



Neutral Citation Number: [2024] EWHC 1441 (Ch)

Case No: IL-2020-000032

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

13 June 2024

Before :

MRS JUSTICE BACON

Between :

EASYGROUP LIMITED

- and -

Claimant

(1) BEAUTY PERFECTIONISTS LIMITED
(2) BEAUTY INTERNATIONAL AUSTRIA LIMITED
(3) JULIE ANN KHAMMO

Defendants

Michael Edenborough KC and Stephanie Wickenden (instructed by **Stephenson Harwood LLP**) for the **Claimant**

James Abrahams KC and Maxwell Keay (instructed by **TLT LLP**) for the **Defendants**

Hearing dates: 13–15, 19–20 March, 11 June 2024

Approved Judgment

This judgment was handed down remotely at 2pm on 13 June 2024 by circulation to the parties or their representatives by email and by release to the National Archives.

MRS JUSTICE BACON:

Introduction

1. In these proceedings the claimant easyGroup Limited (**easyGroup**) alleges that the defendants have infringed two of easyGroup's EU trade marks by using the sign easyCOSMETIC for the defendants' online retail of cosmetics, perfumes and toiletries on websites directed at consumers in Germany and Austria. The defendants counterclaim for partial revocation for non-use of one of the trade marks relied upon by easyGroup. This trial is of liability only; I am not asked to determine any issues relating to quantum.
2. The claim was commenced in 2020 prior to IP Completion Day and brought pursuant to Article 9(2)(b) and (c) of EU Regulation 2017/1001 (the **Regulation**). For those purposes, therefore, the court is sitting as an EU trade mark court and is bound by EU law.
3. The parties' arguments have narrowed during the course of these proceedings. easyGroup's pleaded case on infringement under Article 9(2)(c) of the Regulation relied on registered EU trade marks for easyJet, easyCar, easyBus, easyProperty, easyHotel, easyGym, and easyCoffee. In its opening submissions it reduced those to two easyJet marks: EU mark 1,232,909 for the word mark EASYJET (the **909 mark**) and EU mark 10,584,001 for the word mark EASYJET (the **001 mark**), together with the easyHotel mark. By the time of closing submissions easyGroup only relied on the two easyJet marks, although in respect of its claims of infringement under both Article 9(2)(b) and (c) easyGroup contends that the court should take into account the reputation of the "easy family of brands" in general. easyGroup also narrowed its case in closing submissions to abandon objection to several unstylised forms of the defendants' signs.
4. The defendants, for their part, initially pleaded defences of acquiescence, laches and estoppel. Those are no longer pursued as defences as such. The defendants do, however, continue to rely on the facts pleaded for those defences in relation to the remaining issues in the case. The defendants' claim for revocation has also narrowed, as described further below.
5. At the hearing Mr Edenborough KC and Ms Wickenden appeared for easyGroup, and Mr Abrahams KC and Mr Keay appeared for the defendants. Ms Wickenden and Mr Keay both addressed the revocation issue, and Mr Edenborough and Mr Abrahams addressed the remaining issues in the case. After circulating the draft judgment and receiving written submissions on the consequential issues, there was a further short hearing to address some specific points relating to revocation, on which submissions were made by Ms Wickenden and Mr Keay. Minor amendments to the judgment have been made in light of the submissions at that hearing.

The parties

6. easyGroup is a holding company established in 2000. It is now the owner and licensor of all registered and unregistered intellectual property rights in the various "easy" businesses founded by Sir Stelios Haji-Ioannou, the best-known of these being the airline easyJet. The history of the easyJet business, and the incorporation of easyGroup, is set out in previous judgments on various other trade mark infringement claims brought by

easyGroup, including *W3 v easyGroup* [2018] EWHC 7 (Ch) and *easyGroup v EasyLife* [2021] EWHC 2150 (Ch); it is not repeated here.

7. In these and previous proceedings easyGroup has referred to the various “easy” businesses connected with (and now licensed by) easyGroup as being the “easy family” of businesses or brands. I will adopt the same expression in this judgment, while noting that there are numerous businesses operating in the UK and across Europe which have “easy” as part of their company name, which are not and have never been part of the easy family as described here – a point relied on by the defendants. Moreover, while the defendants do not deny the existence of an easy family of brands with a reputation in the UK, there is a dispute as to the extent of the “family” reputation outside the UK.
8. The easyCOSMETIC business was founded by Daniel Ganzer and Daniel Rowe in 2008, and has been carried on since then as an online-only retailer of cosmetics, perfumes and toiletries, as well as related accessories. The business has over time been, and continues to be, operated by various different companies, with products marketed through websites directed at consumers in Germany (www.easycosmetic.de), Austria (www.easycosmetic.at), Switzerland (www.easycosmetic.ch), the Netherlands (www.easycosmetic.nl) and Belgium (www.easycosmetic.be). The business operates using a “digital nomad dropshipping” model under which orders are placed on the various websites, suppliers then deliver the ordered goods to the assigned logistics providers, and the goods are then despatched by the logistics providers to the end-customers, packaged in easyCOSMETIC livery.
9. The first defendant (**BPL**) was established in October 2016, and has since then operated the German website. It also operated the Austrian website from the same time, until 2018. The second defendant (**BIAL**) was also established in 2016, but only began trading in 2018; it has operated the Austrian website since then. The third defendant (**Mrs Khammo**) was the sole director of BPL and BIAL from 2016 until 2021, but has since retired as a director of the companies.

easyGroup witnesses

10. easyGroup relied on the evidence of eight witnesses, five of whom were cross-examined at the trial.
11. Gavin Richardson is a graphic designer who was employed in different roles in easyGroup operated and licensed businesses, and is now an external consultant to easyGroup. His evidence addressed the goodwill and reputation of easyGroup and the easy family of businesses, in terms very similar to the evidence given by him to this court at the trial of *easyGroup v Nuclei* [2022] EWHC 901 (Ch). His evidence was not materially disputed by the defendants.
12. Anthony Anderson was head of marketing at easyJet and then marketing director of easyGroup. He is now an external consultant to easyGroup. His work has included the compilation and editing of successive editions of a history of the easy family of brands, entitled “easyHistory”. Mr Anderson gave evidence regarding the history and reputation of the easy family of brands, again in terms very similar to the evidence given at the trial of *easyGroup v Nuclei*. When cross-examined on the use of the word “easy”, he was unfortunately rather defensive, repeatedly seeking to avoid admitting that the word “easy” in the easy family company names and marketing materials meant “easy” in a

descriptive sense. While he categorically denied that he had been told what to say by easyGroup’s solicitors, it was evident that he was attempting to avoid any acknowledgement of the descriptive use of “easy” by easyGroup, even where that descriptive use was obvious on the face of the relevant materials. Nothing ultimately turns on that, because the court can form its own view of the descriptive quality of the word “easy” when used by easyGroup; but it was not to Mr Anderson’s credit as a witness that he adopted this approach in his evidence.

13. Angela Mullen is the head of in-flight retail operations at easyJet. Since 2000 she has worked in various employed and self-employed roles either working for or providing services to easyJet in relation to its in-flight retail service. Her evidence addressed the easyJet in-flight sales process and the development of the easyJet in-flight retail offering, and in her oral evidence she explained the genesis of the online pre-order service offered during 2019 and 2020. She was a knowledgeable and credible witness who gave straightforward answers to the questions put to her.
14. Miguel Santos is a data and analytics manager at easyJet. His evidence explained the process by which he had compiled data on easyJet’s in-flight retail sales for the purposes of the hearing. His cross-examination was extremely brief and his evidence was effectively unchallenged.
15. Robert Jacob is a partner at Stephenson Harwood LLP solicitors, which has acted for easyGroup in this claim since proceedings were issued. He gave evidence addressing (among other things) the defendants’ marketing, including examples of their signs and evidence of test purchases, and responding to various points in the defendants’ evidence. In cross-examination he was asked about certain aspects of easyGroup’s disclosure. His evidence was measured and straightforward.
16. In addition to the evidence of the witnesses set out above, easyGroup relied on the evidence of three further witnesses whose evidence was not challenged. Helen Perry is a senior commercial finance manager at easyJet, and she gave evidence on data analysing easyJet flights by territory between 2007–2022, with corresponding in-flight retail profits. Robert Ellice provided evidence of the genesis and development of the easyProperty business, and the use of the easyProperty mark. Michael Keating is the CEO of Ink Global, a company which has produced the easyJet in-flight magazine and has also provided advertising services for easyJet. His evidence addressed a point concerning a marketing partnership apparently offered to the defendants in or around 2013.

The defendants’ witnesses

17. The defendants relied on the evidence of four witnesses, two of whom were cross-examined. They gave their evidence in German, with the assistance of an interpreter.
18. Daniel Ganzer was (together with his colleague Daniel Rowe) the founder of easyCOSMETIC Deutschland Ltd, the first company to operate the easyCOSMETIC business. His evidence explained the creation of the easyCOSMETIC business in 2008, the inspiration for the name and initial stylisation of the brand, and the reasons for the subsequent evolution of the brand stylisation and colours. He was a straightforward witness, whose evidence was not materially challenged; indeed it was relied on not only by the defendants but also (in closing submissions) by easyGroup.

19. Andreas Foerste is a freelance consultant who has worked for the easyCOSMETIC companies since the founding of the easyCOSMETIC business in 2008, and has continued to work for the various easyCOSMETIC companies since then, including the defendants. He described his duties as being comparable to those of a chief operating officer. His evidence addressed the logistics tasks carried out by him in the operation of the business, the growth of the business since 2008, and the transfer of responsibility for operating the German and Austrian websites to the defendants in 2016. He also gave an account of the evolution of the easyCOSMETIC branding, the consumers targeted by the defendants' part of the business (i.e. in Germany and Austria), and the suspension of deliveries to the UK following the UK's departure from the EU. When cross-examined it became clear that although he had given evidence about the circumstances in which the German and Austrian parts of the business were transferred to the defendants, in fact he knew very little about how that transfer had been implemented, why BIAL was incorporated, and why BIAL had not started trading until 2018.
20. In addition to the evidence of those two witnesses, the defendants relied on the evidence of two further witnesses. Thilo Kohler, an employee at KL Discovery, gave evidence on the defendants' disclosure process. He was unable to attend trial due to long-term illness, and his evidence was therefore relied on by the defendants as hearsay on the basis of a Civil Evidence Act notice. In the event nothing turned on that evidence. Finally, Edward Downes, an associate at the defendants' solicitors, gave evidence on access to the defendants' websites from the UK, and the receipt of online pop-up marketing from the defendants following such access. His evidence was unchallenged.

The relevant easyGroup trade marks

21. For the purposes of its Article 9(2)(b) claim, easyGroup relies only on the 001 word mark EASYJET, which was filed on 24 January 2012. That mark was originally registered for (among other things) various services under class 35 of the Nice classification. In unrelated cancellation proceedings, the EU IPO found that some of those services had not been put to genuine use. The class 35 services for which the 001 mark remains registered are:

“Retail services connected with the sale of food and drink, preparations and substances for use in the care and appearance of the hair, lips, face, skin, nails and eyes, cosmetics, perfumes, fragrances, colognes and scents, sun-screening and tanning preparations, sunglasses, jewelry, watches, purses, wallets, pouches and handbags; games.”
22. For the purposes of the Article 9(2)(c) claim, easyGroup relies on both the 001 mark, and the earlier 909 word mark EASYJET filed on 1 July 1999, in respect of (again among other things) the following services under class 39:

“Transportation of goods, passengers and travellers by air; travel agency and tourist office services”.
23. While the 001 and 909 marks are both word marks rather than figurative marks, easyGroup relies on the common stylisation used for brand names across the easy family of brands. The key elements of that common stylisation are the combination of the lower case word “easy” followed by the name of a particular service or product starting with

an initial uppercase letter (such as easyGroup and easyJet), the use of the Cooper Black font, and the use of the Pantone 021c orange colour.

