

Alicante News

Up to date information on IP and EUIPO-related matters

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DesignEuropa Awards 2018: winners revealed

Two outstanding European designs have been honoured at the DesignEuropa Awards in Warsaw.

The Small and Emerging Companies Award was won by the **Air Go 2.0 automatic bag drop system**, owned by Danish firm Marcus Pedersen ApS, and designed by Sara Clement.

The Industry Award was won by the **ARTIS pheno robotic C-arm angiography system** from Siemens Healthcare GmbH, designed by Nadja Roth and Tobias Reese.

The Lifetime Achievement Award was presented to **Hartmut Esslinger**, a German designer with global reach and impact. He is known for his collaboration with Steve Jobs and Apple which led to the creation of the "Snow White" design language for Apple in the 1980s.

During the course of his professional life, he has designed for some of the world's largest companies, including Sony, Microsoft, Lufthansa and Disney.

The DesignEuropa Awards are organised by the EUIPO to celebrate excellence in design and design management among RCD holders.

The 2018 ceremony was held in the POLIN

conference centre in Warsaw, a landmark building in the city, which has won several international architecture prizes.

The finalists in the Industry category were are:

- ARTIS pheno robotic C-arm angiography system (RCD owner and manufacturer: Siemens Healthcare GmbH; designer: Nadja Roth (in-house design) and Tobias Reese (at-design GbR)
- Docks modular outdoor furniture (RCD owner and manufacturer: Gandía Blasco S.A.; designer: Romero Vallejo)
- Intercom smart video doorbell (RCD owner and manufacturer: Fibar Group, S.A.; designer: Maciej Fiedler)
- Origami folding radiator (RCD owner and manufacturer: TubesRadiatorSrl; designer: Alberto Meda)

The finalist designs in the Small and Emerging Companies category were:

- Air.Go.2.0 automatic bag drop solution for airports (RCD owner: Marcus P Holding, manufacturer: Marcus Pederson ApS; designer: Sara Clement)
- Braster in-home breast examination system (RCD owner and manufacturer: Braster S.A.; designers: Arif Veendijk, Grzegorz Ciupiński, Jakub Oller, Jeroen de Graaf, Michał Biernat,

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Reiner Halbertsma, Rogier Braak, Sander Patje)

- Loclock bicycle parking system (RCD owner and manufacturer: Durbanis SLU; designer: Alex Fernández Camps)
- Nico Less chair (RCD owner and manufacturer: DONAR d.o.o.; designer: Primož Jeza)

See all the finalist designs [here](#)

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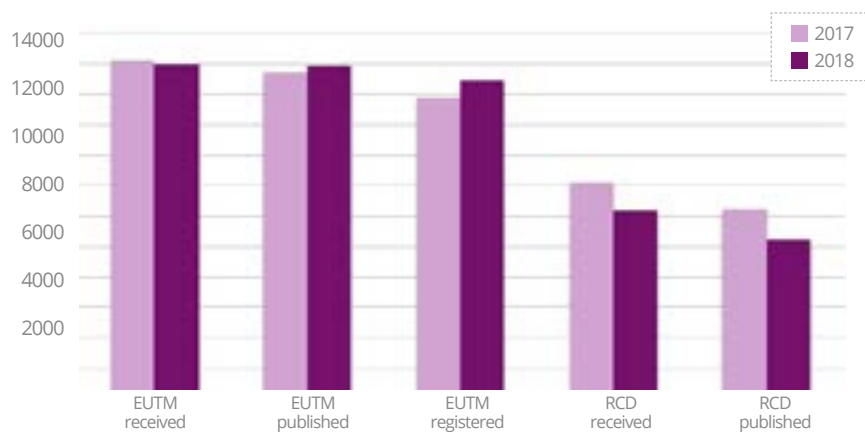


Statistical Highlights



Monthly statistical highlights October*	2017	2018
European Union Trade Mark applications received	12 605	13 605
European Union Trade Mark applications published	11 538	12 255
European Union Trade Marks registered (certificates issued)	11 427	11 118
Registered Community Designs received	7 463	7 721
Registered Community Designs published	8 858	7 674

* Statistical data for the month in course is not definitive. Figures may vary slightly thereafter.



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Consultation on convergence projects CP8 and CP9

The draft Common Practices of the CP8 project (Use of a trade mark in a form differing from the one registered) and CP9 project (Distinctiveness of shape marks containing other elements when the shape itself is non-distinctive) have been published in English on www.tmdn.org.

The CP8 and CP9 Working Groups made significant progress on developing the Common Practices during a drafting workshop in June and the Working Group meetings in November.

As a result, the first drafts of the Common Practices are now available for review and suggestions by all stakeholders.

The EUIPO welcomes your comments, which should be addressed to Joana.DEMOURA@euipo.europa.eu for CP8 and to Boyan.Iekov@ext.euipo.europa.eu for CP9 by Friday 18 January 2019.

European cooperation: BPO implements quality management system

The Patent Office of the Republic of Bulgaria (BPO) has successfully completed the external audit

that certifies the implementation of a Quality Management System (QMS) according to the ISO 9001 (2015) standard.

The audit was carried out on 15-16 October 2018 by the certification body Bureau Veritas.

The implementation was carried out within the framework of the European Cooperation projects (ECP 5 – “Support for Management Systems for IP Offices”).

Mexico to use the list of terms from the harmonised database in TMclass

As of 12 November 2018, the Mexican Institute of Industrial Property (IMPI) will use the list of goods and services from the harmonised database (HDB) in TMclass and IMPI's online tool ClasNiza.

Following IMPI's decision to use HDB there are now four non-EU IP offices that use and accept terms from this database.

With the extension of the reach of HDB to IMPI through TMclass, this tool now offers users the opportunity to search and translate harmonised concepts among 31 IP offices.

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The adoption of HDB by IMPI is a concrete result of the IP Key Latin America programme directed by the European Commission and executed by the EUIPO.

You can find out more at www.tmdn.org, www.ipkey.eu, <http://euiipo.europa.eu/ec2> and <https://clasniza.impi.gob.mx>

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TM5 Annual Meeting 1-2 November

The Korean Intellectual Property Office (KIPO) hosted the 7th Trade Mark 5 (TM5) Annual Meeting in Seoul on 1-2 November 2018.

TM5 is the name given to the multilateral cooperation forum of the five largest trade mark offices in the world, which includes the European Union Intellectual Property Office (EUIPO), the United States Patent and Trademark office (USPTO), the Japan Patent Office (JPO), the Korean Intellectual Property Office (KIPO) and the recently created China National Intellectual Property Administration (CNIPA).

Together the five Offices are responsible for 60% of the world's internationally filed trade marks.

The World Intellectual Property Organization (WIPO) was present as an observer, as it had been at the previous TM5 Annual Meetings.

At this meeting, the Partners exchanged views and information on common projects and new project proposal.

Among fourteen on-going TM5 cooperation projects, the EUIPO reported on the current status of 'User-friendly Access to Trade Mark Information (TMview)', 'User Association Involvement'

and 'Priority Rights' projects and successfully concluded one project: 'Taxonomy and TMclass'.

Additionally the EUIPO reported on two projects that it co-leads, 'Fraudulent Solicitations' with the USPTO and 'Quality Management' with JPO which were adopted at the 2017 Annual Meeting and are under implementation.

A new initiative proposed by KIPO related to raising awareness in the fight against Trade Mark Infringements was adopted as a TM5 cooperation project.

The TM5 Partners adopted a Joint Statement on the Fourth Industrial Revolution, and agreed to undertake the following initiatives: continue cooperation among the TM5 Partners in response to the Fourth Industrial Revolution to protect new trademarks brought by emerging technologies.

The second day of the meeting reinforced the user driven policies of the TM5 Partners by dedicating one full session to informing users and their associations of the progress made on cooperation projects.

Seventeen users from six different associations participated in exchanges of views on IP protection issues and the possible challenges they present.

