness Statement of M. Döring, [14]; Second Witness Statement of M. Döring, [8].

It is not clear why the RP has not specified the UK revenue in respect of the global figure provided for the period 04/2022 – 03/2023 in the bottom row of table i. It would have been helpful to see the figures for the portion of the Relevant Period between April and December 2022. A breakdown of the figures to show the sums referable to particular goods/services sold under the Contested Mark would also have been helpful.

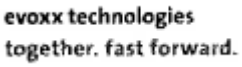
(c) Exhibits MD-1 to MD-12 to Döring 1 comprise documents relating to an order for a product '(S,S)-2,3-Butanediol', from which I note the following:[19]

i. a mark in the following form appears prominently in the header of ten of the documents:

('the Figurative Mark')

and

the following text is in the left hand side of the header, for each of the ten aforementioned documents:



ii. An 'Order Confirmation', dated 7 February 2020, indicates an 'order date' of 22 January 2020, for the following to be delivered to an address in Birmingham, UK, with an order number of 4503836227:[20]

100,000 kg of:

'**evo-3.1.024**

(S,S)-2,3-Butanediol

[19132-06-0]

Spec.: chem. purity >=99 %, *ee* >=98 %'

[19] First Witness Statement of M. Döring, [17].
[20] Exhibit MD-1.

[original emphasis]

The ‘total price’ is quoted as 143.000,00 €.

iii. Two invoices, dated 7 February 2020, and 29 April 2020, respectively, each itemise 50,000 kg of the ‘(S,S)-2,3-Butanediol’ product, with each showing a total price of 71.790,00 €.[21]

iv. Two ‘Certificate of Analysis’ for (S,S)-2,3-Butanediol, dated 15 July 2020, and April 2022, respectively.

v. there are two delivery notes, dated 15 July 2020, and 29 April 2020, respectively, each for delivery of 50,000 kg of (S,S)-2,3-Butanediol.[22]

vi. two packing lists, dated 15 July 2020, and 27 April, respectively, detail the weight and dimensions of each of the two deliveries making up the order.[23]

vii. a shipping label bearing a courier’s branding indicates that the goods are to be dispatched from Germany and delivered to a UK address.[24]

viii. It is clear that the aforementioned documents relate to the same order because they quote the same order number and date when the order was placed.

(d) A document headed ‘Safety Data Sheet’ for ‘(2S,3S)-2,3-Butanediol’ has been provided, detailing, inter alia, various safety measures, the composition of the substance and its toxicological profile.[25] The Figurative Mark (which is not a representation of the Contested Mark as registered) is shown clearly and prominently in the header. The document shows a ‘Revision Date’ and ‘Print Date’ of 27 May 2019.

(e) Exhibits MD-13 to MD-17 relate to an order placed by a US-based company for a product referred to as ‘Lipase 140’.[26] Each document bears the Figurative Mark and plain text reference to ‘evoxx technologies’ in its header, as noted above at [36(c)i.].

[21] First Witness Statement of M. Döring, [17]; Exhibits MD-2 and MD-8.
[22] Exhibit MD-4.
[23] Exhibit MD-6.
[24] Exhibit MD-7.
[25] Exhibit MD-11.
[26] First Witness Statement of M. Döring, [17].

i. An ‘Order Confirmation’, dated 28 October 2020, for an order placed on the same date, for the following to be delivered to an address in the USA, with an order number of 8502784509:[27]

1,00 g of:

‘**evo-1.3.140.S**

Lipase 140

Lyophilized powder, activity >= 43 U/100 mg’

[original emphasis]

The ‘total price’ is quoted as 1.450,00 €.

ii. An invoice, dated 9 November 2020, which can be reconciled with the above based on the order number and order date, has been provided.[28]

iii. A commercial invoice, for the same transaction, has also been provided.[29] It is my understanding that a ‘commercial invoice’, often referred to as an ‘export invoice’, is a document required for any consignment of goods to be exported. The country of the goods’ origin is noted as Germany.

iv. A Certificate of Analysis, dated 2 November 2020, has been provided for Lipase 140.[30]

v. Exhibit MD-17 is introduced in Döring 1 as ‘a safety data sheet for the product Lipase shipped under the invoice MD-13’.[31] The document is titled ‘Safety Data Sheet according to regulation (EC) No. 1907/2006’, and the product named is ‘Lipase 140’. The intended usage of this product is noted as: ‘PROC4: Use in batch and other process (synthesis) where opportunity for exposure arises’. The document indicates that the various standards with which the product is shown to comply are prescribed by instruments of EU law, by way of references to particular EU Directives and Regulations. It is not clear how this document is used or to whom it is directed. It may be for

[27] Exhibit MD-13.
[28] Exhibit MD-14.
[29] Exhibit MD-15.
[30] Exhibit MD-16.
[31] First Witness Statement of M. Döring, [17]; Exhibit MD-17.

internal use by the RP's employees, by way of manual, for example. On the other hand, it may be aimed at the RP's customers; in which case I am unable to ascertain whether a copy of this document was shipped with the particular consignments of 'Lipase' to which the invoices relate, or, perhaps, provided at the point of placing the order. It may even be that this document is part of a catalogue for customers to consult. Either way, based on the evidence provided, I simply cannot tell.

(f) Exhibit MD-18 is described by Ms Döring as follows:

'[…] an information flyer from the alcohol dehydrogenase kit. The evoxx Alcohol Dehydrogenase Kit comprises 18 lyophilized preparations of different alcohol dehydrogenases (ADH) or prokaryotic and eukaryotic origin. It is intended for quick screening for a desired enzyme activity and supports selection of the right biocatalyst for the synthesis of chiral alcohol. This product features on goods falling under Class 5 of the Registration. The flyer was distributed to clients around the world, including the UK, since 2016 and still today'.[32] I note the following:

i. The document it undated, save for a handwritten annotation 'Distributed 2016'. In my view, if a publication is said to have been distributed since 2016 to the UK and internationally, then it would unlikely have been particularly onerous for the RP to have adduced contemporaneous examples of the publication being shown to be available to customers in the UK and/or other geographical locations. No dated examples have been provided. No detail has been provided as to how this material was disseminated; where it was made available; the scale of its distribution; where, if at all, it was published. If the document was made available online, then archived copies of web-pages would have been useful.

ii. Text on the first page indicates that the RP offers '[a] Screening Service and Enzyme Requests' and 'screening projects as a service'. Prospective users of the service are told 'Send us your compound – we will test all our ADHs (kit-enzymes plus a number of additional ones) for best performance towards your target molecule.'

[32] First Witness Statement of M. Döring, [17].

(g) Exhibit MD-19 is described in Döring 1 as the manual to the above-mentioned alcohol dehydrogenase kit, said to have been distributed to 'clients around the world, including the UK, since 2016 and still today'.[33] The document is undated, save for a handwritten annotation 'Distributed 2016'. The Figurative Mark and plain text reference to 'evoxx' are present in the header, as described earlier for previous documents. The content of the manual is highly technical and almost wholly beyond my comprehension as a lay person. However, the manual lists the contents of the Alcohol Dehydrogenase Kit as including a copy of the manual.

(h) A commercial invoice has been provided for the goods 'Alcohol Dehydrogenase KR051-1683, technical enzyme preparation, dry, not restricted, storage temperature: -20ºC'.[34] The invoice is dated 26 February 2021. It is billed to a customer in the USA, although the 'Receiver of goods' is located in Kent in the UK. The sum payable is 17.500,00 €. I am unable to determine whether the product to which this invoice relates is an instance of the Alcohol Dehydrogenase Kit referred to in Exhibits MD-18 and MD-19, or merely a quantity of the mere substance. If this were a clear example of a sale of an Alcohol Dehydrogenase Kit, then I might have been able to infer that a copy of the manual (which bears the Contested Mark) had reached UK soil.

