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Supporting users: by the Executive Director of the EUIPO

At this difficult time, when we face a global health and economic crisis, the EUIPO would like to assure our customers and users that we are ready to help.

Our deepest sympathy goes to those who have been directly touched by the Covid-19 pandemic, either through illness or bereavement.

Looking beyond each day is hard, while many are still struggling with the reality of balancing family and business life and following guidelines on social distancing.

The EUIPO is in the fortunate position of being able to continue to operate well, using pre-existing arrangements for mobile and flexible working.

We are doing what we can to address the emergency in the best interests of users and have taken the step of extending all time limits in all proceedings before the Office.

These time limits were initially extended until 1 May 2020 and have since been further extended until 17 May*. We will keep monitoring the situation depending on needs.

* More details on the extension later in this issue



The Office has now completed around two months of almost universal teleworking. However teleworking has been combined, for most of this period, with home confinement, apart from some essential journeys to buy food or medicine. This is being progressively relaxed by the Spanish authorities as conditions allow.

In terms of the EUIPO operations, virtually all aspects of the Office's mission have been able to continue, with the necessary adjustment to online meetings and conferences.

Around 1,400 of us have been connecting to our systems from home by laptop every working day without any major issue, apart from slow internet connections in some cases.

We are grateful to a very small business contingency team, including maintenance, cleaners, IT services, mailroom etc, who continue to work on the headquarters campus.

While production is going well there has been a fall in filing demand from most EU countries and the United States. Filings from Asia, and especially China, are now recovering.

The examiners, customer service staff, and Boards of Appeal are keeping output at normal levels, quality checks continue to be performed regularly, and quality remains good.

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We have been able to adapt quickly to the new online environment. To take one example, we are actively working on how to “virtualise” our Stakeholder Quality Assurance Panels.

Recent highlights include a series of online meetings with about 100 representatives of the EU Member State Intellectual Property Offices to plan work under the European Cooperation Projects and an online session of the EUIPO Users’ Group, including 11 of the main User Associations.

These online meetings and others like them have allowed the Office to detail its plan to help SMEs as part of our upcoming strategic plan for the years up to 2025.

Helping SMEs will be an even more important issue as we climb out of this crisis, so it was very encouraging to find that there has been a very active interest from our stakeholders.

We are in close consultation with the European Commission, in particular DG GROW which is defining the EU’s response in relation to IP and SME support.

The Office is also investigating the possibility to accelerate a number of initiatives, which we believe can have a positive impact on the costs and efforts facing SMEs seeking to protect their innovation or enforce their rights.



In addition, a specific SME corner and app for easy and quick access to services will be developed and we will continue supporting members of the European Union Intellectual Property Network in their promotion of the use of IP by SMEs.

While restrictions are easing in various countries, including Spain, it is already clear that any return to normal working will need to be gradual and well managed.

The Office has its own “return plan” and is making efforts to source test kits and personal protective equipment, without, of course, competing with the health professionals and first responders who must continue to have priority.

While the EUIPO is coping well, the economic damage caused to the global and European economies will be long-lasting, so we are also looking to future.

Now, as never before, all IP stakeholders need to work together to ensure that we are all part of the solution as we climb out of this crisis.

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Launch of improved TMview and DesignView

The EUIPO has launched improved versions of [TMview](#) and [DesignView](#), the world's largest free trade mark and design search engines.

With a completely redesigned and user-friendly interface, the new TMview and DesignView provide a greatly **enhanced navigation and search experience**.

The new version of the tools has been released following a beta testing period, during which user feedback was collected and guided further enhancements.

As part of the improvements, a wide set of search criteria is available in both tools and can be fine-tuned for a quicker and more efficient search. Previous searches can also be accessed directly from the home page in both TMview and DesignView.

The tools also offer the possibility for logged in users to set alerts when changes are made to specific trade marks and designs. Additionally, the saved preferences of logged in users remain available in the new versions of TMview and DesignView.

The new tools also allows users to select and **compare trade marks and designs** side by side. Users can also easily **export search results** to PDF, Excel and Word formats



The quality of data available through TMview and DesignView has also been significantly improved for the benefit of users.

New misleading invoice alert - Fake EUIPO decisions

Users are warned to be especially alert due to a new misleading invoice in circulation, which takes the form of a fake EUIPO decision.

The misleading invoice, [which can be viewed here](#), has been reported to the Office by users over the course of the past fortnight.

Nevertheless, many of these invoices may still be in circulation. Users can protect themselves against this, and other misleading invoices, by taking careful note of the following:

1. The EUIPO **never** sends invoices or demands for payment of money to its users. If you receive a demand for money for anything to do with your trade mark by post or email, **it does not come from us**. Even if it uses our logo, and appears to be official, it does not come from us.
2. Familiarise yourself with our fee structure (and make sure others in your firm or company are familiar with them too). All fees payable directly to the EUIPO in relation to EUTMs are

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laid down in the European Union Trade Mark Regulation (EU) No 2017/1001. A full list of these statutory fees can be found [here](#). Also, be aware that we only use [two Spanish bank accounts](#) for payments relating to trade mark and design fees. Any invoice which contains a bank account other than those two is fake.

3. Check **everything** you receive in relation to your trade mark application or registration very closely. If you have even the slightest doubt, contact us; we are committed to protecting our users against fraud, and we want you to let us know if you have received anything that looks suspicious. You can email us at information@euipo.europa.eu. We also maintain a searchable database of all misleading invoices that our users send us, which you can consult [here](#).

4. If you haven't already **registered for our User Area** to pay fees and receive communications from the Office, please consider doing so. It's a completely secure channel through which you can pay by credit card, bank transfer or through your EUIPO current account, and through which you can receive notifications from us safely. You can [sign up here](#), and it only takes a couple of minutes.

We are committed to protecting our users,



especially at this time, when phishing emails and other fraud attempts are on the rise. We take legal action whenever necessary to fight this issue, but the most important defence is awareness. Please check everything you receive in relation to your trade mark, and if you have any doubts, contact us.

Australia joins TMview

As of 6 April 2020, IP Australia has made its trade mark data available to the [TMview](#) search tool.

With [IP Australia](#) on board, TMview, the tool now contains data from 74 participating offices.

With the addition of more than 1.6 million trade marks from IP Australia, TMview provides information and access to more than 59.1 million trade marks in total.

Finland joins DesignClass

The Finnish Patent and Registration Office ([PRH](#)) is now part of the Common Harmonised Database on Product Indications (HDBPI) in [DesignClass](#).

The integration was carried out on 30 March 2020 with the support of the EUIPO's European Cooperation Projects (ECP1) and in close collaboration with the PRH office.

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With this latest addition, there are 35 IP offices in the database, including **all national and regional intellectual property offices in the EU**. As a result, product indications with Finnish translations are now available to all users through the DesignClass tool.

The HDBPI is constantly updated so it evolves with the market and user needs. In addition to Locarno classification, the HDBPI is enriched with product indications from Eurolocarno and from national and regional IP offices of the EU.