24. Examples are:



25. In typographical terms, the capitalisation of the second word in brand names such as easyGroup and easyJet are examples of “camel case” lettering – specifically “lower camel case” (also known as dromedary case), denoting an initial lower case word joined to a further word which is capitalised. That contrasts with “upper camel case” lettering (also known as Pascal case) where both of the two conjoined words are capitalised in a name such as YouTube or PowerPoint.

The defendants’ signs

26. easyGroup’s particulars of claim contend that the following signs used by the defendants infringe the easyJet trade marks. I will refer to these signs as the **defendants’ signs**:

- i) the word “easyCOSMETIC” used since 2008, with no stylisation other than the use of lower and upper case (the **easyCOSMETIC word sign**);
- ii) the following figurative sign used from 2009 until 2016 (the **orange/black sign**):

The image shows the text 'easyCOSMETIC' where 'easy' is in orange and 'COSMETIC' is in black.

- iii) the following figurative sign used from 2017 to 2022 (the **white/black sign**):

The image shows the text 'easyCOSMETIC' where 'easy' is in white on a grey background and 'COSMETIC' is in black.

27. The particulars of claim also alleged infringement by the unstylised signs Easycosmetic, easycosmetic.de and easycosmetic.at, but by the time of closing submissions those were no longer challenged by easyGroup.

28. easyGroup does, however, invite the court to find infringement in relation to various further signs used by the defendants, both historically and currently, which are variants of the signs pleaded to be infringing. Those further signs were not identified in the particulars of claim, and no application has been made to amend the infringement claims to cover those signs. I do not, therefore, make any findings in relation to those signs. The parties will, however, no doubt be able to apply the relevant parts of this judgment to other signs used by the defendants, as appropriate.

The easyCOSMETIC business

29. Mr Ganzer was originally a director of an internet advertising agency, Prosales Europe Media GmbH, which designed commercial websites and webshops. During the course of that work, Prosales commenced discussions with a customer regarding the possibility of a joint venture business operating an online webshop for perfumes and cosmetics. That led to the creation of the easyCOSMETIC business, in which Mr Ganzer was one of the founding shareholders.
30. Mr Ganzer's unchallenged evidence was that the inspiration for the easyCOSMETIC name came from Prosales' website design work, several years earlier, for a company operating under the brand name of easyLIMITED, offering services relating to the establishment of limited companies for third parties. The customer had commissioned Prosales to redesign its website; that website used a green colour theme, which Prosales maintained in its redesign.
31. Mr Ganzer explained that the use of green in the easyLIMITED website led him to avoid green as the dominant colour for the easyCOSMETIC logo. He said that he eventually chose orange for several reasons. One reason was that easyCOSMETIC was going to be selling not only via its own website but also as a seller on Amazon Marketplace, and he thought it helpful to "lean" towards the orange colour scheme which appeared on the Amazon website. He also wanted a colour that had "unisex appeal", and was not used by the major competing online perfume shops.
32. Mr Ganzer noted that the design of the logo (and the easyCOSMETIC website generally) has over time reduced the use of orange styling in favour of black, white and grey colours, following marketing trends that associated monochrome styling with higher value products in this sector. In order to retain some continuity in the brand styling, however, the easyCOSMETIC websites retain elements of the original orange styling, for example in menus, buttons, some of the text elements and certain images.
33. The operation of the easyCOSMETIC business has been conducted through multiple different companies since the establishment of the business in 2008, growing to a total of five country-based websites. The German website www.easycosmetic.de has operated since 2008, with the original operating company being Mr Ganzer and Mr Rowe's company easyCOSMETIC Deutschland. From October 2010 until September 2014 the operating business was easyCOSMETIC Vertrieb Ltd, which added the Austrian website www.easycosmetic.at in 2012. The German and Austrian parts of the business were then continued by Smart Beauty Ltd from October 2014 until September 2016, before being transferred to BPL in October 2016 following the sudden death of the managing director of Smart Beauty. BPL initially operated both the German and Austrian websites, but from 2018 onwards the Austrian website was operated by BIAL, a sister company which had been set up in 2016.
34. Meanwhile the Swiss website www.easycosmetic.ch was added in 2011, initially operated by easyCOSMETIC Vertrieb and then Smart Beauty. Between 2017 and 2019 the website was operated by easyCOSMETIC Benelux BV, before being transferred to easyCOSMETIC Swiss GmbH in 2019. The Belgian and Netherlands websites www.easycosmetic.be and www.easycosmetic.nl were established by easyCOSMETIC Benelux in 2014 and have been operated by that company since then.

35. Mr Ganzer sold his shareholding in easyCOSMETIC Deutschland and resigned as a director of that company in 2010, but continued to provide design work services (through Prosales) for various of the easyCOSMETIC companies. Mr Foerste has represented a point of continuity, working as a consultant for the succession of operating companies for the German and subsequently Austrian parts of the business, from the establishment of the easyCOSMETIC business to the present day.
36. The continuity of the German and Austrian business was not admitted by easyGroup. Mr Foerste's evidence was, however, that those parts of the business have been operated on a continuous basis, albeit by a succession of different companies as described above. It was not put to him that his evidence as to the fact of the business transfer from easyCOSMETIC Deutschland through to the defendants was inaccurate.
37. Mr Foerste was asked about the details of the transaction by which Mrs Khammo took over the operation of the German and Austrian parts of the easyCOSMETIC business. He was, however, not able to shed any light on that. He said that he was not involved in that transaction, nor was he (apparently) told of the details by Mrs Khammo or anyone else. Mrs Khammo did not give evidence in these proceedings, and the defendants have not produced any written agreement by which the transfer of the business to them was implemented. The terms upon which the German and Austrian parts of the easyCOSMETIC business (represented by the German and Austrian websites) was transferred to the defendants are therefore entirely unknown. All that can be said, on the basis of Mr Foerste's evidence, is that those parts of the business were somehow transferred to BPL upon its establishment in October 2016, and that the Austrian part of the business was then transferred to BIAL during the course of 2018.
38. The reasons for the transfer of the Austrian business to BIAL are likewise not clear. Mr Foerste said that he understood this to be for VAT reasons, but when cross-examined it was apparent that this was simply what he had been told by Mrs Khammo; he himself had not ever been involved with the accounting or tax side of the business.
39. The turnover of the easyCOSMETIC business has grown over the years, and by 2019 (the last full year before the claim was issued) the annual turnover was more than €72m. The vast majority of this (around 80%) derives from the German market. The marketing expenditure of the business has likewise increased commensurately, with over €4m spent on marketing in 2019. Prior to the departure of the UK from the EU it was possible for customers to select the UK as a delivery country, and some sales were made to the UK (albeit a very small number in the context of the overall business, amounting to only around 0.02% of the total packages distributed in 2019). In around February 2021 the defendants implemented a block on shipping to the UK, since when it has not been possible for customers to select the UK as a delivery country.

Background to these proceedings

40. On 18 May 2011 easyGroup's German solicitors wrote to easyCOSMETIC Vertrieb (which was then the only operating company for the easyCOSMETIC business) complaining about the use of easyCOSMETIC signs including the orange/black sign. The letter referred to various of the easy family EU trade marks, including the 909 mark, alleging breach of both the predecessor to the Regulation and the German Trade Mark Law, and threatening proceedings unless a set of undertakings was given (including as to damages and costs), a draft of which was attached. easyCOSMETIC Vertrieb's solicitors

replied a week later confirming that they acted for the company and were instructed to accept service, but refusing to provide the requested undertakings.

41. According to the defendants, a further detailed letter of rebuttal was subsequently sent, but it has not been located. In any event, there was then no further correspondence from easyGroup for the next eight years. Stephenson Harwood solicitors first started acting for easyGroup in 2012, and Mr Jacob was therefore not involved with the correspondence in 2011. He had, however, seen the 2011 letter, and in his oral evidence he made the following comments about easyGroup's inaction after that letter:

“At the time easyCOSMETIC was not such a big company, so it may have been that it was not such an issue. As it has grown, it has become more of an issue and [easyGroup has] possibly become more diligent to prosecute and take action, so that might be a justification as to why there was a delay. But certainly since I joined in 2012, I was not and I know easyGroup were not aware of easyCOSMETIC until 2019. That is when it started action, when it saw it again.”

42. Mr Jacob confirmed that he was not asked by easyGroup to progress this matter once he was instructed in 2012. His comments as to the easyGroup's initial reasons for failing to take further action can therefore only be surmise. What is, however, apparent is that easyGroup evidently did not consider the matter of sufficient importance to instruct anyone to follow this up; nor, it seems, was the matter even discussed again by easyGroup with its solicitors until 2019.
43. On 19 June 2019, however, easyGroup's solicitors sent the defendants a letter before action. There was then further correspondence during July and August, following which easyGroup again fell silent for over six months, before issuing the present claim on 5 March 2020.

Issues

44. A list of issues is appended to the CCMC order of 12 December 2022. In light of the narrowing of the cases on both sides, the following remaining issues arise for determination (in the order in which the parties addressed them in both their written and their oral submissions):
- i) **Revocation counterclaim** – is the 001 mark liable to be partially revoked for non-use pursuant to Article 58 of the Regulation, by limiting certain of the registered class 35 services to “in-flight retail services”?
 - ii) **Identification of the average consumer** – for the purposes of the infringement claims, is the average consumer a consumer in the EU (without limitation to any Member State, and including for this purpose the UK), or a consumer in Germany and Austria?
 - iii) **Date for assessment of infringement** – what is the relevant date for the assessment of the acts of alleged trade mark infringement?

- iv) **Family of marks** – by the relevant dates, did easyGroup own a family of marks consisting of the work “easy” followed by a second conjoined word referring to the goods and/or services being provided?
- v) **Infringement under Article 9(2)(b)** – have the defendants infringed the 001 mark contrary to Article 9(2)(b) of the Regulation, through their use of the signs set out at §26 above?
- vi) **Infringement under Article 9(2)(c)** – have the defendants infringed the 001 mark and/or the 909 mark contrary to Article 9(2)(c) of the Regulation, through their use of the signs set out at §26 above?
- vii) **Article 14 defence** – do the defendants have a defence under Article 14 of the Regulation, on the basis that the signs complained of are descriptive and not distinctive, and used in accordance with honest practices in industrial or commercial matters?

Revocation

The law

45. Article 58 of the Regulation provides:

“1. The rights of the proprietor of the EU trade mark shall be declared to be revoked on application to the Office or on the basis of a counterclaim in infringement proceedings:

(a) If, within a continuous period of five years, the trade mark has not been put to genuine use in the Union in connection with the goods and services in respect of which it is registered, and there are no proper reasons for non-use;
...

2. Where the grounds for revocation of rights exist in respect of only some of the goods or services for which the EU trade mark is registered, the rights of the proprietor shall be declared to be revoked in respect of those goods or services only.”

46. The principles applicable to determining whether there has been genuine use of a trade mark were summarised by Arnold LJ in *easyGroup v Nuclei* [2023] EWCA Civ 1247, §106 as follows (with further references, which are omitted here):

- i) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark.
- ii) 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.
- iii) 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.