(i) A Certificate of Analysis, Safety Data Sheet and Packing List (dated 1 March 2021, 25 February 2021 and 24 February 2021, respectively) have been provided for the purchase of alcohol dehydrogenase to which the invoice addressed at (h) relates.[35] The Safety Data Sheet sets out the intended usage as follows:

> 'PROC4: Use in batch and other process (synthesis) where opportunity for exposure arises'.

(j) An order and corresponding invoice, dated 10 November 2020 and 2 February 2021, respectively, have been provided in respect of the following, delivered to Kent, UK:[36]

> '**evo-8.1.030**
>
> WP 4 – Enzyme Production

[33] First Witness Statement of M. Döring, [17]; Exhibit MD-19.
[34] Exhibit MD-22.
[35] Exhibit MD-23.
[36] Exhibits MD-20 and MD-21.

Production at 1 kg-scale lyophilized enzyme'

The sum payable is 17.500,00 €. 15 January 2021 is given as the date of earliest shipment, together with a note advising that the shipping date is 'conditional on timely feedback regarding previous sample [REDACTED]'. It is my understanding that 'lyophilize' means 'freeze-dry'.[37] According to Döring 1, the 'development and production' of the aforementioned enzyme is a service within Class 42 of the Nice System.[38] I agree that the offering to which the order and invoice relate is likely a service rather than mere goods.

(k) A document labelled as 'Customer Presentation 2022' has been provided in which the Figurative Mark features prominently, as well as numerous plain text instances of 'evoxx'.[39] Ms Döring has given narrative evidence that this presentation was 'viewed by customers around the world, including in the UK'.[40] No information has been provided on: the particular dates when the presentation was delivered, or its mode of delivery (e.g. in person at physical events, or online); the number of attendees and their geographical territories; or the number of sales generated as a result. I am unable to determine when in 2022 this presentation was delivered and cannot, therefore, ascertain whether it was used in the period up to and including 7 December 2022. The content of the document indicates that the RP's commercial offering is mainly focused on enzymes, whether by way of sales of enzymes, or enzyme-related research and development. The presentation includes general statements on the 'worldwide' geographical breadth of the RP's customer base and emphasises its 'track record […] with global market or technology leaders in their sector'. European custom is mentioned. Clear examples of the provision of goods/services to particular countries or Member States would have been helpful.

The presentation attributes to the RP the following facilities/capabilities and processes:

i. the development, engineering and 'improvement' of enzymes;

[37] Oxford English Dictionary (online version), accessed 10 December, at 09:44 GMT.
[38] First Witness Statement of M. Döring, [17].
[39] Exhibit MD-25.
[40] First Witness Statement of M. Döring, [17].

ii. a ‘Metagenomic library’, which appears to be some sort of repository of known enzymes against which samples of potentially novel enzymes can be screened for novelty for the purpose of patent applications;

and

iv. a process called ‘chiral synthesis’, according to which chemical compounds of a certain type (e.g. alcohols) are converted into chemical compounds of another type (e.g. alcohol dehydrogenases).

(l) A press release, dated 30 June 2022, bearing the Figurative Mark in its header, chronicles the RP entering into a partnership with a cosmetics company.[41]

i. Ms Döring has given narrative evidence that this was sent to customers of both the RP and the company in the partnership ‘around the world, including the UK’.[42] Text indicating that the RP ‘offers a comprehensive portfolio of enzymatic solutions for human nutrition, animal nutrition, bioprocessing, and pharma industries’ and that it ‘offers its technology platform world wide […]’ has been highlighted.

ii. Döring 2 adds that the press release ‘was attached to an email which was sent to a large distribution list of our customers in the UK and EU’ and introduces copies of three online articles intended to demonstrate that it was ‘picked up by various third party publications in the UK and EU. [43] The first article, titled ‘Symrise and evoxx confirm cosmetic ingredient partnership’, is dated 5 July 2022 and from the site ‘NutraIngredients Europe’. The second article, titled ‘evoxx technologies enters into strategic partnership with Symrise Cosmetics Ingredients’, is undated, and from the site ‘BIO NRW’. The third article, titled ‘Symrise Partners with Biotech Company to Advance Beauty Ingredients’, is dated 30 June 2022, and features the American-English spelling ‘flavor’. I am unable to determine whether the final article was seen by UK consumers. No detail has been provided as to the scale or geographical spread of readers of this material. These articles are clearly directed to English-

[41] Exhibit MD-25.
[42] First Witness Statement of M. Döring, [17].
[43] Second Witness Statement of M. Döring, [12]; Exhibit MD-36 (see note on errata at paragraph [32] of this decision).

speaking consumers. However, in the absence of any detail as to the scale or geographical spread of the distribution of its readers, it is of limited assistance.

(m) Copies of three 'Services Agreements' have been provided, said to relate to the Class 42 services in respect of which the Contested Mark stands registered. The RP is named as the 'Service Provider' in each. The pertinent details of each contract are summarised as follows:[44]

i. Services Agreement with effective date of 20 February 2019[45]

This signed agreement is to provide the following service to a party [name redacted] based in the USA:

'The development of a fermentation process, its optimization and scale up for the production of a transaminase and a D-amino acid oxidase (D-AAO)'.[46]

The RP's expertise in the 'development and deregulation of enzymes for food uses' is detailed under the sub-heading 'Object of the proposal'.[47]

The price for the services delivered under the agreement is 192.500 €.

The RP's Figurative Mark appears prominently and consistently throughout the proposal document.

ii. Services Agreement signed by the respective parties thereto on 5 and 7 March 2019[48]

This signed agreement is to provide the following service to a party [name redacted] based in Switzerland:

'Production of the following Fibermalt (alternan oligosaccharides) ingredients:- Fibermalt […]'[49]

The objective of the project is 'to assess the above mentioned ingredients in humans for their digestibility and impact glucose response by [REDACTED]'.[50]

[44] Exhibits MD-26, MD-27 and MD-28.
[45] Exhibit MD-26.
[46] Exhibit MD-26, page 9 of 11, of the 'Proposal' appended to the contract document.
[47] Exhibit MD-26, page 3 of 11, of the 'Proposal' appended to the contract document.
[48] Exhibit MD-27.
[49] Exhibit MD-27, 'Exhibit A'.
[50] As above.

The RP's Figurative Mark appears prominently in the header of the Appendix to the contract document, titled 'Example of Certificate of Analysis'.[51] I note that the 'example certificate' bears a date, although the resolution of the text is poor; the date is either 2012 or 2017.[52]

iii. Services Agreement with effective date of 20 June 2019[53]

This signed agreement has been redacted to the extent that I am unable to discern: the service to be provided; the territory of the party to whom the service is to be provided; or the agreed price. Ms Döring has given narrative evidence that the agreement is with 'a US company relating to the production of Fibermalt (an alternan oligosaccharides)', an enzyme.[54] However, this information cannot be gleaned from the exhibit itself.

