

# Alicante News

Up to date information on IP and EUIPO-related matters

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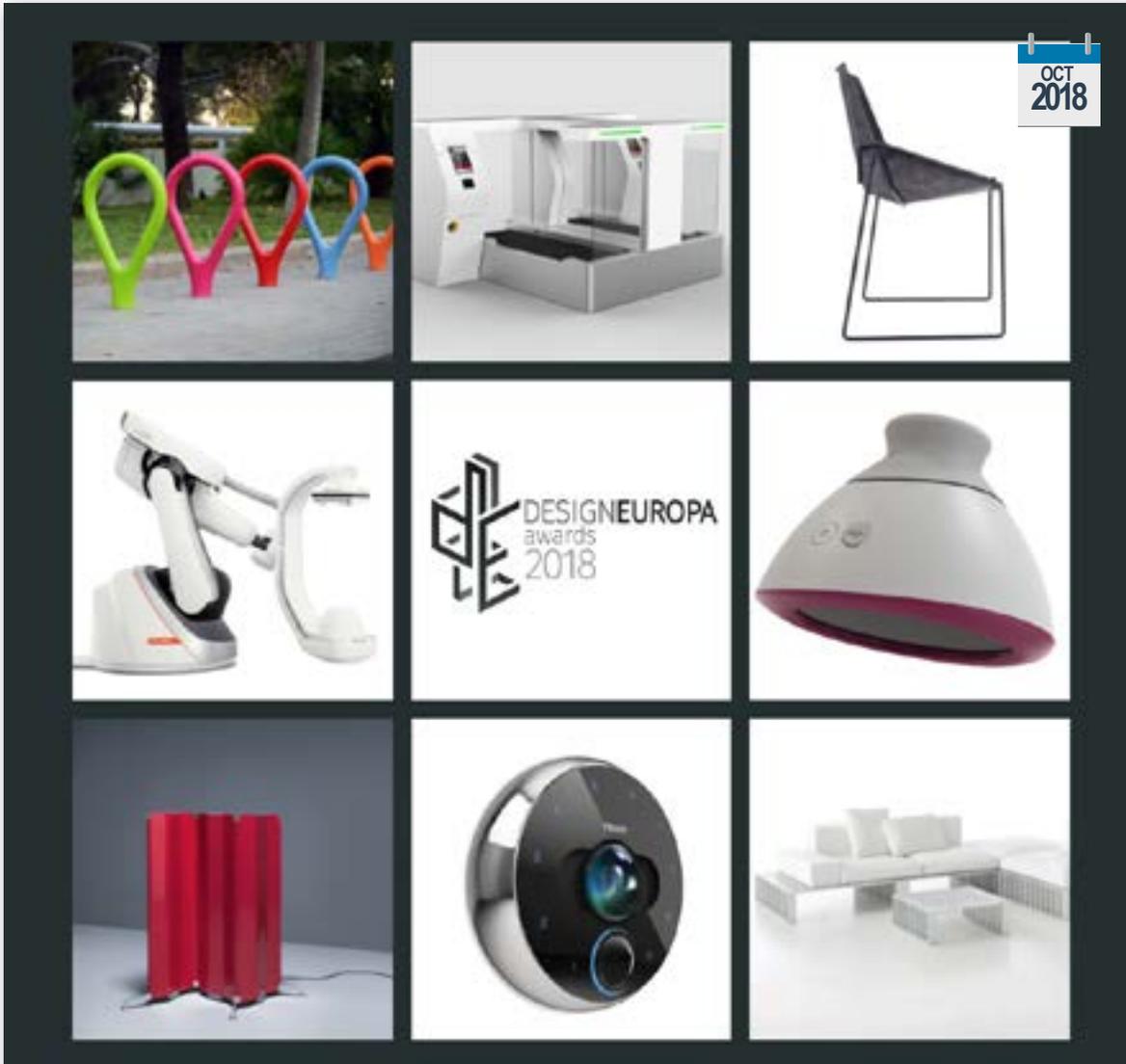
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### DesignEuropa Awards 2018 finalists and Lifetime Achievement Award Winner announced

The names of the DesignEuropa Award finalists and Lifetime Achievement Award winner have been revealed.

The DesignEuropa Awards have three categories: Industry; Small and Emerging Companies and Lifetime Achievement.

The finalists and the winner of the Lifetime Achievement Award were chosen by the DesignEuropa Awards jury; a prestigious panel drawn from the fields of business, design and intellectual property.

The winners of the Industry and Small and Emerging Companies categories will be announced on 27 November, at the DesignEuropa Awards ceremony in Warsaw.

#### The finalists in the Industry category 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: TubesRadiatoriSrl; designer: Alberto Meda

#### The finalist designs in the Small and Emerging Companies category are:

- 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, 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](#)

At the ceremony, the DesignEuropa Lifetime Achievement Award will be presented to Hartmut Esslinger, a German industrial designer with a global

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career spanning five decades. Perhaps best known for his creation of the “Snow White” design language for Apple in the 1980s, Mr Esslinger’s motto has always been “form follows emotion.”

From his early days creating products for Wega and Sony to his close collaboration with Steve Jobs at Apple, Mr Esslinger has blazed a trail as one of the world’s most influential and innovative design professionals. The design studio he founded in 1969, frog design, is now an international firm with a presence in 11 countries. Apart from Apple, he has worked with a huge array of international clients, including Disney, Siemens, Lufthansa and Louis Vuitton.

