

**DECISION
of the Fifth Board of Appeal
of 7 February 2020**

In case R 2446/2019-5

Oatly AB

Stora Varvsgatan 6 A
SE-211 19 Malmö
Sweden

Applicant / Appellant

represented by AWA Sweden AB, Matrosgatan 1, SE-211 18 Malmö, Sweden

APPEAL relating to European Union trade mark application No 18 035 560

THE FIFTH BOARD OF APPEAL

composed of A. Pohlmann (Acting Chairperson), C. Govers (Rapporteur) and
V. Melgar (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 14 March 2019, Oatly AB ('the applicant') sought to register the word mark

IT'S LIKE MILK BUT MADE FOR HUMANS

for the following list of goods:

Class 18 – Briefcases; attaché cases; briefcase-type portfolios; suitcases; suit bags; purses; business card holders; credit card holders; backpacks; key cases; coin holders; trunks and travelling bags; cosmetic bags; toilet bags, and bags for shaving kits; bags; duffle bags, tote bags; handbags; wallets; billfolds; change purses; luggage; overnight cases; umbrellas and parasols; walking sticks;

Class 25 – Clothing; footwear; headwear; clothing, footwear and headwear for women, men, boys and girls, namely, jump suits, shirts, blouses, jackets, bathing suits; clothing, footwear and headwear for women, men, boys and girls, namely, pants, belts, shorts; clothing, footwear and headwear for women, men, boys and girls, namely, warm-up suits, sweatpants and sweatshirts, walking shorts; clothing, footwear and headwear for women, men, boys and girls, namely, jeans, suits, dinner jackets and formal wear, sports jackets; clothing, footwear and headwear for women, men, boys and girls, namely, knitted tops, ties and other neckwear; clothing, footwear and headwear for women, men, boys and girls, namely, stockings, tights; clothing, footwear and headwear for women, men, boys and girls, namely, hats, caps, scarves, shawls, coats, outer coats, vests, sweaters; clothing, footwear and headwear for women, men, boys and girls, namely, dresses, skirts, t-shirts, beach and swimming cover-ups; clothing, footwear and headwear for women, men, boys and girls, namely, rainwear, rain coats, ponchos, tank tops, camisoles; tennis and golf apparel, namely, dresses, tops, skirts, pants, and shorts; biking and running and yoga apparel, namely, tops, tank tops, skirts, pants, short pants, shorts and jackets; footwear, namely, shoes, active sport shoes, sneakers, boots, slippers; blazers, pants, capes, socks, gloves; underwear; underwear, sleepwear and loungewear for men and boys, namely, briefs, boxer shorts; underwear, sleepwear and loungewear for men and boys, namely, athletic underwear, sport knit shirts; underwear, sleepwear and loungewear for men and boys, namely, t-shirts, tank tops, undershirts, basic underwear; underwear, sleepwear and loungewear for men and boys, namely, robes, knitted and woven sleepwear, sleep shirts, pajama tops, pajama bottoms; underwear, sleepwear and loungewear for men and boys, namely, breakfast jackets, smoking jackets, bed jackets, cover-ups; knitted and woven loungewear, lounging pants, and tops, lounge jackets; intimate apparel and bodywear for women and girls, namely, underwear, sleepwear and loungewear; belts; belts [clothing];

Class 29 – Dairy substitutes; dairy product substitutes; milk substitutes; milk substitutes containing oats; oat milk [milk substitute]; oat-based beverages and drinks for use as a milk substitute; milk substitute based beverages and drinks [milk substitute predominating]; almond milk, almond milk-based beverages; coconut milk, coconut milk-based beverages; hemp milk used as milk substitute; peanut milk, peanut milk-based beverages; rice milk, rice milk for use as milk substitute; soya milk, soya bean milk, soya milk [milk substitute]; functional milk substitute beverages; fruit-flavored oat-based drinks; milk substitute-based drinks containing coffee; yoghurt substitutes; yoghurt substitutes containing oats; milk substitute preparations for making yoghurt; oat-based yoghurt substitute; oat-based yoghurt and drinking yoghurt free of milk and lactose; yoghurt and drinking yoghurt substitutes containing oats; fruit-flavored yoghurt substitutes; fruit-flavored yoghurt substitutes containing oats; sour milk substitutes; sour cream substitutes; sour milk substitutes containing oats; sour cream substitutes containing oats; cream substitutes; crème fraiche substitutes; cream substitutes containing oat; crème fraiche substitutes containing oats;

non-dairy creamer; oat-based cooking cream and creamer; vegetable based cream; butter substitutes, margarine substitutes; oat-based butter substitutes; oat-based margarine substitutes; dairy substitutes cheese products; dairy substitutes cheese mixtures; dairy substitutes cheese powder; cheese substitutes; oat-based cheese; instant powder dairy substitutes; milk substitute powder, milk substitute powder for food and nutritional purposes; dried milk substitute powder, cream substitute powder; flavored milk substitute powder for making drinks; vegetable powders; coconut milk powder; compotes, fruit and vegetable spreads; processed fruit, fruit snacks; fruit chips; fruit-based snack foods; fruit juices for cooking; vegetable juices for cooking; vegetable juice concentrates for food; oat-based and vegetable based dairy substitute products for slimming purposes; oat-based dietary supplement drink mixes [milk substitutes]; oat-based dietary supplemental drinks in the nature of vitamin and mineral beverages [milk substitutes]; soup powders; oat-based drinks in powder form (milk substitutes);