- iv) 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. Internal use by the proprietor does not suffice. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter. But use by a non-profit making association can constitute genuine use.
 - v) 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.
 - vi) 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.
 - vii) 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.
 - viii) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use.
47. §107 of that judgment further noted that genuine use of a trade mark cannot be proven by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned; and that the smaller the commercial exploitation of the mark, the more necessary it is for the proprietor to produce additional evidence to dispel doubts as to the genuineness of its use: *Case T-78/19 Lidl v EUIPO* EU:C:2020:166, §§25 and 33. The trade mark proprietor bears the burden of proving genuine use of the mark: *Cases C-720 and 721/18 Ferrari* EU:C:2020:854, §§73–82.
48. As regards partial revocation under Article 58(2), there has been some debate in the English authorities as to whether there is a divergence between the EU approach and the approach of the English courts (see for example the comments of Arnold J in *Stichting BDO v BDO Unibank* [2013] EWHC 418 (Ch), §§53–56). In this case, since I am sitting as an EU trade mark court, to the extent that there is a difference it is the EU approach which must be applied.
49. In that regard, the Court of Appeal in *Merck v Merck Sharp & Dohme* [2017] EWCA Civ 1834, §§243–248, referred to the guidance of the General Court in *Case T-126/03 Reckitt*

Benkiser (España) v OHIM (ALADIN) EU:T:2005:288, [2005] ECR II-2861, Case T-256/04 *AG v OHIM (RESPICUR)* EU:T:2007:46, [2007] ECR II-449 and Case T-258/08 *Matthias Rath v EUIPO* EU:T:2017:22, which it summarised as follows:

- i) First, it is necessary to identify the goods or services in relation to which the mark has been used during the relevant period.
 - ii) Secondly, the goods or services for which the mark is registered must be considered. If the mark is registered for a category of goods or services which is sufficiently broad that it is possible to identify within it a number of subcategories capable of being viewed independently, use of the mark in relation to one or more of the subcategories will not constitute use of the mark in relation to all of the other subcategories.
 - iii) 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 that 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.
 - iv) 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.
50. Further guidance has been given by the European Court in several more recent cases, including Case C-714/18 P *ACTC v EUIPO* EU:C:2020:573; *Ferrari*; and Cases T-221 and 242/22 *Pharmaselect v EUIPO (LUTAMAX)* EU:T:2023:858. In particular, those cases make clear that:
- i) Since a trade mark proprietor cannot in practice prove that the mark has been used for all conceivable variations of the goods concerned by the registration, the definition of a subcategory of the goods or services cannot be based on any and all commercial variations of similar goods or services. Rather, it requires the identification of goods or services that are sufficiently distinct to constitute coherent categories or subcategories: *LUTAMAX* §62.
 - ii) The purpose or intended use of the product or service in question is the essential criterion for defining an independent subcategory of goods or services: *ACTC* §44; *Ferrari* §40; *LUTAMAX* §64.
 - iii) The facts that goods are aimed at different groups of people and are sold in different shops are not relevant criteria for defining an independent subcategory of goods: *ACTC* §53. Likewise the particular market segment in which the goods are sold, such as the market for luxury goods of the particular type, is not a relevant defining feature for the purpose of identifying an independent subcategory of the relevant class of goods: *Ferrari* §§42–50.
51. It is apparent from *Thomson Holidays v Norwegian Cruise Line* [2002] EWCA Civ 1828, §39, that the court's determination of a fair specification of the goods or services, having

regard to the use made of the mark, does not require the court to adopt a blue-pencil approach. The fair specification may instead be achieved by adding a qualification to the specification. In that case the specification of “arrangement and booking of travel and tours” was qualified by adding “words to the effect that the services were all for package holidays”. easyGroup did not dispute this as a permissible approach to the qualification of a class specification, as a matter of principle.

The parties’ submissions

52. The defendants’ counterclaim for revocation did not concern the entirety of the registered class 35 services, but was limited to the following services (the **disputed class 35 services**):

“Retail services connected with the sale of food and drink, preparations and substances for use in the care and appearance of the hair, lips, face, skin, nails and eyes, cosmetics, perfumes, fragrances, colognes and scents, sun-screening and tanning preparations, sunglasses”.

53. The defendants’ initial primary claim for revocation of the 001 mark for the entirety of the disputed class 35 services was not pursued, in light of the evidence filed by easyGroup. That included extensive evidence of the in-flight retail sales made by easyJet during the period 2014–2020 in relation to food and drink, cosmetics, perfumes, other toiletries and sunglasses, and evidence of advertising on in-flight brochures and (for some but not all products) online.
54. Instead, the defendants focused on their alternative claim, which was for revocation of the 001 mark for the disputed class 35 services save in so far as those services were provided to passengers on an aeroplane, described as “in-flight retail”.
55. easyGroup did not seek to contend that the 001 mark had been used for the disputed class 35 services in any context other than retail sales of products provided on board an easyJet flight. It nevertheless opposed any “in-flight retail” qualification on two grounds. The first was that, in easyGroup’s submission, applying the criterion of the intended purpose of the goods or services does not permit a distinction to be drawn between different types of retail channels, such as in-flight sales. Ms Wickenden argued that such sales are no different to a purchase in an airport, in their intended purpose and use. She referred to *ACTC* which expressly rejected the definition of a subcategory by reference to the shop in which the goods are sold.
56. Secondly, easyGroup said that online pre-orders would fall outside the definition of in-flight sales, and that the sales by easyJet made via online pre-orders were not merely token but constituted genuine commercial use of the mark.

In-flight retail as a separate retail channel

57. Neither party has been able to identify a case in which a subcategory of goods or services has been defined by reference to a particular retail channel. I do not, however, consider, that this precludes the definition of a coherent subcategory of in-flight retail services in the present case.

58. The starting point is that the registration for class 35 is not for the goods themselves, but for retail services connected with the sale of particular types of goods. Those services consist of bringing together goods manufactured and supplied by third parties for sale through a retail channel. The explanatory note to class 35 of the Nice classification states:

“This class includes, in particular:

- the bringing together, for the benefit of others, of a variety of goods, excluding the transport thereof, enabling customers to conveniently view and purchase those goods; such services may be provided by retail stores, wholesale outlets, through vending machines, mail order catalogues or by means of electronic media, for example, through websites or television shopping programmes;”

59. That classification expressly contemplates, therefore, that the service may be provided through different categories of retail channels. As Mr Keay pointed out, easyGroup itself registered the EU 003090958 mark, a figurative mark for easy.com, for (among others) class 35 services defined by reference to specific retail channels as follows:

“... bringing together and displaying a variety of goods enabling customers conveniently to view and to purchase such goods through retail shops, retail kiosks, the internet, on board aircraft, by telecommunication and by mail order catalogues; advisory and arrangement services relating to all the aforesaid; including, but not limited to, all the aforesaid services provided via telecommunications networks, by online delivery and by way of the internet and the world wide web.”

60. While the purpose or use of the *goods* sold onboard an aeroplane may be no different to that of the same goods sold in an airport shop, the *retail service* provided onboard an aeroplane is functionally distinct from the retail service provided in, for example, a bricks and mortar retail shop or a vending machine. I agree with the defendants that the average consumer would plainly perceive a difference between the purpose and functioning of the two services.
61. As Ms Mullen explained when cross-examined on this point, the differences in the nature of an in-flight retail service, as compared with a retail shop, include the logistical operation of getting the goods onto the aircraft, the fact that the goods are sold by cabin crew who are required to have knowledge of the several hundred products on offer on the aircraft alongside doing their normal job as cabin crew, the existence of a captive customer base on a flight as compared with the requirement to attract customers into a retail shop, the very different way in which products are presented to the customer in an aircraft as compared with being displayed on a shelf in a shop, and the returns procedure (which requires customers to send products to easyJet’s relevant logistics partner for processing on easyJet’s behalf).
62. The provision of the disputed class 35 services on board an aircraft is therefore, in my judgment, a sufficiently distinct service in its purpose and function, by comparison with the sale of the relevant products through different retail channels such as retail shops or the internet, that it can be regarded as constituting a coherent subcategory of the class 35 retail services.

Online pre-orders

63. The remaining issue is whether a limitation of the registration of the 001 mark for the disputed class 35 services to in-flight retail sales is undermined by easyJet's use of an online pre-ordering service. The defendants contended that the pre-ordering service did not affect the analysis, on the basis that:
- i) easyJet's use of online pre-ordering services was insufficient to constitute genuine use of its 001 mark in that regard, at least for cosmetics and fragrances.
 - ii) Online pre-ordering for delivery of goods in-flight still constitutes "in-flight retail".
64. easyGroup's evidence regarding the development and extent of a pre-ordering service for its in-flight retail sales was given by Ms Mullen and Mr Santos. Ms Mullen was adamant that easyGroup had had no involvement in easyJet's decision-making concerning its online pre-ordering service. Rather, she explained that the pre-ordering service was first introduced in around 2017, as an initiative of the in-flight retail team, and that decisions as to the rollout of the service were taken jointly by the in-flight retail team and Gate Retail, which supplied in-flight retail products to easyJet. The pre-ordering service was initially trialled with an offering of pre-orders for champagne and chocolates on flights around Valentine's Day 2018. That was then expanded to other items during the course of 2019, with pre-orders for cosmetics and fragrances being launched in or around July 2019. Where pre-ordering was available, it enabled the booker to place an order online, for goods which would be delivered to them during their flight. The booker was notified of the pre-ordering facility by an email sent to them by easyJet. The pre-ordering service was only available on selected easyJet flights.
65. It appears, however, from the data provided that the only pre-orders of cosmetics and fragrances took place in the period from July to October 2019, with no further pre-orders of those products after that date (during the relevant period). Ms Mullen could not explain why that was the case, and did not know whether emails offering the pre-order service were still being sent to flight bookers after that time. There is no evidence as to the proportion of flights on which pre-orders were offered, or the basis on which those flights were chosen. Pre-orders of all products appear to have ceased in 2020.
66. During the four-month period in which pre-orders of cosmetics and fragrances were made, the pre-order sales were miniscule, amounting to a total of £2519 of cosmetic and fragrance products. That figure stands in marked contrast to the direct (i.e. non-pre-ordered) in-flight sales by easyJet of cosmetics and fragrances, amounting to over £28m for FY 2019, and over £10m for FY 2020 (with the reduction between those years no doubt accounted for by the Covid pandemic).
67. There is no evidence before me as to the full range of cosmetic and fragrance products on offer for pre-orders, and whether that range changed during the period during which those products were available for pre-order. The sales data provided, however, disclose sales of only 15 individual cosmetic and fragrance products, in relation to several of which only a single item was pre-ordered throughout the four-month period in which pre-orders were available.
68. I bear in mind that the use of the mark need not always be quantitatively significant for it to be regarded as genuine. There must, however, be real commercial exploitation of the

mark on the relevant market, which is shown to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services: see §46.v) and vii) above. The smaller that commercial exploitation is, the more important it is for the trade mark proprietor to provide additional evidence as to the genuineness of its use: §47 above.

69. In the present case the evidence shows only tiny sales figures. Further evidence is therefore necessary, if easyGroup is to establish genuine commercial exploitation of the mark notwithstanding the extremely small volume of sales. There is, however, no evidence of the precise length of time for which the pre-order facility was in fact offered, or the proportion of flights on which it was offered, or the extent of cosmetic and fragrance products for which pre-ordering was available. In those circumstances, notwithstanding Ms Mullen's credible account of the genesis of the pre-order initiative, taken as a whole the evidence is insufficient to establish a genuine attempt thereafter to generate retail sales for cosmetics and fragrances via online pre-ordering, by contrast with the direct in-flight sales of those products which generated very significant turnover during the same period of time.
70. Ms Wickenden argued that if the pre-orders of other products (such as champagne and food) were such as to amount to genuine commercial exploitation of the mark for services connected with those products, then it would be necessary to establish something different about the pre-orders of cosmetic and fragrance products, if the court is to conclude that the latter did *not* constitute genuine exploitation of the mark. I do not reach any conclusion as to the genuineness of the exploitation of the mark in relation to pre-ordering services for other products: that has not been put in issue by the defendants. I note, however, that the data provided show far greater pre-order sales of other products (particularly champagne) than of cosmetic and fragrance products. Beyond that, any attempt to address that issue would face similar evidential problems as arise in relation to the sales of cosmetic and fragrance products.
71. Furthermore and in any event, I do not consider that the existence of a pre-ordering facility is inconsistent with a limitation of the registration of the disputed class 35 services to in-flight retail services. Since pre-orders were only ever available to the bookers of selected easyJet flights, and the relevant products were delivered to the passengers onboard those flights, the service provided remained an in-flight retail service, even if the relevant products were pre-ordered and paid for online rather than onboard the aircraft. A specification limited to in-flight retail services would not, therefore, exclude online pre-orders.