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During the TM5 User Session, topics such as Quality Management, AI operations in Image Search, the Fourth Industrial Revolution and Trade Mark, the Experiences of Users and SMEs on operating business via e-commerce and the new set-up of CNIPA were discussed.

JPO was officially designated as the next TM5 Host and Secretariat with a view to hold Mid-Term and Annual Meetings in 2019.

ID5 Annual Meeting 5-6 November

The Korean Intellectual Property Office (KIPO) hosted the 4th ID5 Annual Meeting in Seoul on 5-6 November 2018.

ID5 is the multilateral cooperation forum, inaugurated in 2015, which allows the five largest design Offices, the European Intellectual Property Office (EUIPO), the United States Patent and Trademark Office (USPTO), the Japan Patent Office (JPO), the Korean Intellectual Property Office (KIPO) and the recently created China National Intellectual Property Administration (CNIPA) to seek cooperation synergies for the benefit of users in the field of design registration.

The World Intellectual Property Organization (WIPO) was present as an observer, as in previous ID5 Annual Meetings.

During the meeting, the ID5 Partner Offices shared updates on their progress in a number of cooperation projects. The EUIPO reported on the progress made in the two projects it leads, 'Product Indications' and 'Forecasting' as well as on 'Emerging Designs', a project it co-leads with the USPTO.

Five cooperation projects were successfully concluded during the meeting as all deliverables were met: 'Catalogue of Eligibility for Industrial Design', 'Development and Maintenance ID5 website', 'Comparative Study of the Application of a Grace Period for Industrial Design Applications', 'Comparative Study of Partial Designs as an Effective Means of Protection for Industrial Design Innovation' and 'Study of Practices on Protection of New Technological Designs.'

Six new initiatives for the ID5 forum were adopted and launched as projects, including '3D Printing', 'Admissibility of Internet Information as Legitimate Discloser', 'Design Patent Quality Management', 'ID5 Recommended Design Practices' and 'Remedies for Design Patent Infringement'.

The ID5 Partners adopted a Joint Statement on the Fourth Industrial Revolution, pursuing the objective of strengthening protection of designs in a new technological environment, encouraging the adoption of new technologies for administrative systems of industrial designs and providing user

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friendly services using new technologies for applicants of design systems.

A full day was dedicated to the session for users from the ID5 Partner Offices, a great achievement for user involvement in ID5.

JPO was officially designated as the next ID5 Host and Secretariat with a view to holding Mid-Term and Annual Meetings in 2019.

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Luxembourg trade mark and design news

B: General Court: Orders and Judgments on appeals against decisions of the EUIPO

T-328/16; DEEP PURPLE / DEEP PURPLE; *Ian Paice v EUIPO*; Judgment of 4 October 2018; EU:T:2018:649; Language of the case: EN

RESULT: Action dismissed

KEYWORDS: Admissibility, Passing off, Reputation

FACTS: The intervener sought to register the word mark **DEEP PURPLE** as an EUTM for goods and services in Classes 9, 25 and 41. An opposition based on the earlier non-registered mark **DEEP PURPLE** for all the abovementioned goods and services was filed pursuant to Article 8(4) EUTMR. The OD partly upheld the opposition refusing registration of the mark applied for in respect of some of the goods in Class 9 and all of the services in Class 41. However, it granted the application for registration of the mark for the goods in Class 25 as well as for some of the goods in Class 9. The applicant appealed against the OD's decision. The Board of Appeal (BoA) dismissed the appeal regarding some of the goods in Class 9, namely *computer hardware [and] computer chips and discs, interactive software as well as computer firmware; computer*

games; software for interactive games for computer, mobile phones and handheld devices; digital games, mobile phone games; DVD games; computer software and computer programs. The BoA found that no evidence had been submitted that the band Deep Purple had been involved in trading those items. It also stated that those items fell into a category of goods that were not clearly associated with music business merchandising in general and Deep Purple in particular. This did not, therefore, have the nature of 'notorious fact' evidence (para. 14). The applicant filed an action before the General Court (GC), relying on two pleas in law: (i) alleging that the **Lego** judgment was misapplied and, (ii) alleging deceptive intent on the part of the intervener.

SUBSTANCE: The applicant submits that the BoA failed to have regard to the principle established in the **Lego** judgment, according to which, the existence or absence of a common field of activity is not the acid test for establishing the likelihood of misrepresentation. The test is actually whether a real risk exists that a substantial number of people will in fact believe that there is a business connection between the claimant and the defendant. The BoA did not, however, ask itself that question, instead applying the 'badge of allegiance' test (para. 27). There is no indication in the contested decision that the use of the expression 'badge of allegiance' gave rise to an incorrect conclusion. It is only used by the BoA in order to explain the concept of merchandising in the music industry (para. 34). The applicant

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has not adduced any evidence that shows that the band Deep Purple have been involved in trading any of the goods at issue or that music bands or other performers or celebrities commonly traded those type of goods (para. 35). The fact that the applicant was involved in trading some of the goods in Class 9 is irrelevant, as that does not imply that the likelihood of misrepresentation is established for all the goods in that class, in general, or the goods at issue in particular (para. 36). The claim that the intervener sought to deceive the public was set out only in a very summary manner before the BoA. In addition, that claim was not substantiated by any evidence capable of proving that the intervener intended to deceive the public in a manner likely to damage the applicant. Though it is understood that the intervener is a former member of the band and is, therefore, associated with the band in the mind of the public, this cannot in itself amount to proof of a deceptive intent on his part. The BoA dealt fully with the issue of the likelihood of misrepresentation (para. 48). It cannot be successfully argued that the BoA failed to adjudicate on the applicant's argument concerning 'subjective deceptive intent', nor that it failed to state the reasons for which it had not upheld that argument (para. 49).

T-447/16; DEVICE OF A TYRE TREAD; *Pirelli Tyre SpA v EUIPO*; Judgment of 24 October 2018; EU:T:2018:709; Language of the case: EN

RESULT: Action upheld (BoA decision partially annulled)

KEYWORDS: Figurative trade mark, Function of trade mark, Right to be heard, Shape of the product, Technical result

FACTS: The EUTM proprietor registered the figurative mark below as an EUTM for *inter alia* *tyres, solid, semi-pneumatic and pneumatic tyres for vehicle wheels of all kinds* in Class 12. An invalidity application was filed pursuant to Article 59(1)(a) EUTMR in conjunction with Article 7(1)(e)(ii) EUTMR. The Cancellation Division (CD) upheld the invalidity application for the goods mentioned. It found that the contested sign consisted exclusively of the shape of the goods concerned necessary to obtain a technical result within the meaning of Article 7(1)(e)(ii) EUTMR. The proprietor filed an appeal. The Board of Appeal (BoA) rejected the appeal for the abovementioned goods finding that the sign represented a tyre tread and, thus, perhaps the most crucial part of the contested goods, at least from a technical perspective. The proprietor filed an action before the General Court (GC), relying on three pleas in law: i) having based the contested decision on a version of Article **7(1)(e)(ii)** EUTMR that was not applicable *ratione temporis*, (ii) procedural irregularities and infringement of the obligation to state reasons, and (iii) infringement of Article 7(1)(e)(ii) EUTMR.