DesignClass allows users to easily navigate the harmonised database of product indications to search for a specific translated term in 27 languages, now including all official languages of the EU.

EUIPO Guidelines in electronic format: new functionalities

The [EUIPO Guidelines for Examination of EUTMs and RCDs](#) in electronic format have been enhanced with new functionalities.

Among the improvements, an advanced search function and the possibility to download a PDF on Part and Section level have been made available, following the feedback received from users.



An **advanced search function** has been made available to allow users to better define searches. It is now possible to search in the entire Trade Mark or Design Guidelines publication, in a specific Part, or in a specific Section. In which Part or Section a search is initiated depends on where you have navigated to within the Guidelines.

Additionally, in order to improve the user experience, the term searched for (or its linguistic variant) is now highlighted in the list of search results. So-called 'breadcrumbs' have also been added to the search results list, enabling users to easily spot the searched terms in the Guidelines.

Part and Section-level PDFs have also been made available to download from the Guidelines. The type of PDF that will open depends on and recognises the following:

- in which publication (Trade Mark Guidelines or Design Guidelines) you are browsing;
- in which edition you are browsing (2017, 2020);
- where in the Guidelines you have navigated to (which Part or Section);
- in which language you are browsing, and
- whether you have 'Show modifications' turned on or off; either a 'clean' version or a version with tracked changes will open.

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The [updated tutorial](#) provides more detailed information about the new features, including the improved search functionalities (pages 11-13) and how to download each type of PDF (page 16).

In addition to these improvements, the **responsive design** which allows the Guidelines to be consulted from other devices, such as a tablet or smart phone, has also been enhanced.

The EUIPO welcomes your [feedback](#) and continues to work on further improvements for an enhanced user experience on the Guidelines.

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eRegister (beta version) launched

eRegister, a new tool for accessing historical information on European Union trade marks (EUTMs) and registered Community designs (RCDs), has been launched in beta version.

EUIPO's goal with the future eRegister is to offer an official record, in electronic form, of every entry made in the Register in relation to an EUTM or RCD application or registration. As the records are presented in chronological order they also serve for historical reference purposes.

With the future eRegister tool, EUIPO's users will be able to access EUTM and RCD related information in such manner that a consultation of the situation of the IP right at a given point in time remains stable independently of when this consultation is made.

This new tool is expected to increase the traceability of a given IP right's history, allowing users to easily ascertain what information was changed, when it was changed and why it was changed.

For instance, understanding the successive changes to an IP right such as the creation, modification and extinction of licences will be a much simpler exercise. Another example is IP rights with many transfers of ownership, where it may currently be difficult to ascertain the different previous owners at a specific point in time.

This tool seeks to **streamline and improve the tracing of IP right changes**, in terms of information that defines its nature and extent of protection, so that it is possible to **know its situation at any point in time**, thus contributing to the creation of an effective and secure digital environment with streamlined digital operations and highly available systems.

For now, the eRegister beta version should only be used for testing purposes. It should not be used to replace eSearch functionalities or to meet the everyday needs of users. The information contained on the beta version of the eRegister may not work as expected, or be comprehensive, complete, accurate, or up to date. For this reason **it does not have any legal value and should not be relied on for any purpose**. Disclaimers have been inserted in the tool raising awareness of this fact.

For further information on how personal data is processed within the framework of the eRegister beta version, please refer to this [privacy statement](#) and to the data [protection section](#) of EUIPO's website.

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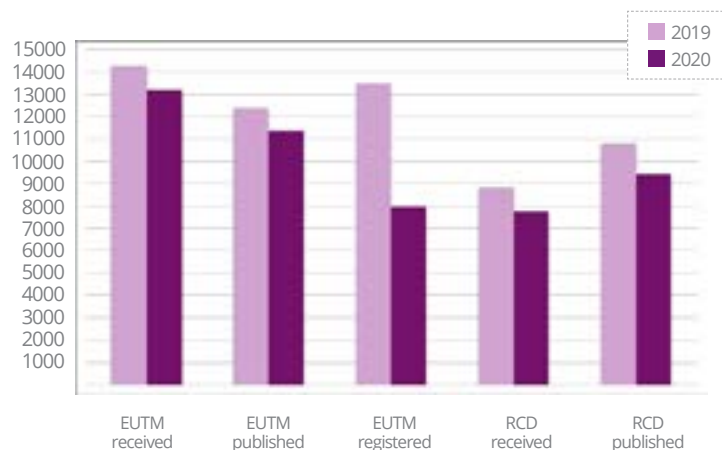
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Statistical Highlights

Monthly statistical highlights March*	2019	2020
European Union Trade Mark applications received	14 253	13 197
European Union Trade Mark applications published	12 360	11 353
European Union Trade Marks registered (certificates issued)	7 947	10 476
Registered Community Designs received	7 746	8 270
Registered Community Designs published	9 428	8 153

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



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Information and guidance note on further extension of deadlines

As a response to the exceptional circumstances created by the COVID-19 pandemic, in [Decision No EX-20-3](#), the Office's Executive Director extended **until 1 May 2020** all time limits expiring between **9 March 2020** and **30 April 2020**.

On 29 April 2020, in a new decision ([No EX-20-4](#)), the Office's Executive Director further extended until **18 May** all time limits expiring between **1 May 2020** and **17 May 2020**.

In effect, all deadlines expiring between 9 March and 17 May are extended until 18 May.

In order to provide users with guidance the following clarification has been issued about the time limits affected by the extension, the nature of the extension and the measures to adapt communications sent to users and the impact on current accounts.

I. TIME LIMITS AFFECTED BY THE EXTENSION

Article 1(1) of [Decision No EX-20-4 of the Executive Director of the Office of 29 April 2020](#) extends until 18 May '**all time limits** expiring between 1 May and 17 May 2020 inclusive that affect all **parties in proceedings before the Office**'.

Article 101(4) EUTMR, which empowers the Executive Director to extend time limits in the case of exceptional occurrences uses a similar language, by also referring to 'all time limits' and 'all parties to the proceedings'.

The reference to '**all time limits**' is to be read literally and encompasses **all procedural deadlines**, irrespective of whether they have been set by the Office or are statutory in nature (i.e. are stipulated directly in the Regulations).

- For the sake of clarity, this expression covers:
- Time limits set by any instance of the Office, in any proceeding before the EUIPO, including its Boards of Appeal
- Time limits imposed directly by the EUTMR, the EUTMIR or the EUTMDR as well as CDR and CDIR
 - including those originating from the Paris Convention or other International Treaties, and
 - regardless of whether they are excluded from restitutio in integrum within the meaning of Article 104 (5) EUTMR and Article 67(5) CDR
- In particular, the following statutory time limits **are covered** by the extension:
 - Payment of the Application Fee (Article 32 EUTMR)
 - Right of Priority (Article 34(1) EUTMR and Article 41 CDR)

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- Exhibition Priority (Article 38(1) EUTMR and Article 44 CDR)
- Opposition Period (Article 46(1) EUTMR)
- Payment of the Opposition Fee (Article 46(3) EUTMR)
- Request for Renewal (Article 53(3) EUTMR and Article 13 CDR)
- Filing of an Appeal and of the Statement of Grounds, payment of the Appeal Fee (Article 68 (1) EUTMR and Article 57 CDR),
- Conversion (Article 139 EUTMR)
- Deferment of publication of design (Article 50 CDR).