(n) Excerpts from the RP's website, www.evoxx.com, have been provided, in which the Figurative Mark appears prominently and consistently. Eight examples have been provided. Five of the examples are 'Wayback' prints[55] for the following dates: 15 October 2015, 20 January 2017, 2 April 2018, 5 January 2019 and 15 February 2020. I am unable to ascertain the precise dates of the remaining three examples, albeit the references to the RP's (at the time) forthcoming attendance at 'Fi Europe', a trade fair in Paris 3 – 5 December 2019 and the RP's strategic partnership with Symrise, which was announced in 2022, likely place the material within the relevant periods. All of the material is in English, indicating that English-speaking markets are targeted. However, it is not possible to determine whether these webpages were directed to the UK market. The products and processes featured in the web pages indicate a main focus on enzymes. Items listed under 'products' include, inter alia: transaminases; alcohol dehydrogenases; and lipases. I note that the aforesaid goods are listed under the web pathway 'products/biocatalysis'. Products listed under 'Human Nutrition' are: Serratiopeptidase; Nattokinase; Saccharomyces Boulardii; and Bromelin. Other products featured are 'alternate', described as 'zero-calorie replacement for fat and sugar, and 'MAOS', described as a 'slowly digestible carbohydrate'. The RP has not

[51] Exhibit MD-27, 'Appendix'.
[52] Exhibit MD-27, 'Appendix'.
[53] Exhibit MD-28.
[54] First Witness Statement of M. Döring, [17].
[55] Archived web pages retrieved by the web archiving service, The Wayback Machine.

sought to explain what these products are. As to the RP's offering by way of services, these include, inter alia: 'discovery of new enzymes' and 'enzyme engineering'. Other activities listed under 'services' are: 'Strain Development'; 'Process Development – Bioconversion'; 'Analytics and Characterization'; and 'Technology transfer and scale-up'. An explanation from the RP as to what these activities are would have been helpful.

(o) The RP's 'annual financial statement […] for the period of 1 April 2020 to 31 March 2021' has been provided. I consider this material unnecessary given that sales figures have already been provided, and I shall say no more about it.

(p) A number of invoices has been provided, each invoice bearing the Figurative Mark in the header (some of which are accompanied by, variously: Certificates of Analysis, delivery notes, packing lists, safety data sheets, purchase orders). [56]

Date:	Description of good/service purchased; and territory delivery address:	Sum due €:
30/01/17	'Work Package "Patent Maintenance" Patent Fees and Maintenance Patent Families AL, BCS 07-5003, BCS 08-5005, 08-5006 and 08-5001 for period 07-12 2016'. Delivery to East Yorkshire, UK.	18.172,30
14/08/17	As above, for period 01-06 2017	34.163,19
22/01/18	As above, for period 07-12 2017	15.811,12
5/07/18	As above, for period 01-06 2018	33.035,44
30/04/19	As above, for period 07-12 2018.	5.397,94
28/06/19	As above, for period 01-06 2019.	33.644,55
31/12/19	As above, for period 07-12 2019.	10.091,37
31/07/21	As above, for period 12/2020 – 06/2021.	20.985,92
31/12/21	As above, for period 07/2021 – 12/2021.	13.192,64
30/06/22	As above, for period 01/2022 - 06/2022	22.820,13
31/01/23	As above, for period 07/2022 – 12/2022	6.899,19

[56] Exhibits MD-34 and MD-37.

13/10/16	20,000 kg of (S,S)-2,5-Hexanediol (unit price 1.195,00). Delivery to Cambridge, UK.	24.075,00
20/01/17	20,000 kg of (S,S)-2,5-Hexanediol (unit price 1.230,00). Delivery to Cambridge, UK.	24.750,00
29/10/17		24.750,00
16/03/17		24.750,00
25/04/17		24.750,00
10/10/17	Goods as above. Delivery to West Yorkshire, UK.	24.750,00
1/12/17 (x2 orders)	Goods above, for each of the two invoices. Delivery to Cambridge, UK.	24.750,00 24.750,00
12/12/17	Goods, as above. Delivery to West Yorkshire, UK.	24.750,00
5/06/18		24.750,00
24/04/19	7,000 kg of (S,S)-2,5-Hexanediol (unit price 1.230,00). Delivery to Cambridge, UK.	8.705,00
28/05/19	Goods as above. Delivery to West Yorkshire, UK	8.705,00
29/05/19	40,000 kg of (S,S)-2,3-Butanediol (Unit price 1.450,00) Delivery to Birmingham, UK.	58.290,00
3/06/19		58.290,00
30/07/19	10,00g of Alcohol Dehydrogenase 200 NAD-dependent Lyophilized powder. Delivery to Germany.	2.713,20
22/06/21	‘Alcohol Dehydrogenase Kit 18 Alcohol Dehydrogenases (0.1g each) for your chiral synthesis […]’. Delivery to Belgium.	1.540,00
21/03/23	0,0001 kg of Alcohol Dehydrogenase 030 NAD-dependent Lyophilized powder. Delivery to Belgium.	910,00

(q) Exhibit MD-35 comprises a document referred to as an affidavit. However, it is not an affidavit as prescribed by Practice Direction 32 ('PD 32') of the CPR.[57] Given that the content does not add anything that is not already included elsewhere in evidence, I do not consider it to have probative value anyway.

(r) A scientific paper, dated 2019, titled 'Simultaneous Prediction of Cosolvent Influence on Reaction Equilibrium and Michaelis Constants of Enzyme-Catalyzed Ketone Reductions', together with extracts from a doctoral thesis and a student's dissertation, have been exhibited to Döring 2. [58] There is no accompanying narrative to identify how these are intended to assist the RP's case. During the hearing, Ms Knott acknowledged this omission, and submitted that the material was nevertheless relevant. I summarise her submission here:

i. It was argued that the reference in the scientific paper to 'enzyme-catalyzed reactions […] for deeper understanding of *in cellulo* reaction conditions' indicated that the article was concerned with the impact of a reaction inside a cell, whether human or animal. Ms Knott argued that this, therefore, indicated that enzyme-catalyzed reactions are capable of being used in a medical or pharmaceutical environment.

ii. Later in the scientific paper, under the section 'Materials and Methods', there is the following statement: 'The genetically modified alcohol dehydrogenase (ADH 270) was obtained from evoxx technologies'.

iii. Ms Knott directed me to the excerpt from the thesis, dated 2021, and highlighted the following statement: '[…] the other enzymes found in the work are commercially available: the alcohol dehydrogenases were part of [sic] kit from Evoxx kit […]'.

iv. Ms Knott submitted that the foregoing demonstrated that the RP's mark had been used in respect of alcohol hydrogenases, which are a type of enzyme.

v. Further, Ms Knott submitted that the reference to 'lipases' in the context of the 'enzymes exploited for this [thesis] work' demonstrated that 'lipase' was an example of an enzyme.

[57] First Witness Statement of M. Döring, [17].
[58] Second Witness Statement of M. Döring, [13]; Exhibit MD-38.

vi. The following references have been highlighted in the extract of the dissertation, dated 9 June 2020:

- ‘Lyophilized ADH-R was provided by evoxx’
- ‘ADH-R lyophilizate (obtained from evoxx technologies[…])’
- ‘Lyophilisate of ADH-R was provided by […] evoxx’.
- ‘Two oxidoreductases, a laccase from Trametes versicolor (TvL) and ADH-R (provided by evoxx), were identified as new biocatalysts […]’

It is presumed that this is intended to demonstrate instances of chemical compounds having been purchased from the RP. However, I note that the author of the dissertation is based in ‘Karschi, Usbekistan’ (which I presume to be the domestic spellings for Qarshi and Uzbekistan, the city and country in Central Asia), which suggests that such purchases were outwith the relevant geographical territories.

The matter of variant use

33. As noted, the evidence includes many instances of the following Figurative Mark:

34. The Contested Mark is a word mark. It is, therefore, necessary for me to determine whether the Figurative Mark amounts to acceptable use of the Contested Mark.

35. For ease of reference, I reproduce the relevant provision under section 46 of the Act here:

‘(2) For the purpose of subsection (1) 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 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.'

36. The correct approach to the test under section 46(2) of the Act is set out in the case of *Lactalis McLelland Limited v Arla Foods AMBA,*[59] by Phillip Johnson, sitting as the Appointed Person:

'13. […] While the law has developed since *Nirvana* [BL O/262/06], the recent case law still requires a comparison of the marks to identify elements of the mark added (or subtracted) which have led to the alteration of the mark (that is, the differences) (see for instance, T-598/18 *Grupo Textil Brownie v EU*IPO*, EU:T:2020:22, [63 and 64]).