Revocation date

72. It is therefore, in my judgment, appropriate to order partial revocation of the easyJet 001 mark, by limiting the specification of the disputed class 35 services to in-flight retail services.
73. By the time of closing submissions, it was common ground that the date from which any revocation should take effect is the day following the five-year period from the date on which the 001 mark was placed on the register. The 001 mark was placed on the register on 9 January 2015; the five-year period from that date therefore expired on 9 January 2020; revocation on the basis set out above will therefore take effect as of 10 January 2020.

The average consumer

74. The average consumer for the purposes of an infringement claim must be a consumer of the relevant goods or services who is both (i) familiar with the trade mark and (ii) exposed to, and likely to rely upon, the sign: *Sky v Skykick UK* [2018] EWHC 155, §275. The average consumer must therefore be a consumer of the goods or services in relation to which the signs complained of have been used: *easyGroup v easylife* [2021] EWHC 2150 (Ch), §200. This does not mean, however, that the average consumer should be defined by the particular characteristics of the defendants' customers: *easyGroup v Easyway* [2021] EWHC 2007 (IPEC), §18.
75. There was, at least initially, a dispute between the parties as to the identification of the average consumer in the present case. The defendants' position was that their websites are directed at Germany and Austria and use exclusively the German language. Their business has never been directed at the UK, and the defendants contended that such sales as were made to the UK were small and "mere spillover". On that basis, the defendants' position was that the average consumer in this case is an online purchaser of cosmetics in Germany or Austria, aged between 22 and 55 years.
76. easyGroup said that there was no reason to limit the average consumer to any particular age (indeed the evidence included an email from a consumer who said that they were 100 years old). easyGroup also contended that the consumer should be identified as simply a customer in the EU without reference to any specific location.
77. By the time of closing submissions, the position was essentially agreed between the parties. The defendants no longer contended that the average consumer should be limited to any particular age group. It was also clear that despite the German-language target of the defendants' websites, the defendants had made non-negligible sales to the UK from October 2016 until February 2021 (even if those sales were small compared to the defendants' business in Germany and Austria). The defendants therefore did not pursue an argument that the average consumer should exclude consideration of consumers in the UK. The claimants, equally, did not suggest that any consumers other than those in Germany, Austria and the UK were relevant, and there was no evidence of sales by the defendants to any other countries.
78. It was therefore common ground that (i) the infringement analysis should consider German/Austrian consumers and UK consumers, and that (ii) in so far as the court finds a difference in the likelihood of confusion between German/Austrian consumers and UK consumers, that might lead to a limitation of the territorial scope of any injunctive relief: Case C-223/15 *Combit Software v Commit Business Solutions* EU:C:2016:719. On that basis, it will be necessary to consider in due course whether the likelihood of confusion differs as between consumers in Germany/Austria and the UK, on the basis that UK consumers are more exposed to the easy family of brands than customers in Germany/Austria.

Date for assessment of infringement

The law

79. *General principle.* In general, the relevant date for assessment of whether the use of a sign infringes a trade mark is the date that the use of the sign commenced: Case C-145/05

Levi Strauss v Casucci [2006] ECR I-370, §§17–18; *easyGroup v Easy Live* [2022] EWHC 3327 (Ch), §121. Where, however, use of a disputed sign precedes the publication of the trade mark said to be infringed, the earliest possible relevant date for assessment of the claim of infringement is the publication date of the trade mark said to be infringed: *W3 v easyGroup* §§216–218.

80. *Impact of limitation date.* Where that date falls prior to the limitation cut-off date, Arnold J held at §95 of *Walton International v Verweij Fashion* [2018] EWHC 1608 (Ch) that the relevant date for the assessment of infringement is the limitation cut-off date:

“The question whether the use of a sign infringes a trade mark pursuant to Article 10(2)(a),(b) of the Directive or Article 9(2)(a),(b) of the Regulation falls to be assessed as at the date that the use of the sign was commenced ... Where the use of the sign commenced more than six years (i.e. the limitation period) before the claim form, then the relevant date is six years before the date of the claim form: see *Stichting BDO v BDO Unibank Inc* [2013] EWHC 418 (Ch); [2013] E.T.M.R. 31 at [98].”

81. That analysis was adopted by both parties in *easyGroup v Nuclei*, without further argument, and I followed it at §295 of my judgment in that case. At §§123–4 of *easyGroup v Easy Live*, however, Sir Anthony Mann accepted the submission of counsel for Easy Live that Arnold J’s reliance on his earlier comments in the *BDO* case was misplaced. What the relevant passage in *BDO* actually said was that the court should consider the position as at the dates on which the respective defendants commenced using the sign, reassessing if necessary taking the partial revocation into account, but with the qualification that infringements prior to the date six years before the claim form was issued are barred by limitation in any event.
82. On that basis, Sir Anthony Mann departed from what Arnold J said in *Walton v Verweij* and my statement in *easyGroup v Nuclei* following *Walton*. As he went on to explain at §§124–5:

“An analysis which shifts the date of assessment to a date just inside the limitation period seems to me to be illogical if one starts from the proposition (which is not disputed as a starting point) that the dates for assessment of infringement and for passing off are the same, that is to say the date of the first use of the infringing sign (absent any subsequent material change of use). ... A continued use of the infringing sign will continue to be an infringement, but the assessment will already have been made. ... The intervention of a limitation period does not affect this logic. What it does is limit the period of time for which the remedy can be obtained. It does not (on well-established principles) extinguish the previous breach and require one to start again; it bars the infringements which can be relied on in the action.

In my view paragraph 98 of the *BDO* case makes that sort of observation about limitation. It does not say that the assessment has to be re-done at the beginning of the limitation period.”

83. Mr Edenborough contended that the analysis of Sir Anthony Mann is itself questionable in the light of the judgment of Arnold LJ on appeal in the *easyGroup v Nuclei*, which noted at §52:

“The judge proceeded on the basis that the relevant date for assessment of the infringement claim was 15 May 2013 (i.e. six years before the claim form was issued). This was not challenged by easyGroup on its appeal (although the Defendants contended by a respondents’ notice that the relevant dates were 18 October 2002, 29 September 2003 and 23 April 2013). The judge took into account evidence both pre-dating and post-dating 13 May 2013 in making her assessment. There is no dispute that she was correct to do so.”

84. Arnold LJ therefore acknowledged that the respondents’ notice had disputed the date for assessment of infringement. But he did not go on to decide the point, in the light of the other conclusions that he reached. I do not, therefore, think this takes the matter any further. The most recent consideration of the point remains that of Sir Anthony Mann. I should therefore in principle follow that judgment unless there is a powerful reason for not doing so: *Willers v Joyce (No. 2)* [2016] UKSC 44, §9. I am not persuaded that there is any good reason to depart from the analysis of Sir Anthony Mann; on the contrary, I respectfully agree with it, for the reasons he gave as set out above.
85. *Transfer of business.* A further question is whether a change in the company using the sign requires a new assessment of infringement to be made. In *W3 v easyGroup*, at §214, Arnold J repeated his conclusion in *BDO* that if the defendant uses the sign in a materially different manner or context at a later date, then a new global assessment must be made as of that date. He went on to reject arguments that the context of the use of the EasyRoommate signs had changed, and found that the relevant dates for assessment ranged from 2000 to 2005. It was irrelevant that during that period of time the EasyRoommate business was being conducted by the company DMISL rather than by the defendant W3, which did not take over the business until around October 2006. Similarly in *Supreme Petfoods v Henry Bell* [2015] EWHC 256 (Ch), §167, Arnold J took account of the use of the sign by both the defendant and its predecessors.
86. Mr Edenborough said that it was implicit in both *Supreme Petfoods* and *W3* that the respective defendants were the successors in title to the earlier businesses. He contended that the same should not apply in a case where there is no evidence of a formal transfer of the business (such as a written sale or assignment agreement). I agree that in both *Supreme Petfoods* and *W3* the court referred to the circumstances in which the defendants had acquired the predecessor businesses. I do not, however, accept that reference may only be made to the use by a predecessor company where there is evidence of a formal transfer of the business.
87. The relevant factor is whether a change in hands of the business leads to the use of the sign in a materially different manner or context. If it does, then a new assessment of infringement must be made. If it does not, i.e. if the evidence before the court establishes continuity in the use of the sign for a particular business operated by successive companies, then the transfer of the business does not require a new assessment of infringement to be made. It is not, for those purposes, necessary to go further and investigate the precise nature of the business transfer agreements between those companies: the material question is not the manner in which the business has transferred, but the use that has been made of the sign.
88. *Honest concurrent use/due cause.* Finally, in so far as reliance is placed on honest concurrent use as a factor to be considered in establishing whether there is an infringement, for the purposes of either Article 9(2)(b) or (c), or the question of whether

the defendants' use of the sign was "without due cause" for the purposes of Article 9(2)(c), it appears to be common ground that the application of these factors may change over time and as such must be assessed throughout the relevant period, beginning with the limitation cut-off date. To this extent, therefore, the assessment of infringement may ultimately change during the relevant period, such that liability arises for some but not all parts of the relevant period.

Assessment in the present case

89. In the present case, the disputed signs have been used by the easyCOSMETIC business on various dates since 2008, as set out at §26 above. While the defendants did not operate the German and Austrian parts of the business until 2016 (BPL and Mrs Khammo) and 2018 (BIAL), Mr Foerste's evidence is in my judgment sufficient to establish that there was a transfer of the business through successive companies from easyCOSMETIC Deutschland to the defendants. The absence of any details as to the precise contractual arrangements in each case does not undermine that conclusion. easyGroup does not contend that the changes in the operating entities led to the relevant easyCOSMETIC signs being used in a materially different manner or context. In principle, therefore, the assessment of infringement should have regard not only to the defendants' use of the sign but also the use of the sign by their predecessors in the easyCOSMETIC business.
90. As to the publication dates of the trade marks relied upon by easyGroup:
- i) The 909 mark was published on 17 July 2000, prior to the use of any of the easyCOSMETIC signs. The dates for assessment of infringement of that mark pursuant to Article 9(2)(c) are therefore the subsequent dates on which use of the disputed signs commenced, i.e. 2008 for the easyCOSMETIC word sign, 2009 for the orange/black sign and 2017 for the white/black sign.
 - ii) The 001 mark was published on 21 March 2012. That is therefore the date for the assessment of infringement of that mark pursuant to Article 9(2)(b) and (c) by the unstylised easyCOSMETIC word sign and the orange/black sign. Since the white/black sign was not used until 2017, infringement by that sign falls to be assessed as at that later date.

These dates are of particular relevance to the assessment of the existence and reputation of the easy family of marks.

91. In so far as it is necessary to consider honest concurrent use and due cause, it will be necessary to determine whether the application of those factors changed during the relevant period, i.e. from the limitation cut-off date of March 2014 onwards.

Family of marks

The law

92. Where it is shown that the claimant has used a "family" of trade marks with a common feature, and the disputed sign shares that common feature, that may support the existence of a likelihood of confusion for the purposes of an infringement claim under Article 9(2)(b), or a link between the sign and the trade mark for the purposes of a claim under Article 9(2)(c).

93. The existence of a family of marks will be a relevant factor in assessing a likelihood of confusion, for the purposes of a claim under Article 9(2)(b), where two conditions are satisfied. First, the marks said to form part of the family must be present on the relevant market. This requires proof of the “actual use” of the marks belonging to the family. Secondly, the sign must be similar to the marks belonging to the family and must also display characteristics capable of associating it with the family: see Case T-287/06 *Miguel Torres v OHIM* [2008] ECR II-3817, §§79–81; Case T-301/09 *IG Communications v OHIM* EU:T:2012:473, §§23 and 86; Case T-175/22 *Novartis v EUIPO* EU:T:2023:135, §98.
94. In the case of a claim under Article 9(2)(c), where a family of marks is established, that is one of the factors to be taken into account in establishing whether there is a connection between the contested sign and the trade mark said to form part of that family: *IG Communications v OHIM*, §§22 and 106.
95. The consideration of the market presence of the marks said to form part of the family does not necessarily require all of those marks to be used in the market at the date of the assessment of infringement. Where a mark has been used in the market but is no longer used at the date of assessment, the question is whether it is likely to remain in the mind of the average consumer: *easyGroup v Easy Live*, §149.