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EUTM application



SUBSTANCE: First plea. Applicable version of Article 7(1)(e)(ii). Although the BoA wrongly cited the wording of Article 7(1)(e)(ii) of Regulation (EC) No 207/2009 as amended by Regulation (EU) No 2015/2424, whereas the version in force at the time of the EUTM application in 2001 was that of Regulation (EC) No 40/94, when the BoA set out in detail the interpretation of that provision, it mentioned the case-law handed down under Article 7(1)(e)(ii) of Regulation (EC) No 40/94, which refers only to the 'shape of goods', several times. In addition, it is apparent from reading the contested decision that the BoA assessed the facts on the basis of the conditions laid down in Article 7(1)(e)(ii) of Regulation (EC) No 40/94, as interpreted by the relevant case-law. Therefore, the BoA did not apply the amendment made by Regulation (EU) No 2015/2424 ('the shape, or another characteris-

tic, of goods which is necessary to obtain a technical result') but rather the provision applicable at the time, namely Article 7(1)(e)(ii) of Regulation (EC) No 40/94, which provides for the refusal of registration of 'signs which consist exclusively of ... the shape of goods which is necessary to obtain a technical result'. The first plea in law must therefore be rejected (paras 24-28). **Third plea. Infringement of Article 7(1)(e)(ii) of Regulation (EC) No 40/94.** The figurative two-dimensional sign which, when abstractly analysed, resembles, for example, the shape of an inclined hockey stick or an inclined 'L', clearly does not represent the shape of a tyre, nor that of a tyre tread (paras 48-49). The BoA was permitted to take into account all information making it possible to identify what the shape at issue actually represents, but not to the point of defining the contested sign by including characteristics that the sign, as represented, does not possess and that it does not cover (paras 56-57). The fact that some of the EUTM proprietor's tyre models contain a groove in the shape represented by the sign applied for on their tyre tread, did not entitle the BoA to go beyond the contested sign in order to qualify it as 'a representation of a tyre tread'. In other words, the BoA, by adding elements that do not form part of the contested sign, took the view that the sign represented the shape of the goods in question for which it had been registered (para. 58). The case-law relating to signs, which did not have the same characteristics as the contested sign either, because they were three-dimensional

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signs or because the relevant shapes were defined based on characteristics that were 'specific' to the sign at issue or 'constituent' of it, does not apply to the present case, that is, such case-law does not authorise the Office to qualify the contested sign as a tyre or as 'a representation of a tyre tread' (paras 62-66). Since the assessment of what the contested sign actually represents is a step that allows, firstly, its essential characteristics to be identified, and secondly, any potential functionality of those essential characteristics to be gauged, the fact that the BoA included elements that do not form part of the shape actually represented by the contested sign in its assessment, is capable of invalidating the conclusion that the conditions set out in Article 7(1)(e)(ii) of Regulation (EC) No 40/94 are met (para. 67). In the present case, the contested sign represents a single groove of a tyre tread, which is not a product since it is not a separable element of a tyre. Consequently, the contested sign is not made up exclusively of the shape of the goods in question, nor of a shape which, on its own, represents, quantitatively and qualitatively, a significant part of those goods (paras 68-71). A single groove in the shape identical to that represented by the contested sign, is not capable of producing the technical result accepted in the contested decision. The BoA was therefore wrong to take the view that the contested sign represented a tyre tread and, therefore, consisted of the 'shape of the goods' within the meaning of Article 7(1)(e)(ii) of Regulation (EC) No 40/94 (paras 72, 74). Since the first part

of the third plea in law relied on by the proprietor must be upheld, there is no need to rule on the second part of the same plea alleging that the essential characteristics of the contested sign do not all have exclusive functionality, nor on the second plea in law (para. 75). The part of the contested BoA decision confirming the declaration of invalidity of the registered mark must therefore be annulled (para. 76).

T-736/17; FLEXCUT; *Lincoln Global, Inc. v EUIPO*; Judgment of 4 October 2018; EU:T:2018:646; Language of the case: EN

RESULT: Action dismissed

KEYWORDS: Descriptive element

FACTS: The applicant sought to register the word sign **FLEXCUT** as an EUTM for goods in Classes 7 and 9. The Office refused to register the EUTM application pursuant to Article 7(1)(b) and (c) and Article 7(2) EUTMR, as it was descriptive and devoid of distinctive character. The applicant filed an appeal. The Board of Appeal (BoA) dismissed the appeal finding that the mark applied for was descriptive and devoid of any distinctive character. The applicant filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of Article 7(1)(c) EUTMR and (ii) infringement of Article 7(1)(b) EUTMR.

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SUBSTANCE: The goods covered by the mark applied for refer to machinery and highly specialised tools targeted at a specialist professional public. The relevant consumer was deemed to be reasonably well informed and reasonably observant and circumspect (para. 21). The BoA found that since the mark applied for consisted of elements in English, the existence of absolute grounds for refusal had to be examined with regard to English-speaking consumers within the European Union and at least consumers in Malta, Ireland and the United Kingdom (para. 22). The mark applied for consists of two elements, namely 'flex', an abbreviation of the term 'flexible', and 'cut', an English word. The target public is able to understand the meaning of the words 'flex' and 'cut' (paras 27, 29). The combination of the words 'flex' and 'cut' follows the rule of English usage pursuant to which the adjective precedes the word (para. 30). The term 'flex-cut' has a clear and unambiguous meaning in the field to which the trade mark application relates, namely 'flexible cut'. The sign in question will be understood as containing direct information on the quality or characteristics of the goods concerned (para. 32). The simple combination of the words 'flex' and 'cut' is itself also descriptive of the quality and the characteristics of those goods and is merely a simple description of the functions of the goods in question (para. 34). Since the word 'flex-cut' will enable the public to understand immediately that that term refers to a 'flexible cut', the BoA did not err in holding that the ground of refusal un-

der Article 7(1)(c) EUTMR was applicable (para. 39). The sign is descriptive of the goods and services concerned for the purposes of Article 7(1)(c) EUTMR because that provision pursues an aim in the public interest, which requires that such signs or indications may be freely used by all (para. 42). The BoA carried out a full and specific examination of the mark applied for before refusing to register it (para. 50). Concerning the applicant's argument that it registered the trade mark FLEXCUT in the United States in respect of identical goods, without any objection being raised in that regard, the EU trade mark regime is an autonomous system with its own set of objectives and rules. Being self-sufficient, it applies independently of any national system (para. 51). Given all of the above, the first plea must be rejected (para. 52). Since it is sufficient that one of the absolute grounds for refusal applies for the signs to be ineligible for registration as an EU trade mark, there is no need to rule on the second plea (paras 53-54).

T-150/17; FLÜGEL; *Asolo Ltd v EUIPO*; Judgment of 4 October 2018; EU:T:2018:641; Language of the case: EN

RESULT: Action upheld (BoA decision partially annulled)

KEYWORDS: Acquiescence, Dissimilarity of the goods and services, Likelihood of confusion

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FACTS: The predecessor in title of the EUTM proprietor registered the word mark **FLÜGEL** as an EUTM for *beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for the preparation of drinks* in Class 32 and *alcoholic drinks (except beers)* in Class 33. An invalidity application was filed pursuant to Article 60(1)(a) EUTMR in conjunction with Article 8(1)(b) and Article 8(5) EUTMR. It was based on, inter alia, the earlier Austrian word mark **...VERLEIHT FLÜGEL** for *energy drinks* in Class 32. The Cancellation Division (CD) upheld the invalidity application in its entirety. In light of the repute of the earlier mark **...VERLEIHT FLÜGEL** and considering the possibility that the proprietor of the contested mark could take unfair advantage of that earlier mark, the CD accepted the request for a declaration of invalidity based on Article 60(1)(a) EUTMR in conjunction with Article 8(5) EUTMR. Furthermore, although the invalidity applicant was aware of the existence of the contested mark, it had not been demonstrated that the invalidity applicant had acquiesced in its use in Austria and been aware of it during the relevant period in this case, namely from 5 December 2006 to 5 December 2011. The proprietor filed an appeal, which the Board of Appeal (BoA) dismissed. However, the BoA did not assess Article 60(1)(a) EUTMR in conjunction with Article 8(5) EUTMR, since it found that there was a likelihood of confusion with the earlier mark **...VERLEIHT FLÜGEL** on the basis of Article 8(1)(b) EUTMR. Therefore, it annulled point 2 of the op-

erative part of the CD decision to the extent that examination under Article 8(5) EUTMR was not necessary in the present case. The BoA considered that the signs were similar to an average degree and the *energy drinks* covered by the earlier mark were in part identical and in part similar to an average degree to all the goods of the contested mark. It also found that the evidence submitted by the proprietor was not sufficient to conclude that there had been acquiescence on the part of the invalidity applicant. The proprietor filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of Article 61(2) EUTMR and (ii) infringement of Article 60(1)(a) EUTMR in conjunction with Article 8(1)(b) EUTMR.