After retiring from frog design in 2006, he dedicated his time to teaching, latterly at the University of Shanghai in China. He has, in the assessment of the DesignEuropa Awards jury: “changed thinking on design, which has impacted the whole world.”

Read more about Hartmut Esslinger’s life and work [here](#).

There are still some places left for the award ceremony in Poland. To express interest in attending, [click here](#).

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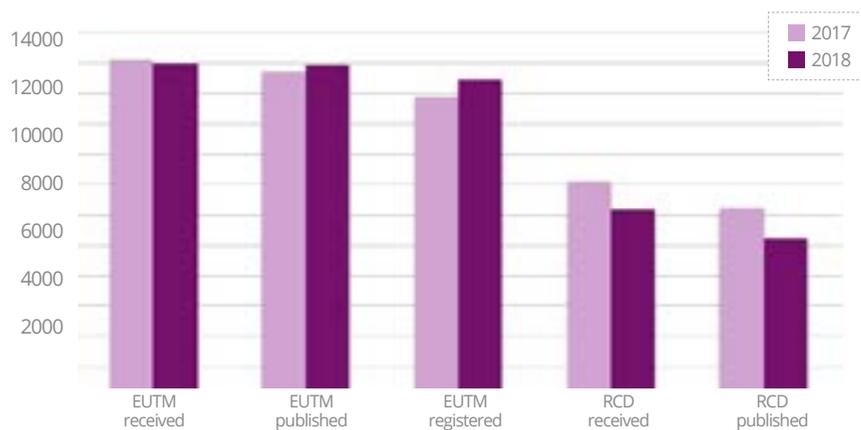


## Statistical Highlights



Monthly statistical highlights September*	2017	2018
European Union Trade Mark applications received	12 106	11 996
European Union Trade Mark applications published	11 714	11 915
European Union Trade Marks registered (certificates issued)	10 858	11 463
Registered Community Designs received	8 102	7 182
Registered Community Designs published	7 219	6 219

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



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## International Cooperation: Technical Workshop on Tools in Australia

A Technical Workshop on Tools developed under the European Union Intellectual Property Network (EUIPN) took place in Sydney in October. Representatives of the Industrial Property Offices of Australia and New Zealand took part in the workshop.

The Technical Workshop on Tools, organised under the framework of the EUIPO's bilateral international cooperation activities, focuses on extending the benefits of the EUIPN tools and practices, including TMview, DesignView and TMclass.

## BOIP implements Back Office for Trade Marks

The Benelux Office for Intellectual Property (BOIP) has implemented the Software Package Back Office for Trade Marks.

The Back Office tool, developed by the EUIPO's Cooperation Fund, is used to process trade mark applications received. This implementation follows the successful launch of Back Office for Designs within BOIP in 2015.

The implementation of the trade marks extension not only brings important technical improvements to the existing back office system, it also allows for existing manual activities to be automated. These improvements will bring efficiencies, accelerate the trade mark application process and ultimately increase productivity within BOIP.

In addition, the tool provides several opportunities to easily integrate future functionalities such as the correspondence module which will enable BOIP to directly communicate with its clients through their web portal.

The EUIPO and its stakeholders are working together on five major European Cooperation Projects. The overall aim of the projects is to benefit users across the EU by providing modern, state of the art tools and services for EU IP offices.

## Costa Rica joins TMview and DesignView

As of 22 October 2018 the National Registry of the Republic of Costa Rica (RNPCR) has made its trade mark and design data available to the TMview and DesignView search tools.

With RNPCR having joined TMview and DesignView, both tools now contain data from 68 participating offices.

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With the addition of more than 275,000 trade marks from RNPCR, TMview provides information and access to more than 51.9 million trade marks in total. DesignView contains more than 14.1 million designs, including more than 1 700 designs from RNPCR.

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### The EUIPO Litigation Office hosts its first 'IP Tertulia'

On 9 October 2018, the EUIPO Litigation Office in Luxembourg hosted its first IP Tertulia on the 'Legal Reform: the applicability *ratione temporis* of the law and the case-law'.

Following the inauguration of the Litigation Office in Luxembourg in October 2017, a series of round tables ('tertulias' in Spanish) will be organised at its premises with the goal of gathering intellectual property professionals and experts in the Luxembourg region.

During the course of the first IP Tertulia, three speakers addressed different aspects of the applicability of the law and case-law in the context of the reform of the EU trade mark regulation:

- Katia Manhaeve (Allen & Overy)
- Andrej Stec (*Référéndaire* Cabinet Judge J. Schwarcz, General Court, EU)
- Arnaud Folliard-Monguiral (EUIPO)

### Judges' seminars at EUIPO

The Judges' seminars, which have been organised since 2008, have established a body of practice among senior EU judges and prosecutors who regularly deal with intellectual property and enforcement issues.

With a total of 3 000 attendances at 65 events, the Judges' Network comprises over 900 judges and prosecutors from all EU Member States and beyond, including all types and levels of jurisdiction: civil, commercial, administrative and criminal.

Attendance at the seminar is by invitation, and in order to facilitate a free exchange of views, discussions are held in camera.

The seminars are, at their core, highly participative and the judges and prosecutors who attend usually return for future events.

Well in advance of a seminar, participants receive a mock case, known as the Max Case, together with questions, and they are required to prepare a response before the event.

This preparation allows the judges to share their experience with peers at working sessions that take place during the event.