14. The courts, and particularly the General Court, have developed certain principles which apply to assess whether a mark is an acceptable variant and the following appear relevant to this case.

15. First, when comparing the alterations between the mark as registered and used it is clear that the alteration or omission of a non-distinctive element does not alter the distinctive character of the mark as a whole: T-146/15 *Hypen v EUIPO*, EU:T:2016:469, [30]. Secondly, where a mark contains words and a figurative element the word element will usually be more distinctive: T-171/17 *M & K v EUIPO*, EU:T:2018:683, [41]. This suggests that changes in figurative elements are usually less likely to change the distinctive character than those related to the word elements.

16. Thirdly, where a trade mark comprises two (or more) distinctive elements (eg a house mark and a sub-brand) it is not sufficient to prove use of only one of those distinctive elements: T-297/20 *Fashioneast v AM.VI. Srl*, EU:T:2021:432, [40] (I note that this case is only persuasive, but I see no reason to disagree with it). Fourthly, the addition of descriptive or suggestive words (or it is suppose [sic] figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS

[59] Case BL O/265/22.

registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*, EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).

17. It is also worth highlighting the recent case of T-615/20 *Mood Media v EUIPO*, EU:T:2022:109 where the General Court was considering whether the use of various marks amounted to the use of the registered mark MOOD MEDIA. It took the view that the omission of the word "MEDIA" would affect the distinctive character of the mark (see [61 and 62]) because MOOD and MEDIA were in combination weakly distinctive, and the word MOOD alone was less distinctive still.

37. The definition of a word mark was set out in *LA Superquimica v EUIPO*, Case T-24/17, at paragraph [39]:

'[…] it should be noted that a word mark is a mark consisting entirely of letters, words or groups of words, without any specific figurative element. The protection which results from registration of a word mark thus relates to the word mentioned in the application for registration and not the specific figurative or stylistic aspects which that mark might have. As a result, the font in which the word sign might be presented must not be taken into account. It follows that a word mark may be used in any form, in any colour or font type (see judgment of 28 June 2017, *Josel* v *EUIPO — Nationale- Nederlanden Nederland (NN)*, T-333/15, not published, EU:T:2017:444, paragraphs 37 and 38 and the case-law cited).'

38. I also note that, in *Adidas AG v EUIPO* Case T-307/17, the General Court ('GC') found that:

'…contrary to what the applicant claims, it must be held that, where a trade mark is extremely simple, even minor alterations to that mark may constitute significant changes, so that the amended form may not be regarded as broadly equivalent to the mark as registered. Indeed, the simpler the mark, the less

likely it is to have a distinctive character and the more likely it is for an alteration to that mark to affect one of its essential characteristics and the perception of that mark by the relevant public (see, to that effect and by analogy, judgment of 13 September 2016, Representation of a polygon, T-146/15, EU:T:2016:469, paragraphs 33 and 52 and the case-law cited).'

39. Although the above-mentioned finding by the GC concerned the use of a simple three stripe trade mark, which was claimed to have acquired a distinctive character through use, the finding is considered relevant to assessments of whether use of an extremely simple trade mark with minor alterations constitutes genuine use of the mark.

40. I set out the representations to be compared:

Figurative Mark:	Contested Mark as it appears on the register:
	evoxx

41. I must first consider the distinctiveness of the Contested Mark 'evoxx' and how that distinctive character arises. I find that the Contested Mark will be perceived as an invented word, to which no meaning will attach beyond the narrow concept of a string of characters in the sequence 'e-v-o-x-x'. The mark will likely be articulated as 'EE-VOX'. I find that the distinctive character of the mark resides in the sequence of characters 'e-v-o-x-x'.

42. The Figurative Mark comprises the same sequence of characters. The only visual differences are: the gradual 'fading' effect in the characters 'e-v-o'; and the greater relative size and slight stylisation of the 'X-X', the aforesaid features present in the Figurative Mark and absent from the Contested Mark. To my mind, these visual differences do nothing to disturb the distinctive character of the Contested Mark.[60]

[60] *Lactalis McLelland Limited v Arla Foods AMBA,* Case BL O/265/22, [15].

I find that the figurative aspects do not alter the perception of the Figurative Mark beyond the narrow concept conveyed by the Contested Mark, i.e. the mere sequence of characters 'e-v-o-x-x'. I find that, for each presentation, the distinctive character arises in the same way. I, therefore, find the Figurative Mark to be an acceptable variant of the Contested Mark as registered.

Assessment of genuine use

43. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.[61] I note the following dicta on the matter of sufficient use:[62]

> '[53] In order to examine whether use of an earlier mark is genuine, an overall assessment must be carried out which takes account of all the relevant factors in the particular case. Genuine use of a trade mark, it is true, cannot be proved by means of probabilities or suppositions, but has to be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (*COLORIS (T-353/07)*, at [24]). However, it cannot be ruled out that an accumulation of items of evidence may allow the necessary facts to be established, even though each of those items of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (see, to that effect, judgment of the Court of Justice of April 17, 2008 in *Ferrero Deutschland GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (C-108/07 P)* , not yet reported, at [36]).

44. In assessing the body of evidence available to me, I bear in mind the case of *Awareness Limited v Plymouth City Council,* Case BL O/236/13, in which Mr Daniel Alexander Q.C. (as he then was) as the Appointed Person stated that:

> '22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if

[61] *New Yorker SHK Jeans GmbH & Co KG v OHIM,* T-415/09
[62] As above.

it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.'

45. I also bear in mind the case of *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd,* Case BL 0/404/13*,* Mr Geoffrey Hobbs Q.C. (as he then was), as the Appointed Person, stated that:

'21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

> [24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what

is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not *'show'* (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use.'

46. By way of a general observation, the RP has adduced a large number of documents, almost all of which feature the Figurative Mark (found to be an acceptable variant of the mark as registered). Whilst the totality of documentary evidence provided does not cover the duration of the Relevant Periods, the Figurative Mark appears prominently, consistently, and frequently on the material that has been adduced. For example, the mark appears on the face of every invoice. It is not in dispute that the RP has been operating commercially, and a number of concessions have been noted in this regard. It is also clear that the RP's field of activity includes enzymes. I now proceed to assess whether the use of the mark that has been demonstrated by the evidence amounts to genuine use for the purposes of the Act. I will address arguments advanced by both counsel, as appropriate, in the course of my analysis.

47. I will first address the revenue figures. I note that no figures have been provided for the period 27 October 2015 to March 2018, which is almost half of the First Relevant Period. No explanation has been provided for their absence. As noted, use of the mark in the EU is relevant up to and including 31 December 2020, and a breakdown of the figures by EU and the UK has been provided in this regard (although there is no breakdown by Member State). The EU figures show a notable increase from approximately 573k € in the fiscal year 2018/2019 (the lowest figure)

to approximately 1.337million € for 2019/2020 (the highest figure). For the fiscal year 2020/2021, EU revenue will only be relevant up to and including 31 December 2020. It is, therefore, not possible to determine how much of the approximately 1.147million € sum constitutes EU trade predating IP Completion Day. However, sums generated by trade in the UK have been provided for the four-year period between April 2018 and March 2022. The UK figures show a rather erratic trajectory. UK revenue was highest in the year 2019/2020, with a peak of 336k €, having risen dramatically from approximately 82.5k € in the previous fiscal year. Although revenue dipped sharply to approximately 174k € for 2020/2021, this is not an insignificant sum. UK revenue dropped to its lowest point in the fiscal year 2021/2022, at just over 34k €. No explanation has been provided for this trajectory.

48. It would have been helpful to see the revenue figures refined to show the sums generated by particular goods/services. However, evidence by way of invoices (some reconciled with purchase orders and other documents) provides concrete evidence of transactions concluded in respect of a number of goods and services. The sums payable for these offerings are not insignificant. Most of the invoices are in exhibit MD-34. Further examples are found in exhibits MD-2, MD-8, MD-21 and MD-37. I have collated these examples in order to present my analysis in the paragraphs that follow.