However, the reference in the Decision to **'proceedings before the Office'** means that time limits that relate to proceedings **before other authorities are not covered** by the extension, even if mentioned in the Regulations. This is in particular the case with regard to the time limit for:

- Bringing an action before the General Court against decisions of the Boards of Appeal (Article 72(5) EUTMR and Article 61 CDR).

Finally, it should be pointed out that the expression **'proceedings before the Office' only relates to trade mark and design matters**, which means that time limits related to subjects not dealt with by the EUTMR or the CDR (such as employment or procurement) or which relate to other matters (e.g. the governance of the Office) **are also not covered**

by the Decision of the Executive Director.

II. NATURE OF THE EXTENSION

The extension of time limits granted by the Executive Director has the immediate effect of preventing the deadlines concerned from lapsing when they were originally due, and of setting a new expiry date applicable to all, namely the **18 May 2020**.

This effect is automatic and derives directly from the Decision of the Executive Director. Accordingly, affected parties are **not required** to file a request to the Office for the extension of the time limit to take effect.

Parties to ongoing proceedings are therefore advised not to lodge unnecessary requests for extension.

Article 1(2) of Decision No EX-20-4 also establishes that:

In the event parties to proceedings before the Office choose to discharge their procedural obligations before the expiry of the extended time limit, by submitting observations, documents or performing any other procedural act, the relevant time limit will be considered exhausted and the proceedings will continue without awaiting its expiration pursuant to Article 1.

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This means, for example, that where the extended time limit concerns the submission of the last round of observations in an Opposition, Cancellation or RCD Invalidity action, and observations are submitted by the party concerned, the Office will close the proceedings, inform the parties accordingly and rule on the case on the basis of the evidence before it.

Furthermore, where, for example, the extended time limit concerns the reply to the Office's absolute grounds objection and the applicant/holder submits observations before the expiry of the extended time limit, the Office will proceed and re-assess the eligibility for registration of the application based on the evidence before it.

In all of the abovementioned cases, the Office will **not keep the file on hold** until the expiry of the extended time limit.

The same applies to proceedings before the Office's Boards of Appeal.

III. COMMUNICATIONS SENT TO USERS

The immediate effect of the extension also implies that users whose time limits are concerned **will not be informed** about the grant of the extension by means of individual communications.

The Office has done its utmost to adapt its IT systems in such a way as to guarantee a seamless treatment of the time limits that were due to expire before the extension date. However, in the unlikely event that

a communication from the Office does not adhere to the given extension, the Office will address the case immediately by issuing a rectification either of its own motion or following a written request from the user indicating the file number concerned.

IV IMPACT ON CURRENT ACCOUNTS

To clarify the impact on the handling of the procedure for insufficient funds in a current account, as indicated in that procedure, should a fee be unsuccessfully debited on a particular date, the Office will proceed with a notification of insufficient funds. The client has one month from receipt of notification to replenish the account with sufficient funds in order to cover the fees and administrative charges.

However, following the extension of time limits, the Office will not issue any notifications for insufficient funds in current accounts until the end of the period of extension, that is 18 May 2020.

Customers can use the current account information available in the user area in order to follow-up their account balances, become aware of possible shortage of funds and make replenishments. This will allow them to avoid the blocking of the debits, the administrative charges linked to notifications of insufficient funds and, subsequently, assure the progress of the trade mark or design files.

Deadlines indicated in notifications of insufficient funds issued before 1 May 2020 which fall into the period from 1 May to 17 May are automatically extended to 18 May 2020.

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Webinars from the EUIPO Academy

Latest webinars

A selection of the latest webinars [can be found here](#), including:

Decisions of the trimester of the GC and the CJEU

This webinar provides an overview of the most relevant decisions of the GC and the CJEU during the first trimester of 2020.

Cancellation: the basics on invalidity and revocation proceedings

This webinar covers the basics of both types of cancellation proceedings — invalidity on the one hand and revocation on the other. It explains the basic requirements of the filing and admissibility of the application and describes the exchange of observations during these proceedings.

Notification of detentions using the IP Enforcement Portal and introduction to the Detention Report 2013-2017

In this webinar we show how to notify detentions using the IP Enforcement Portal (IPEP). After last year's successful pilot of notifications, a couple of authorities have started to notify their detentions using the IPEP. We will highlight the advantages and explain what happens to the detention data that we collect in the IPEP and present the main results of the Detentions Report 2013-2017.

Representantes: designación, supresión y sustitución

This webinar provides a quick introduction to the general rules on the professional representation before the Office; who may request a representative replacement, appointment or a deletion and how to do it.

Upcoming webinars

A list of upcoming webinars [can be found here](#), including:

- Webinar: Belated Evidence [Tuesday 5 May](#), 10.00 AM » 11.00 AM
- Webinar: IPTV crime in the European Union [Tuesday 12 May](#), 10.00 AM » 11.00 AM
- Webinar: Distinctiveness of shape marks — Convergence Programme 9 [Tuesday 26 May](#), 10.00 AM » 11.00 AM

On current case-law

In [C 328/18 P](#), the Court of Justice annulled the GC judgment and the BoA Decision was confirmed. The marketing circumstances are to be taken into account at the stage of the global assessment of the LOC and not in the assessment of the similarity of the signs.

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To dive into likelihood of confusion and into the 3-step test developed by the case-law of EU courts, watch our webinar on [Likelihood of confusion: the 3-step test and recent trends in the case-law of EU Courts](#).

The most viewed webinar of last month:

Video gaming and IP: how to play the game

In this webinar, the Office joined forces with the EPO to explore the intricate bundle of technical and non-technical IP rights behind video games. In a rapidly evolving landscape of video game design, development and commercialisation, the what and the how of protecting the IP of video game components can be a challenge.

Find out more about our online learning catalogue in the [Academy Learning Portal](#)

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Luxembourg trade mark and design news

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

12/03/2019, T 352/19; Packaging for foodstuffs, EU:T:2020:94

RESULT: Action dismissed

KEYWORDS: Conflict of design with prior design, Individual character, Informed user, Overall impression

FACTS: The RCD proprietor registered the design for packaging for foodstuff in Class 9-3 of the Locarno Classification.

An invalidity application was filed pursuant to Article 25(1)(b) CDR in conjunction with Article 5 and 6 CDR on the basis of the earlier design.

The Invalidity Division (ID) rejected the invalidity application. The ID found the contested design had individual character since the contents of the packaging in which the contested design was intended to be incorporated are visible and therefore formed part of the design. The differences between the contested design and the earlier design were found to be sufficient for the designs to produce different overall impressions on the informed user.