Assessment in the present case

96. easyGroup relies heavily on the existence and reputation of an “easy family” of marks including some or all of easyJet (and various sub-brands associated with easyJet), easyHotel, easyCar/easyRentacar, easyBus, easyGym, easyProperty, easyCoffee, easyEverything/easyInternetCafé, easy4men, easyValue, easyWatch, easyCruise, easyMoney, and easyCinema. easyGroup contends that the easy family of marks has a collective reputation in the UK and throughout the EU countries which is relevant in assessing the likelihood of confusion as between the 001 mark and the defendants’ signs.
97. easyGroup relies, in particular, on the common stylisation used for brand names across the easy family of marks, as set out at §23 above, namely the lower case word “easy” followed by the name of a service or product starting with an initial uppercase letter, the use of the Cooper Black font, and the use of the Pantone 021c orange colour.
98. For the reasons set out above, the relevant question is the use and reputation of the marks in Germany, Austria and the UK. It follows from my findings above on the relevant dates for assessment that in the context of the Article 9(2)(b) infringement claim, which refers only to the 001 mark, the relevant dates for assessment of a family reputation are 2012 for the easyCOSMETIC word sign and the orange/black figurative sign, and 2017 for the white/black figurative sign. In the context of the Article 9(2)(c) infringement claim, which refers to the 909 mark in addition to the 001 mark, it is also relevant to consider the family reputation as at 2008 and 2009, when the easyCOSMETIC word sign and the orange/black figurative sign were first used.
99. The consistent use of the stylisation described above across the “easy” brands is not disputed. It is also not disputed that easyJet had a substantial reputation in all three countries throughout the relevant period. Various sub-brands (such as easyKiosk and easyRider) have been used for ancillary services provided to easyJet customers, but there is no evidence that those brands have ever been used in a context separate from that of

easyJet. As to the other brands relied on by easyGroup as forming part of its family of brands:

- i) easyHotel is a chain of budget hotels starting with a single hotel in 2004, growing to six hotels in the UK in 2009, and ten by 2014. There are no easyHotels in Austria, but two hotels in Germany opened in 2011 (Berlin) and Frankfurt (2015). While the business is undoubtedly substantial, leading to a flotation on London's AIM exchange in 2014, there is no evidence of the turnover generated by the German hotels, or any marketing of those hotels in Germany or Austria.
- ii) easyCar/easyRentacar was launched as a car rental service in 2000 (easyRentacard, rebranded to easyCar in 2003), but became a brokerage/booking service in 2004. It was a substantial business in the UK during the relevant periods of time, but there is no evidence that it has ever traded to a material extent in Germany or Austria.
- iii) easyBus was launched in 2004 and offers airport transfers. It operated in the UK during the relevant periods of time, and has at various times also offered services in France, Switzerland and Italy, but there is no evidence that it has ever traded in Germany or Austria.
- iv) easyGym was launched in 2011 and has operated up to 15 UK gyms (in 2016–2017). It expanded into France in 2019, but has never operated in any other countries.
- v) easyProperty is an online estate agent and auction house which launched in 2014. There is no evidence that it has ever traded outside the UK.
- vi) easyCoffee is a small chain of coffee shops launched in 2016, with 9 UK shops in 2020. There is no evidence that it has ever traded outside the UK.
- vii) easyEverything/easyInternetCafé was a chain of internet cafés that was launched in 1999, with substantial turnover in the early 2000s, but then began winding down and closed in 2007. There were two locations in Germany (Berlin and Munich) which opened in 2000–2001, but there is no evidence of any turnover or marketing at those locations, nor is there any evidence of how long trading continued at those locations.
- viii) easy4men was an economy range of male toiletries sold in Boots stores between 2004 and 2007. Between 2007–2010 it conducted sales through the website www.easy4men.com and thereafter at easyLand. There is evidence of a very small turnover before 2007, but no evidence of sales after 2007 or any evidence of sales outside the UK.
- ix) easyValue was a price comparison website launched in 2000. There is evidence of substantial revenue in 2000, but no evidence as to the scale of its trading after 2003, and no evidence of any market presence outside the UK.
- x) easyWatch was a line of watches developed in around 2005. easyGroup says that they were sold between 2005 and 2008, but there is no evidence of sales volumes or turnover at any period of time, and no evidence of any market presence outside the UK.

- x i) easyCruise launched in 2005 and generated substantial turnover in 2005–2006. There is, however, no evidence as to the scale of its operations after 2006, or its presence on the German or Austrian markets, other than screenshots of a German version of its website in November 2006 and January 2007, and brochures for 2008 and 2009.
 - x ii) easyMoney was a credit card that was launched in 2001 and discontinued in 2006. The brand has subsequently been used for online information and advice including comparison services for financial products. No turnover figures have been provided for any period after 2004, nor is there any evidence of a presence on the German or Austrian markets.
 - x iii) easyCinema was a single cinema in Milton Keynes which opened in 2003 and was short-lived. Thereafter the brand was used for a mail-order DVD rental provider. There is no evidence of business turnover in either of these guises, and no evidence of any market presence outside the UK.
100. Accordingly, as regards Germany and Austria, the only relevant brands are easyJet, and possibly easyHotel (from 2011). The only other brand with any market presence in Germany was easyEverything/easyInternetCafé, for which there is no evidence of the extent of trading after two internet cafés opened in 2000–2001. There is, therefore, insufficient evidence of a market presence of that brand which would have remained in the mind of the average German or Austrian consumer by even the earliest relevant time point for the purposes of this case (2008/2009). In relation to the other brands relied on by easyGroup, there is no evidence of any market presence outside the UK.
101. It follows that, at the relevant points of time, the evidence establishes only one or at most (from 2011) two of the “easy” marks on the market in Germany or Austria. That is not sufficient for a finding of use on the market of a family of marks: *Novartis v EUIPO*, §100 (rejecting a “family” consisting of only two marks).
102. As regards the UK, easyGroup can rely on the existence of a family of marks at the relevant points in time, on the basis of the market presence of easyJet, easyHotel, easyCar/easyRentacar and easyBus (in these cases throughout the relevant period), together with easyGym (from 2011), easyProperty (from 2014), easyCoffee (from 2016) and easyMoney (from 2016). I also accept that in relation to the earlier part of the relevant period easyInternetCafé (as it became) might have retained enough of a lingering reputation to have remained in the minds of the average UK consumer. The other brands relied on by easyGroup were launched in the early 2000s, but there is no evidence of their continuing market presence by even the earliest relevant time point for the purposes of this case, or that they had been used on the market sufficiently close to that time that the marks would have been likely to have remained in the mind of the average UK consumer.
103. I do not accept easyGroup’s pleaded claim that its use of a family of marks has come to indicate to the average UK consumer, by any date relevant in these proceedings, that the use of a mark comprising “easy” before or as a prefix to a word or words alluding to goods and services was a reference to goods and services associated with, approved, authorised or endorsed by easyGroup alone, and no other entity. That is an extreme proposition which is not remotely established on the evidence before the court.

104. As the defendants have pointed out, the word “easy” is a common descriptive adjective and there are, and have been at all material times, numerous UK companies unconnected with easyGroup, which use a brand comprising the word “easy” before or as a prefix to a word or words alluding to goods and services. These include several brands in respect of which the courts have found there to be no infringement (EasyRoommate, easylife, Easy Live Auction and EasyOffices). Mr Anderson’s evidence also referred to other companies whose brand rights were eventually acquired by easyGroup, such as Easy Cleaning, Easy Voyage and Easy Food, and who had built up substantial businesses prior to those acquisitions.
105. It is, moreover, notable that easyGroup requires its licensees to adopt the common stylisation set out above. That is an indicator that a specific form of presentation is required to indicate to consumers that the relevant brand is a brand within the family of brands associated with easyGroup. While there is no dispute that easyGroup has gone to considerable efforts to promote and market the easy family of brands, its brand marketing invariably uses the specified stylisation.
106. No doubt recognising the problems with easyGroup’s pleaded case in this regard, Mr Edenborough’s closing submissions did not seriously pursue a claim to the repute of the word “easy” in itself before or as a prefix to another word. He did, however, submit that if “easy” conjoined with a second word was combined with use of the colours orange and white, that indicated that the brand was part of the easy family of brands. That claim was not pleaded and I do not accept it. It is not supported by the evidence before the court, which not only refers to the use of a specific shade of orange (Pantone 021c) but also the use of a specific font (Cooper Black) and lower camel case lettering as distinguishing characteristics of the easyGroup brands.
107. While I accept (as discussed further below) that it is relevant to take account of the association of the easy family marks with orange colouring in addressing the infringement issues, the evidence certainly does not establish that simply using the word “easy” conjoined with a second word, and using orange/white colours, is or was at any material time perceived by consumers in the UK or elsewhere as indicating an easyGroup brand. Indeed, Mr Edenborough did not identify any evidence at all supporting this proposition.

Infringement under Article 9(2)(b)

The law

108. Article 9(2)(b) of the Regulation provides:

“Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the EU trade mark, the proprietor of the EU trade mark shall be entitled to prevent all third parties not having his consent from using in the course of trade, in relation to goods or services, any sign where:

...

(b) the sign is identical with, or similar to, the EU trade mark and is used in relation to goods or services which are identical with, or similar to, the goods or services for which the EU trade mark is registered, if there exists a

likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;”

109. In order to establish infringement under Article 9(2)(b), six conditions must be satisfied: (i) there must be use of a sign by a third party within the relevant territory; (ii) the use must be in the course of trade; (iii) it must be without the consent of the proprietor of the trade mark; (iv) it must be of a sign which is at least similar to the trade mark; (v) it must be in relation to goods or services which are at least similar to those for which the trade mark is registered; and (vi) it must give rise to a likelihood of confusion on the part of the public: *Liverpool Gin Distillery v Sazerac* [2021] EWCA Civ 1207, §7.
110. In the present case there is no issue as to conditions (i) to (v). It is therefore not disputed that the easyCOSMETIC signs are at least similar to the trade marks relied upon by easyGroup, and that the services provided by the easyCOSMETIC business are at least similar to the services for which the 001 mark is registered. The defendants did not suggest that the partial revocation of the 001 mark would make any difference to that analysis. The only disputed issue is therefore the likelihood of confusion under condition (vi).
111. *Likelihood of confusion.* The approach to the likelihood of confusion has been considered by the CJEU in numerous decisions. The Trade Marks Registry has adopted a standard summary of the principles established by those authorities, which has been approved by the Court of Appeal. The current version of the summary is set out in *Iconix v Dream Pairs* [2024] EWCA Civ 29, §10 as follows:

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

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

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

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

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

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain

an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

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

112. As set out above, where a family of marks is established, that will also be relevant to the assessment of the likelihood of confusion.
113. *Direct and indirect confusion.* There are two main kinds of confusion: direct confusion, where consumers mistake the disputed sign for the trade mark, and indirect confusion, where the consumers do not mistake the sign for the trade mark, but believe that goods or services denoted by the sign come from the same undertaking as goods or services denoted by the trade mark or from an undertaking which is economically linked to the undertaking responsible for goods or services denoted by the trade mark. The two types of mistake are very different in nature. Direct confusion is a simple matter of mistaking one mark for another, whereas in the case of indirect confusion the consumer recognises the difference between the marks but concludes, based on the common element(s) taken in the context of the use of the sign, that the sign comes from the same undertaking as, or an undertaking economically-linked to, the owner of the trade mark: *Liverpool Gin Distillery v Sazerac* [2021] EWHC Civ 1207, §§10–12, citing Iain Purvis QC in *LA Sugar v Back Beat* (O/375/10).
114. *Actual use in context.* It is necessary to consider the actual use of the sign complained of in the context in which the sign has been used: Kitchin LJ in *Specsavers International Healthcare v Asda* [2012] EWCA Civ 24, §87. Likewise, where a trade mark is not registered in colour but has become associated with a particular colour or combination of colours through extensive use in that colour or combination of colours, that may be taken into account as a relevant factor in assessing the likelihood of confusion with the disputed sign: Case C-252/12 *Specsavers International* EU:C:2013:497, §§37, 39–41.
115. *Evidence of actual confusion.* In *easyGroup v Nuclei*, I made the following comments regarding the relevance of evidence of actual confusion:

“308. ... in the case of infringement the assessment of confusion must take account of any relevant evidence of what has actually occurred – *a fortiori* where the case concerns a historic infringement.