49. I have compiled the following table, which is limited to the 30 invoices that:

i. are dated within the Relevant Periods;

ii. clearly show that the recipient of the goods, or the party engaging the service, is located in the UK;

and/or

iii. precede IP Completion Day and clearly show that the recipient of the goods, or the party engaging the service, is located in the EU.

(Invoices outside of these criteria will be addressed later, as appropriate)

		Total invoiced amount €:
Total number of UK invoices:	29	773,608.79

(Of which, total number predating IP Completion Day:	23	674,710.91)
Total number of EU invoices predating IP Completion Day (excluding the UK as a then Member State):	1	2,713.20

50. The total sum referable to these 30 invoices is 776,321.99€. Only 6 of the UK invoices post-date IP Completion Day; the total sum referable to these 6 is 98,897.88€. These 6 invoices fall on a range of dates between 31 July 2021 and 31 Jan 2023. Although the latter date falls after the Relevant Periods, the narrative on the face of the invoice concerned indicates that the service for which payment was due was performed between July and December of 2022.[63] Two of the six, dated 2021 and 31 December 2021, respectively, account for 34,178.56€. I refer back to the RP's revenue figures, set out at [32(b)ii], and note that the figure provided for UK revenue in the fiscal year 2021/2022 is 34,179€. This appears to be the rounded-up figure relating to the aforementioned two invoices. To my mind, it can, therefore, be inferred that the total revenue for the fiscal year 2021/22 relates to just these two invoices. Both are for sums payable in respect of an offering described as 'Work Package "Patent Maintenance" Patent Fees and Maintenance Patent Families AL, BCS 07-5003, BCS 08-5005, 08-5006 and 08-5001 for period 07-12 2016'. I presume this to be a service, as opposed to a good, although I am unable to determine precisely what this service entails. During the hearing, Mr Eldridge highlighted the absence of an explanation as to what this service is; however, Ms Knott made no submissions on this point. There are, in total, 11 invoices for this service, all to an address based in East Yorkshire, UK; and they account for 214,213.79€ (more than a quarter of the total sum invoiced).

51. Aside from the UK invoices predating IP Completion Day, there is just one invoice to an EU Member State: dated 30 July 2019.

[63] See the table at paragraph [36(q)] of this decision.

52. I will now focus on the invoices whose descriptions of the goods delivered/services rendered can be more readily understood. I note the following:

Goods/services sold:	Number of invoices:	Total amount invoiced €:	Other notable details:
(S,S)-2,5-Hexanediol	12	255,530.00	The invoices span various dates between 13 September 2016 and 28 May 2019; for deliveries to addresses in Cambridge and West Yorkshire, UK.
(S,S)-2,3-Butanediol	4	259,530.00	The four invoices, dated 29 May and 3 June 2019, and 7 February and 29 April 2020, are pairs, each pair relating to a single order. The delivery address is in Birmingham, UK.
Alcohol Dehydrogenase	1	2,713.20	Invoice dated 30 July 2019, to a delivery address in Germany.
'WP 4 – Enzyme Production *Production at 1 kg-scale lyophilized enzyme'*	1	17,500.00	The invoice is dated 2 February 2021, and the delivery address is in Kent, UK.

The matter of EU use and exported goods

53. I will now address the matter of trade mark use in relation to the export of goods from a relevant territory. It is convenient to repeat here the following wording in section 46(2) of the Act:

'[…] 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'.

[References to the UK are to be read as also referring to the EU in the case of comparable EU marks]

54. Ms Knott, in her oral submission, argued that the evidence of the sale of lipase to a customer based in the USA[64] amounted to relevant use within the EU because the Contested Mark 'has been affixed to [the goods] or their packaging in the relevant EU territory. I summarise the pertinent details of the three 'lipase 140' invoices in question:

Date:	Territory of delivery address/'Receiver of goods'[65]:	Sum due €:
28 Oct 2020	Groton, CT, USA	1,450.00
23 Oct 2020	Bartlett, TN, USA	1,450.00
*9 Nov 2020	Groton, CT, USA	1,450.00
	Total:	**4,350.00**

* This is a commercial or 'export' invoice.

55. The commercial invoice indicates that the goods were dispatched from the RP, based in Germany. I have no reason to doubt that the goods to which the other two invoices relate were also dispatched from Germany. I note that the only example of a shipping label that has been provided in evidence relates to a shipment of (S,S)-2,3-Butanediol, dispatched from the RP in Germany to a delivery address in the UK. Putting aside the fact that the label relates to none of the 'USA' transactions, the Contested Mark does not feature anywhere on the shipping label, which was a point raised by Mr Eldridge in his oral submission. The only trade mark present is that of the carrier. In my view, in the absence of any examples of shipping labels (or other labels affixed to the goods) bearing the RP's mark, I am unable to infer that the deliveries of lipase noted above at [54] amount to relevant use in the EU as provided for by the wording in section 46(2) of the Act. I note that there are

[64] Exhibits MD-13 to MD-16 (inclusive).
[65] Exhibit MD-15.

several instances of packing lists (which, as noted, bear the Contested Mark) which are included with consignments of goods to be delivered. However, I do not consider the presence of the Contested Mark on documents accompanying the goods to be the same as affixing a label to the goods or their packaging. I, therefore, respectfully reject Ms Knott's submission on this matter. Contemporaneous examples by way of photographs of packaging or labelling, on which the Contested Mark is visible, on the goods themselves, might have bolstered the RP's case.

56. Numerous documents such as Certificates of Analysis and Safety Data Sheets have been provided, which, as I will later address, do go some way to assist in explaining what the goods/services provided entail. Whilst these documents consistently feature the Contested Mark, not all of them can be reconciled with an invoice or other solid evidence of a transaction. The extent to which these documents have been directed to/seen by actual customers, in relevant territories, during the Relevant Periods, is, therefore, not evident. There are several examples of undated documents accompanied by narrative to the effect that 'document x' has been distributed to customers around the world from 'date y' to the present. An example of one of these 'broad brush' statements relates to the manual for alcohol dehydrogenase kits, noted at [32(g)], said to have been distributed worldwide, including the UK, from 2016 to date. Such statements, without more, are insufficient to support a finding of genuine use. In the case of the aforementioned kit, a table in the manual itself indicates that a copy of the manual is a component part of the alcohol dehydrogenase kit. The only invoice specifically for an alcohol dehydrogenase 'kit', is for a delivery to Belgium, but this post-dates IP Completion Day and, therefore, cannot constitute genuine use. As noted at [52], there is one invoice for 'alcohol dehydrogenase' (i.e. the mere substance, as opposed to the kit) which can be considered in my assessment of genuine use. However, there is nothing on the face of the document to suggest that it is in kit form. Had the RP provided invoices for alcohol hydrogenase kits, within relevant territories/periods, then it would have been possible to 'pin' appearances of the Contested Mark in the aforementioned manual to definite sales. There is indirect evidence of an alcohol hydrogenase kit having been provided by the RP by way of an acknowledgment in the thesis dated 2021, noted at [32(r)iii]. However, the author is based in Milan,

Italy, and the thesis is dated 2021, placing it after IP Completion Day. There is a further reference to alcohol hydrogenase supplied by the RP in the scientific paper dated 2019, whose authors are based in Milan. However, there is nothing to demonstrate that it was in 'kit' form. In the light of the foregoing, I am unable to find a single solid example of a relevant sale of an alcohol hydrogenase kit. (not to be confused with alcohol dehydrogenase, the mere substance).