Class 30 – Processed grains, starches, and goods made thereof, baking preparations and yeasts; flour, oat-based food and foodstuffs; oatmeal, rolled oats; cereals, processed cereals; food preparations and foodstuffs made from cereals; crisps made of cereals; breakfast cereals; breakfast cereals containing fibre; breakfast cereals containing a mixture of fruit and fibre; cereals flakes; muesli consisting predominantly of cereals; cereal bars and energy-bars; cereal powders; oat flakes; muesli; oat-based gruel; snack foods consisting principally of grain; snack foods consisting principally of extruded cereals; cereal snacks; snack foods and snack products made from cereals; snacks made from muesli; snack foods made of whole wheat; bread; wholemeal bread and bread mixes; wholewheat bread and crisps; whole wheat grains being cooked, precooked and preserved; biscuits; pastry and confectionery; oat-based cake mixes, oat-based biscuit mixes; coffee; decaffeinated coffee; instant coffee; coffee (roasted, in powder form); artificial coffee; coffee drinks and beverages; coffee-based drinks and beverages; coffee-based drinks and beverages containing milk substitutes; pancakes; waffles; pancake batter; liquid batter for making pancakes; oat-based pancakes; oat-based waffles; oat-based pancake batter; oat-based liquid batter for making pancakes; Corn starch derivatives in powder form for making into drinks; powdered preparations containing cocoa for use in making beverages; Food dressings [sauces]; sauces; cooking sauces; prepared foodstuffs in the form of sauces; oat-based sauces; oat-based custard, oat-based vanilla custard, oat-based vanilla sauce; Ice cream substitute; ice cream; ice cream made from milk substitutes; non-dairy ice cream; oat-based ice cream; oat-based flavoured ice-cream; oat-based fruit ice-cream; flavoured ice-cream, fruit ice-cream; soy-based ice cream; milk substitutes frozen yoghurt; non-dairy frozen yoghurt; fermented foodstuffs based on oats; acidified food-stuffs based on oat; oat-based grains and cereals products for slimming purposes; grain-based products for slimming purposes; oat-based food spread;

Class 32 – Preparations for making beverages; non-alcoholic beverages; non-alcoholic drinks; oat-based beverages; oat-based natural energy drinks; oat-based breakfast drinks; oat-based fruit drink beverages; oat-based smoothie beverages; oat-based fruit and berry drinks and beverages; oat-based drinks and beverages for slimming purposes; energy drinks; energy drinks containing caffeine; recovery drinks; sports drinks; functional beverages; functional water-based beverages; nut and soy based beverages; powders for the preparation of beverages, powders used in the preparation of fruit-based drinks and beverages; oat-based dietary supplement drink mixes [not milk substitutes]; oat-based dietary supplemental drinks in the nature of vitamin and mineral beverages [not milk substitutes]; powders for the preparation of beverages; powders for use in preparation of fruit based beverages.

- 2 The Office raised an objection on 9 April 2019 because it found that the trade mark applied for was devoid of any distinctive character The examiner argued as follows:
 - Milk which is consumed by humans usually comes from cows, goats and sheep (in the Western world). There are now milk and dairy substitutes for people who are allergic to milk and dairy, and lactose-intolerant. There is also a belief in society today that milk is not good for the human body, because, for instance, studies have shown that those who drink a lot of cow's

milk have an increased risk of fractures, and cow's milk contains cholesterol, while plant-based milk contains no cholesterol, and is low in saturated fats.

- These are some of the reasons why many people now use milk and dairy substitute instead of cow's milk products, even if they are not allergic to milk. The sign for which protection is sought, 'IT'S LIKE MILK BUT MADE FOR HUMANS', would simply be perceived by the relevant public as a laudatory promotional slogan, the function of which is to communicate an inspirational or motivational statement. The relevant public will not tend to perceive any particular indication of commercial origin in the sign beyond the promotional information conveyed, which merely serves to highlight positive aspects of the goods in question, namely that they are or contain milk substitutes which are like real milk (in terms of for e.g. consistency and use etc.), but contain ingredients that are more apt for human consumption than real cow's milk.

3 On 19 July 2019, the applicant submitted the following observations:

- The EUTM application possesses the minimal level of distinctiveness required to be registered.
- The ECJ has held that the mere fact that a mark is perceived by the relevant public as a promotional formula is not sufficient, in itself, to conclude that it is devoid of any distinctive character, and that an advertising slogan cannot be required to display imaginativeness in order to be registered.
- An advertising slogan is likely to be distinctive when it is seen as more than a mere advertising message because, inter alia, it introduces elements of conceptual intrigue or surprise. Furthermore, the fact that the mark can at the same time, or perhaps even primarily, be understood as a promotional formula has no bearing on its distinctive character.
- Humans have been drinking milk for thousands of years, and consumers in general perceive milk as a product that is intended for human consumption, even if, as they are well aware, its true purpose is to feed calves. The statement 'IT'S LIKE MILK BUT MADE FOR HUMANS' is therefore thought-provoking, and triggers a cognitive process which makes the relevant consumers realize that while milk is mostly produced in order to satisfy human demand, it is actually intended for calves. Because of the surprising message of the mark, they will not merely see it as a slogan, but will see it as an indication of commercial origin.
- The applicant refers to case-law in support of its arguments

4 On 5 September 2019, the examiner took a decision ('the contested decision') partially refusing the trade mark applied for, under Article 7(1)(b), in conjunction with Article 7(2), EUTMR, with regard to the following goods:

Class 29 – Dairy substitutes; dairy product substitutes; milk substitutes; milk substitutes containing oats; oat milk [milk substitute]; oat-based beverages and drinks for use as a milk substitute; milk substitute based beverages and drinks [milk substitute predominating]; almond milk, almond milk-

based beverages; coconut milk, coconut milk-based beverages; hemp milk used as milk substitute; peanut milk, peanut milk-based beverages; rice milk, rice milk for use as milk substitute; soya milk, soya bean milk, soya milk [milk substitute]; functional milk substitute beverages; fruit-flavored oat-based drinks; milk substitute-based drinks containing coffee; yoghurt substitutes; yoghurt substitutes containing oats; milk substitute preparations for making yoghurt; oat-based yoghurt substitute; oat-based yoghurt and drinking yoghurt free of milk and lactose; yoghurt and drinking yoghurt substitutes containing oats; fruit-flavored yoghurt substitutes; fruit-flavored yoghurt substitutes containing oats; sour milk substitutes; sour cream substitutes; sour milk substitutes containing oats; sour cream substitutes containing oats; cream substitutes; crème fraîche substitutes; cream substitutes containing oat; crème fraîche substitutes containing oats; non-dairy creamer; oat-based cooking cream and creamer; vegetable based cream; butter substitutes, margarine substitutes; oat-based butter substitutes; oat-based margarine substitutes; dairy substitutes cheese products; dairy substitutes cheese mixtures; dairy substitutes cheese powder; cheese substitutes; oat-based cheese; instant powder dairy substitutes; milk substitute powder, milk substitute powder for food and nutritional purposes; dried milk substitute powder, cream substitute powder; flavored milk substitute powder for making drinks; vegetable powders; coconut milk powder; compotes, oat-based and vegetable based dairy substitute products for slimming purposes; oat-based dietary supplement drink mixes [milk substitutes]; oat-based dietary supplemental drinks in the nature of vitamin and mineral beverages [milk substitutes]; soup powders; oat-based drinks in powder form (milk substitutes);

Class 30 – Oat-based cake mixes, oat-based biscuit mixes; coffee-based drinks and beverages containing milk substitutes; pancakes; waffles; pancake batter; liquid batter for making pancakes; oat-based pancakes; oat-based waffles; oat-based pancake batter; oat-based liquid batter for making pancakes; Corn starch derivatives in powder form for making into drinks; powdered preparations containing cocoa for use in making beverages; Food dressings [sauces]; sauces; cooking sauces; prepared foodstuffs in the form of sauces; oat-based sauces; oat-based custard, oat-based vanilla custard, oat-based vanilla sauce; Ice cream substitute; ice cream; ice cream made from milk substitutes; non-dairy ice cream; oat-based ice cream; oat-based flavoured ice-cream; oat-based fruit ice-cream; flavoured ice-cream, fruit ice-cream; soy-based ice cream; milk substitutes frozen yoghurt; nondairy frozen yoghurt; fermented foodstuffs based on oats; acidified foodstuffs based on oat; oat-based grains and cereals products for slimming purposes; grain-based products for slimming purposes; oat-based food spread;

Class 32 – Preparations for making beverages; non-alcoholic beverages; nonalcoholic drinks; oat-based beverages; oat-based natural energy drinks; oat-based breakfast drinks; oat-based fruit drink beverages; oat-based smoothie beverages; oat-based fruit and berry drinks and beverages; oat-based drinks and beverages for slimming purposes; energy drinks; energy drinks containing caffeine; recovery drinks; sports drinks; functional beverages; nut and soy based beverages; powders for the preparation of beverages, powders used in the preparation of fruit-based drinks and beverages; oat-based dietary supplement drink mixes [not milk substitutes]; oat-based dietary supplemental drinks in the nature of vitamin and mineral beverages [not milk substitutes]; powders for the preparation of beverages; powders for use in preparation of fruit based beverages.

5 The decision was based on the following main findings:

- The Office cannot find other than that the applied mark is devoid of any distinctive character in relation to the goods at issue. There is nothing thought-provoking or surprising in the mark as far as the Office can see.
- There is a belief in society today that milk is not good for the human body, for instance, because it contains cholesterol, and because those who drink a lot of milk have an increased risk of fractures.
- Many people do not drink real milk because they are lactose-intolerant. In many cultures milk is, and has been since times immemorial, a basic human food staple. Milk has also for a long time been touted as being a healthy food

which delivers a host of nutrients. As the health benefits of milk have been questioned lately, more and more consumers choose to buy other nutritious liquid sources for drinking, cooking and food preparations, as alternatives to 'real' milk. Milk substitutes, such as those provided by the applicant, are such alternatives. The health benefits of milk substitutes, and the negative effects of real milk, is heavily emphasized in the marketing of milk substitutes, and in articles and news items in health magazines and programs, and even in media in general.

- The applied EUTM as a whole will therefore simply be perceived by the relevant consumers as a typical laudatory promotional message which simply indicates that the applicant's goods, being of plant origin, are very similar to milk, and that they, in contrast to cow's, goat's and sheep's milk, are specifically made and apt for human consumption, in terms of for e.g. nutrition and digestibility, etc.
- There is no element of conceptual intrigue in the mark. The message is clear and straightforward, and is immediately understandable.
- There is no element whatsoever in the mark that would lead the relevant consumers to believe that the mark is an indication of commercial origin.
- The Office is aware that the ECJ has held that a trade mark does not need to be original, imaginative, unusual or striking. That is of course true but it does not mean that such matters are irrelevant when appraising the distinctiveness of a sign. On the contrary, a sign which is imaginative, original, unusual and fanciful is far more likely to be able to do the job of distinguishing the goods or services of a specific undertaking than a sign which is banal, hackneyed, commonplace and derivative.
- Also, the fact that the slogan applied for does not contain exact indications about the content or nature of the goods offered under the mark or the way in which the goods are focused or on target, is irrelevant. The Court of First Instance has held on various occasions that for a finding that there is no distinctive character, it is sufficient to note that the semantic content of the word mark in question indicates to the consumer a characteristic of the product relating to its market value which, whilst not specific, comes from promotional or advertising information which the relevant public will perceive first and foremost as such, rather than as an indication of the commercial origin of the goods; the mere fact that the word combination applied for does not convey any information about the nature of the goods or services concerned is not sufficient to make that sign distinctive (30/06/2004, T-281/02, Mehr für Ihr Geld, EU:T:2004:198, § 21).
- While it is true that the 'Vorsprung durch Technik' judgment, which the applicant refers to, did not exclude promotional formulas from registration, it did not indicate that all slogans are distinctive and may be registered just because of the fact that they are promotional formulas. In paragraph 45 of that judgment the ECJ stated that 'in so far as the public perceives the mark as an indication of that origin, the fact that the mark is at the same time

understood – perhaps even primarily understood – as a promotional formula has no bearing on its distinctive character’ (21/01/2010, C-398/08 P, *Vorsprung durch Technik*, EU:C:2010:29, § 45). This means that the relevant public has to perceive a promotional formula as a source originator in order for it to be considered as distinctive. The applicant did not indicate or show that this is the case.