309. It is therefore not disputed that the extent of evidence of actual confusion is a matter that will form part of the global assessment of the likelihood of confusion for the purposes of infringement. In particular, a lack of evidence of confusion may contribute to a finding of non-infringement where the extent of side-by-side use of the mark and the disputed sign, and the efforts put into finding evidence of confusion, are such that if there was a likelihood of confusion one might expect more abundant evidence of that to have emerged: *Spear v Zygnna* [2015] EWCA Civ 290, [2015] FSR 19, §181; and *W3 v easyGroup* at §§276–7.

310. An absence of evidence of confusion will, however, be less probative where the mark has only been used to a limited extent, or in such a way that there has been no possibility of confusion, or where the alleged infringer’s use has also been very limited: Kitchin LJ in *Maier v Asos* [2015] EWCA Civ 220, [2015] FSR 20, §80, citing Laddie J at §22 of *Compass Publishing v Compass Logistics* [2004] EWHC 520 (Ch), [2004] RPC 41. (See also more recently, *easyGroup v easyWay* [2021] EWHC 2007 (IPEC), §80.) Where reliance is placed on an absence of evidence of confusion, it is therefore necessary to consider the relevance of that in the context of the use that has been made of the mark and the disputed sign.”

116. On appeal in *easyGroup v Nuclei*, Arnold LJ commented at §77 that:

“... absence of evidence of actual confusion is not necessarily fatal to a claim under ... Article 9(2)(b). The longer the use complained of has gone on in parallel with use of the trade mark without such evidence emerging, however, the more significant it is. In considering the weight to be attached to this factor, it is relevant to consider what opportunity there has been for confusion to occur and what opportunity there has been for any such confusion to be detected.”

117. *Distinctiveness/colour*. The more distinctive a trade mark becomes, the greater will be the existence of the likelihood of confusion: Case C-251/95 *Sabèl* EU:C:1997:528, §24, and more recently see e.g. Case T-564/22 *Pierre Balmain* EU:T:2023:851, §78. The use of colour may form part of the assessment of the distinctiveness of a trade mark. Where the trade mark has been used in a particular colour or combination of colours, such that it has become associated in the mind of a significant portion of the public with that colour or combination of colours, and the disputed sign uses the same colour or combination of colours, that can support the existence of a likelihood of confusion even if the trade mark is not registered in colour: *W3 v easyGroup* §236, citing Case C-252/12 *Specsavers International*, §41.

118. *Honest concurrent use*. Honest concurrent use of the sign complained of is not a defence to a claim for trade mark infringement under Article 9(2)(b), but may be relied upon as a factor in the infringement analysis. Thus if the claimant establishes a *prima facie* case of likelihood of confusion, the burden shifts to the defendant to establish that, by virtue of its honest concurrent use, there is nevertheless no adverse effect on any of the functions of the trade mark. In exceptional cases, even if there is a small level of actual confusion between the trade mark and the sign, honest concurrent use may lead to the conclusion that there has been no infringement if most of the relevant class of consumers have come to understand that the trade mark and the sign denote different trade origins. That does

not require specific positive evidence of consumer education, but can be inferred from many years of parallel trade on a substantial scale: Arnold LJ in *Match v Muzmatch* [2023] EWCA Civ 454, §§115–16 and 119–20, and in *easyGroup v Nuclei*, §§78 and 103.

Assessment in the present case

119. It is not suggested that the average consumer (whether in the UK, or in Germany/Austria), would mistake the defendants' signs for the 001 mark. Rather easyGroup's case is one of indirect confusion with the 001 mark, namely that at the relevant times the average consumer would have believed that easyCOSMETIC was a business that was economically linked to the undertaking responsible for the services registered under the 001 mark.
120. *Level of attention of average consumer.* In assessing the likelihood of indirect confusion, the defendants submit that the average consumer is likely to pay an above average level of attention, because cosmetics and fragrances are products applied to the face or body, in respect of which consumers tend to be knowledgeable and typically have strong preferences. The defendants also rely on the fact that their websites include products from luxury brands. Those submissions might carry weight if the defendants themselves produced the relevant cosmetics and fragrances, but they do not do so; rather, their service is in providing the websites on which the products are sold, and there is no evidence suggesting that consumers will pay an above average degree of attention to the branding in that context.
121. *Distinctive character of the 001 trade mark.* The defendants accept that the word "Jet" in the 001 word mark has inherent distinctive character in respect of retail services. The "easy" element of the mark, however, has no inherent distinctive character: it is a descriptive word, which indicates that the services are easy to use. It is common ground that the 001 mark has acquired a reputation and enhanced distinctive character in respect of airline services, but easyGroup does not rely on the registration of the mark in respect of these services for the purposes of its Article 9(2)(b) claim. Rather, it relies on the registration of the mark in respect of retail services connected with the sale of cosmetics and fragrances. easyGroup has not, however, pleaded any reputation or enhanced distinctive character of the 001 mark in respect of those services.
122. easyGroup does, however, plead that the easy *family* of marks has a substantial reputation, which it contends enhances the distinctiveness of the 001 mark. As already discussed, in respect of the perception of the average German or Austrian consumer I do not consider that any reliance can be placed on the easy family of marks. As regards the average UK consumer, while easyGroup can rely on the existence of a family of marks, the family reputation does not merely rest on the use of the word "easy" in the brand name. Rather, its distinctiveness relies heavily on the common stylisation elements of the colour and font prescribed by easyGroup. Moreover, by 2012 (the relevant date for the assessment of Article 9(2)(b) infringement by the unstylised easyCOSMETIC word sign and the orange/black figurative sign) the only brands which I have found to form part of the easy family in the UK were easyJet, easyHotel, easyCar/easyRentacar, easyBus and easyGym. With the exception of easyGym, all of these were travel related; none of these are established to have had any reputation in the retail of consumer goods. By 2017 (the relevant date for the assessment of the white/black figurative sign) the easyProperty,

easyCoffee and easyMoney businesses had launched. Even then, however, none of these related to the retail of consumer goods such as cosmetics and fragrances.

123. *Comparison of services.* It is not disputed that the defendants' services fall within the class 35 services for which the 001 mark is currently registered, such that the relevant services are identical. From the date of revocation (10 January 2020) the comparison is between in-flight retail of cosmetics and fragrances under the 001 mark, and the defendants' online retail of cosmetics and fragrances through their German and Austrian websites. Those services are similar but only to a moderate degree, given the very different nature of the retail channels used in each case. As the defendants rightly point out, in-flight retail services are perceived as ancillary to the core transport services provided by the relevant airline, and the average consumer would not expect to see airlines engaging in the online retail of goods outside the context of the flight.
124. *Comparison of signs.* The comparison is between the defendants' disputed signs and the 001 mark. In making that comparison, easyGroup submitted that the average consumer would place more emphasis on the "easy" element of the 001 mark and the defendants' signs, because:
- i) "easy" is at the start of the mark and the signs (reading from left to right), and it is recognised that consumers pay more attention to the beginning of marks (e.g. Case T-879/19 *Sumol + Compal Marcas v EUIPO* EU:T:2020:401, §47).
 - ii) COSMETIC in the defendants' signs is descriptive of the goods or services in issue, and would therefore be discounted in significance.
 - iii) COSMETIC is a recognisable English word similar to those of the main languages spoken across the EU, whereas "easy" is translated into quite different words in the main European languages (e.g. *einfach* in German, *facile* in French, *fácil* in Spanish). The "easy" component of the words is therefore more striking in the EU context.
 - iv) The "easy" component of the defendants' figurative signs is in thicker and more striking font than the COSMETIC component, with the first three letters of "easy" the same height as the letters of COSMETIC.
 - v) For the orange/black sign, the orange colour of the word "easy", set on a white background, mimics the typical way in which the 001 mark is presented in practice.
 - vi) For the white/black sign, orange stylisation is used elsewhere on the website to provide a degree of visual continuity, such that the white/black sign is "tainted" by that use of colour.
 - vii) The distinctiveness of the "easy" element of the 001 mark has been enhanced through use in the context of other "easy" family businesses, and is associated with orange and white stylisation. Consumers have thereby been educated to see the "easy" element of the 001 mark as a guarantee of origin.
125. I accept (i) as a general proposition. I do not accept that this would lead to greater emphasis being placed on the "easy" element of the mark and signs in this case, however, given that both easyJet and easyCOSMETIC are relatively short words, and in

circumstances where “easy” is, as I have already found, a common descriptive adjective. I do not accept (ii) and (iii). Both “easy” and “cosmetic” are common descriptive words which are recognisable in Germany/Austria as well as in the UK. The material before me does not provide any reason to consider either word as being inherently more striking than the other, whether in the UK or German/Austrian context. I accept (iv) in relation to the orange/black and white/black signs used by the defendants. As regards (v) and (vi), I accept that the use of orange for the word “easy” in the orange/black sign tends to emphasise that word, by comparison with the black of COSMETIC. The same is not, however, true for the white/black sign, where orange colouring is entirely absent. Mr Edenborough’s submission that the sign might be “tainted by association” with orange used elsewhere on the defendants’ website was wholly unconvincing.

126. I only partially accept (vii): I accept that the 001 mark is associated with the use of a particular orange colour, and that as regards the average UK consumer (but not the average German/Austrian consumer) the distinctiveness of the “easy” element of the 001 mark has been further enhanced through its use in the context of other “easy” family businesses, in which the specified orange colour (Pantone 021c) is also used as a common stylistic element. For the reasons set out above, I do not accept that consumers regard the word “easy” as a guarantee of origin, whether when associated with the colour orange or not.
127. There are therefore some factors which indicate that, to some extent, the word “easy” might be slightly more dominant than the word COSMETIC in the defendants’ two figurative signs. This is, however, more significant for the orange/black sign than the white/black sign, and I do not accept all of easyGroup’s submissions in that regard.
128. In that context, I accept that there are some visual and conceptual similarities between the 001 mark and the defendants’ signs. The defendants’ signs all start with “easy”, which I accept might be slightly more dominant in the figurative signs. The slightly thicker font used for the word “easy” in the figurative signs bears some (modest) similarity to the Cooper Black font used for the easy family of marks. The orange colouring in the orange/black sign is also somewhat similar to the orange stylisation extensively used for (and therefore associated with) the 001 mark. The orange stylisation is also used by the easy family of marks, which would be of some added relevance to the UK consumer.
129. Those similarities are, however, in my judgment offset by the visual and conceptual differences between the marks. Most obvious is the clear difference between EASYJET and easyCOSMETIC. While I have found that the slightly thicker font (for both figurative signs) and orange colouring (for the orange/black sign) somewhat emphasises the word “easy”, attention is drawn to the word COSMETIC by the capitalisation of that word and the fact that in both figurative signs that word is presented in black, which is a clear contrast to the word “easy” in orange or white. The use of capitalisation for COSMETIC is also a clear point of differentiation compared to the 001 mark, which is consistent with the common stylisation of the easy family of marks uses lower camel case lettering.
130. The defendants refer to other differences between their figurative signs and the easy family stylisation, which I consider to have less significance in this regard in the overall impression produced by the figurative signs. While the orange colour used on the orange/black sign is a paler orange than the Pantone 021c used for the easy family of brands, I accept that the average consumer will have imperfect recollection of the precise colour associated with the easyGroup brands. The defendants also emphasise the

different font used by easyCOSMETIC and the easy family of brands, but again the average consumer is not likely to have a good recollection of precise font stylisation details. I have already rejected the submission that the average consumer will have an above average level of attention in this context.