The invalidity applicant filed an appeal. The Board of Appeal (BoA) upheld the appeal, annulled the ID's decision and declared the contested design invalid for lack of individual character. It took the view that the contested design produced the same overall impression on the informed user as that produced by th353e earlier design. It added that only the features of appearance of the packaging in which the contested design is intended to be incorporated should be taken into account, and not the features of appearance of the foodstuffs contained within it, irrespective of whether, due to the fact that the packaging or its lid are transparent, the foodstuffs are visible.

The invalidity applicant filed an action before the General Court (GC), relying on a single plea in law: infringement of Article 25(1)(b) CDR in conjunction with Article 6 CDR. The GC dismissed the action.

SUBSTANCE:
LACK OF INDIVIDUAL CHARACTER.

Although the classification of the products (packaging for foodstuffs) in which a design is intended to be incorporated cannot serve, on its own, to determine the subject matter of the protection (Article 36(6) CDR), it cannot be ruled out that it may in fact contribute to establishing the overall impression produced by that design on the informed user for the purpose of assessing

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whether it has individual character in relation to an earlier design (§ 28). Therefore, the BoA was right to take into consideration that the contested design is intended to be incorporated in packaging for foodstuffs for the purpose of assessing the design's overall impression and its individual character in relation to the earlier design (§ 30).

CTMA



Earlier marks



Contrary to the applicant's claim, the fact that the contents of the packaging in which it is intended to be incorporated are visible does not extend the protection conferred on the contested design to those contents. The presence of visible foodstuffs inside the products merely provides a better illustration of the purpose of the design, namely as packaging for foodstuffs, as well as one of their components, specifically the transparent lid (§ 31). The comparison of the overall impressions produced



by the designs must relate solely to the elements actually protected (13/06/2017, T 9/15, Dosen [für Getränke], EU:T:2017:386, § 79). The protection conferred by the contested design relates to its appearance in that it is intended to be incorporated into packaging for foodstuffs having certain components with specific characteristics, namely a metal container that has a transparent lid with a translucent tab. The foodstuffs inside the container must not, therefore, be taken into consideration for the purpose of assessing the 'overall impression' (§ 33).

The assessment of the overall impression produced on the informed user by a design includes the manner in which the product represented by that design is used (21/11/2013, T 337/12, Sacacorchos, EU:T:2013:601, § 46). Accordingly, the informed user of the contested design, whether a consumer of the preserves or a professional in the food processing industry, will assess that design according to the purpose of the products, namely as packaging for foodstuffs, and will be able to differentiate between that packaging and its contents. Therefore, the appearance of the foodstuffs contained in the packaging in which the contested design is intended to be incorporated, as well as their specific arrangement inside that packaging, is not relevant for the purpose of assessing the overall impression produced on the informed user by the contested design (§ 40).

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Although visible in both examples of the packaging, the foodstuffs in that packaging do not form part of the appearance of the designs. The appearance of the designs is given to them by, in particular, their components with their specific characteristics, namely a metal container that has a transparent lid with a translucent tab (§ 31, 43).

Consequently the designs produce the same overall impression on the informed user. The contested design produces an impression of 'déjà vu' in relation to the earlier design and lacks individual character for the purposes of Article 25(1)(b) CDR, in conjunction with Article 6 CDR, in relation to the earlier design (§ 23, 24, 50).

12/03/2019, T 353/19; Packaging for foodstuffs, EU:T:2020:95

RESULT: Action dismissed

KEYWORDS: Conflict of design with prior design, Disclosure outside the EU, Individual character, Informed user, Overall impression

FACTS: The RCD proprietor registered the design for packaging for foodstuff in Class 9-3 of the Locarno Classification.



An invalidity application was filed pursuant to Article 25(1)(b) CDR in conjunction with Article 5 and 6 CDR on the basis of the earlier designs.

The Invalidity Division (ID) rejected the invalidity application. It found that the invalidity applicant had not proved the disclosure for the first earlier design. The ID stated that the contested design had individual character, insofar as it produced an overall impression on the informed user distinct from that produced by the earlier designs for which disclosure had been established, in particular that produced by the second earlier design.

The invalidity applicant filed an appeal. The Board of Appeal (BoA) upheld the appeal, annulled the ID's decision and declared the contested design invalid for lack of individual character in relation to the first earlier design. Having found that the intervenor had established disclosure of the first earlier design, the BoA held that the contested design produced an impression of 'déjà vu' on the informed user in relation to the first earlier design, namely a transparent glass jar with a coloured circular removable lid. It added that only the features of appearance of the packaging in which the contested design is intended to be incorporated should be taken into account and not the features of appearance of its contents. Similarly, according to the BoA, the label affixed only to the jar in which the first earlier design is intended to be incorporated does not influence the overall impression produced by the designs.

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The invalidity applicant filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of Article 7(1) CDR and (ii) infringement of Article 25(1)(b) CDR in conjunction with Article 6 CDR. The GC dismissed the action.

RCD



Earlier designs



SUBSTANCE:

(i) DISCLOSURE.

In the light of the items of evidence submitted, which must be assessed in relation to each other, the proprietor demonstrated the events constituting



disclosure of the first earlier design, which took place before the date of filing of the application for registration of the contested design (§ 33).

(ii) LACK OF INDIVIDUAL CHARACTER.

Although the classification of the products (packaging for foodstuffs) in which a design is intended to be incorporated cannot serve, on its own, to determine the subject matter of the protection (Article 36(6) CDR), it cannot be ruled out that it may in fact contribute to establishing the overall impression produced by that design on the informed user for the purpose of assessing whether it has individual character in relation to an earlier design (§ 51). Therefore, the BoA was right to take into consideration that the contested design is intended to be incorporated in packaging for foodstuffs for the purpose of assessing the design's the overall impression and its individual character in relation to the earlier design (§ 53).

Contrary to the applicant's claim, the fact that the contents of the packaging in which it is intended to be incorporated are visible does not extend the protection conferred on the contested design to those contents. The presence of visible foodstuffs inside the products merely provides a better illustration of the purpose of the design, namely as packaging for foodstuffs (§ 54).

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The comparison of the overall impressions produced by the designs must relate solely to the elements actually protected (13/06/2017, T 9/15, Dosen [für Getränke], EU:T:2017:386, § 79). The protection conferred by the contested design relates to its appearance in that it is intended to be incorporated into packaging for foodstuffs having certain components with specific characteristics, namely a transparent glass jar with a coloured circular removable lid. The foodstuffs inside the container must not, therefore, be taken into consideration for the purpose of assessing the 'overall impression' (§ 56).

The assessment of the overall impression produced on the informed user by a design includes the manner in which the product represented by that design is used (21/11/2013, T 337/12, Sacacorchos, EU:T:2013:601, § 46). Accordingly, the informed user of the contested design, whether a consumer of the preserves or a professional of the food processing industry, will assess that design according to the purpose of the products, namely as packaging for foodstuffs, and will be able to differentiate between that packaging and its contents. Therefore, the appearance of the foodstuffs contained in the packaging in which the contested design is intended to be incorporated, as well as their specific arrangement inside that packaging, is not relevant for the purpose of assessing the overall impression produced on the informed user by the contested design (§ 63).