57. I now turn to the contemporaneous documentary evidence by way of Wayback prints of the RP's webpages on dates within the Relevant Periods. By way of a general observation, it is apparent that the RP has maintained a web presence from at least 2014 to 2023, directed to English-speaking consumers. The content of the webpages has been summarised at [36(l)]. The 'products' listed in the pages from 2022, 2020 and 2019 (i.e. 'Food processing; Human Nutrition; and Biocatalysis), are, in the absence of further detail as to what these offerings entail, of limited assistance in identifying what goods have been held out for sale. They merely indicate broad categories of goods, whatever those goods might be. As to the services offered, the listing of 'Enzyme Development' under 'Technologies' likely indicates that enzymes of some sort are produced or generated. I consider the terms 'Process Development' and 'Production' to be insufficiently informative to be of much assistance. Webpages from a later date (albeit after the Relevant Periods) list the following goods under the product category 'Human Nutrition': Serratiopeptidase; Nattokinase; Saccharomyces Boulardii; Bromelin. However, the RP has not explained what these goods are. The webpages from 2014, 2017 and 2018 indicate that the products '[…] proprietary soluble polysaccharide', a form of carbohydrate to be taken as a food replacement, has been consistently held out for sale over this period. Of the three service agreements provided, two concern contracting parties based in the USA. The 2019 agreement with a contracting party based in Switzerland relates to the development of 'Fibermalt, which I understand to be an enzyme. However, no invoices or further documents have been provided to demonstrate that the service was performed. In my view, the most that can be said about the service concerned is that it was at least held out as being commercially available to a party based in Switzerland.

58. No information has been provided to demonstrate the RP's promotional efforts or marketing expenditure. There is no documentary evidence to demonstrate the size of the relevant market and the RP's position, either. Nevertheless, Ms Knott submitted in the hearing that the goods/services at stake were highly specialised and that, therefore, the orders that have been placed are financially significant.

59. An argument central to Mr Eldridge's submission is the matter of the appropriate classification of the goods/services that feature in the RP's evidence. Mr Eldridge emphasised that the CA has conceded that there had been genuine use of the Contested Mark in some respects. The concessions in question have been set out at [23] to [27]. Mr Eldridge clarified that the essence of the dispute was not so much a matter of *quantum* of use demonstrated, but, rather, a question of *what goods or services the commercial activities featured in the RP's evidence could be said to relate to*. He argued that it was the question of whether goods featured in the RP's evidence were proper to class 1 or class 5 that was one of the principal issues at stake between the parties. I will address this issue in detail further on in my decision when considering the matter of a fair specification. Given the framing of Mr Eldridge's arguments, and in the absence of any challenge to the level of any use shown, it will suffice to proceed to determine a fair specification based on the clear instances of use that have been found in the relevant territories, within either of the Relevant Periods. My observations addressing the extent to which the RP's evidence covers (or does not cover) portions of the Relevant Periods have been included for completeness.

Framing a fair specification

60. In *Merck KGaA v Merck Sharp & Dohme Corp & Ors*, [2017] EWCA Civ 1834, Kitchin LJ (as he then was) set out the approach to be followed when considering partial revocation of a trade mark. The same approach is relevant when framing a fair specification. He said:

> '244. As I described in *Maier v Asos*, the approach to be adopted is relatively straightforward (although I readily acknowledge that it may on occasion be difficult to apply) and it is in my view consistent with the earlier decisions of the

Court of Appeal to which I referred at paragraph [63]. On reflection, I think it can be expressed more clearly 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 categories.

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.'

61. In *Euro Gida Sanayi ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person, summed up the law as follows:

'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 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.'

My general approach

62. I will first set out the goods/services for which I have found genuine use, before proceeding to take each offering in turn, in order to assess:

i. the class to which the offering belongs;
ii. having determined the appropriate class, whether it falls within any of the terms present in the registered specification (i.e. registered terms that remain in dispute);
and
iii. finally, I will apply the steps set out in the *Merck* case to arrive at a fair specification.

63. The goods and services that remain in dispute are set out above at [28].

64. The goods for which I have found that there has been genuine use are as follows:

(S,S)-2,5-Hexanediol

(S,S)-2,3-Butanediol

Alcohol Dehydrogenase (not to be confused with 'alcohol dehydrogenase kits')

65. I have found genuine use for the following service:

'*WP 4 – Enzyme Production*

Production at 1 kg-scale lyophilized enzyme'

66. Before I address the parties' specific submissions on the goods/services set out above, it is appropriate to outline the disagreement as to their classification.

67. Mr Eldridge submitted that several products which the RP had claimed to be Class 5 goods are proper to Class 1. Ms Knott subsequently made an oral submission that the RP now conceded that instances of the product 'hexanediol' and 'butanediol' which featured in the evidence, initially claimed to be Class 5, belonged to Class 1 after all.

68. Mr Eldridge directed me to the following excerpts from the 'Explanatory Notes' to Classes 1 and 5 of the Nice System:

> i) 'Class 1 includes mainly chemical products for use in industry, science and agriculture, including those which go to the making of products in other classes.
> […]
> This class does not include, in particular:
> - chemical preparations for medical or veterinary purposes (Cl. 5)'
> [my words added]
>
> ii) 'Class 5 includes mainly pharmaceuticals and other preparations for medical or veterinary purposes.
> […]
> This class does not include, in particular:
> - ingredients for use in the manufacture of pharmaceuticals, for example vitamins preservatives and antioxidants (Cl. 1)'

(S,S)-2,5-Hexanediol

69. As noted at [67], the parties now agree that this good belongs to Class 1 of the Nice System. Ms Knott directed me to the Safety Data Sheet which identifies the intended uses for *(S,S)-2,5-Hexanediol* as 'Laboratory Chemical; chemical industry intermediate'.[66] She submitted that this good was encompassed by the following of the RP's registered terms:
Class 1:

[66] Exhibit MD-34, paragraph 1.2 of the Safety Data Sheet.

Terms where use has been conceded:	*Chemicals used in industry; Chemical, biochemical and/or biotechnological preparations used in science; Enzymes for industrial purposes; Enzyme preparations for industrial purposes; Biochemical catalysts*
Term which remains in issue:	*Chemical, biochemical and/or biotechnological preparations for making pharmaceutical preparations and/or medicines*

70. I now consider whether *(S,S)-2,5-Hexanediol* is encompassed by the term *Chemical, biochemical and/or biotechnological preparations for making pharmaceutical preparations and/or medicines.* Having considered the totality of evidence available to me, I am unable to determine the purpose of this compound beyond its function as a chemical preparation used during chemical processes within a laboratory setting. I accept that the evidence demonstrates that the RP has expertise in, inter alia, the fields of Biochemistry and Biotechnology. It is also clear that the RP undertakes some sort of work which has utility in relation to pharmaceuticals or medicines. However, there is no information on how this particular good is used. Some examples of the specific uses or applications for *(S,S)-2,5-Hexanediol* would have been helpful. As the evidence stands, all that can be said is that *(S,S)-2,5-Hexanediol* is a chemical preparation used in chemical reactions. The safety data Sheet notes the following 'Specific end uses: no data available'.[67] I am, therefore, unable to find that this good is encompassed by the broad term *Chemical, biochemical and/or biotechnological preparations for making pharmaceutical preparations and/or medicines.*

71. Ms Knott has not suggested that the goods are encompassed by any other of the registered terms that remain in dispute. However, I will address this for the sake of completeness. For all but three of the class 1 terms that remain in dispute, the goods are qualified according to their purpose. For example, '[…] used in photography', '[…] for making beverages' etc. In the absence of sufficiently granular detail to indicate what *(S,S)-2,5-Hexanediol* is used for, I am unable to find that it is covered by the aforementioned 'qualified' terms.

[67] Exhibit MD-34, paragraph 7.3 of the Safety Data Sheet.