- As for the applicant’s argument that the relevant consumers will link the mark with its company, and see it as a source originator, the applicant did not provide any evidence which proves this.
- 6 On 30 October 2019, the applicant filed an appeal against the contested decision, requesting that the application be accepted for registration for all goods applied for, including those refused in the contested decision. The statement of grounds of the appeal was received on 20 December 2019.

Grounds of appeal

- 7 The arguments raised in the statement of grounds may be summarised as follows:
- The relevant public consists of the average consumer that understands English. The average consumer is defined as being reasonably well-informed and reasonably observant and circumspect. As the refused goods are all food and beverage products in Classes 29, 30 and 32, which are all everyday purchases, the average consumer will not pay any special attention when purchasing the goods in question.
 - There is strong evidence showing that society in general believes milk to be healthy for humans, especially for children, and this is further supported by the clear recommendations of governmental authorities to consume milk and milk products. Evidence is provided that milk has been consumed for thousands of years by humans, is produced for human consumption, and that therefore milk is healthy for humans.
 - As a foodstuff, milk is considered to be one of the staple foods of humans. It is stated on the Wikipedia page for ‘Staple Food’ that a staple food ‘is eaten routinely and in such quantities that it constitutes a dominant portion of a standard diet for a given people, supplying a large fraction of energy needs and generally forming a significant proportion of the intake of other nutrients as well’. It later goes on to state that ‘most of the human population lives on a diet based on one or more of the following staples: ...milk’. This recognition of milk as a staple food shows that milk is an important part of the human diet and therefore that the majority of people consider that it is produced for human consumption in order to contribute to a healthy diet (Appendix 1, page 2).
 - Wikipedia’s page on ‘Milk’ states that human consumption of milk started around 9 000-7 000 BC and reached Europe in the beginning of 7 000 BC and reached Britain and Scandinavia after 4 000 BC. Under industrialization

the urban demand for milk grew and milk was regarded as being a required daily commodity (Appendix 2, page 11).

- As per Wikipedia’s page on ‘Breakfast’, we can see that the typical breakfast in different countries of the European Union almost without fail includes milk or milk products in some form for e.g. by itself or in combination with cereals or coffee. All of the typical breakfasts in the European countries include milk in some form, showing the prevalence of milk consumption amongst the relevant public (Appendix 3, pages 36-41).
- The daily consumption of dairy products is recommended by authorities and governmental organisations (Appendix 4).
- EU SCIENCE HUB (The European Commission’s science and knowledge service) has published a list of Food-Based Dietary Guidelines in Europe. The listed recommendations for milk and dairy products show that most countries actively recommend the daily consumption of milk and other dairy products (Appendix 5, pages 110-134).
- Council Regulation (EC) No 1255/1999 on the common organization of the market in milk and milk products – this regulation, whilst no longer in force, shows the history of the protection/state funded support of milk consumption in the EU. In the EU Commission’s press release dated 11 July 2008, they state, ‘The EU support for milk distribution has existed with various modifications for 30 years’ and the new scheme ‘allows and encourages children to replace low-quality food and drinks with convenient, high-quality dairy products’ (Appendix 6, pages 138-139).
- There is still an ongoing milk scheme, which as of 1 August 2017 is combined with the EU fruit and vegetable scheme, showing that the EU places an equivalent importance on the health benefits of milk compared with fruit and vegetables (Appendix 7, page 141).
- In an article in *Farmers Guardian* dated 3 September 2019, milk is described as a ‘superfood packed with all the essential nutrients for growing children’ by the School and Nursery Milk Alliance, (Appendix 8, page 151).
- The diagrams filed by the applicant illustrate just how widespread the consumption of milk is in the EU, when compared with the consumption of milk substitutes:
- In 2018, the EU was the second largest consumer of fluid cow milk, consuming 33.3 million metric tons. The United States who are in third place consumes only 2/3 of the amount consumed by the European Union (Appendix 9, page 155).
- In 2018, the EU was the 7th largest consumer of milk per capita in the world (Appendix 10, page 160).

- The European Commission published in 2018 material from a meeting of the Milk Market Observatory (MMO) Economic Board (Appendix 11, pages 163-283).
- The average consumer will generally not question the information given by the authorities, particularly where the recommendations of the authorities corroborate thousands of years of custom that milk is an important source of nutrition, and which is so engrained in society that children's milk consumption is actually subsidized by the European Union to promote the drinking of milk.
- Case-law states that for an advertising slogan to be distinctive as a mark, it is not a necessary condition that it has different meanings, constitutes a play on words or is perceived as inter alia surprising and unexpected and in that way is easily remembered.
- The notion that milk is produced for human consumption is so dominant in the relevant public's mind. As a consequence, when faced with the mark 'IT'S LIKE MILK BUT MADE FOR HUMANS', it is only after further thought and reflection (i.e. the triggering of a cognitive thought process) which leads the relevant public to remember that cow's milk is actually produced for calves and not humans. The initial reaction when thinking of milk or hearing the word 'milk' is to think of milk produced and adapted for human consumption.
- Autocontrol, the Spanish independent advertising regulatory organisation, is investigating a complaint made about the applicant's use of the EUTM applied for on the basis, inter alia, that it underestimates milk with no justification and that it uses the false argument that milk is not for humans.
- There has been a huge reaction to the campaign run by the applicant using the mark 'IT'S LIKE MILK BUT MADE FOR HUMANS'. The campaign received a huge amount of press coverage, showing that the mark is incredibly controversial, thought-provoking and surprising and has really awakened a discussion (see examples of the press coverage in Appendix 13).
- On that basis, the mark should not have been rejected for the following goods:

Class 29 – Soup powders; oat-based drinks in powder form;

Class 30 – Oat-based cake mixes; oat-based biscuit mixes; pancakes; waffles; pancake batter; liquid batter for making pancakes; oat-based pancakes; oat-based waffles; oat-based pancake batter; oat-based liquid batter for making pancakes; Corn starch derivatives powder form for making into drinks; powdered preparations containing cocoa for use in making beverages; Food dressings [sauces]; sauces; cooking sauces; prepared foodstuffs in the form of sauces; oat-based sauces; oat-based vanilla custard; oat-based vanilla sauce; oat-based grains and cereals products for slimming purposes; grain-based products for slimming purposes; oat-based food spread;

Class 32 – Preparations for making beverages; non-alcoholic beverages, non-alcoholic drinks; oat-based beverages; oat-based natural energy drinks; oat-based breakfast drinks;

oat-based fruit drink beverages; oat-based Smoothie beverages; oat-based fruit and berry drinks and beverages; oat-based drinks and beverages for slimming purposes; recovery drinks; sports drinks; functional beverages; nut and soy based beverages; powders for the preparation of beverages; powders used in the preparation of fruit-based drinks and beverages; powders for the preparation of beverages; powders for use in preparation of fruit based beverages.

- The contested application is distinctive as it is immediately perceived as an indication of the commercial origin. The staple food milk has been consumed by humans for thousands of years and is both subsidized and recommended by the authorities to consume it daily for its nutritional value.

Reasons

- 8 All references made in this decision should be seen as references to the EUTMR (EU) No 2017/1001 (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended, unless specifically stated otherwise in this decision.
- 9 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

Scope of the appeal

- 10 Insofar as the applicant claims in the notice of appeal that the extent of the appeal concerns the contested decision in its entirety, it follows from the statement of grounds that the appeal is not directed at the goods that the contested trade mark has been accepted for.
- 11 The scope of the appeal concerns the goods for which the examiner refused the contested mark, namely:

Class 29 – Dairy substitutes; dairy product substitutes; milk substitutes; milk substitutes containing oats; oat milk [milk substitute]; oat-based beverages and drinks for use as a milk substitute; milk substitute based beverages and drinks [milk substitute predominating]; almond milk, almond milk-based beverages; coconut milk, coconut milk-based beverages; hemp milk used as milk substitute; peanut milk, peanut milk based beverages; rice milk, rice milk for use as milk substitute; soya milk, soya bean milk, soya milk [milk substitute]; functional milk substitute beverages; fruit-flavored oat-based drinks; milk substitute-based drinks containing coffee; yoghurt substitutes; yoghurt substitutes containing oats; milk substitute preparations for making yoghurt; oat-based yoghurt substitute; oat-based yoghurt and drinking yoghurt free of milk and lactose; yoghurt and drinking yoghurt substitutes containing oats; fruit-flavored yoghurt substitutes; fruit-flavored yoghurt substitutes containing oats; sour milk substitutes; sour cream substitutes; sour milk substitutes containing oats; sour cream substitutes containing oats; cream substitutes; crème fraiche substitutes; cream substitutes containing oat; crème fraiche substitutes containing oats; non-dairy creamer; oat-based cooking cream and creamer; vegetable based cream; butter substitutes, margarine substitutes; oat-based butter substitutes; oat-based margarine substitutes; dairy substitutes cheese products; dairy substitutes cheese mixtures; dairy substitutes cheese powder; cheese substitutes; oat-based cheese; instant powder dairy substitutes; milk substitute powder, milk substitute powder for food and nutritional purposes; dried milk substitute powder, cream substitute powder; flavoured milk substitute powder for making drinks; vegetable powders; coconut milk powder; compotes, oat based and vegetable based dairy substitute products for slimming purposes; oat-based dietary supplement drink mixes [milk substitutes]; oat-based dietary supplemental drinks in the nature of vitamin and mineral beverages [milk substitutes]; soup powders; oat-based drinks in powder form (milk substitutes);

Class 30 – Oat-based cake mixes, oat-based biscuit mixes; coffee-based drinks and beverages containing milk substitutes; pancakes; waffles; pancake batter; liquid batter for making pancakes; oat-based pancakes; oat-based waffles; oat-based pancake batter; oat-based liquid batter for making pancakes; Corn starch derivatives in powder form for making into drinks; powdered preparations containing cocoa for use in making beverages; Food dressings [sauces]; sauces; cooking sauces; prepared foodstuffs in the form of sauces; oat-based sauces; oat-based custard, oat-based vanilla custard, oat-based vanilla sauce; Ice cream substitute; ice cream; ice cream made from milk substitutes; non-dairy ice cream; oat-based ice cream; oat-based flavoured ice-cream; oat-based fruit ice-cream; flavoured ice-cream, fruit ice-cream; soy-based ice cream; milk substitutes frozen yoghurt; non-dairy frozen yoghurt; fermented foodstuffs based on oats; acidified foodstuffs based on oat; oat-based grains and cereals products for slimming purposes; grain-based products for slimming purposes; oat-based food spread;

Class 32 – Preparations for making beverages; non-alcoholic beverages; non-alcoholic drinks; oat-based beverages; oat-based natural energy drinks; oat-based breakfast drinks; oat-based fruit drink beverages; oat-based smoothie beverages; oat-based fruit and berry drinks and beverages; oat-based drinks and beverages for slimming purposes; energy drinks; energy drinks containing caffeine; recovery drinks; sports drinks; functional beverages; nut and soy based beverages; powders for the preparation of beverages, powders used in the preparation of fruit-based drinks and beverages; oat-based dietary supplement drink mixes [not milk substitutes]; oat-based dietary supplemental drinks in the nature of vitamin and mineral beverages [not milk substitutes]; powders for the preparation of beverages; powders for use in preparation of fruit based beverages.