The seminars are not training sessions, but rather a series of workshops during which judges can share knowledge, learn from each other and network with colleagues belonging to different courts and different countries.

The EUIPO Judges' Network participants regularly communicate with each other between seminars and relay judgments and other information on their

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national practices back to the EUIPO, continuing and enriching the practice.

After having discussed issues related to the conditions of copyright protection, the exception and limitation of copyright use and the content and scope of the economic and moral rights of copyright in 2017; the judges convened to address contract issues, international conflict of laws and the enforcement of copyright violations.

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### Luxembourg trade mark and design news

#### A: Court of Justice: Orders, Judgments and Preliminary Rulings

**C-488/16 P; NEUSCHWANSTEIN;** *Bundesverband Souvenir - Geschenke - Ehrenpreise v EUIPO*; Judgment of 6 September 2018; EU:T:2018:673; Language of the case: DE

**RESULT: Appeal dismissed**

**KEYWORDS: Bad faith, Descriptive element, Distinctive element**

**FACTS:** The EUTM proprietor registered the word mark **NEUSCHWANSTEIN** as an EUTM for goods and services in Classes 3, 8, 14 to 16, 18, 21, 25, 28, 30, 32 to 36, 38 and 44. An application for invalidity was filed pursuant to Article 59(1)(a) EUTMR in conjunction with Article 7(1)(b) and (c) EUTMR. The Cancellation Division (CD) dismissed the application for invalidity insofar as, firstly, the contested mark did not consist of indications that might serve to indicate the geographical origin or other characteristics of the goods and services concerned; secondly, it was distinctive in respect of those goods and services; and thirdly, the invalidity applicant did not prove that the EUTM proprietor had acted in bad faith. The Board of Appeal (BoA) confirmed the CD's decision and

dismissed the appeal. The invalidity applicant filed an action before the General Court (GC), relying on three pleas in law: (i) infringement of Article 7(1)(b) EUTMR (ii) infringement of Article 7(1)(c) EUTMR, (iii) infringement of Article 59(1)(b) EUTMR. The GC rejected all three pleas of the invalidity applicant and dismissed the action in its entirety. The invalidity applicant appealed to the Court of Justice of the European Union (CJ).

**SUBSTANCE: Descriptiveness of the characteristics of the goods and services.**

The mere fact that the goods and services are offered in a particular place cannot constitute a descriptive indication of the geographical origin of those goods and services, insofar as the place where those goods and services are sold is not capable, as such, of designating characteristics, qualities or distinctive features connected with their geographical origin, such as a craft, a tradition or a climate that is characteristic of a particular place. Neuschwanstein Castle is not famous for the souvenir items it sells or the services it offers, but rather for its unusual architecture (paras 50-51). In the mind of the relevant public, the place of marketing to which the name 'Neuschwanstein' relates is not, as such, a description of a quality or an essential characteristic of the goods and services covered by the contested mark (para. 53). **Distinctiveness.** 'Neuschwanstein' means 'new swan stone'. This word element constituting

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the contested mark, which is identical to the name of the castle, is a fanciful name, which has no descriptive relationship with the goods and services marketed or offered; consequently, the mere affixing of the mark on the items sold and the services offered enables those goods and services to be distinguished from other everyday consumer goods and services sold or provided in other commercial or tourist areas (para. 65). Furthermore, the mark enables the relevant public, because of the nature of the name of that mark, not only to refer to a visit to the castle, but also to distinguish the commercial origin of the goods and services concerned, so that it will conclude that all the goods and services designated were manufactured, marketed or supplied under the control of the Freistaat Bayern, which is the owner of the mark and the entity responsible for the quality of the goods and services under the mark (para. 66). **Bad faith.** Pleading bad faith on the EUTM proprietor's part without identifying even the slightest distortion of the evidence upon which the GC based its assessment of that issue is inadmissible. This only means that the invalidity applicant is in fact attempting to call into question the assessment of the evidence carried out by the GC, which cannot be done before the CJ (paras 79-81).

**C-547/17 P; RAPPRESENTAZIONE DI TRE STRISCE VERTICALI (MARCHIO FIGURATIVO);** *Basic Net SpA v EUIPO*; Judgment of 6 September 2018;

EU:T:2018:682; Language of the case: IT

### **RESULT: Appeal dismissed**

**KEYWORDS: Colour mark, Declaration, Distinctiveness acquired by use, Minimum degree of distinctiveness, Proof of use**

**FACTS:** The applicant sought to register the mark below as an EUTM for goods in Classes 18, 25 and 26. The mark was identified in the application form as a figurative mark that claimed three shades of yellow, orange and blue Pantone colours, respectively. The Office refused registration of the EUTM application pursuant to Article 7(1) (b) EUTMR. The Board of Appeal (BoA) dismissed the applicant's appeal. It found that the mark was devoid of distinctive character and that the applicant had not proved acquisition by that mark of such character through use. The applicant filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of Article 7(1)(b) EUTMR and (ii) infringement of Article 7(3) EUTMR. The GC dismissed the action. It found that, first, the mark was devoid of any distinctive character and, second, that the acquisition by the mark of distinctive character had been proved for France, Italy, the Netherlands and the United Kingdom only. For Belgium, Germany, Spain and Austria, the applicant had provided a sworn declaration mentioning turnover and sales data for goods marketed under the disputed mark as evidence of use, but no other evidence to corroborate it.