The informed user will easily recognise in the designs the same components, namely a transparent glass jar with the same characteristics of shape and proportion and a coloured circular removable lid. Although the colour of the lid of the first earlier design is black, the gold colour of the lid of the contested design is not sufficient to produce distinct overall impressions of the designs on the informed user, especially as the lids in question are the same shape and thickness (§ 66).

Consequently the designs produce the same overall impression on the informed user. The contested design produces an impression of 'déjà vu' in relation to the earlier design and lacks individual character for the purposes of Article 25(1)(b) CDR, in conjunction with Article 6 CDR, in relation to the first earlier design (§ 46, 47, 70).

26/03/2020, T 653/18, GIORGIO ARMANI le Sac 11 (fig.) / LESAC et al., EU:T:2020:121

RESULT: Action dismissed

KEYWORDS: Likelihood of confusion, Proof of use, Right to be heard

FACTS: The applicant sought to register the figurative mark GIORGIO ARMANI le Sac as an EUTM for goods and services in Classes 18 and

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25, such as handbags; travel baggage; card wallets [leatherware]. Pursuant to Article 8(1)(b) EUTMR, an opposition was filed. It was based on earlier Spanish word mark LESAC (No 919 900), registered for handbags, purses, suitcases and wallets made from leather in Class 18, the Spanish figurative mark lesac (No 2 244 284) registered for ready-made clothing, footwear, headgear in Class 25, and the Spanish figurative mark (No 2 244 285) registered for retail sales services in Class 35.

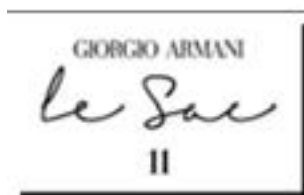
The Opposition Division found that genuine use of the earlier marks had been proved in relation to handbags and purses made from leather in Class 18 and ready-made clothing, footwear in Class 25 and upheld the opposition.

The applicant filed an appeal. The Board of Appeal (BoA) dismissed the appeal. It found that earlier trade mark No 2 244 285 had been put to genuine use for retail sales services in relation to handbags, purses and wallets made from leather, ready-made clothing and footwear in Class 35 and that there was a likelihood of confusion (LOC) between the signs.

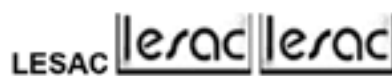
The applicant filed an action before the General Court (GC), relying on four pleas in law: (i) infringement of Article 94(1) EUTMR, (ii) infringement of Article 8(1)(b) EUTMR as regards the scope of protection of earlier trade mark No 2 244 285, (iii) infringement of Article 18 and Article 47(2) EUTMR, and (iv) infringement of Article 8(1)(b) EUTMR as regards the existence of a LOC. The GC dismissed the action.



EUTM Application



Earlier trade mark



SUBSTANCE:

(i) INFRINGEMENT OF ARTICLE 94(1) EUTMR.

The BoA did not exceed its powers by carrying out a new, complete examination of the proof of genuine use of earlier trade mark No 2 244 285 for retail sales services in relation to handbags, purses and wallets made from leather, ready-made clothing and footwear in Class 35 (§ 22-23). The right to be heard for the purposes of Article 94(1) EUTMR extends to the factual and legal matters on which the decision-making act is based, but not to the final position that the authority intends to adopt (07/09/2006, T 168/04, Aire limpio, EU:T:2006:245, § 116). On two occasions in the course of the proceedings before the Office, the applicant had the opportunity to

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submit its observations on the evidential value of the evidence of genuine use of the earlier marks (§ 26-27).

(ii) INFRINGEMENT OF ARTICLE 8(1)(b) EUTMR AS REGARDS THE SCOPE OF PROTECTION OF EARLIER TRADE MARK No 2 244 285.

The BoA did not infringe Article 8(1)(b) EUTMR by finding that genuine use of earlier trade mark No 2 244 285 had been proved only for retail sales services in relation to handbags, purses and wallets made from leather, ready-made clothing and footwear, and not for the broader category of 'retail sales services', even though that earlier mark had been registered for retail sales services in general (§ 41).

By using all the general indications listed in the class heading of Class 35, the other party to the proceedings, whose earlier trade marks had been registered before the delivery of the Praktiker and IP Translator judgments (07/07/2005, C 418/02, Praktiker, EU:C:2005:425 and 19/06/2012, C 307/10, IP Translator, EU:C:2012:361), intended to cover all the services in that class (31/01/2013, T 66/11, Babilu, EU:T:2013:48, § 50) (§ 38). In those circumstances, the BoA was justified, pursuant to Article 47(2) EUTMR, in ascertaining for which goods or services proof of genuine use of earlier trade mark No 2 244 285 had been provided, although that mark had been registered for the broad category of retail sales services (§ 40).



(iii) INFRINGEMENT OF ARTICLE 18 AND ARTICLE 47(2) EUTMR.

The BoA correctly found that the evidence proved genuine use of earlier trade mark No 2 244 285 for retail sales services in relation to handbags, purses and wallets made from leather, ready-made clothing and footwear in Class 35 (§ 43, 62).

In particular, the fact that a verbal element is used as a company's trade name does not preclude its use as a mark to designate goods (18/07/2017, T 110/16, SAVANT, EU:T:2017:521, § 26). The abbreviation 'S.L.' on the invoices is much smaller than the earlier mark or the verbal element constituting that mark. It will not preclude consumers from establishing a link between the company name LESAC S.L. and the services provided (§ 51-52). The different stylisation of the term 'lesac' and the addition of the figurative element including the letter 'l' placed in a circle above earlier trade mark No 2 244 285 in some of the items of evidence do not alter the distinctive character of that earlier mark (§ 60).

(iv) INFRINGEMENT OF ARTICLE 8(1)(b) EUTMR AS REGARDS THE EXISTENCE OF A LOC.

The relevant public consists of the Spanish general public with an average level of attention (§ 68).

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COMPARISON OF GOODS AND SERVICES.

The retail sales services in Class 35 constitute one of the distribution channels of the goods in Classes 18 and 25. There is an average degree of similarity between some of the goods in Classes 18 and 25 covered by the mark applied for and the retail sales services which relate to the same goods, mainly on account of their complementary nature (§ 70, 74-75).

COMPARISON OF THE SIGNS.

In earlier trade mark No 2 244 285, the verbal element 'lesac' is visually important in the overall impression created by the mark and has an average degree of distinctiveness (§ 82-86).

The signs are visually and phonetically similar to an average degree in particular because of the presence of the verbal elements 'le sac' and 'lesac', which are almost identical visually and will be pronounced in the same way (§ 90-91).

The conceptual comparison is irrelevant since 'le sac' and 'lesac' have no meaning for the Spanish public and the elements 'giorgio armani' and '11' in the mark applied for do not convey any concept (§ 94).