131. There is a clear aural difference between EASYJET and easyCOSMETIC, but I agree with easyGroup that it is unlikely that the aural aspect of the mark will play a significant role in the purchasing process, as the signs will be encountered predominantly on screen.
132. *Context of use of the defendants' signs.* The context in which the defendants' signs are used tends to point away from a likelihood of confusion. It is apparent from the defendants' websites that the business is that of a German or Austrian cosmetics retailer. There is (and was, during the relevant period) nothing on those websites to indicate any connection with the easyJet airline business. easyGroup places some reliance on the use of orange design elements on parts of the defendants' websites. I consider that to be too remote from the defendants' signs for that to have any impact on the likelihood of confusion between the defendants' signs and the 001 mark.
133. *Evidence of actual confusion.* The defendants and their predecessors have been trading alongside easyJet for a very long time (by now over 15 years), on a very substantial scale. easyJet's sales figures for cosmetics and fragrances show sales growing from £10m in FY 2014 up to over £28m in FY 2019, before dropping off somewhat in the following years due no doubt to the Covid pandemic. The easyCOSMETIC business grew very quickly from its first trading year in 2009, to an annual turnover of over €2m in 2010, almost €17m by 2014 and over €72m by 2019. In terms of the volume of orders, in 2019 the easyCOSMETIC business distributed over 1m packages, the vast majority of which (over 900,000) were to Germany. In principle, therefore, there has been ample opportunity for evidence of actual confusion to emerge, if there was a likelihood of confusion.
134. In the present case easyGroup searched its internal files comprising around 17 million emails, over 13 million files and over 2 terabytes of data in total dating from 2003, as well as easyJet customer email files for the period 2016–2020, and searches of social media sources. Those extensive searches produced just two emails which are relied upon by easyGroup as instances of confusion. The defendants, for their part, searched almost 18 million emails from their customer service accounts, revealing a small number of emails referring to easyJet. easyGroup says that these various communications provide "some evidence" of actual confusion. The defendants say that none of the emails in fact establishes confusion on the part of the sender. None of the authors of the emails were called to give evidence. As Arnold J commented in *W3 v easyGroup*, §254, it is therefore necessary to be cautious in trying to interpret these communications.
135. I will start with the emails sent to easyGroup. The context for these is that, as described in *W3 v easyGroup*, §116 and *easyGroup v Nuclei*, §323, since at least November 2002 there has been a "brand thieves" section on easyGroup's www.easy.com webpage where easyGroup solicits evidence of confusion from members of the public with the following request:

"If you see a company that you think is disguising itself as an easyGroup company or that is trying to piggyback off our brand in any way, then please help us to protect both the consumer and our brand. Please email any

information to domains@easygroup.co.uk and indicate if at any stage you have been under the impression that this was a genuine easyGroup company set up by our founder and chairman Stelios. Evidence of confusion helps our case.”

136. That request produced the following two emails relied upon by easyGroup:

i) An email on 11 November 2013:

“Having a look on the net for aftershave for Christmas I found a company on amazon and also having a brand web site selling perfumes/cosmetics called easyCOSMETIC. initially I thought this was an easy group brand as the word easy was in lower case and using the easy orange colouring on the amazon web site, below is the branding/link for your perusal”.

I agree with the defendants that even if the writer was “initially” confused as suggested, it is apparent that they were no longer confused by the time of the email. I do not, therefore, consider this to be an example of actual confusion.

ii) An email on 9 February 2013:

“I have noticed a fragrance website based in Germany doing grey perfumes and looks very much like an easy brand. Is it any thing to do with you?”

easyGroup’s response confirmed that easyCOSMETIC was nothing to do with the easyGroup group of companies. This email is not an instance of confusion; the writer was merely asking whether there was a link between the companies.

137. Turning to the emails sent to the defendants in which easyJet is referenced, and which are relied upon by easyGroup as instances of confusion:

i) In 14 emails sent between September 2014 and June 2023 a customer wrote “easyJet Cosmetic” or similar, rather than “easy Cosmetic”. A typical example is an email on 3 May 2021 from a German customer which started “Hallo easyJet Cosmetic Team ...” The emails address a range of issues including delivery, invoicing and payment enquiries. I agree with the defendants that these emails do not demonstrate that the customers thought that easyCOSMETIC was associated with easyJet (particularly given that the authors of the emails have not given any evidence on this point). The far more probable explanation is that these were simply typographical errors, most likely caused by use of predictive text or autocorrect functions. In one case there is clear evidence that this was, indeed, the explanation: on 28 June 2018 the customer wrote an email beginning “Hallo an das Team von easyJet cosmetic”, before resending that a short time later corrected to “Hallo an das Team von easy cosmetic”. That indicated that the customer spotted the error shortly after sending the email, and corrected it promptly.

ii) The only other email disclosed by the defendants which is relied on by easyGroup as an instance of confusion is an email on 1 May 2017 in which the customer said, “Ich kann kein Parfüm in das easy vapo füllen. Trotz Anleitung geht nichts in das easyJet vapo.” (“I’m unable to top up the easy vapo spray with perfume. Despite

following the instructions, nothing can be inserted into the easyJet vapo spray.”) As with the examples referring to “easyJet Cosmetic” the most likely explanation for the reference to “easyJet vapo” is that it was a typographical error caused by the use of predictive text or autocorrect, particularly given that the writer’s first sentence referred to “easy vapo” rather than easyJet. Nothing suggests that the customer genuinely believed this to be a product associated with easyJet.

138. There is therefore no evidence of actual confusion by anyone (whether a customer of the defendants or otherwise), despite the many years of parallel trading.
139. easyGroup said that this could be explained by the fact that indirect confusion would not be likely to come to light, particularly given the scale of the actual overlap between easyJet’s retail of cosmetics and fragrances and the easyCOSMETIC business.
140. I do not accept that explanation. The defendants’ business has been operated on a very significant scale, as set out above, and it is apparent from the customer emails which have been disclosed that it is very straightforward for the defendants’ customers to make a complaint or raise a query, by sending an email to the easyCOSMETIC customer service team at service@easycosmetic.de or service@easycosmetic.at. The easyJet sales figures likewise show a multimillion pound annual turnover in cosmetics and fragrances, from their in-flight sales. More generally, as set out above easyGroup positively solicits evidence of confusion from members of the public. In those circumstances, if there was indeed a likelihood of indirect confusion on the part of the average consumer, one would expect to find at least some instances of genuine confusion in the extensive searches conducted by the parties through millions of customer service emails. The fact that there are no examples at all is a factor suggesting that confusion was not likely.
141. *Likelihood of confusion overall.* The matters set out above disclose factors that point in both directions. The “easy” element of the 001 mark (which easyGroup contends is the dominant component of that mark) has no inherent distinctive character, and the family reputation is not relevant for German/Austrian consumers. For UK consumers the family reputation is relevant, although none of the easy family brands are related to the retail of consumer goods such as cosmetics and fragrances. There is some visual and conceptual similarity between the 001 mark and the easyCOSMETIC signs, and the font style of the figurative signs and the orange colouring in the orange/black sign bears some similarity to the stylisation of the easy family of marks, and the colouring associated with the 001 mark. I also bear in mind that the defendants’ services were identical to the registered class 35 services for the 001 mark, until January 2020, and of moderate similarity thereafter. Those similarities are, however, in my judgment outweighed by the clear visual and conceptual differences between the marks, and the context of use by the defendant which also points away from a likelihood of confusion. It is also significant that despite extensive searches of many millions of emails on both sides, and many years of parallel trading, no instance of genuine confusion has been identified.
142. Overall, taking account of all of those factors, I do not consider there to be a likelihood of indirect confusion between the defendants’ signs and the 001 mark.
143. For completeness, I note that the German Patent and Trade Mark Office (**DPMA**) in *Beauty Perfectionists and easyGroup v UWI* (14 June 2023) considered that the sign



used in relation to the retail of perfume gave rise to a likelihood of confusion with the EASYJET mark. That decision is not binding on me, is very concisely reasoned, and I have had the benefit of far more evidence than was apparently put before the DPMA.

144. *Honest concurrent use.* In light of my conclusions above, it is not necessary to consider honest concurrent use of the defendants' signs. Had it been necessary to do so, however, this would have been a further relevant factor pointing away from a conclusion of infringement under Article 9(2)(b), at least during the later part of the relevant period. The launch of the easyCOSMETIC business predated the registration of the 001 mark by over two years. Mr Ganzer's unchallenged evidence was, moreover, that the inspiration for the easyCOSMETIC name and logo design came from his design work for another company, easyLIMITED. As I have already found, "easy" is a common descriptive adjective. There is nothing to suggest that the defendants' designs were chosen on a basis that was not honest.
145. easyGroup was aware of the easyCOSMETIC business since at least 2011, but after an initial complaint in May 2011 it then took no further action until June 2019. That is indicative of the fact that the defendants' business was having no real impact on easyGroup or its licencees; and there is certainly no evidence that easyGroup or any of its licencees have been harmed by the easyCOSMETIC business. easyGroup argued that it was justifiable for it to have reconsidered the risk and damage to its intellectual property rights as the scale of the business increased since 2011. In 2011, however, the defendants' turnover was already over €3.7m, and it was therefore already a substantial business. The business continued to grow rapidly, reaching almost £17m in 2014, over €55m in 2017 and over €72m in 2018, during all of which time easyGroup remained silent. (It appears that the turnover figures include some Swiss turnover, but the likely scale of that does not change the analysis.) It is also relevant that, as set out above, there is no evidence of customer confusion between the easyCOSMETIC and EASYJET signs during the many years in which they have been used concurrently, with trade on a very large scale on both sides. It is therefore apparent that the defendants' honest concurrent use has not in any way adversely affected the functions of the 001 mark.
146. It may also be inferred, from the facts set out above, that most of the relevant class of consumers have over time come to learn that EASYJET and easyCOSMETIC have different trade origins. Even if this may not necessarily have been the case by 2014 (the limitation cut-off date, and therefore the start of the relevant period for these purposes) when easyCOSMETIC had only been trading for six years, I consider that by the later part of the relevant period the length of time for which easyCOSMETIC had been in business, and the scale of its trade, would have been sufficient to indicate the education of consumers as to the different trade origins of the mark and signs. I do not, however, need to reach a definitive conclusion on this in light of my findings above.
147. *Conclusion.* I conclude that the defendants have not infringed the 001 mark, pursuant to Article 9(2)(b), by their use of the easyCOSMETIC word sign and the orange/black and white/black figurative signs.

Infringement under Article 9(2)(c)

The law

148. Article 9(2)(c) of the Regulation provides:

“Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the EU trade mark, the proprietor of the EU trade mark shall be entitled to prevent all third parties not having his consent from using in the course of trade, in relation to goods or services, any sign where:

...

(c) the sign is identical with, or similar to, the EU trade mark irrespective of whether it is used in relation to goods or services which are identical with, similar to or not similar to those for which the EU trade mark is registered, where the latter has a reputation in the Union and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the EU trade mark.”

149. In order to establish infringement under Article 9(2)(c), nine conditions must be satisfied: (i) the registered trade mark must have a reputation in the relevant territory; (ii) there must be use of a sign by a third party in the relevant territory; (iii) the use must be in the course of trade; (iv) it must be without the consent of the proprietor; (v) it must be of a sign which is identical with or similar to the trade mark; (vi) it must be in relation to goods or services; (vii) it must give rise to a link between the sign and the trade mark in the mind of the average consumer; (viii) it must give rise to one of three types of injury, namely, (a) detriment to the distinctive character of the trade mark, (b) detriment to the repute of the trade mark, or (c) unfair advantage being taken of the distinctive character or repute of the trade mark; and (ix) it must be without due cause: *Match v Muzmatch*, §55.
150. In the present case, there is no issue as to conditions (i) to (vi). The disputed conditions are (vii) to (ix). In relation to condition (viii), easyGroup focused on (a) and (c), namely the alleged detriment to the distinctive character of the 001 and/or 909 marks, and the alleged unfair advantage being taken of the distinct character or repute of those marks.
151. *Link between sign and trade mark*. There is a link between the sign and the trade mark if the sign would call the trade mark to mind for the average consumer: Case C-252/07 *Intel v CPM* EU:C:2008:655, [2008] ECR I-8823, §63; *Lidl v Tesco* [2024] EWCA Civ 262, §21. The existence of such a link must be assessed globally, taking into account all factors relevant to the circumstances of the case: *Intel* §30; *Lidl v Tesco* §21.
152. Those factors will include (i) the degree of similarity between the mark and the sign; (ii) the nature of the goods or services for which the mark and sign were registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public; (iii) the strength of the earlier mark’s reputation; (iv) the degree of the earlier mark’s distinctive character, whether inherent or acquired through use; and (v) the existence of the likelihood of confusion on the part of the public: *Intel* §42. As set out above, where a family of marks is established, that will be relevant in considering these factors.