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The applicant appealed to the Court of Justice of the European Union (CJ). In support of its appeal, the opponent relies, primarily, on a single plea, alleging infringement of Article 7(3) EUTMR and the obligation to state reasons. In the alternative, it puts forward three other pleas, alleging infringement of Article 7(1)(b) EUTMR, failure to take account of another EUTM belonging to it and failure to take into consideration other registered marks consisting of combinations of colours, respectively.

### EUTM application



**SUBSTANCE: Member states in which a mark must have acquired distinctiveness through use or percentage of the EU population for which such acquisition must be proven.** It is incorrect to argue that it is sufficient, for the purpose of proving acquired distinctiveness through use, to adduce evidence of such acquisition for certain Member States whose population represents a significant

proportion of the population of the European Union as a whole, where there is no evidence of use for one or more other Member States (paras 29-30). Insofar as the GC considered that the mark was devoid of any distinctive character throughout the EU, which, at the date of submission of the application for registration of that mark, consisted of 27 Member States, registration of this mark required proof of the acquisition of distinctiveness through use in all these Member States and not only in some of them, even where the combined population of the latter represented a significant proportion of the population of the EU (para. 32). Since acquisition of distinctiveness through use was not proved for 15 EU Member States, the main plea must be rejected (paras 36-40). Furthermore, the GC was not required to state whether the population of the four Member States for which acquired distinctiveness through use was proved represented a significant proportion of the total population of the EU, since that question was devoid of relevance for the registration of the mark (para 38). **Obligation to state reasons.** Since the GC stated the grounds on which it held that acquisition by the mark of distinctive character through use had not been proved for a number of EU countries, namely Belgium, Germany, Spain, Hungary and Austria, the opponent is not justified in accusing the GC of a breach of the obligation to state reasons in that regard (para. 39). **Inadmissibility of the alternative pleas in law.** Considering that in support of its three alternative

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pleas, the opponent fully reproduces, in its appeal, the arguments previously put forward before the GC, without setting out in detail the parts of the contested judgment concerned by those pleas or developing a specific legal argument capable of calling into question the assessments of the GC, those three pleas must be rejected as inadmissible (paras 42-44).

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

**T-94/17; tigha / TAIGA; ACTC GmbH v EUIPO;** Judgment of 13 September 2018; EU:T:2018:539; Language of the case: EN

#### **RESULT: Action dismissed**

**KEYWORDS: Identity of the goods and services, Likelihood of confusion, Phonetic similarity, Proof of use, Purpose of the goods and services, Similarity of the goods and services, Visual similarity, Word mark**

**FACTS:** The applicant sought to register the word mark **tigha** as an EUTM for goods in, inter alia, Classes 18 and 25. An opposition based on the earlier word mark **TAIGA**, registered for goods in, inter alia, Classes 9, 18 and 25, was filed pursuant to Article 8(1)(b) EUTMR. The Opposition Division (OD) dismissed the opposition and the opponent filed an appeal. The Board of Appeal (BoA) partially upheld

the appeal. It found that there was a likelihood of confusion regarding the goods in Class 25, given their identity or similarity to the goods covered by the earlier mark, and due to the fact that the signs were visually very similar, phonetically identical (at least for English-speaking consumers) and could not be associated with any concept for the majority of the relevant public. The applicant filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of Article 47(2) EUTMR and ii) infringement of Article 8(1)(b) EUTMR.

**SUBSTANCE:** (i) The clothing goods referred to in the evidence of use have the same purpose, since they are intended to cover the human body — to conceal, adorn and protect it against the elements. They cannot be considered to constitute an independent category in relation to the goods in Class 25. The fact that they have particular weather-protection characteristics is, in principle, irrelevant, as the characteristics of the goods are not relevant to the definition of subcategories of the goods or services (para. 35). **Relevant public.** The relevant public consists of the general public and professionals with a high level of attention when purchasing the goods covered by the earlier mark and an average level of attention with regard to the *clothing, footwear, headgear and bags* in Class 25 covered by the contested mark (para. 39). **Comparison of the goods.** The *clothing* and *headgear* are identical. The *footwear* covered by the contested mark and the *clothing* and *headgear* covered by the earlier

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mark are similar. Those goods belong to the same class (Class 25), and may be produced by the same operators or sold together in the same sales outlets (para. 47). **Comparison of the signs.** (i) Both signs have five letters, four of which they have in common and in almost the same position (para. 55). The average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details (para. 56). (ii) The signs are phonetically identical, at least for English-speaking consumers, to the extent that it is impossible, in the English language, to pronounce the letter 'h' in the middle of the contested sign. The pronunciation of the syllables 'ti' and 'tai' is identical (para. 58). (iii) The extract from the online encyclopaedia Wikipedia does not demonstrate that the semantic connotations relating to the word 'taiga' are well-known facts likely to be known by consumers in all parts of the EU territory (para. 68). Even though it is likely that the word 'taiga' will be perceived as referring to the boreal forest in the north and east of the European continent, it has no specific and immediate meaning for average consumers in the southern parts of the European continent or English-speaking consumers (paras 70-71). **Likelihood of confusion.** Given that the goods concerned are usually sold in self-service shops, where a consumer chooses the goods him- or herself and that, therefore, the visual aspect is more important than the phonetic aspect, and taking into account the average distinctiveness of the earlier mark, the visual and phonetic similarity of the signs, their lack of clear and specific meaning

for a significant part of the relevant public, and the similarity or identity of the goods concerned, there is LOC (paras 74, 78 and 80).