In view of the low to average degree of similarity between the goods and services, the average degree of visual and phonetic similarity between the signs, the average degree of distinctiveness of



the earlier mark and the not uncommon practice, in the clothing sector, of configuring a mark in different ways (25/05/2012, T 233/10, Jumpman, EU:T:2012:267, § 53), there is a LOC (§ 101).

26/03/2020, T 654/18, le Sac 11 (fig.) / LESAC et al., EU:T:2020:122

RESULT: Action dismissed

KEYWORDS: Likelihood of confusion, Proof of use, Right to be heard

NORMS: Article 8(1)(b) EUTMR, Article 18 EUTMR, Article 71(1) EUTMR, Article 47(2) EUTMR, Article 94(1) EUTMR

KEY POINTS: The right to be heard for the purposes of Article 94(1) EUTMR extends to the factual and legal matters on which the decision-making act is based, but not to the final position that the authority intends to adopt (07/09/2006, T 168/04, Aire limpio, EU:T:2006:245, § 116).

By using general indications listed in a class heading for trade marks registered before the delivery of the Praktiker and IP Translator judgments (07/07/2005, C 418/02, Praktiker, EU:C:2005:425 and 19/06/2012, C 307/10, IP Translator, EU:C:2012:361), the EUTM proprietor intended to cover all the services in that class (31/01/2013, T 66/11, Babilu, EU:T:2013:48, § 50) (§ 38).

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FACTS:

The applicant sought to register the figurative mark le Sac as an EUTM for goods and services in Classes 18 and 25, such as handbags; travel baggage; card wallets [leatherware]. Pursuant to Article 8(1)(b) EUTMR, an opposition was filed. It was based on earlier Spanish word mark LESAC (No 919 900), registered for handbags, purses, suitcases and wallets made from leather in Class 18, the Spanish figurative mark lesac (No 2 244 284) registered for ready-made clothing, footwear, headgear in Class 25, and the Spanish figurative mark (No 2 244 285) registered for retail sales services in Class 35.

The Opposition Division found that genuine use of the earlier marks had been proved in relation to handbags and purses made from leather in Class 18 and ready-made clothing, footwear in Class 25 and upheld the opposition.

The applicant filed an appeal. The Board of Appeal (BoA) dismissed the appeal. It found that earlier trade mark No 2 244 285 had been put to genuine use for retail sales services in relation to handbags, purses and wallets made from leather, ready-made clothing and footwear in Class 35 and that there was a likelihood of confusion (LOC) between the signs.

The applicant filed an action before the General Court (GC), relying on four pleas in law: (i) infringement of Article 94(1) EUTMR, (ii) infringement of Article 8(1)(b) EUTMR as regards the scope of protection of earlier

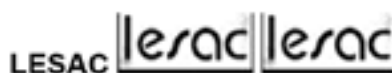


trade mark No 2 244 285, (iii) infringement of Article 18 and Article 47(2) EUTMR and (iv) infringement of Article 8(1)(b) EUTMR as regards the existence of a LOC. The GC dismissed the action.

EUTM application



Earlier trade marks



SUBSTANCE:

(i) INFRINGEMENT OF ARTICLE 94(1) EUTMR.

The BoA did not exceed its powers by carrying out a new, complete examination of the proof of genuine use of earlier trade mark No 2 244 285 for retail sales services in relation to handbags, purses and wallets made from leather, ready-made clothing and footwear in Class 35 (§ 22-23). The right to be heard for the purposes of Article 94(1) EUTMR extends to the factual and legal matters on which the decision-making act is based, but not to the final position that the authority intends to adopt (07/09/2006, T

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168/04, Aire limpio, EU:T:2006:245, § 116). On two occasions in the course of the proceedings before the Office, the applicant had the opportunity to submit its observations on the evidential value of the evidence of genuine use of the earlier marks (§ 26-27).

(ii) INFRINGEMENT OF ARTICLE 8(1)(b) EUTMR AS REGARDS THE SCOPE OF PROTECTION OF EARLIER TRADE MARK No 2 244 285.

The BoA did not infringe Article 8(1)(b) EUTMR by finding that genuine use of earlier trade mark No 2 244 285 had been proved only for retail sales services in relation to handbags, purses and wallets made from leather, ready-made clothing and footwear, and not for the broader category of 'retail sales services', even though that earlier mark had been registered for retail sales services in general (§ 41).

By using all the general indications listed in the class heading of Class 35, the other party to the proceedings, whose earlier trade marks had been registered before the delivery of the Praktiker and IP Translator judgments (07/07/2005, C 418/02, Praktiker, EU:C:2005:425 and 19/06/2012, C 307/10, IP Translator, EU:C:2012:361), intended to cover all the services in that class (31/01/2013, T 66/11, Babilu, EU:T:2013:48, § 50) (§ 38). In those circumstances, the BoA was justified, pursuant to Article 47(2) EUTMR, in ascertaining for which goods or services



proof of genuine use of earlier trade mark No 2 244 285 had been provided, although that mark had been registered for the broad category of retail sales services (§ 40).

(iii) INFRINGEMENT OF ARTICLE 18 AND ARTICLE 47(2) EUTMR.

The BoA correctly stated that the evidence proved genuine use of earlier trade mark No 2 244 285 for retail sales services in relation to handbags, purses and wallets made from leather, ready-made clothing and footwear in Class 35 (§ 43, 61).

In particular, the fact that a verbal element is used as a company's trade name does not preclude its use as a mark to designate goods (18/07/2017, T 110/16, SAVANT, EU:T:2017:521, § 26). The abbreviation 'S.L.' on the invoices is much smaller than the earlier mark or the verbal element constituting that mark. It will not preclude consumers from establishing a link between the company name LESAC S.L. and the services provided (§ 51-52). The different stylisation of the term 'lesac' including the uppercase letter 'L' in the earlier trade mark No 2 244 285 in some of the items of evidence do not alter the distinctive character of that earlier mark (§ 55, 60-61).

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(iv) INFRINGEMENT OF ARTICLE 8(1)(b) EUTMR AS REGARDS THE EXISTENCE OF A LOC.

The relevant public consists of the Spanish general public with an average level of attention (§ 67).

COMPARISON OF GOODS AND SERVICES.

The retail sales services in Class 35 constitute one of the distribution channels of the goods in Classes 18 and 25. There is an average degree of similarity between some of the goods in Classes 18 and 25 covered by the mark applied for and the retail sales services which relate to the same goods, mainly on account of their complementary nature (§ 69, 73-74).

COMPARISON OF THE SIGNS. The element 'le sac' is the element that contributes most to the overall impression created by the mark applied for. Furthermore, that element is common to the signs, since earlier trade mark No 2 244 285 consists solely of the verbal element 'lesac' written in a stylised font (§ 84).

The signs are visually similar to an above average degree and phonetically similar to a high degree in particular because of the presence of the verbal elements 'le sac' and 'lesac', which are almost identical visually and will be pronounced in the same way (§ 88-89).