Article 7(1)(b) EUTMR

- 12 Under Article 7(1)(b) EUTMR, trade marks which are devoid of any distinctive character are not to be registered. It precludes the registration of trade marks which are devoid of distinctive character, which renders them incapable of fulfilling their essential function (16/09/2004, C-329/02 P, SAT/2, EU:C:2004:532, § 23).
- 13 The notion of general interest underlying Article 7(1)(b) EUTMR is manifestly inseparable from the essential function of a trade mark, which is to guarantee the identity of the origin of the marked product or service to the consumer or end-user by enabling him/her, without any possibility of confusion, to distinguish the product or service from others which have another origin (08/05/2008, C-304/06 P, Eurohypo, EU:C:2008:261, § 56; 15/09/2005, C-37/03 P, BioID, EU:C:2005:547, § 60).
- 14 The distinctive character of a sign lies in its capacity to allow the average consumer, who is reasonably well-informed and reasonably observant and circumspect, to distinguish the goods and services of one undertaking from those of other undertakings (16/07/1998, C-210/96, Gut Springenheide, EU:C:1998:369, § 31).
- 15 The signs referred to in Article 7(1)(b) EUTMR are, therefore, in particular, those which do not enable the relevant public to repeat the experience of a purchase if it proves to be positive, or to avoid it if it proves to be negative, on the occasion of a subsequent acquisition of the goods or services concerned (05/12/2002, T-130/01, Real People, Real Solutions, EU:T:2002:301, § 18; 29/09/2009, T-139/08, Smiley, EU:T:2009:364, § 14 and the case-law cited therein).

- 16 As regards marks made up of signs or indications that are also used as advertising slogans, indications of quality or incitements to purchase the goods or services covered by those marks, registration of such marks is not excluded as such by virtue of such use. As regards the assessment of the distinctive character of such marks, the Court has already held that it is inappropriate to apply to them criteria which are stricter than those applicable to other types of sign (21/01/2010, C-398/08 P, *Vorsprung durch Technik*, EU:C:2010:29, § 35-36).
- 17 Slogans are often of a laudatory nature. Their very purpose is to persuade potential customers to buy the goods or services of the enterprise in question. Even though an advertising slogan cannot be required to display ‘imaginativeness’ or even ‘conceptual tension which would create surprise and so make a striking impression’ in order to have the minimal level of distinctiveness, a slogan that is banal, commonplace or directly descriptive of a characteristic of the relevant goods or services is unlikely to possess any distinctive character because it will probably not be perceived immediately as an indication of the commercial origin of the goods or services in question. No undertaking should be given a monopoly right to use banal, commonplace or everyday terms to promote its commercial activities. On the other hand, a slogan that is for example original, imaginative and fanciful is far more likely to be able to perform the essential function of a trade mark.
- 18 Moreover, the mere fact that a mark is perceived by the relevant public as a promotional formula, and that, because of its laudatory nature, it could in principle be used by other undertakings, is not sufficient, in itself, to support the conclusion that that mark is devoid of distinctive character (21/01/2010, C-398/08 P, *Vorsprung durch Technik*, EU:C:2010:29, § 44; 12/02/2014, T-570/11, *La qualité est la meilleure des recettes*, EU:T:2014:72, § 26).
- 19 However, it is apparent from case-law that although the criteria for the assessment of distinctive character are the same for different categories of marks, it may be that, for the purposes of applying those criteria, the relevant public’s perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks of other categories (21/10/2004, C-64/02 P, *Das Prinzip der Bequemlichkeit*, EU:C:2004:645, § 34).
- 20 On that point, it should be noted that the laudatory connotation of a word mark does not mean that it cannot be appropriate for the purposes of guaranteeing to consumers the origin of the goods or services which it covers. Thus, such a mark can be perceived by the relevant public both as a promotional formula and as an indication of the commercial origin of goods or services. It follows that, in so far as the public perceives the mark as an indication of that origin, the fact that the mark is at the same time understood – perhaps even primarily understood – as a sign consisting of a promotional formula has no bearing on its distinctive character (21/01/2010, C-398/08 P, *Vorsprung durch Technik*, EU:C:2010:29, § 45; 12/02/2014, T-570/11, *La qualité est la meilleure des recettes*, EU:T:2014:72, § 27).

- 21 On the other hand, a word mark is devoid of distinctive character when its semantic content indicates to the consumer a characteristic of the product or service relating to its market value which, whilst not specific, comes from promotional or advertising information and which the relevant public will perceive at first glance as such, rather than as an indication of the commercial origin of the goods or services in question (30/06/2004, T-281/02, Mehr für Ihr Geld, EU:T:2004:198, § 31; 12/03/2008, T-128/07, Delivering the essentials of life, EU:T:2008:72, § 20; 06/06/2013, T-126/12, Inspired by efficiency, EU:T:2013:303, § 25).