**T-112/17; NEW ORLEANS PELICANS (fig.) / Pelikan et al.; Pelikan Vertriebsgesellschaft mbH & Co. KG v EUIPO;** Judgment of 12 September 2018; EU:T:2018:528; Language of the case: EN

**RESULT: Action dismissed**

**KEYWORDS: Complex mark, Conceptual dissimilarity, Dissimilarity of signs, Dominant element, Figurative element, Figurative trade mark, Phonetic dissimilarity**

**FACTS:** The applicant sought to register the figurative mark below as an EUTM for goods and services in Classes 9, 16, 18, 25, 28 and 41. An opposition based on, inter alia, two earlier word marks, **Pelikan**, registered for, inter alia, goods and services in Classes 9, 16, 18, 25, 28 and 41 respectively, was filed pursuant to Article 8(1) (b) and (5) EUTMR. The Opposition Division (OD) upheld the opposition in respect of all the contested goods and services, finding that the goods and services of the earlier word marks were identical or similar and that the signs were similar. The Board of Appeal (BoA) upheld the applicant's appeal in view of the differences between the signs and the fact that the opponent had failed to submit

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a coherent line of argument as to why use of the mark applied for would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier mark. The opponent filed an action before the General Court (GC), relying on eight pleas in law, alleging, in the first seven, infringement of Article 8(1)(b) EUTMR and, in the final plea, infringement of Article 8(5) EUTMR.

EUTM application	Earlier trade marks
	<p>Pelikan</p>

**SUBSTANCE: Dominant elements.** The BoA did not distort the description of the dominant figurative element of the mark applied for when it described it as a bird and not as a pelican, as the BoA's definition does not exclude the possibility that the bird could be perceived as a pelican, even though that is not clear (paras 34-37). Nor did the BoA err when it held that the dominant verbal element 'New Orleans' would not be perceived by the EU public as an indication of the geographical origin of the goods and services (paras 41-43). **Phonetic dissimilarity.** The word 'pelicans' in the EUTM might well not

be pronounced at all, in view of its secondary position, and, if it were, it would be pronounced at the end, after the words 'New Orleans', in which case, the differences between the signs are such, considering, *inter alia*, the respective number of words, that they cannot be held to be similar (para. 52). **Conceptual dissimilarity.** The concept conveyed by the mark applied for differs from that expressed by the earlier marks since it refers to the words 'New Orleans' and to an 'indefinable angry looking bird surrounded by wings and holding a basketball under his beak' (para. 56). Furthermore, the presence, in a stylised form, of the name of a city in the United States together with an animal, reinforced as the case may be by an element referencing a sports team, such as a basketball, constitutes in itself a conceptual association capable of being recognised by the relevant public (para. 57). **Independent distinctive role.** In the present case, the word element 'pelicans' does not play an independent distinctive role in the mark as it does not include the word 'pelikan', but rather the word 'pelicans' with the letter 'c' instead of 'k', and with a final 's' to indicate the plural (para. 63). Furthermore, the element 'pelicans' is not dominant, playing only a secondary role in the overall impression conveyed by the mark (para. 64) and no arguments have been put forward to plead in favour of attributing an independent distinctive role to that specific secondary element in the case at issue (paras 64-66). **Article 8(5) EUTMR.** As the signs have been found to be dissimilar, it

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is not necessary to consider what consequence a potential similarity between the signs could have with regard to Article 8(5) EUTMR, even if the applicant were to put forward an argument on that point (para. 73).

**T-184/17; DARSTELLUNG VON VIER GRÜNEN QUADRATEN (posit.);** *Leifheit AG v EUIPO*; Judgment of 13 September 2018; EU:T:2018:537; Language of the case: DE

**RESULT: Action dismissed**

**KEYWORDS: Distinctive element, Position mark**

**FACTS:** The applicant sought to register the position mark below as an EUTM for *balances; weighing scales; kitchen scales; household scales; trebuchets; scales for measuring fat mass; heat control apparatus* in Class 9. In the application for registration, the sign applied for is described as follows: 'The position mark consists of a total of four green squares on the underside of a scale at each corner near the edge. The dashed lines indicate the position of the mark and are not part of the mark'. The Office refused to register the EUTM application pursuant to Article 7(1)(b) EUTMR, as it was devoid of distinctive character. The applicant filed an appeal, which was dismissed by the Board of Appeal (BoA). It found, firstly, that the mark applied for was inseparable from the rectangular shape of the goods claimed, which would be

evidenced not only by the dashed lines, but also by the description of it; secondly, that because of its simple and purely decorative configuration, the relevant public would not perceive the mark applied for as an indication of origin; and thirdly, that the decorative possibilities of the surfaces of the goods in question were unlimited. The applicant filed an action before the General Court (GC), relying on one single plea in law: infringement of Article 7(1)(b) EUTMR.