SUBSTANCE: Scope of the contested decision.

By basing the invalidity of the contested mark on a ground different from that favoured by the Cancellation Division, the BoA merely substituted its own assessment for that of the Cancellation Division, thus exercising its powers under Article 71 EUTMR (para. 24). **Acquiescence.** The BoA rightly held, on the basis of all the information in the file, that the evidence adduced by the proprietor (before both the CD and the BoA) concerning the invalidity applicant's actual knowledge of the use of the contested mark in Austria was insufficient for the purposes of establishing that there had been acquiescence in that use within the meaning of Article 61(2) EUTMR, that is, that the proprietor of the earlier mark had actually (and not just potentially)

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been aware of the use of the contested mark (paras 41-51). **Comparison of the goods.** To consider that alcoholic and non-alcoholic drinks are similar just because they are generally mixed, consumed or marketed together, when they are not intended to be consumed in either the same circumstances or the same state of mind or, as the case may be, by the same consumers, would put a large number of goods that can be described as 'drinks' into one and the same category for the purposes of the application of Article 8(1)(b) EUTMR. Thus, it cannot be considered that an alcoholic drink and an energy drink are similar merely because they can be mixed, consumed or marketed together, given that the nature, intended purpose and use of those goods differ, based on the presence or absence of alcohol in their composition. Furthermore, the undertakings that market alcoholic drinks premixed with a non-alcoholic ingredient do not sell that ingredient separately and under the same or a similar mark as the premixed alcoholic drink at issue (paras 80-81). The average Austrian consumer is used to and aware of the distinction between alcoholic and non-alcoholic drinks, which is, moreover, necessary, since some consumers do not wish to, or cannot even, consume alcohol (para. 83). The findings of the European Union judiciary in previous cases on the relevant public's perception of drinks, according to their alcohol content, are undoubtedly valid in a context such as that of the present case. Although in some instances the Court might have acknowledged, in circumstances that

were not identical to those of the present case, a low degree of similarity between alcoholic drinks and non-alcoholic drinks, that cannot be held to be sufficient to challenge the finding here that the conflicting goods are not similar (paras 84-85). The goods applied for in Class 33, *alcoholic beverages (except beers)* and *alcoholic essences; alcoholic extracts; fruits extracts (alcoholic)* are not similar to the earlier mark's *energy drinks*. Consequently, there is no likelihood of confusion between the marks as regards the goods in Class 33. The contested decision must therefore be partially annulled.

T-820/17; Alfrisa (fig.) / Frinsa F (fig.); Frinsa del Noroeste, S.A v EUIPO; Judgment of 4 October 2018; EU:T:2018:647; Language of the case: ES

RESULT: Action dismissed

KEYWORDS: Common element, Dissimilarity of the goods and services, Distinctiveness acquired by use, Figurative trade mark, Identity of the goods and services, Likelihood of confusion, New submission on appeal, Phonetic dissimilarity, Reputation, Similarity of the goods and services, Scope of proceedings, Visual dissimilarity

FACTS: The applicant sought to register the figurative mark below as an EUTM for goods and services in Classes 29 and 35. An opposition based on the earlier EU figurative mark below registered for goods in Class 29 was filed pursuant to Article 8(1)

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(b) EUTMR. The Opposition Division (OD) dismissed the opposition. It found that there was no likelihood of confusion (LOC). The opponent appealed. The Board of Appeal (BoA) dismissed the appeal and confirmed the OD's findings. The opponent filed an action before the General Court (GC), relying primarily on the infringement of Article 8(1)(b) EUTMR.

EUTM application	Earlier trade mark
	

SUBSTANCE: Relevant public. The goods target not only the general public but also professional clients. The examination focused on the perception of the general public as this public will be less attentive than the professional public (paras 30-31). **Comparison of the goods and services.** The goods and services are in part identical, in part similar to varying degrees, and in part different (para. 39) **Comparison of the signs.** The GC confirms that the common sequences of letters in the conflicting signs lack any semantic content or graphic features that could make them identifiable. Therefore, they cannot counteract the visual and phonetic differences between the signs (para. 44). **Distinctiveness of the earlier mark.**

The extracts submitted and duly assessed by the BoA are insufficient to prove that the earlier trade mark was well-known or had a reputation in the EU (para. 55). The alleged reputation of the undertaking is not to be confused with — and does not necessarily entail — the reputation of the earlier mark *per se*. In any event, the alleged reputation covers only Spain and not the whole of the EU (para. 57). It is not for the Office to search the website of the undertaking in order to find relevant data regarding the reputation of the earlier mark (para. 63). **Family of marks.** The existence of other marks containing the word 'frinsa' was alleged for the first time before the BoA (para. 65). However, no proof of use of said marks was adduced (para. 68). Furthermore, the opposition was based solely on the earlier mark and not on the alleged 'whole family' of marks (para. 70). **No LOC.** Given the important visual and phonetic differences, and since the reputation of the earlier mark was not duly proven, the low similarities between the signs are not sufficient to establish a LOC.

T-313/17; FORM EINER FLASCHE (3D); *Wajos GmbH v EUIPO*; Judgment of 3 October 2018; EU:T:2018:638; Language of the case: DE

RESULT: Action upheld (BoA decision annulled)

KEYWORDS: Functional element, Minimum degree of distinctiveness, Shape of the product, Technical result, Three dimensional mark

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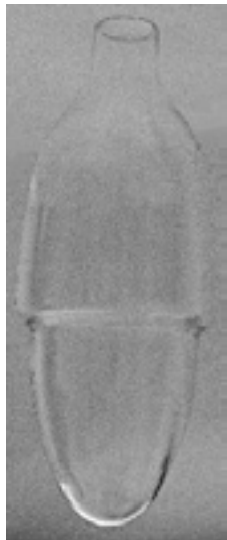
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FACTS: The applicant sought to register the 3D mark below as an EUTM for goods in Classes 29, 30, 32 and 33. The Office refused to register the EUTM application pursuant to Article 7(1)(b) EUTMR, so the applicant appealed. The Board of Appeal (BoA) dismissed the appeal finding that the mark was devoid of any distinctive character. The applicant went on to file an action before the General Court (GC), relying on a single plea in law: infringement of Article 7(1)(b) EUTMR.

EUTM application



SUBSTANCE: Relevant public. The goods concerned also target the general public, not only customers with an increased level of attention. The wording of the list of goods includes very common, everyday foodstuffs (paras 17-18). Their eventual high price does not mean that the public will pay a particularly high degree of attention (para. 20). **Significant departure from the norm used on the market.** The 3D mark applied for is a transparent amphora-like container. The upper part is tapered in the form of a bottle mouth closable with a glass lid. The lower part is narrower in comparison to the upper part and tapers to a rounded point. The upper part is separated from the lower, narrower part by a slight ridge, which not only constitutes a technical and functional feature, but also adds aesthetic value to the contested mark. Consumers are not used to such an accentuated curved form in the middle of a bottle. The form departs significantly from classical amphoras, in particular as amphoras are not normally made of glass. The combination of elements comprising the contested mark is unique and not trivial, easily memorised by the relevant public (paras 34-35). Therefore, it acquires a particular appearance which, taking into account the overall aesthetic result, is capable of holding the attention of the public concerned and enabling that public, due to the shape of the packaging of the goods, to distinguish the goods covered from those with a different commercial origin (para. 36). Therefore, taken as a whole, it presents the required minimum distinctiveness for registrability (para. 39).