Relevant public and degree of attention

- 22 It is settled case-law that the distinctive character of a trade mark must be assessed by taking into account, first, the products or services in respect of which registration has been applied for and, second, the perception on the part of the relevant public, which consists of average consumers of the products or services in question, who are sufficiently well informed and reasonably observant and rational (21/01/2010, C-398/08 P, Vorsprung durch Technik, EU:C:2010:29, § 34; 08/05/2008, C-304/06 P, Eurohypo, EU:C:2008:261, § 67; 29/04/2004, C-473/01 P & C-474/01 P, Tabs, EU:C:2004:260, § 33).
- 23 The average consumer's level of attention is likely to vary according to the category of goods or services (13/02/2007, T-256/04, Respicur, EU:T:2007:46, § 42; 07/10/2010, T-244/09, Acensa, EU:T:2010:430, § 18 and the case-law cited therein). In the present case, the level of attention of the average consumer will be normal.
- 24 The goods at issue are those listed in paragraph 11.
- 25 In line with the examiner's finding, as the trade mark applied for 'IT'S LIKE MILK BUT MADE FOR HUMANS' consists of English words, account should be taken of the public in the English-speaking territory of the European Union, including Ireland and Malta, for the assessment of its eligibility for protection (20/09/2001, C-383/99 P, BABY-DRY, EU:C:2001:461, § 42; 27/11/2003, T-348/02, Quick, EU:T:2003:318, § 30).
- 26 In this regard, it should be recalled that, pursuant to Article 7(2) EUTMR, a trade mark shall not be registered even if the grounds of non-registrability are met only in part of the European Union. Therefore, an obstacle pertaining to the English-speaking public of the European Union is deemed to be sufficient in order to reject a trade mark application.

Distinctiveness of the sign

- 27 The assessment of the distinctiveness of a mark must be based on the overall impression conveyed by the mark, but nothing prevents the Office from examining each of the mark's individual elements separately (09/12/2010, T-282/09, Carré convexe vert, EU:T:2010:508, § 18; 21/01/2011, T-310/08,

executive edition, EU:T:2011:16, § 28; 27/06/2013, T-248/11, Pure Power, EU:T:2013:333, § 21 and the case-law cited therein).

- 28 According to settled case-law, the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. Thus, in order to assess whether or not a trade mark is devoid of any distinctive character, the overall impression given by it must be considered, which may however mean first examining, in that overall assessment, each of the individual components of which that mark is composed (17/11/2009, T-473/08, Thinking ahead, EU:T:2009:442, § 31).
- 29 In the present case, the mark is composed of the words ‘IT’S’, ‘LIKE’, ‘MILK’, ‘BUT’, ‘MADE’, ‘FOR’ and ‘HUMANS’. The expression ‘IT’S LIKE MILK’ just indicates that the applicant’s products are or contain milk substitutes which are like real milk in terms of for e.g. consistency, nutrition and use. The term ‘BUT MADE FOR HUMANS’ clearly indicates that the applicant’s milk substitutes are more apt for human consumption than real milk or those containing real milk.
- 30 The Board finds that there is no perceptible difference between the sign as a whole and the mere sum of its parts (08/05/2008, C-304/06 P, Eurohypo, EU:C:2008:261, § 45). The simple juxtaposition of different easily recognisable elements is not capable of creating an overall impression which is sufficiently far removed from that produced by the combination of meanings lent by the elements of which it is composed, with the result that the meaning of the overall term created is more than the sum of its parts (12/02/2004, C-363/99, Postkantoor, EU:C:2004:86, § 98 et seq.). There is nothing thought-provoking or surprising in the mark.
- 31 It should be recalled that the assessment of a trade mark must be conducted in the context of the goods and services applied for (20/07/2016, T-11/15, SUEDTIROL, EU:T:2016:422, § 35; 15/10/2003, T-295/01, Oldenburger, EU:T:2003:267, § 34. As such, this context provides a significant interpretative aid as to how consumers will perceive the mark applied for.
- 32 The contested decision found that the mark, as a whole, would simply be perceived by the relevant public as a laudatory promotional slogan the function of which is to communicate a value statement. Some consumers may be lactose-intolerant, or suffer from milk allergy, or maybe they have quit drinking milk from animal origin because they are vegans. Therefore, the relevant public would not perceive any particular indication of commercial origin beyond the promotional information conveyed, but as a typical laudatory promotional message which simply indicates that the applicant’s goods, being of plant origin, are very similar to milk, and that they, in contrast to cow’s, goat’s and sheep’s milk, are specifically made and apt for human consumption, in terms of for e.g. nutrition and digestibility, etc.
- 33 For a finding that there is no distinctive character, it is sufficient that the semantic content of the word mark in question indicates to the consumer a characteristic of the product relating to its market value which, whilst not specific, comes from

promotional or advertising information which the relevant public will perceive first and foremost as such, rather than as an indication of the commercial origin of the goods/services. In addition, the mere fact that the semantic content of the word sign applied for does not convey any information about the nature of the goods and services concerned is not sufficient to make that sign distinctive (23/09/2009, T-396/07, Unique, EU:T:2009:353, § 17 and the case-law cited).

- 34 Thus, when interpreting the mark, it must be borne in mind that the consumer does not perceive the mark in a void, but rather in relation to the goods and services to which it is applied. As such, the context of the goods and services provides a significant interpretative aid as to how consumers will perceive the contested mark. Even when the mark displays minor elements of vagueness in its conceptual content, when viewed in isolation, such vague or unclear elements can be minimised or eliminated when consumers are confronted with the mark in the context of the relevant goods or services.
- 35 When seen in relation to the specific requested goods, the mark will be immediately perceived as a promotional message, indicating the positive aspects of the goods at paragraph 11, namely that are very similar to milk, and that they, in contrast to cow's, goat's and sheep's milk, are specifically made and apt for human consumption.
- 36 As regards the goods in Class 29, they are different foodstuff and dairy products substitutes. The mark applied for immediately informs the consumer that they are similar to milk or milk substitutes and especially apt for human consumption.
- 37 As for the goods in Class 30, they encompass several oat-based edible products, for which the previous considerations also apply. They may also contain milk substitutes. Such is the case for example, for ice-cream.
- 38 Finally, as regards the goods in Class 32, they are drinks and beverages, or preparations for making beverages, being of plant origin. The mark applied for gives the consumer the idea that they have the same characteristics as real milk. They may be consumed with or on the basis of milk substitutes.
- 39 Furthermore, the mark applied for contains no additional figurative or verbal elements which would be capable of endowing the mark applied for as a whole with any distinctive character and which would allow the mark to fulfil its essential function in relation to the objectionable goods. Additionally, the fact that the mark applied for is a very long mark, does not facilitate its perception as an indication of origin by the relevant public, but may instead rather hinder the mark being perceived as such.
- 40 Considering all of the foregoing, the Board concurs with the examiner in that there is nothing unusual or distinctive about the mark applied for and that it will not enable the relevant public to distinguish the applicant's goods from those of other undertakings. In the context of these goods, the mark will be understood unequivocally and without any mental effort, as a mere laudatory and promotional slogan, the function of which is to communicate to the consumer a value statement, highlighting the positive aspects of the goods concerned, namely

aspects which considering their importance to consumers are likely to be emphasised and underlined in a purely promotional sense (06/06/2013, T-515/11, Innovation for the real world, EU:T:2013:300, § 37).