**SUBSTANCE: Position marks.** The mark applied for, which seeks the protection of a specific sign on a particular part of the goods in question, will be confused by the relevant public with the appearance of these goods, the mark being inseparable from the shape of the underside of a scale (paras 31-32). Specifically, in view of the most likely use of the mark applied for, the mark

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is inseparable from the four feet of a scale, which form an integral part of the figurative form and representation of said goods (para. 34). Concerning the possibility that the goods at issue are designed with convex or concave sides, it does not follow from previous case-law that a mark is identical with the appearance of the goods concerned only if it adapts automatically to a change of shape (para. 33). **Distinctiveness.** The mark does not significantly depart from the standard or habits of the sector as, firstly, the square shape of the elements of the mark applied for constitutes a basic form not likely as such to convey a message that consumers might remember (para. 46); secondly, it is positioned to coincide with the usual positioning of the feet of weighing scales, ensuring the stability and operation of the goods concerned (para. 48); and thirdly, the light green colour chosen by the applicant for the four squares is neither particularly vivid or striking (para. 49) nor especially unusual in the sector concerned (paras 56-58).

**T-652/17; Eddy's Snackcompany / TEDDY et al.;** *Eddy's Snack Company GmbH v EUIPO*; Judgment of 19 September 2018; EU:T:2018:564; Language of the case: DE

**RESULT: Action upheld (BoA decision annulled)**

**KEYWORDS: Abbreviation, Similarity of the goods and services, Similarity of the signs**

**FACTS:** The applicant sought to register the word mark **Eddy's Snackcompany** as an EUTM for goods in Classes 29 and 30. An opposition based on, inter alia, the earlier German word mark **TEDDY**, registered for goods in Class 30, was filed pursuant to Article 8(1)(b) EUTMR against registration of the EUTM application for the goods for which protection was sought in Class 30. The Opposition Division (OD) dismissed the opposition. It found that, despite a certain visual and phonetic similarity between the signs, there was no likelihood of confusion (LOC) because of the total difference between their meanings. The opponent filed an appeal. The Board of Appeal (BoA) upheld the appeal, finding that there was a LOC: the goods were in part dissimilar and in part similar to varying degrees, while the signs had at least an average degree of visual and phonetic similarity and, conceptually, did not differ to the point that it was easy for the target public to differentiate between them. 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 95(1) EUTMR.

**SUBSTANCE: Infringement of Article 95(1) EUTMR.** Although the opposition was directed only against the goods for which protection was sought in Class 30, the BoA rejected the EUTM application also for the goods in Class 29, thus ruling *ultra petita* and unlawfully extending its decision to goods outside the scope of the opposition.

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Consequently, the second plea must be upheld (paras 21-24). **Infringement of Article 8(1)(b) EUTMR. Distinctive and dominant elements.** The BoA erred when it excluded from the comparison the elements “s’ and ‘Snackcompany’ of the EUTM application, which are in fact not negligible (paras 41-42). **Visual and phonetic similarity.** As a consequence of that, and contrary to what the BoA considered, the signs have only a low degree of visual and phonetic similarity (paras 49-50, 52). **Conceptual similarity.** The BoA’s reasoning concerning the conceptual comparison is also flawed. In fact, the signs are not conceptually similar as, first, the hypothesis that teddy bears could be given the name ‘Eddy’ is pure speculation; second, the concepts of ‘teddy bear’ and ‘company belonging to Eddy that produces snacks’ are completely different; third, if ‘Snackcompany’ is not taken into account, the notions of ‘teddy bear’ and that of the abbreviation of the name Eduard are also different; and, fourth, if ‘Teddy’ were taken as the abbreviation of ‘Theodor’ by some of the public, this name is very different from the name ‘Eduard’ (paras 55-59). **Likelihood of confusion.** For goods that are not identical but simply similar, the low degree of visual and phonetic similarity of the signs is not sufficient to give rise to LOC, without it even being necessary to rule on the question of whether the conceptual differences between the signs are capable of neutralising the visual and phonetic similarities. There is no LOC (paras 65-66).

**T-266/17; UROAKUT/UroCys;** *Kwizda Holding GmbH v EUIPO*; Judgment of 20 September 2018; EU:T:2018:569; Language of the case: DE

**RESULT: Action upheld (BoA decision annulled)**

**KEYWORDS: Likelihood of confusion, Weak element**

**FACTS:** The applicant sought to register the word mark **UROAKUT** as an EUTM for *food supplements and dietetic preparations; medical and veterinary preparations and articles* in Class 5. An opposition based on the earlier figurative mark **UroCys**, registered for *dietary substances and food supplements for medical purposes, other than for the treatment or prevention of gout* in Class 5, was filed pursuant to Article 8(1)(b) EUTMR. The Opposition Division (OD) upheld the opposition. The applicant filed an appeal. The Board of Appeal (BoA) dismissed the appeal, finding, first, that the level of attention of the relevant public would be normal in the case of the general public of Germany and Austria and high in the case of medical and pharmaceutical specialists; second, that the goods were identical or highly similar; and third, that the signs had an average degree of visual and phonetic similarity and a certain conceptual similarity. The BoA found therefore that there was a likelihood of confusion (LOC). The applicant brought an action before the General Court (GC), relying on a single plea in law, alleging infringement of Article 8(1)(b)

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EUTMR.