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T-70/17; NorthSeaGrid (fig.) / nationalgrid (fig.) et al.; TenneT Holding BV v EUIPO; Judgment of 27 September 2018; EU:T:2018:611; Language of the case: EN

RESULT: Action upheld (BoA decision partially annulled)

KEYWORDS: Conceptual similarity, Distinctive element, Figurative element, Likelihood of confusion, Phonetic similarity, Scope of proceedings, Visual similarity

FACTS: The applicant sought to register the figurative mark below as an EUTM for goods and services in Classes 4, 35 and 37 to 39. An opposition based on inter alia the two earlier EU trade marks below, registered for goods and services in Classes 1, 35 and 37 to 39, was filed pursuant to Article 46 EUTMR. The Opposition Division (OD) dismissed the opposition. The opponent filed an appeal. The Board of Appeal (BoA) partially upheld the appeal, namely in respect of the goods and services applied for with the exception of the services *negotiation and settlement of commercial transactions for third parties relating to the delivery of electricity* in Class 35. It found that, with the exception of the latter services in Class 35, which were directed solely at business users, there would be a likelihood of confusion (LOC) in respect of all the goods and services applied for. It also found, insofar as Article 8(5) EUTMR was concerned, that it had not been

proven that use of the mark applied for would take unfair advantage of, or be detrimental to, the earlier trade mark's distinctive character or repute. The applicant filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of Article 8(1)(b) EUTMR and (ii) infringement of Article 8(5) EUTMR.

EUTM application	Earlier trade marks
	 nationalgrid

SUBSTANCE: Scope of the action. Even though the applicant asked the Court to annul the contested BoA decision without providing further clarification, it stated before the Court that the action did not concern the part of that decision admitting certain services in Class 35 for registration (paras 25-26). It must furthermore be understood from the replies given by the applicant to the questions of the Court, that the applicant withdrew its second plea in law, alleging infringement of Article 8(5) (paras 30-31). **Relevant territory, relevant public and the latter's level of attention.** As the earlier marks are EU trade marks, the relevant territory in the present case is that of the European Union (para. 43). The relevant public includes both the general public and professionals. The applicant

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cannot validly rely on the fact that its circle of clients consists solely of professionals, since it is the description of the goods and services covered by the marks at issue and not the goods and services actually marketed under those marks that must be taken into account, and it is not apparent from the description of the goods and services that they are intended for professionals only (paras 50-54). Given, however, the sophisticated nature of the goods and services in question, the general public's level of attention is likely to be slightly higher than average (para. 59). **Comparison of the goods and services.** It is not disputed that the goods and services are identical (para. 42). **Comparison of the signs.** The overall impression conveyed to the relevant English-speaking and non-English-speaking public by the mark applied for, and the earlier marks, is not dominated by any one of their respective components. In addition, none of the elements comprising the marks is negligible for the English-speaking public or the non-English-speaking public (paras 102, 117). The signs are visually similar to a low degree. The similarities resulting from the presence of the common element 'grid' and the initial letter 'n', as well as the colour blue in the figurative signs at issue are not totally offset by their differences in many respects (paras 123-125). The signs are also phonetically similar only to a low degree in view of their different number of syllables and the difference in pronunciation of their first parts, namely 'national' and 'northsea', respectively (paras 128-130). Conceptually, the signs are simi-

lar to a low degree for the English-speaking part of the relevant public, who will perceive the identical meaning of the common element 'grid' as a system of wires through which electricity is connected to different power stations across a region, and it cannot be concluded that there is a conceptual similarity between the signs for the non-English-speaking public (paras 135-136, 142). In an overall comparison, the signs at issue are similar to a low degree for the English-speaking public, as they are weakly similar regarding the visual, phonetic and conceptual aspects, while for the non-English-speaking public they have a low degree of visual and phonetic similarity and are conceptually different (paras 143-144). **Global assessment of the likelihood of confusion.** As regards the English-speaking public, despite the identity of the goods and services, the visual, phonetic and conceptual similarities of the signs are not sufficient to give rise to a LOC for that part of the relevant public, which has a higher than average level of attention. That part of the public will view the common element 'grid' as descriptive, will identify the marked differences between the elements 'northsea' and 'national' and will note the figurative element of the mark applied for as reinforcing the message conveyed by the element 'northsea' (para. 146). As regards the non-English-speaking public, which shows a high level of attention and takes time to study the marks, the differences between their respective initial parts counteract the presence of the common element 'grid', placed at the end and shorter. It is the ele-

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ment 'northsea' that will leave a particular impression on this part of the public, as it has a normal distinctive character, unlike the lowly distinctive element 'national'. A LOC does not exist here either (paras 147-149). The BoA therefore acted correctly in excluding a LOC for the English-speaking general public and, by contrast, erred in finding that there was a LOC for the non-English-speaking general public (paras 150-151).

T-120/17; fluo.; *M & T Emporia Elektrikon-Ilektronikon Eidon AE v EUIPO*; Judgment of 11 October 2018; EU:T:2018:672; Language of the case: EN

RESULT: Action upheld (BoA decision annulled)

KEYWORDS: Descriptive element, Figurative element, Figurative trade mark, New submission on appeal, Scope of proceedings

FACTS: The applicant sought to register the figurative mark below as an EUTM for goods in, inter alia, Class 9. The Office refused to register the EUTM application pursuant to Article 7(1)(b) and (c) EUTMR, as it was descriptive and devoid of distinctive character. The applicant filed an appeal. The Board of Appeal (BoA) partially dismissed the appeal, so the applicant filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of Article 7(1)(c) EUTMR and (ii) infringement of Article 7(1)(b) EUTMR.



SUBSTANCE: Relevant public. As the contested mark contained the French word 'fluo', the relevant public was the French-speaking public of the EU (para. 27). **Meaning of the mark.** The figurative elements of the contested mark serve clearly and immediately to identify the word 'fluo'. The font used is a standard, easily legible and unmemorable typeface. In addition, the full stop after the word 'fluo' does not alter the meaning of that word (para. 34). The relevant consumer will understand the word 'fluo', an abbreviation of the word 'fluorescent', as an expression meaning 'luminous, vivid in colour' (para. 35). **Link between the mark and the goods.** The BoA did not establish a sufficiently direct and specific relationship between the word 'fluo' and the goods (para. 36). The mere fact that screens emit light and colour images is not sufficient to conclude that fluorescent colours are an essential characteristic of the goods. In addition, the colour images on the screens of the goods at issue are not usually fluorescent in the course of the normal operation of those goods (para. 38). The word 'fluo' relates, only under certain conditions, to a part of the goods, namely their screens. The fact

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that a screen may possibly emit fluorescent colours cannot realistically be considered an intrinsic and permanent characteristic of the goods or a part thereof, namely the screens (para. 40). **Lack of descriptiveness.** The word 'fluo' does not directly and immediately inform the consumer of one of the characteristics of the goods (para. 41). The BoA did not show that the relevant public would perceive the contested mark, immediately and without further thought, as a description of the goods or one of their characteristics (para. 42). **New submission of evidence before the GC.** New evidence consisting of a market study on the perception of the word 'fluo' by the French-speaking public is inadmissible as it was not produced by the applicant during the proceedings before the Office (paras 15, 17). Since the BoA relied solely on the first plea in law in order to refuse registration, there is no need to examine the second plea in law (para. 45).



T-186/17; WALLAPOP (fig.) / WALA W (fig.) et al.; Unipreus, SL v EUIPO; Judgment of 3 October 2018; EU:T:2018:640; Language of the case: ES

RESULT: Action upheld (BoA decision annulled)

KEYWORDS: Identity of the goods and services

FACTS: The intervener sought to register the figurative sign **WALLAPOP** for services in Class 35. The applicant filed an opposition pursuant to Article 8(1)(b) EUTMR for the abovementioned servic-

es. The Opposition Division (OD) rejected the opposition, so the applicant appealed against the OD's decision. The Board of Appeal (BoA) dismissed it, confirming that the relevant territory was Spain and that the signs were only weakly similar. The applicant filed an action before the General Court (GC), relying on a single plea in law: infringement of Article 8(1)(b) EUTMR.