153. *Detriment to distinctive character.* Detriment to the distinctive character of the earlier mark is caused when the mark's ability to identify the goods or services for which it is registered and used, as coming from the proprietor of that mark, is weakened by use of the later sign. That is the case when the earlier mark, which used to cause an immediate association with the goods and services for which it is registered, is no longer capable of doing so: *Intel* §29. The more immediately and strongly the earlier mark is brought to mind by the disputed sign, the greater the likelihood that there is detriment to the distinctive character of the mark: *Intel* §67.
154. Proof of detriment to the distinctive character of the earlier mark requires evidence of a change in the economic behaviour of the average consumer of the goods or services for which the earlier mark was registered consequent on the use of the disputed sign, or a serious likelihood that such a change will occur in the future. It is, however, not necessary to show that the proprietor of the disputed sign draws real commercial benefit from the distinctive character of the earlier mark: *Intel* §§77–78.
155. Evidence of actual detriment is not required; rather, it is sufficient to show a serious risk of detriment, on the basis of deductions. Such deductions must not, however be the result of mere suppositions, but must be founded on all the circumstances of the case, including the nature of the trade in issue and the normal practice in the relevant commercial sector: *Case C-383/12 Environmental manufacturing v OHIM* EU:C:2013:741, §§42–43; *Comic Enterprises v Twentieth Century Fox* [2016] EWCA Civ 41, §118.
156. *Unfair advantage.* The approach to determining whether use of a sign takes unfair advantage of a mark was set out in *Case C-487/07 L'Oréal v Bellure* [2009] ECR I-5185. In particular:
- i) That concept covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation: §41.
 - ii) In order to determine whether the use of a sign takes unfair advantage of the distinctive character or the repute of the mark, it is necessary to undertake a global assessment, taking into account all factors relevant to the circumstances of the case, which include the strength of the mark's reputation and the degree of distinctive character of the mark, the degree of similarity between the marks at issue and the nature and degree of proximity of the goods or services concerned. The more immediately and strongly the mark is brought to mind by the sign, the greater the likelihood that the current or future use of the sign is taking, or will take, unfair advantage of the distinctive character or the repute of the mark: §44.
 - iii) Where a third party attempts, through the use of a sign similar to a mark with a reputation, to ride on the coat-tails of that mark in order to benefit from its power of attraction, its reputation and its prestige, and to exploit the marketing effort expended by the proprietor of that mark in order to create and maintain the image of that mark, the advantage resulting from such use must be considered to be an advantage that has been unfairly taken of the distinctive character or the repute of that mark: §49.

157. *Due cause*. Where the proprietor of the earlier mark has shown that there is either actual and present injury to its mark, or a serious risk that such injury will occur in the future, it is for the proprietor of the disputed sign to establish that there is due cause for the use of that sign: *Intel* §39. The concept of due cause involves a balancing between the interests of the proprietor of a trade mark in safeguarding its essential function, and the interests of other economic operators in having signs capable of denoting their products and services: *Comic Enterprises* §123.
158. Relevant factors in determining whether there is due cause for the use of the sign include how the sign has been accepted by, and what its reputation is with, the relevant public, the degree of proximity between the goods and services for which that sign was originally used and the product for which the mark with a reputation was registered, and the economic and commercial significance of the use for that product of the sign which is similar to that mark: *Case C-65/12 Leidseplein Beheer v Red Bull* EU:C:2014:49, §60.

Assessment in the present case

159. *Link between sign and trade mark*. For the purposes of the assessment under Article 9(2)(c), easyGroup relies on both the 001 and the 909 EASYJET word marks. easyGroup accepts that the link must involve the calling to mind of those marks and the reputation of those marks, as opposed to merely a vague recognition or familiarity with the word “easy”. easyGroup submits, however, that a consumer thinking about the easy family is likely to have some knowledge of easyJet as the key part of that family.
160. I do not consider that the easyCOSMETIC word sign would create a link to the EASYJET marks in the mind of the average consumer. The sole linking factor is the use of the word “easy” at the start of the marks and the sign. I have already found that there is not a likelihood of confusion for this or the other two disputed signs, and as part of that analysis the visual and conceptual similarity is (of the three disputed signs) weakest for the easyCOSMETIC word sign. The defendants’ services of retailing cosmetics and fragrances are, moreover, very different to the airline services for which EASYJET has a reputation and enhanced distinctive character. As noted above, easyGroup has not pleaded any reputation or enhanced distinctive character of the 001 mark in respect of the retail of cosmetics and fragrances, and the 909 mark is not registered for cosmetics and fragrances.
161. The analysis of the white/black sign is not, in my judgment, materially different. The only additional factor in relation to that sign which might be said to create a link is the slightly thicker font used for the word “easy”, which (as I have already found) has some modest similarity to the Cooper Black font used for the easy family of brands. That might have marginal significance for the UK consumer. However, as also discussed above, any such significance is in my judgment counterbalanced by the other visual elements which create clear differentiation between the white/black sign and the EASYJET marks (including any recognition of the easy family of marks), namely the difference in colour and capitalisation.
162. The only one of the disputed signs which might arguably create a link to the EASYJET marks is the orange/black sign, given the stylisation used by the easy family of marks and the association of the EASYJET marks with the colour orange. I accept that the orange colour used for the word “easy”, which is somewhat similar to the orange

stylisation used for the EASYJET marks and more generally the easy family of marks, might just tip the balance.

163. easyGroup also relies upon the fact that in *easyGroup v Easyway* and *easyGroup v Easy Live* a link was found between EASYJET and the signs used by the defendants. The assessment in each case is, however, inevitably multifactorial and fact sensitive. In *easyGroup v Easyway*, easyGroup relied on word marks for EASYJET, EASYCAR, EASYBUS and EASYHOTEL, and the judge had found a likelihood of confusion on the basis of, among other things, a high degree of similarity between the relevant services, given the travel-related nature of the marks and the fact that the defendants' business was also travel-related. In the present case, I have not found a likelihood of confusion, and for the purposes of the assessment under Article 9(2)(c) the focus is on the reputation of the EASYJET marks, which is not said to extend to retail of cosmetics and fragrances. There is therefore a clear distinction between the services provided by the defendants and the services for which the EASYJET marks have a reputation. In *easyGroup v Easy Live*, particular emphasis was placed (at §214) on the finding that the defendant sought to create a link with the easy family in the mind of the average consumer, when choosing to modify the sign to make it closer to the easy family branding. That factor is, again, not present in this case: as already noted, Mr Ganzer's unchallenged evidence was that the inspiration for the easyCOSMETIC name and logo design came from his previous design work for easyLIMITED.
164. There is therefore, in my judgment, arguably a link between the orange/black sign and the EASYJET word marks, based on the additional feature of the orange colour used for the orange/black sign. I do not consider a link to arise in the case of the white/black sign or the easyCOSMETIC word sign.
165. *Detriment to distinctive character.* In the light of the findings above, a claim of detriment to the character of the marks is entirely implausible. easyGroup's submissions on detriment rely on the likelihood of confusion, but I have not found any such likelihood. Rather, any link that might arise is confined to the orange/black sign, on the basis of the orange colour used for that sign. There is no explanation of how a link created by little more than the colour of the orange/black sign could give rise to detriment to the EASYJET marks. There is no evidence of any change in the economic behaviour of consumers, nor does easyGroup put forward any credible basis for a finding of a serious likelihood that such a change will occur in the future. Indeed, easyGroup does not even explain what change it says is likely to occur.
166. easyGroup's submissions on detriment seem instead to turn on speculation as to the damage to the "strength of the family", if third parties use the same or significantly similar brand stylisation. In the present case, however, the stylisation of the easyCOSMETIC signs is neither the same nor significantly similar to that of the easy family of brands. In any event the question is not detriment to the family reputation but detriment to the distinctive character of the two EASYJET marks relied upon.
167. Moreover, the only specific example given by easyGroup to explain its claim of detriment is hopeless. easyGroup says that a customer who may have had a positive experience with easyHotel, leading that customer by virtue of association to be more likely to choose easyJet for a flight, might then see the defendants' signs and become less sure whether easyHotel is in fact part of the same family as easyJet. The consequence, it is said, is that "the immediate association of distinctiveness of easyJet as part of the 'easy' family is

eroded”. That submission is fanciful in the extreme. There is no basis whatsoever – whether in the evidence, or by any logical inference from the facts – for the suggestion that a customer seeing any the defendants’ signs might then become unsure of the link between easyJet and easy family brands such as easyHotel, given my findings as to the lack of likelihood of confusion and the marginal nature of any link between the defendants’ signs and the easyGroup marks. Moreover, even if there were any such doubt, the leap from that to a claim of erosion of the distinctiveness of the EASYJET marks is a complete *non sequitur*.

168. *Unfair advantage.* easyGroup’s case on unfair advantage fares no better. The only attempt at explaining how a cosmetics retail business could take advantage of marks with a reputation in airline services is the assertion that the registration of the 001 mark for the retail of cosmetics demonstrates that airline services and cosmetics retail services can be provided together. But that is a long way from explaining how the defendants’ business could derive any advantage from the reputation of the EASYJET marks for a completely different kind of service.
169. The high point of easyGroup’s analysis was its assertion that the formation of a link allows the defendants to “trade on the trust that people have in the easy family of brands” such that customers might choose the defendants’ services when they might not otherwise have done so. That is, however, pure speculation without any support whatsoever in the evidence. It is particularly implausible given the marginal link identified above.
170. *Due cause.* In light of my conclusions above, it is not necessary for me to consider due cause. Had it been necessary to do so, the factors set out above in relation to honest concurrent use would also have been relevant to consideration of this point.
171. *Conclusion.* I conclude that the defendants have not infringed the 001 or 909 mark, pursuant to Article 9(2)(c), by their use of the easyCOSMETIC word sign and the orange/black and white/black figurative signs.

Article 14 defence

172. It is not necessary to consider the Article 14 defence in light of my conclusions above.

Conclusions

173. My conclusions are as follows:
- i) The 001 mark should be partially revoked on grounds of lack of genuine use, by limiting the specification of the disputed class 35 services to in-flight retail services, with effect from 10 January 2020.
 - ii) The average consumers for the purposes of the infringement claims are consumers in the UK, Germany and Austria.
 - iii) The dates for the assessment of infringement of the 909 mark, pursuant to Article 9(2)(c), are the dates on which the use of the disputed signs commenced, i.e. 2008 (for the easyCOSMETIC word sign), 2009 (for the orange/black sign) and 2017 (for the white/black sign). The dates for the assessment of infringement of the 001

mark, pursuant to Article 9(2)(b) and (c), are 2012 (for the easyCOSMETIC word sign and orange/black sign) and 2017 (for the white/black sign).

- iv) easyGroup can rely on the existence of a family of marks at the relevant points in time, as regards UK consumers, but not German/Austrian consumers. It is, in that regard, relevant to take account of the association of the easy family of marks with orange colouring, and other distinctive features such as the use of the Cooper Black font and lower camel case lettering.
- v) The defendants' signs did not infringe Article 9(2)(b) or (c).
- vi) It is therefore not necessary to address the Article 14 defence raised by the defendants.