72. I now consider whether *(S,S)-2,5-Hexanediol* falls within any of the remaining Class 1 terms in dispute: i.e. *Carbonic hydrates; Artificial sweeteners;* and *Emulsifiers.* There is nothing in the evidence to indicate that *(S,S)-2,5-Hexanediol* is an emulsifier, carbonic hydrate or an artificial sweetener. Whilst there are webpages which include references to 'zero-calorie replacement for fat and sugar' and 'slowly digestible carbohydrate […] proprietary soluble polysaccharide' which might possibly relate to sugars of some sort, there is nothing to link them to *(S,S)-2,5-Hexanediol.*

73. I am, therefore, unable to find that *(S,S)-2,5-Hexanediol* falls within any of the Class 1 terms that remain in dispute.

(S,S)-2,3-Butanediol

74. As noted, the parties have agreed that this good belongs to Class 1 of the Nice System. Ms Knott submitted that *(S,S)-2,3-Butanediol* falls within the same Class 1 terms that she identified as encompassing *(S,S)-2,5-Hexanediol* (set out at [75]). The Safety Data Sheet states the following 'Intended Use': 'Laboratory Chemicals; chemical industry intermediate'.[68] I also note the following information further on in the document: 'Specific end uses: no data available'.[69] According to the dictionary definition, 'butanediols' belong to a group of alcohols, which are used as a solvents and reagents in chemical synthesis.[70] I consider the evidence, as a whole, to be insufficiently granular to enable me to determine whether *(S,S)-2,3-Butanediol* falls within any of the Class 1 terms that remain in issue. No explanation has been provided as to the particular application of this good, nor in which field (other than in chemical processes in a laboratory setting). I am, therefore, unable to find that *(S,S)-2,3-Butanediol* falls within any of the Class 1 terms that remain in issue.

Alcohol Dehydrogenase

[68] Exhibit MD-11.
[69] As above.
[70] Oxford English Dictionary (online version), accessed 19 December 2025, at 15:29 GMT.

75. It is the CA's case that 'alcohol dehydrogenase' is proper to Class 1 of the Nice System, whereas the RP contends that it belongs to Class 5. Mr Eldridge's points can be summarised as follows:

i. The manual to the RP's 'Alcohol Dehydrogenases Screening Kit' contains instructions headed 'What you need' which enumerate the pieces of 'standard laboratory equipment necessary in order to use the kit.[71] Mr Eldridge submitted that this was difficult to reconcile with the suggestion that these are 'finished' goods in Class 5.

ii. On the RP's own account, ([and, as noted above at [32](f)]), alcohol dehydrogenase is used 'for quick screening for a desired enzyme activity' to enable the correct biocatalyst to be selected for the synthesis of chiral alcohol. It was argued that this suggested that the alcohol dehydrogenase kit was 'for the production of chiral alcohol'.

iii. The fact that alcohol dehydrogenase kit is for use in the manufacture/production of other products in an industrial, scientific or laboratory setting appears to be confirmed by the Safety Data Sheet at Exhibit MD-23.

iv. The references to alcohol dehydrogenases within the scientific literature at Exhibit MD-38 appear to confirm that they are used in laboratory settings.

and

v. It was argued that the warnings within the Safety Data Sheet for alcohol dehydrogenase, according to which the substance could be harmful if not handled correctly and/or without personal protective equipment, is difficult to reconcile with the goods being proper to Class 5.

76. I summarise Ms Knott's submissions on this matter, as follows:

[71] Exhibit MD-19.

i. Just because a good might be used in manufacturing to create a further product, does not necessarily mean that it is an 'unfinished' good.

ii. Mr Eldridge's proposed criterion of demarcation between Classes 1 and 5 based on 'finished/unfinished' goods was an oversimplification.

iii. It is not the laboratory setting that determines whether an enzyme (alcohol dehydrogenase being an example of an enzyme) is proper to Class 1 or 5, but the ultimate purpose of the enzyme in question. Ms Knott pointed to the presence in Class 5 of enzymes for use in the pharmaceutical and healthcare industries, arguing that this is where the RP's alcohol dehydrogenase belongs.

77. After careful consideration of both parties' arguments, I find the following:

i. Mr Eldridge appears to have conflated 'alcohol dehydrogenase kits' with 'alcohol dehydrogenases' and ascribed the same purpose to each. My view is that the evidence demonstrates that, whilst both are used in laboratory settings, their specific purposes are different. It is clear from the evidence that the intended use of an 'alcohol dehydrogenase kit' is as a screening 'tool' to enable the most appropriate iteration of alcohol dehydrogenase to be selected. The evidence shows that the kit includes, inter alia, several iterations of the enzyme in question. It is, therefore, likely that the 'kit' is used on smaller samples of whichever compounds the user intends to use in full-scale production of chiral alcohol, for the purpose of identifying the iteration which will optimise production. I find that it is 'Alcohol dehydrogenase', as a good on its own, is the enzyme that is then used in full-scale production process. I have already found that there has been no genuine use in respect of the 'kits'.

78. I agree with Ms Knott's argument that it is not necessarily the case that use of the good within a laboratory setting determines its membership to Class 1. I disagree with Mr Eldridge's suggestion that the fact that a good might be a harmful substance necessarily renders it a Class 1 good. I note that Class 5 of the Nice System includes the term 'acids for pharmaceutical purposes', which are known to

be corrosive chemicals and, therefore, hazardous. The fact that such hazards are associated with a good is, therefore, not a deciding factor. Further, I disagree that a criterion of demarcation between Class 1 and 5 goods is whether or not they are a 'finished good'. To take the 'alcohol dehydrogenase kit' as an example (which the CA contends belongs to Class 1), my view is that, in so far as the kit is ready to be used to identify an optimum enzyme for the production of chiral alcohols, it is a finished good.

79. I have already noted that it is clear that the RP does operate in some way within/or in relation to healthcare and pharmaceuticals. The evidence also suggests that the RP does operate, in some way, in relation to nutrition. However, where I have found definite instances of genuine use for the good 'alcohol dehydrogenase', the evidence is insufficiently granular to tell me the precise application of the goods. I accept that 'alcohol dehydrogenases' are enzymes used in the reduction of certain compounds to produce chiral alcohol, whatever that might be. However, there is nothing in the evidence to indicate the application of this process. I am unable to determine what the resulting chiral alcohol is for. I am, therefore, unable to find any evidential basis for 'alcohol dehydrogenases' being encompassed by any of the RP's Class 5 terms.

80. Whilst I have not found genuine use of 'alcohol dehydrogenase kits', the evidence in relation to those kits, to my mind, indicates that the RP's alcohol dehydrogenases are likely used in industrial processes. Broadly speaking, the goods in Class 1 have an industrial or scientific application. Class 5 goods, on the other hand, have mainly pharmaceutical or medical/veterinary applications. I find that the evidence suggests that the RP's goods have an industrial application and are proper to Class 1.

81. I now proceed to consider whether alcohol dehydrogenases are encompassed by any of the RP's Class 1 terms that remain in issue.[72] The evidence contains nothing to indicate that alcohol dehydrogenases are *Carbonic hydrates; Artificial sweeteners* or *Emulsifiers.* As to the remaining Class 1 terms in issue, each of

[72] These are set out at [28] of this decision.

them is, by its very wording, 'qualified' in terms of its application or use, e.g. '[…] used in photography', '[…] for making beverages' etc. The evidence available to me is insufficiently granular to support a finding that any of these 'qualified' terms encompass 'alcohol dehydrogenases'.

The service '*WP 4 – Enzyme Production*; *Production at 1 kg-scale lyophilized enzyme'*

82. There is no dispute as to the class to which this service belongs. I now proceed to determine whether it is encompassed by any of the RP's registered terms in Class 42. I find that the core function of the service is the production of 'lyophilized enzyme'. I find that the defining act of service being provided is as the wording suggests: i.e. the production of a quantity of enzyme in freeze-dried form. Neither party has identified the Class 42 term(s) to which this service belongs. I have considered carefully the RP's registered terms in Class 42. I find that the RP's 'enzyme production' service will be encompassed by the following broad terms: '*Science […] services'* and '*Chemical […] laboratories'*.