EUTM application	Earlier trade mark
	

SUBSTANCE: The distribution channels of the contested services are, at the very least, weakly similar (para. 38). The mark applied for does not concern sales services per se, but intermediation or online market management services for buyers and sellers of goods and services, including the provision of commercial information relevant to the conduct of sales (para. 41). The nature, destination and use of the services are not necessarily identical insofar as the applicant's retail services are provided directly between the seller and the buyer through access to fixed stores or through the seller's usual website. The intervener's services, however, are provided through a mobile application that connects third party buyers and sellers who negotiate prices and purchase conditions between themselves. The services covered by the mark applied for facilitate retail

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sales between buyers and sellers. Consequently, the destination and use of the services in question should not have been considered absolutely different by the BoA, but rather not very similar instead (para. 44). It cannot be excluded that the mark applied for may be used to connect professional sellers with consumers, contrary to what the BoA stated in its contested decision (para. 47). The BoA therefore wrongly held that the services in question were not aimed at the same consumers (para. 49). It should also be noted that the services are weak competitors. Indeed, as the applicant claims, consumers can analyse the offer for the same product both on the 'www.walashop.com' website and on the 'www.wal-lapop.com' website (para. 50). The services in question are, at the very least, weakly similar, therefore, the BoA wrongly deemed that these services were different (para. 54).

T-24/17; D-TACK / TACK et al.; LA Superquímica, SA v EUIPO; Judgment of 10 October 2018; EU:T:2018:668; Language of the case: EN

RESULT: Action dismissed

KEYWORDS: Proof of use

FACTS: The predecessor of D-Tack GmbH sought to register the word mark **D-TACK** for goods and services in Classes 1, 17 and 35. An opposition was filed based on six earlier Spanish rights, pursuant to Article 5 and Article 8(1)(b) EUTMR. The

Opposition Division (OD) rejected the opposition in its entirety as proof of the earlier marks had not been provided and the evidence of use of the earlier mark was insufficient. The opponent appealed against the OD's decision. The Board of Appeal (BoA) dismissed it, as the evidence provided showed use that altered the distinctive character of the earlier mark as registered. The opponent filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of the rules on the substantiation of the registrations of the earlier marks and (ii) infringement of the rules on proof of use of the earlier word mark **TACK**.

EUTM application	Earlier trade marks
D-TACK	<p>TACK used as TACKCEYS</p> 

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SUBSTANCE: The BoA exercised its discretion and considered, rightly, that the new extracts from the Sitadex database could not be taken into account, highlighting the legitimate interest of the applicant, whose behaviour in no way influenced the belated filing of the extracts (paras 27-28). The relevant public is the Spanish public (not contested) (para. 51). In view of the goods at issue, the words 'tack' and 'ceys' have at least an average distinctive character (para. 52). The BoA's conclusion that the use of the word 'tackceys' in the invoices, in the text of the brochures and catalogues alters the distinctive character of the earlier word mark **TACK** and cannot be regarded as an acceptable variation of the use, must be approved (para. 56). The BoA noted that the two elements 'tack' and 'ceys' are systematically juxtaposed and always appear conjoined, forming an indivisible unit. Even though the element 'ceys' is smaller and represented in a different colour and font type, that added element is still clearly visible and does not occupy a secondary or ancillary position in the overall impression produced by the combination 'tackceys' (para. 58). The BoA rightly found that the last letter, 'k', appears to frame the following part of the sign, namely, the band or arrow pointed towards the term 'tack' on which the element 'ceys' appears (para. 59). The finding that the distinctive character of the earlier word mark **TACK**, as registered, has been altered, is supported by the addition of other terms like 'crick', 'cristal' or 'bricocinta' (para. 60). The earlier word mark **TACK** and the combination 'tackceys' cannot be regarded as broadly

equivalent (para. 61). The BoA rightly found that the variations in use shown alter the distinctive character of the earlier word mark **TACK** as it is registered (para. 63). The BoA did not infringe point (a) of the second subparagraph of Article 18(1) EUTMR, read in conjunction with Article 47(2) and (3) EUTMR, given the alteration of the earlier word mark **TACK** in the evidence produced by the opponent (para. 64).

T-788/17; MicroSepar / SEPARSolidaria (fig.); Andreas Szabados v EUIPO; Judgment of 17 October 2018; EU:T:2018:691; Language of the case: DE

RESULT: Action dismissed

KEYWORDS: Common element, Complex mark, Distinctive element, Figurative element, Identity of the goods and services, Likelihood of confusion, Phonetic similarity, Similarity of the signs, Visual similarity, Weak element

FACTS: The applicant sought to register the word mark **MicroSepar** as an EUTM for services in Class 42. An opposition based on the earlier Spanish figurative mark below, registered for services in Classes 42 and 44, was filed pursuant to Article 8(1)(b) EUTMR. The Opposition Division (OD) upheld the opposition and the applicant appealed. The Board of Appeal (BoA) dismissed the appeal. The applicant went on to file an action before the General Court (GC), relying on a single plea in law: infringement of Article 8(1)(b) EUTMR.

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EUTM application	Earlier trade mark
MicroSepar	

SUBSTANCE: Relevant public. Regarding the nature of the services, the relevant public is composed of the general public and professionals, both of whom will be attentive (para. 21). Since the earlier mark is a Spanish trade mark, the relevant territory is Spain (para. 22). **Comparison of the services.** The services are identical, since both include *veterinary services, medical services and chemical laboratory services* (para. 25). **Comparison of the signs.** The signs are visually similar to an average degree due to their common distinctive element ‘separ’. This similarity is not counteracted by the red circle in the earlier mark or by the other verbal elements (para. 30). The different position of the element ‘separ’ in the two marks does not alter its distinctive character or the perception of the public regarding the coincidence of the term in both marks (para. 42). Phonetically, the marks are similar given the coincidence of the element ‘separ’. The weak elements ‘Micro’ and ‘Solidaria’ will not neutralise the phonetic similarity (paras 31-32). Neither ‘MicroSepar’ nor ‘SEPARSolidaria’ has a concrete meaning in Spanish. Moreover, ‘Micro’ and ‘Solidaria’ are weak, non-distinctive components of the marks: ‘Micro’ is a prefix used in

many Spanish words in the medical, technical and scientific fields and confers on the compound form the sense of something small or localised or relatively small in size, while ‘Solidaria’ is an expression that is commonly used to denote objectives that are aligned with the community as a whole (paras 33-34). The website ‘deepl,’ adduced by the applicant, is not an online dictionary but a search engine that provides a merely mechanical translation of words and elements without taking into account the context in which these are used. Therefore, it cannot prove that the element ‘separ’, a term which does not exist in the Spanish language and is not listed in Spanish dictionaries, would have any meaning for the relevant public (para. 35). Even if it did have a meaning, the marks would only be conceptually similar to a low degree because of their common element ‘separ’ (para. 36). **LOC.** Given the common distinctive element ‘separ’, the visual and phonetic (and potentially conceptual) similarity of the signs, as well as the identity of the services and the degree of attention of the relevant public, there is a LOC (para. 40).

T-63/17; Bingo VIVA! Slots (fig.) / vive bingo (fig.); Grupo Orenes, S.L. v EUIPO; Judgment of 24 October 2018; EU:T:2018:716; Language of the case: ES

RESULT: Action dismissed

KEYWORDS: Conceptual similarity, Distinctive element, Dominant element, Figurative ele-

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ment, Identity of the goods and services, Likelihood of confusion, Phonetic similarity, Visual similarity, Weak element

FACTS: The applicant sought to register the figurative mark below as an EUTM for *online video game services related to free games* in Class 41. An opposition based on the earlier figurative EUTM below, registered for services in Classes 28, 35, 36, 38 and 41, was filed pursuant to Article 8(1)(b) EUTMR. The Opposition Division (OD) dismissed the opposition. The opponent filed an appeal, which the Board of Appeal (BoA) dismissed. It found that the services were identical and the signs had a very low degree of visual similarity and an average phonetical and conceptual similarity. It considered that given the nature of the services in question, the visual aspect should be favoured in the assessment and consequently, a likelihood of confusion (LOC) between the signs had to be excluded. The applicant filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of Article 94 EUTMR and ii) infringement of Article 8(1)(b) EUTMR.