EUTM application	Earlier trade mark
UROAKUT	UroCys

**SUBSTANCE: Relevant public's level of attention.** The BoA wrongly held that part of the relevant public would only pay an average level of attention when purchasing the goods at issue. Both pharmaceutical products and dietetic products or food supplements are goods that are intended to improve health; consequently, as the case-law has consistently held, the relevant public will pay a high level of attention when purchasing them (paras 25-30). **Comparison of the goods.** It is not disputed that the goods are either identical or highly similar, as the BoA rightly held. **Comparison of the signs.** The relevant public will understand that preparations and drugs with names that begin with the word element 'uro' are intended for the treatment of urinary tract diseases. Therefore, the public will perceive this element as a reference to the purpose of the goods rather than as an indication of their commercial origin. This element therefore has weak distinctive character (paras 43, 80). As the BoA rightly held, the signs have an

average degree of visual and phonetic similarity and a certain conceptual similarity, given their common initial element 'Uro', which refers to the field of urology (paras 42, 55-56, 60-63, 68-70). However, the visual, phonetic and conceptual differences relating to the additional elements 'akut' and 'cys' of the signs are not negligible in the impression that the signs make on the relevant public, but rather compensate for the visual, phonetic and conceptual similarities arising solely from the presence of the common element 'uro' and the idea to which it refers; this is particularly true where the relevant public pays an increased level of attention (para. 81). The overall impression made by the signs on the relevant consumers will be different. There is no LOC (para. 82).

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[14/09/2018, R0266/2018-1, Happy NERO NUTS WAFERS Happy \(fig.\) / Nero nero et al.](#)

#### EUTM application



**Outcome:** Appeal inadmissible.

**Norms:** Article 68(1) EUTMR, Article 23(1)(a)

EUTMDR.

**Keywords:** Admissibility.

**Summary:** An opposition was filed against the registration of the published trade mark application as represented above based on the Article 8(5) and Article 8(1)(b) EUTMR (§ 3). The Opposition Division partially refused the trade mark applied for on the ground that there was likelihood of confusion (§ 5).

The appeal was not filed within the two-month deadline from the date of notification of decision in accordance with Article 68(1) EUTMR and Article 23(1)(a) EUTMDR and the defendant consequently requested that the appeal be rejected as inadmissible (§ 8). The appellant was invited to comment on this. It appears that it attempted to file an appeal by eComm but did not succeed even though the appeal fee was paid separately. However, creating a draft document in the Office system and downloading it does not amount to filing an appeal as the Office did not receive it (§ 15).

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06/09/2018, R 609/2018-5, ZUMO (fig.)

### EUTM application



**Outcome:** Decision confirmed.

**Norms:** Article 53(7) EUTMR, Article 53(8) EUTMR, Article 104 EUTMR.

**Keywords:** Renewal, Restitutio in integrum.

**Summary:** The examiner took a decision rejecting the request for restitutio in integrum, reimbursing the renewal fees and confirming the cancellation of EUTM registration under Article 47 EUTMR (§ 8).

In the present case, the relevant act concerned the timely payment of the renewal fee. The non-payment of the renewal fee within the time limit resulted in the cancellation of the EUTM. The EUTM proprietor's representative did not apply all due care required by the circumstances. The explanation provided in the representative's statement that the payment to be carried out online within the grace period was performed by an employee, one of the

first times that she had to renew a trade mark and incorrectly interpreted a 'transaction code' in the software does not demonstrate that the due care required was ensured. The representative should have monitored and double-checked its employee when executing her tasks (13/09/2011, T-397/10, Ara AG, EU:T:2011:464, § 29) (§ 20-24). The application for restitutio in integrum is rejected.

22/08/2018, R 711/2018-2, AKAMARU SHIN-AJI (fig.)

### EUTM application



**Outcome:** Decision confirmed.

**Norms:** Article 33(8) EUTMR.

**Keywords:** Right to be heard.

**Summary:** The EUTM proprietor sought to register an EUTM declaration under Article 33(8) EUTMR in respect of Class 30, however, the declaration contained terms already covered by the literal meaning of the indication of the class heading (§ 3-4). The EUTM proprietor requested an amendment of

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the specification of the goods in Class 30 by adding the acceptable part of the declaration to the current list of goods and amending the specification of the goods in Class 29 by adding 'soup for ramen' (§ 6). The examiner partially refused the application for a recordal under Article 33(8) EUTMR insofar as the original declaration did not mention Class 29.

The application for a recordal already included the good 'Soup for ramen' but in Class 30 and not Class 29 (§ 19). The good 'Soup for ramen' was not added to the list, but it was simply transferred to the right Nice Classification class. Hence, the original declaration under Article 33(8) EUTMR was not altered but corrected (§ 20).

Nevertheless, this does not alter the outcome: the good 'Soup for ramen' is not an acceptable term belonging to the alphabetical list of the eighth edition of the Nice Classification, which is applicable in the present appeal, be it in Class 29 or in Class 30. As a result, the examiner was correct in finding that the request for said good had to be refused (§ 21-22).

Since the deficiency letter included a list of terms which would be accepted, the EUTM proprietor had the opportunity to present its comments regarding the refusal of the good 'soup of ramen' on the basis that this term was not listed in the alphabetic list of the eighth edition of the Nice Classification. The EUTM proprietor failed to address this point and did not submit any arguments in relation thereto (§ 23-24). In light of the above, the appeal

is dismissed.

25/09/2018, R 1032/2018-4, SHAPE OF A PLUSH TOY (3D)

### EUTM application



**Outcome:** Decision annulled.

**Norms:** Article 7(1)(b) EUTMR.

**Keywords:** Distinctive element.

**Summary:** The examiner partially rejected the mark applied for because it was found to be devoid of distinctive character.