The conceptual comparison is irrelevant since 'le sac' and 'lesac' have no meaning for the Spanish public (§ 92).

In view of the low to average degree of similarity between the goods and services, the above average degree of visual similarity and high degree of phonetic similarity between the signs, the average degree of distinctiveness of the earlier mark and the not uncommon practice, in the clothing sector, of configuring a mark in different ways (25/05/2012, T 233/10, Jumpman, EU:T:2012:267, § 53), there is a LOC (§ 99-100).

26/03/2020, T 312/19, Chameleon / Chameleon, EU:T:2020:125

RESULT: Action dismissed

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

FACTS:

The applicant sought to register the word mark CHAMELEON for goods in Class 9, such as computer software in the field of computer network security for VPNs (virtual private networks), and services in Class 38, such as virtual private network services; providing private and secure real time electronic transmission communication over a computer network.

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Pursuant to Article 8(1)(b) EUTMR, an opposition was filed. It was based on an earlier German word mark CHAMELEON and on an earlier international registration designating the European Union for the word mark CHAMELEON. The earlier marks were registered for the following goods in Class 9: head ends for cable networks, namely apparatus for receiving, processing, converting, amplifying and transmitting signals; parts of the aforesaid goods; accessories for the aforesaid goods, as far as included in this class.

The Opposition Division (OD) rejected the opposition on the ground that the goods and services were dissimilar.

The Board of Appeal (BoA) dismissed the opponent's appeal. It found that there was no similarity between the goods or services and, therefore, there could be no likelihood of confusion (LOC).

The opponent filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of Article 95(2) EUTMR and Article 27(4) EUTMDR, and (ii) infringement of Article 8(1)(b) EUTMR. The GC dismissed the action.

SUBSTANCE:

INFRINGEMENT OF ARTICLES 95(2) EUTMR AND ARTICLE 8(1)(b) EUTMR.

Although the BoA did not explicitly address the definition of the relevant public (not disputed by the opponent) in the contested decision, the OD's reasoning in that regard is taken into account, since the BoA confirmed the OD's decision in its entirety, and in view of the continuity in terms of functions between the OD and BoA, Article 71(1) EUTMR. There is no infringement of the duty to state reasons (§ 21).

As stated by the OD, the relevant public is composed of professionals, that is, for the goods covered by the earlier marks, manufacturers of specialised equipment used for receiving, processing and distributing signals over cable network systems and, for the contested goods and services, software companies specialised in securing networks, on the one hand, and network providers, on the other (not disputed) (§ 22).

COMPARISON OF GOODS AND SERVICES.

In essence, the opponent argues that the scope of protection of the earlier mark extends to software, since software is needed to use head ends for cable networks and, therefore, constitutes a 'part' or 'accessory'. The opponent claims that the BoA could not, therefore, rely on the solution adopted in the prior judgment 27/09/2018, T 472/17, Camele'on (fig.) / CHAMELEON, EU:T:2018:613 (the judgment found dissimilarity of the goods and services at issue in an opposition based on the same earlier rights

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against a different applicant) in order to consider that the wording of the lists of goods covered by the earlier marks was 'vague' or referred to 'numerous and complex' goods (§ 27).

The goods covered by the earlier marks are head ends for cable networks, namely apparatus for receiving, processing, converting, amplifying and transmitting signals in Class 9, and parts of the aforesaid goods and accessories for the aforesaid goods, as far as included in this class (§ 28).

Therefore, as found in the abovementioned judgment, the wording of the goods covered by the earlier marks does not refer to software developed and designed to use the head ends for cable networks covered by the earlier marks. A fortiori, that wording does not cover software that relates to a VPN (§ 29).

In view, in particular, of the complexity of head ends for cable networks, the terms 'parts' and 'accessories' used in the wording of the goods covered by the earlier marks are vague terms. If the opponent wanted to ensure that the earlier marks were also registered for configuration and operating software for head ends for cable networks, it should have made that clear when it applied to register its trade marks. It should not benefit from the vague wording of the goods covered by its marks (§ 30).

Consequently, the BoA was not required to find that the earlier marks were registered for the software needed to use head ends for cable networks (§ 32). It was entitled to conclude that the goods and services were neither similar nor complementary, bearing in mind in particular the differences in their nature and intended purpose (§ 37). The requirement that the goods and services be similar has not been met and there is, therefore, no LOC (§ 38).

26/03/2020, T 77/19, [alcar.se \(fig.\)](#) / [Alcar](#), [EU:T:2020:126](#)

RESULT: Action dismissed

KEYWORDS: Likelihood of confusion, Phonetic similarity, Similarity of the goods and services, Visual similarity

FACTS:

The applicant sought to register the figurative mark [alcar.se](#) for the following services - insofar as contested:

- Class 35: dealer services in relation to vehicles; sales of vehicles; advertising services relating to the sale of motor vehicles;
- Class 39: vehicle renting services; providing information about automobiles for lease by [means] of the internet; motor land vehicle hire services.

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Pursuant to Article 8(1)(b) EUTMR, an opposition was filed. It was based on the earlier EU word mark ALCAR, registered for the following goods:

- Class 6: anti-theft devices for wheels (wheel clamps);
- Class 7: exhaust systems;
- Class 12: vehicle parts and accessories, namely disc edges of aluminium or steel, wheel nuts and wheel screws, valves for pneumatic tyres, snow chains.

The Opposition Division (OD) rejected the opposition.

The opponent filed an appeal. The Board of Appeal (BoA) upheld the appeal and annulled the OD's decision. It considered that the goods and services were similar since they were, to some extent, complementary and distributed via the same distribution channels. The BoA concluded that there was a likelihood of confusion (LOC) between the signs.

The applicant filed an action before the General Court (GC), relying on a single plea in law: infringement of Article 8(1)(b) EUTMR. The GC dismissed the action.



EUTM Application

alcar.se

Earlier trade mark

ALCAR

SUBSTANCE:

INFRINGEMENT OF ARTICLE 8(1)(b) EUTMR.

The relevant public consists of both the general public and the specialist public with a higher level of attention due to the technical complexity of the goods and their infrequent purchase (not disputed) (§ 29).

COMPARISON OF THE GOODS AND SERVICES. The BoA was not wrong in concluding that there is a low to average degree of similarity between the goods and services (§ 32, 41). In particular, the applicant's general statement, according to which the goods and services are not similar as they are neither complementary nor offered at the same points of sale, is a peremptory statement that is neither substantiated nor proven (§ 39).

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COMPARISON OF THE SIGNS. The signs have a high degree of visual and phonetic similarity, in particular because they coincide in their first five letters, namely the verbal element 'alcar'. The only difference, that is the suffix 'se', is not enough to rule out the phonetic similarities (§ 53-54, 66, 67, 69-70). As the marks do not convey any meaning to the relevant public, their conceptual comparison is neutral (§ 71-72).

Given the high degree of similarity of the marks and the low or average degree of similarity of the goods and services, there is a LOC between the signs despite the higher level of attention paid by the relevant public (§ 80-82).