SUBSTANCE: Article 94 EUTMR. The submission that the BoA should have carried out a comparison of the services different to that carried out by the first instance of the Office, which had been accepted by the opponent in the administrative proceedings, implies amending and enlarging the subject matter of the proceedings before the BoA. Consequently, the claim that the BoA failed to fulfil its obligation to state reasons is rejected, since it is based on an inadmissible modification of the subject matter of the proceedings (paras 19-21). **Article 8(1)(b) EUTMR. Relevant public.** The relevant public is the general public of the EU, whose level of attention is average (not disputed) (paras 30-31). **Comparison of services.** The contested services are identical to some services of the earlier mark in Class 41. **Comparison of signs.** The GC confirms that the distinctive elements of the earlier mark are the figurative element and the verbal element 'vive', whereas in the mark applied for, the public will pay attention mainly to the figurative part of the sign and the verbal element 'VIVA'. 'Bingo' and 'Slots' are descriptive in relation to the services (paras 45-51). The signs have a very low degree of visual similarity as they have a different structure, image and overall composition. The relevant public will not focus solely on the verbal elements 'vive' and 'viva', but also on the figurative parts of the conflicting signs, which differ in every respect (para. 57). The verbal elements 'bingo' and 'slots' are descriptive and consequently have a limited phonetic weight. Following the reading order, the mark applied for could be pronounced as

EUTM application	Earlier trade mark
	

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'bingo viva! Slots'. The BoA finding that the signs are phonetically similar only to an average degree is not questioned by the GC (paras 62-64). The signs are conceptually similar to an average degree, without this finding being contested by the parties (paras 65-66). **Overall assessment.** The consumers of the contested signs will rely basically on their visual appearance (para 72). The way the Internet and search engines work does not exclude the possibility of making a comparison between the figurative elements (para 74). The fact that access to these services is initially free cannot exclude the public carrying out a comparative process between different offers, since this does not exclude the service from offering paid content or requiring a financial investment at a later stage (para. 73). Although the services covered by the marks are identical, the importance of the visual differences between the signs provides sufficient grounds for considering that there is no LOC (para. 77).

T-644/17; Sustainable!; DNV GL AS, v EUIPO; Judgment of 16 October 2018; EU:T:2018:684; Language of the case: EN

RESULT: Action dismissed

KEYWORDS: Descriptive, Misspelled word mark, Nature of the goods and services

FACTS: The applicant sought to register the word mark **Sustainable!** as an EUTM for goods and ser-

vices in Classes 9, 35 and 42. The Office refused to register the EUTM application pursuant to Article 7(1)(b) and (c) EUTMR in respect of all the services in Class 35 and the services in Class 42 except *development of computer software application solutions*. The applicant filed an appeal. The Board of Appeal (BoA) dismissed the appeal finding that, since the services in respect of which registration had been refused were, in essence, sustainable services aimed at reducing negative effects on the environment, the mark applied for was descriptive of the services at issue in Classes 35 and 42 and, as such, was necessarily devoid of distinctive character. The applicant filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of Article 7(1)(c) EUTMR and (ii) infringement of Article 7(1)(c) EUTMR.

SUBSTANCE: Descriptiveness. The relevant public is made up of the English-speaking general public and professionals (undisputed) (paras 19-20). The sign **Sustainable!**, notwithstanding its misspelling, will be understood by the relevant public as meaning the same as the English adjective of which the sign in question essentially consists, namely 'sustainable'. The simple addition of a graphic element at the end of the word, whether it is perceived as a number, a letter of the alphabet, or as a lexical mistake, is not, in the present case, going to affect the perception of the consumer (paras 27-28). The services of *providing consumer product information; providing consumer product information relating to*

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food or drink products; providing information and advice to consumers regarding the selection of products and items to be purchased; providing advice relating to the analysis of consumer buying habits, in Class 35, may, in the mind of the public concerned, aim to encourage a responsible use of the goods regarding the natural environment in which that public lives. The same is true of the services involving the provision of advice on the analysis of consumer buying habits, also aimed at promoting, as a whole, conduct that favours sustainable development and that is environmentally conscious (para. 32). Next, the service of compilation of environmental information into computer databases, in Class 35 and the services: scientific analysis of consumer habits; research in the field of environmental conservation; technical consultancy in the field of environmental science; technical consultancy, namely providing technological information about environmentally conscious and green innovations; development of computer software application solutions; testing of services for the certification of quality and environmental standards; design and development of software for evaluation and calculation of environment data; compilation of environmental information; compilation of information relating to environmental conditions in Class 42, expressly concern the environment and, precisely because of that intended purpose, they can only be seen in the context of providing advice and promoting public awareness on environmental and ecological issues, and thus have a direct connection with the concept of sus-

tainability (para. 33). Finally, regarding the services surrounding the creation of sustainable strategies and operations aimed at reducing environmental impact, the term 'sustainable' suggests, in a clear and unequivocal way, the common purpose of the services in question, which contribute, in a general manner, to preventing long-term ecological damage (para. 34). In sum, the mark **Sustainable!** displays, from the point of view of the relevant public, a sufficiently direct and specific connection with the services covered by the trade mark application. **Distinctive character.** Since it has been held that the mark applied for was descriptive of the services in question, it is not necessary to rule on the second plea in law, alleging infringement of Article 7(1) (b) EUTMR.

T-7/17; MINERAL MAGIC / MAGIC MINERALS BY JEROME ALEXANDER et al.; *John Mills Ltd v EUIPO*; Judgment of 15 October 2018; EU:T:2018:679; Language of the case: EN

RESULT: Action upheld (BoA decision annulled)

KEYWORDS: Agent, Identity of the goods and services, Ratio legis, Similarity of the signs

FACTS: The applicant sought to register the word mark **MINERAL MAGIC** as an EUTM for goods in Class 3. An opposition based on, inter alia, the earlier American word mark **MAGIC MINERALS BY JEROME ALEXANDER**, designating the goods *face*

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powder featuring mineral enhancements was filed pursuant to Article 8(3) EUTMR. The Opposition Division (OD) dismissed the opposition. The opponent filed an appeal, which the Board of Appeal (BoA) upheld. It pointed out that Article 8(3) EUTMR relates not only to cases where the signs and the goods or services compared are identical, but also to cases where they are similar. The applicant filed an action before the General Court (GC), relying on a single plea in law: infringement of Article 8(3) EUTMR.

SUBSTANCE: Identity and not just similarity of the marks for the application of Article 8(3) EUTMR.

The intention of the EU legislature was that Article 8(3) EUTMR can be applied only if the proprietor's trade mark and the mark applied for by the agent or representative of the proprietor are identical and not merely similar (para. 37). The fact that the legislature twice refrained from making express mention of the fact that the provision at issue should also apply in cases where the trade marks are similar -- firstly by amending the pre-draft of the regulation on this point and, secondly, by specifically rejecting a request made by a delegation during the CTMR Working Group within the Council -- sufficiently demonstrates its intention with regard to this matter (para. 30). In addition, the same Working Group had agreed that the provision at issue should be interpreted as applying internationally within the meaning of Article 6 *septies* of the Paris Convention, which also refers to

the identity of the marks (paras 32, 34). The inclusion of the words 'identical or similar' in Article 8(1) (b) EUTMR and the absence of such words in Article 8(3) EUTMR suggests the obvious application of the latter provision when the trade mark applied for by the agent is the mark of the proprietor (and so, by definition, identical), contrary to the Office's argument that its scope is not limited to cases concerning strictly identical trade marks. Therefore, it seemed unnecessary to the legislature to state this specifically (para. 36). However, when it comes to the level of similarity required for the signs to be considered identical, case-law indicates that a sign is identical to another where it reproduces, without any modification or addition, all the elements constituting the other sign. In the same vein, the issue of identity has also been examined, in a more indirect manner, in the context of assessing the genuine use of a trade mark (paras 38-39).