The Board finds that the combination of the features of the representation of the sign, in particular the light blue colour and the roundish shape of an oversized head with almost no limbs, does not correspond to the shape and colour

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of any animal typically used for plush or stuffed toys. Consequently, it does not correspond to the shape that consumers looking for plush toys, stuffed toys, puppets or dolls will expect. On the contrary, the light blue colour and the oversized head with one ear are striking features that are easy to remember. On account of these features, consumers will be able to distinguish the shape applied for from plush toys and dolls from other producers and will be able to repeat their purchase decision if they have positive experiences with the products offered under the sign applied for. The sign is distinctive within the meaning of Article 7(1) (b) EUTMR (§ 16 17).

The contested decision is annulled and the sign allowed to proceed to publication for all the goods applied for (§ 18).

02/08/2018, R 2696/2017-1, KJ PRO Kangor jumps XL (3D)



**Outcome:** Decision annulled.

**Norms:** Article 7(1)(a) EUTMR, Article 7(1)(b) EUTMR, Article 7(1)(e)(ii) EUTMR, Article 59(1)(a) EUTMR.

**Keywords:** Dominant element, Figurative element, Functional element, Shape of the products, Technical result, Used in the course of trade, Shape mark.

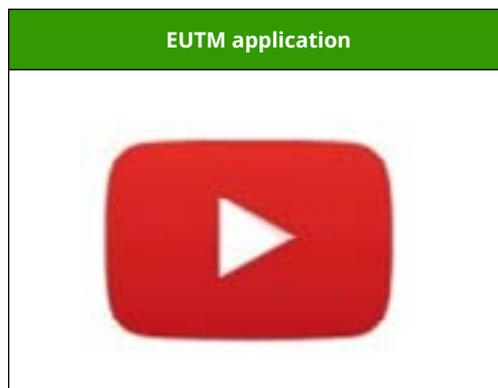
**Summary:** A request for a declaration of invalidity was filed against the three-dimensional mark represented above which was rejected in its entirety by the Cancellation Division.

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Following the relevant case-law and the proven facts, the contested three-dimensional mark is essentially composed of the shape of a rebound boot whose characteristics are functional, with the rest of the elements being non-essential (§ 20-21, 35, 37, 41). In addition, the relevant public will perceive the sign as consisting essentially of a form necessary for a technical purpose and not, as a whole, as an indicator of origin, as the word elements are not dominant (§ 62-64). It is also rejected on the basis of Article 7(1)(a) EUTMR, because the graphic representation is not sufficiently clear, without a more detailed description and would not allow the Office or economic operators to define the scope of protection of the sign (§ 71). The appeal is upheld in its entirety.

28/08/2018, R 119/2018-2, [DEVICE OF A WHITE RIGHT-POINTING TRIANGLE IN A RED RECTANGLE \(fig.\)](#)



**Outcome:** Decision confirmed.

**Norms:** Article 7(3) EUTMR.

**Keywords:** Distinctiveness acquired by use.

**Summary:** The examiner rejected the figurative mark applied for under Article 7(3) EUMR.

The Board finds that no market study was presented and only two declarations originating from the UK and Germany were submitted. In this respect, two statements originating from two out of 28 Member States is not sufficient to extrapolate the survey data submitted to the rest of the European Union. Nor can a lack of recognition of

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the sign as an indication of commercial origin in one part of the territory of the European Union be offset by a higher level of awareness in another part of the European Union (§ 71). The other items of evidence do not compensate for the deficiency in the lack of surveys and declarations. The applicant has submitted ample evidence showing that the 'Youtube' platform is well known within the EU. However, this evidence does not prove that the relevant public in the whole EU will link the 'play button' alone, with no additional (dominant) elements such as 'Youtube' and/or further related logos, with the applicant exclusively (§ 73). Without further evidence it cannot be presumed that the relevant public will perceive the contested sign as an indication of origin pointing towards the applicant (§74). The appeal is dismissed.

07/09/2018, R 457/2018-4, Velvita (fig.) / Belvita

EUTM application	Earlier trade mark
	BELVITA

**Outcome:** Decision annulled.

**Norms:** Rule 19(2) CTMIR, Rule 98(1) CTMIR.

**Keywords:** Substantiation of earlier right, Translation of evidence.

**Summary:** The opponent filed an opposition against the goods, 'fresh fruits and vegetables', which was based on a German trade mark. As concerns the validity of this earlier right the opponent attached an excerpt, in English, from the official database of the German Patent and Trademark Office. The Opposition Division upheld the opposition in its entirety and omitted, in its reasoning, the question concerning the validity of the evidence as regards the substantiation of the earlier mark (§ 7).

Rule 19(3) CTMIR provides that any document filed as evidence in support of the opposition has to be, or has to be translated into, the language of the opposition proceedings. Rule 20(1) CTMIR provides that if within the said time limit this is not complied with, the opposition shall be rejected as unfounded (§ 13).

The document filed as an attachment to the opposition was provided in English giving the general impression of being an official extract (§ 20). However, the automatic translation on the website only extends to entire standard descriptions of registration data (INID codes) except for the translation of the list of goods and services which remains in German (§ 21).

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Consequently, the document filed is not completely an official document but one to which an unofficial translation of the list of goods and services has been added (§ 22).

The opponent presented a printout from the official database using the 'English' version available on this website as an option. This is an original version but does not include a translation of the goods and services. The original document provides the list of goods and services in German, for which no corresponding text appears in the document dated 12/04/2017, with the further consequence that one cannot be sure that the two lists of goods and services match (§ 24-25).

The result of this is simply that the document cannot be accepted as an original and the existence and validity of the earlier mark has not been substantiated (§ 30-31). The appeal is upheld.

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