- 41 Therefore, the Board finds that the mark applied for does not go beyond its obvious promotional and laudatory meaning. The Board considers, in line with the examiner, that the expression 'IT'S LIKE MILK' just indicates that the applicant's products are or contain milk substitutes which are like real milk in terms of for e.g. consistency, nutrition and use. The consumers are of course well aware that for e.g. cow's milk is food for calves. The term 'BUT MADE FOR HUMANS' therefore clearly indicates that the applicant's milk substitutes are more apt for human consumption than real milk or those containing real milk. As a result, the mark applied for is incapable of performing the essential function of a trade mark and does not enable the consumer who bought the goods in question to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition.
- 42 It follows from the foregoing that, the mark applied for must be rejected as being non-distinctive within the meaning of Article 7(1)(b) EUTMR in respect of the following goods:

Class 29 – Dairy substitutes; dairy product substitutes; milk substitutes; milk substitutes containing oats; oat milk [milk substitute]; oat-based beverages and drinks for use as a milk substitute; milk substitute based beverages and drinks [milk substitute predominating]; almond milk, almond milk-based beverages; coconut milk, coconut milk-based beverages; hemp milk used as milk substitute; peanut milk, peanut milkbased beverages; rice milk, rice milk for use as milk substitute; soya milk, soya bean milk, soya milk [milk substitute]; functional milk substitute beverages; fruit-flavored oat-based drinks; milk substitute-based drinks containing coffee; yoghurt substitutes; yoghurt substitutes containing oats; milk substitute preparations for making yoghurt; oat-based yoghurt substitute; oat-based yoghurt and drinking yoghurt free of milk and lactose; yoghurt and drinking yoghurt substitutes containing oats; fruitflavored yoghurt substitutes; fruit-flavored yoghurt substitutes containing oats; sour milk substitutes; sour cream substitutes; sour milk substitutes containing oats; sour cream substitutes containing oats; cream substitutes; crème fraiche substitutes; cream substitutes containing oat; crème fraiche substitutes containing oats; non-dairy creamer; oat-based cooking cream and creamer; vegetable based cream; butter substitutes, margarine substitutes; oat-based butter substitutes; oat-based margarine substitutes; dairy substitutes cheese products; dairy substitutes cheese mixtures; dairy substitutes cheese powder; cheese substitutes; oat-based cheese; instant powder dairy substitutes; milk substitute powder, milk substitute powder for food and nutritional purposes; dried milk substitute powder, cream substitute powder; flavored milk substitute powder for making drinks; vegetable powders; coconut milk powder; compotes, oatbased and vegetable based dairy substitute products for slimming purposes; oat-based dietary supplement drink mixes [milk substitutes]; oat-based dietary supplemental drinks in the nature of vitamin and mineral beverages [milk substitutes]; soup powders; oat-based drinks in powder form (milk substitutes);

Class 30 – Oat-based cake mixes, oat-based biscuit mixes; coffee-based drinks and beverages containing milk substitutes; pancakes; waffles; pancake batter; liquid batter for making pancakes; oat-based pancakes; oat-based waffles; oat-based pancake batter; oat-based liquid batter for making pancakes; Corn starch derivatives in powder form for making into drinks; powdered preparations containing cocoa for use in making beverages; Food dressings [sauces]; sauces; cooking sauces; prepared foodstuffs in the form of sauces; oat-based sauces; oat-based custard, oat-based vanilla custard, oat-based vanilla sauce; Ice cream substitute; ice cream; ice cream made from milk substitutes; non-dairy ice cream; oat-based ice cream; oat-based flavoured ice-cream; oat-based fruit ice-cream; flavoured ice-cream, fruit ice-cream; soy-based ice cream; milk substitutes frozen yoghurt; nondairy frozen yoghurt; fermented foodstuffs based on oats; acidified

foodstuffs based on oat; oat-based grains and cereals products for slimming purposes; grain-based products for slimming purposes; oat-based food spread;

Class 32 – Preparations for making beverages; non-alcoholic beverages; nonalcoholic drinks; oat-based beverages; oat-based natural energy drinks; oat-based breakfast drinks; oat-based fruit drink beverages; oat-based smoothie beverages; oat-based fruit and berry drinks and beverages; oat-based drinks and beverages for slimming purposes; energy drinks; energy drinks containing caffeine; recovery drinks; sports drinks; functional beverages; nut and soy based beverages; powders for the preparation of beverages, powders used in the preparation of fruit-based drinks and beverages; oat-based dietary supplement drink mixes [not milk substitutes]; oat-based dietary supplemental drinks in the nature of vitamin and mineral beverages [not milk substitutes]; powders for the preparation of beverages; powders for use in preparation of fruit based beverages.

Conclusion

- 43 In light of the foregoing, the examiner correctly considered that the contested mark in relation to the contested goods that form the scope of the appeal is inherently devoid of distinctive character in accordance with Article 7(1)(b) EUTMR.

Order

On those grounds,

THE BOARD

hereby:

Dismisses the appeal.

Signed

A. Pohlmann

Signed

C. Govers

Signed

V. Melgar

Registrar:

Signed

H.Dijkema