Comparison of the signs in issue. It should be determined whether the signs at issue are identical within the meaning of the judgment *iDrive / IDRIVE* (03/12/2015, T105/14, *iDrive / IDRIVE*, EU:T:2015:924) taking into consideration the criteria set out in the judgment *Bainbridge* (23/02/2006, T194/03, *Bainbridge*, EU:T:2006:65) (para. 40). The contested trade mark differs from the earlier trade mark in that the order of the words 'mineral' and 'magic' is reversed and in that it contains neither the letter 's' nor the expression 'by Jerome Alexander'. The BoA correctly held, on this basis, that the signs should be considered similar. The conclusion

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that the signs are not identical is so obvious that it applies irrespective of any difference in perception that the average consumer may have depending on the territory (para. 41). Since the signs are not identical, the BoA erroneously held that it could rely on Article 8(3) EUTMR to refuse the registration of the contested mark (para. 42).

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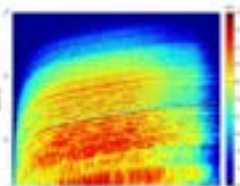


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20/09/2018, R 157/2018-2, SUONO DI RUMORE DI UN MOTORE

EUTM application



OUTCOME: Decision confirmed.

NORMS: Article 7(1)(b) EUTMR.

KEYWORDS: Sound mark, Non-distinctive.

SUMMARY: The examiner rejected the EUTM application in its entirety, under Article 7(1)(b) EUTM.

The mark consists of a sound which clearly evokes, although it is not identical to, the noise of a combustion engine that accelerates and dissolves. When seen in the context of the goods applied for (namely land vehicles and acoustic indicators for vehicles) it will not be perceived as an indicator of commercial origin. It is likely to be perceived as a functional element and, as such, descriptive of a characteristic of the goods. This also applies to electric land vehicles and acoustic indicators for electric vehicles. Even though electric vehicles do not produce any noise, the use of artificial engine sounds for those vehicles is frequent and may even become compulsory for reasons of road safety (§ 22-24).

25/10/2018, R 2333/2017-1, CHEESE

EUTM application

CHEESE

OUTCOME: Decision confirmed.

NORMS: Article 7(1)(c) EUTMR, Article 59(1)(a) EUTMR.

KEYWORDS: Word mark, Descriptive.

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SUMMARY: The Cancellation Division declared the EUTM invalid, finding that the word ‘cheese’ was descriptive for marijuana seeds and that the mark had not acquired distinctiveness through use.

‘Cheese’ is a name of a plant and should not be monopolised, even if the EUTM proprietor participated in the hybrid creation of the cannabis variety. The contested EUTM has been used in general to identify a kind of seed over the years (§ 30, 39). Also, relevant consumers and competitors use the word cheese as a designation of a particular type of product, not a particular producer. Thus, the relevant consumer, without making any mental effort or being required to stop and think, will immediately perceive said sign as being obviously descriptive in connection with the goods concerned and the purpose thereof (§ 47).

The trade mark is at the same time a descriptive indication in a larger context. Firstly, the list of goods, i.e. in Class 31 covering: ‘Grains and agricultural, horticultural and forestry products not included in other classes; ‘seeds’ was worded by the proprietor in a very broad way which includes hemp, and therefore the trade mark must be rejected for the entire list. Secondly, the word ‘cheese’ describes the possible smell of plants in a more general context. The odour of a plant may be a decisive characteristic of the product, be it in a positive or in a negative way. This in itself justifies the refusal of the trade mark (§ 57-58).

26/09/2018, R 2284/2017-2, Reeflowers (fig.) / flower (fig.)

Contested IR	Earlier trade mark
	

OUTCOME: Decision confirmed.

NORMS: Article 8(1)(b) EUTMR.

KEYWORDS: Complex mark, Descriptive element, Distinctive element, Identity of the goods and services, Weak element.

SUMMARY: An opposition was filed against the abovementioned IR in relation to part of the registered goods and on the basis of Article 8(1)(b) and Article 8(5) EUTMR. The Opposition Division rejected the opposition in its entirety.

The Board endorses the Opposition Division’s finding that although the evidence submitted by the opponent does show use of the opponent’s trade mark as registered, at least in Spain, it does not

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demonstrate whether the earlier trade mark acquired a higher degree of distinctiveness through use, or whether there was a high extent of recognition by the relevant public. Thus, the opponent failed to prove the enhanced distinctiveness of its earlier trade mark. Notwithstanding the principles of interdependence and 'imperfect recollection', which in the present case is also counterbalanced by the enhanced level of attention of the relevant public, there is no reason to assume that the relevant public will be misled into thinking that goods, even if identical and similar, bearing the conflicting signs, come from the same undertaking or, as the case may be, from undertakings that are economically linked. This finding also takes into account the identity and similarity between the conflicting goods, which does not outweigh the low degree of similarity between the signs under the particular circumstances of the case (§ 58-59).

In relation to Article 8(5) EUTMR, the opponent did not establish that the earlier trade mark had a reputation, one of the necessary conditions contained in the said article not being fulfilled, the opposition must be rejected on this ground as well (§ 69).

02/10/2018, R 2279/2017-2, [lovebook / FACEBOOK et al.](#)

EUTM application	Earlier trade marks
Lovebook	 FACEBOOK BOOK

OUTCOME: Decision confirmed.

NORMS: Article 8(1)(b) EUTMR, Article 8(5) EUTMR.

KEYWORDS: Detriment to earlier mark, Reputation, Similarity of the goods and services, Similarity of the signs, Unfair advantage.

SUMMARY: The opposition against the above mentioned EUTM applied for was partially upheld for part of the contested services in Classes 35, 38, 42 and 45.

As regards Article 8(5) EUTMR the Board finds that even if admittedly some of the contested services are dissimilar to the earlier reputed services, the gap between them is not so great and that consequently there exists *prima facie* a possibility that the contested mark would remind relevant consumers of the earlier marks (§ 52). There is a high

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probability that the use of the contested mark for the relevant services which, as observed, can be connected either directly or indirectly to the field of social networking, may lead to free-riding, that is to say, it would take unfair advantage of the well-established reputation of the earlier trade marks and the considerable investment undertaken by the opponent to achieve that reputation (§ 65). Furthermore, the applicant has failed to produce evidence that the use of the trade mark applied for complies with the due cause rule (§ 72). Therefore, the Board confirms that the opposition, as far as it is based on based on Article 8(5) EUTMR, is upheld for the contested services at stake, namely, in Class 35 - Advertising; Class 38 - Telecommunications; and Class 45 - Personal and social services rendered by others to meet the needs of individuals (§ 24-26, 73). There is however no mental 'link' that could be established between the signs for the services in Class 42 - Design and development of computer software.

In relation to Article 8(1)(b) EUTMR and the services in Class 42, the Board considers that the marks are similar overall (§ 72). The fact that the entire earlier mark 'BOOK' is included in the contested sign and plays an independent distinctive role in its composition may lead the public to believe that the services at issue derive, at the very least, from companies which are linked economically, in which case the likelihood of confusion must be held to be established. The presence of the prefix 'LOVE' does

not influence this finding. The probability of confusion also captures the risk that consumers will assume that the services at issue will extend from economically-linked undertakings (§ 103-105). The Board therefore concludes that the Opposition Division did not err in finding that a likelihood of confusion exists between the signs for the relevant public in relation to the contested 'scientific and technological services and research and design relating thereto; design and development of computer hardware' in Class 42 (§ 106).

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