83. Before I proceed to determine a fair specification in line with *Merck*, I will explain why I am unable to find that the service is covered by the remaining Class 42 terms. The core acts of service for the remaining terms can be summarised as, variously: research; analysis; consultancy; technical and scientific support; development. The service for which I have found genuine use appears to be confined to the mere *production* of the enzyme. There is no evidence to show that this particular 'invoiced' service extends beyond that. Whilst the evidence does appear to show that the RP does undertake research, development and analytical activities of some sort, I am unable to 'pin' these activities to the instance of enzyme production that has been shown.

84. Applying the *Merck* approach, I now consider whether the two categories that I have identified at [82] as encompassing the RP's enzyme production service can be further refined into sub-categories capable of being viewed independently. I will address each in turn.

'Science […] services':

85. This category is extremely broad and will encompass a) any scientific discipline (the broadest and most well-known examples being Chemistry, Biology and Physics); and b) any service within a scientific discipline. According to the dictionary definition, enzymes are chemical substances found in living creatures.[73] To my mind, this places them within the scientific discipline of 'biochemistry', which I find to be a sub-category of 'chemistry'. As to the scope of services within biochemistry, which might be referred to as 'biochemical' or 'biochemistry' services, the array of activities will be vast. I consider the act of 'production' to be capable of being a standalone activity comprising any act of service whose desired result is the production or generation of something. Put simply, an example of such a service would be the production of a specified quantity of substance X. Such a service would not cover the design or development of substance X, but the mere act of generating it. I bear in mind that I must be careful not to restrict the scope of the RP's protection such that it is stripped of protection for each and every 'iteration' of the service beyond that which has been demonstrated in evidence. I must also consider the perception of the average consumer for the RP's service. Based on the evidence, the average consumer of the RP's 'enzyme production' services will be exclusively professionals, predominantly in industry. Taking all of the foregoing into consideration, it is my view that a fair specification would be: *'biochemistry services, namely the production of enzymes'*. Whilst this term may be capable of being further refined to specify particular types of enzymes, and the forms in which they may be supplied (e.g. in liquid or freeze-dried form) I consider that this would be arbitrary and overly restrictive. The evidence by way of the contents of the 'alcohol hydrogenase kit', for example, enumerates 'iterations' of enzymes by way a numbering convention. To refine 'enzymes' with such granularity as a registered term would not, in my view, be reasonable.

'Chemical […] laboratories'

[73] Collins English Dictionary (online version), accessed 19 December 2025, at 15:38 GMT.

86. I take this term to mean the provision of a chemical laboratory *service*. This is a very broad term covering a vast array of laboratory-based activities in the field of chemistry. In the same vein as my comments at [85], I find that 'Chemical' can be further sub-divided into the discipline 'biochemical'. For reasons analogous to those set out at [85], I find that a fair specification in respect of the aforesaid registered term would be '*Biochemical laboratories, namely production of enzymes'* or '*Biochemical laboratory services*, *namely production of enzymes'.*

Outcome of Revocation

87. This partial revocation has been partially successful.

88. Following i) the RP's concessions on non-use (detailed at [27]); and ii) the outcome of my assessment of a fair specification (detailed at [85] and [86]), the Contested Mark is to be revoked from the earliest possible revocation date, i.e. 27 October 2020, for the following:

Class 1: *Chemical, biochemical and/or biotechnological preparations used in photography; Chemical, biochemical and/or biotechnological preparations used in agriculture; Chemical, biochemical and/or biotechnological preparations used in horticulture; Chemical, biochemical and/or biotechnological preparations used in forestry; Chemical, biochemical and/or biotechnological preparations for preserving foodstuffs; Chemical, biochemical and/or biotechnological preparations for conserving foodstuffs; Chemical, biochemical and/or biotechnological preparations for making foods and foodstuffs; Chemical, biochemical and/or biotechnological preparations for making beverages; Chemical, biochemical and/or biotechnological preparations for cosmetic purposes; Chemical, biochemical and/or biotechnological preparations for making hair and/or body care preparations; Chemical, biochemical and/or biotechnological preparations for making pharmaceutical preparations and/or*

medicines; Carbonic hydrates; Starch for industrial purposes; Artificial sweeteners; Emulsifiers; Unprocessed plastics; Adhesives used in industry.
Class 5: *Pharmaceutical and veterinary preparations; Adjuvants for medical purposes; Appetite suppressants for medical purposes; Medical preparation for slimming purposes; Constipation (Medicines for alleviating -); Laxatives; Dietetic preparations adapted for medical use; Diabetic bread; Dietetic beverages adapted for medical purposes; Dietetic substances adapted for medical use; Dietetic foods adapted for medical use; Nutritional supplements; Infant formula; Edible plant fibres; Nutritional supplements; Additives to fodder for medical purposes; By-products of the processing of cereals for medical purposes; Cellulose esters for pharmaceutical purposes; Starch for dietetic or pharmaceutical purposes; Capsules for medicines; Capsules for pharmaceutical purposes; Digestives for pharmaceutical purposes; Dietetic beverages adapted for medical purposes; Beverages adapted for medicinal purposes; Healthcare preparations; Disinfectants; Biotechnological preparations and products, namely proteins, enzymes for medical use; Enzymes for veterinary purposes; Enzyme preparations for medical purposes; Enzyme preparations for veterinary purposes; Bacterial production strains for medical use; Bacterial production strains for veterinary use; Micro-organism cultures for medical use; Cultures of micro-organisms for veterinary purposes; Ferments for pharmaceutical purposes; Ferments for veterinary use; Mediums (Bacteriological culture -); Dental impression materials*.
Class 42: *Science and technology services, with the exception of biochemical services, namely the production of enzymes; Research and services relating thereto; Industrial analysis and research services; performance of chemical analyses; Biological research; Chemical, pharmaceutical, biotechnological and/or genetic technology laboratories, with the exception of biochemical laboratories, namely production of enzymes; Technical and scientific consultancy and support in the*

field of chemistry, pharmacy, biotechnology and/or genetic technology, including via communications media, including the internet; Technical and scientific consultancy and support with regard to the introduction of chemical, pharmaceutical, biotechnological and/or genetic technology preparations and products; Research and development (for others).

89. Following i) the CA's concessions on use; and the outcome of my assessment of a fair specification, the Contested Mark remains registered for the following:

Class 1: *Chemicals used in industry; Chemical, biochemical and/or biotechnological preparations used in science; Enzymes for industrial purposes; Enzyme preparations for industrial purposes; Biochemical catalysts.*
Class 42: *Biochemistry services, namely the production of enzymes; Biochemical laboratories, namely production of enzymes.*

COSTS

90. The CA has enjoyed the greater level of success overall and is entitled, therefore, to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016, calculated as follows:

Official filing fee for Form TM26(N)[74]	£200
Preparation of Form TM26(N)*	£100
Preparation for and attendance at a hearing	£1,000
Total	**£1,300**

[74] Application to revoke a registration or a protected international trade mark (UK) for reasons of non-use.

91. *I have awarded a sum below the minimum threshold in respect of preparation of the Form TM26(N) given that the CA elected not to include an accompanying statement (which it was perfectly entitled to do).

92. I have declined to apply a deduction to the CA's costs award to reflect the RP's partial success, for the reason that the RP made a number of concessions at a very late stage of the proceedings, i.e. during the latter part of hearing, after Mr Eldridge's main submissions.

93. I, therefore, order evoxx technologies GmbH to pay the sum of £1,300 to Evox Therapeutics Limited. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 23rd day of December 2025

N. R. Morris
For the Registrar,
the Comptroller-General