26/03/2020, T 570/19, Käsestrang III (3D), EU:T:2020:127

RESULT: Action dismissed

KEYWORDS: Non-distinctive, Shape mark

FACTS:

The applicant sought to register the three-dimensional sign Shape of a braided cheese as an EUTM for cheese and processed cheese in Class 29.

The examiner refused the mark as non-distinctive pursuant to Article 7(1)(b) EUTMR.



The applicant filed an appeal. The Board of Appeal (BoA) dismissed the appeal. It found that the relevant public consisted of end consumers of those goods in the European Union, and that the sign was devoid of distinctive character since the mark applied for represented the goods themselves and the form was simple and banal and did not differ significantly from the customs of the sector.

The applicant filed an action before the General Court (GC), relying on a single plea in law: infringement of Article 7(1)(b) EUTMR. The GC dismissed the action.

EUTM Application



SUBSTANCE:

INFRINGEMENT OF ARTICLE 7(1)(b) EUTMR.

It is sufficient that a ground for refusal exists in relation to a non-negligible part of the target public (11/07/2019, T 601/18, Fi Network, EU:T:2019:510, § 26). Therefore, regarding foodstuffs for everyday

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consumption, the BoA could rely on the perception of the end consumer and it was unnecessary to examine whether other consumers belonging to the relevant public, such as specialist trade circles, were also aware of that sign (§ 16).

In order to determine whether the shape of the contested sign is significantly different from the norms or customs of the sector, it is not required to prove that an identical or almost identical shape already exists on the market. However, it must be checked whether, in the industry in question, a large variety of shapes is present, and whether the mark will be considered only as a variant of those shapes (28/06/2019, T 340/18, SHAPE OF A FLYING V GUITAR (3D), EU:T:2019:455, § 35, 36) (§ 21).

The cheese market is characterised by many different cheese forms. As this shape is very simple, the relevant public will perceive it as a mere variant of the existing shapes and not as originating from a particular manufacturer (§ 22).

Insofar as the sector concerned is characterised by a wide variety of forms, the existing shapes of cheese on the market are a well-known fact. The BoA was allowed to take one of the shapes that are customary in the sector, namely the shape of the cheese strip, as a point of reference. There is no infringement of Article 95 EUTMR (§ 29).

Even if the shape differed from all other cheese shapes available on the market, the overall impression produced by the trade mark applied is not significantly different from the customary forms of cheese available in the sector. The sign is consequently devoid of distinctive character (§ 32).

Novelty or originality are not relevant criteria in the assessment of the distinctive character of a mark. It does not suffice that the mark applied for is original (§ 33).

26/03/2020, T 571/19, Käsestrang I (3D), EU:T:2020:128

RESULT: Action dismissed

KEYWORDS: Non-distinctive, Shape mark

FACTS:

The applicant sought to register the three-dimensional sign Shape of a braided cheese as an EUTM for cheese and processed cheese in Class 29.

The examiner refused the mark as non-distinctive pursuant to Article 7(1)(b) EUTMR.

The applicant filed an appeal. The Board of Appeal (BoA) dismissed the appeal. It found that the relevant public consisted of end consumers of those goods in the European Union, and that the sign

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was devoid of distinctive character since the mark applied for represented the goods themselves and the form was simple and banal and did not differ significantly from the customs of the sector.

The applicant filed an action before the General Court (GC), relying on a single plea in law: infringement of Article 7(1)(b) EUTMR. The GC dismissed the action.

EUTM Application



SUBSTANCE:
INFRINGEMENT OF ARTICLE 7(1)(b) EUTMR.

It is sufficient that a ground for refusal exists in relation to a non-negligible part of the target public (11/07/2019, T 601/18, Fi Network, EU:T:2019:510, § 26). Therefore, regarding foodstuffs for everyday consumption, the BoA could rely on the perception of the end consumer and it was unnecessary to examine whether other consumers belonging to the relevant public, such as specialist trade circles, were also aware of that sign (§ 16).



In order to determine whether the shape of the contested sign is significantly different from the norms or customs of the sector, it is not required to prove that an identical or almost identical shape already exists on the market. However, it must be checked whether, in the industry in question, a large variety of shapes is present and whether the mark will be considered only as a variant of those shapes (28/06/2019, T 340/18, SHAPE OF A FLYING V GUITAR (3D), EU:T:2019:455, § 35, 36) (§ 21).

The cheese market is characterised by many different cheese forms. As this shape is very simple, the relevant public will perceive it as a mere variant of the existing shapes, and not as originating from a particular manufacturer (§ 22).

Insofar as the sector concerned is characterised by a wide variety of forms, the existing shapes of cheese on the market are a well-known fact. The BoA was allowed to take one of the shapes that are customary in the sector, namely the shape of the cheese strip, as a point of reference. There is no infringement of Article 95 EUTMR (§ 29).

Even if the shape differed from all other cheese shapes available on the market, the overall impression produced by the trade mark applied for is not significantly different from the customary forms of cheese available in the sector. The sign is consequently devoid of distinctive character (§ 32).

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Novelty or originality are not relevant criteria in the assessment of the distinctive character of a mark. It does not suffice that the mark applied for is original (§ 33).

26/03/2020, T 572/19, Käsestrang II (3D), EU:T:2020:129

RESULT: Action dismissed

KEYWORDS: Non-distinctive, Shape mark

FACTS:

The applicant sought to register the three-dimensional sign Shape of a braided cheese as an EUTM for cheese and processed cheese in Class 29.

The examiner refused the mark as non-distinctive pursuant to Article 7(1)(b) EUTMR.

The applicant filed an appeal. The Board of Appeal (BoA) dismissed the appeal. It found that the relevant public consisted of end consumers of those goods in the European Union, and that the sign was devoid of distinctive character since the mark applied for represented the goods themselves and the form was simple and banal and did not differ significantly from the customs of the sector.

The applicant filed an action before the General Court (GC), relying on a single plea in law: infringement of



Article 7(1)(b) EUTMR. The GC dismissed the action.

EUTM Application



SUBSTANCE:
INFRINGEMENT OF ARTICLE 7(1)(b) EUTMR.

It is sufficient that a ground for refusal exists in relation to a non-negligible part of the target public (11/07/2019, T 601/18, Fi Network, EU:T:2019:510, § 26). Therefore, regarding foodstuffs for everyday consumption, the BoA could rely on the perception of the end consumer and it was unnecessary to examine whether other consumers belonging to the relevant public, such as specialist trade circles, were also aware of that sign (§ 16).

In order to determine whether the shape of the contested sign is significantly different from the norms or customs of the sector, it is not required to prove that an identical or almost identical shape

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already exists on the market. However, it must be checked whether, in the industry in question, a large variety of shapes is present, and whether the mark will be considered only as a variant of those shapes (28/06/2019, T 340/18, SHAPE OF A FLYING V GUITAR (3D), EU:T:2019:455, § 35, 36) (§ 21).

The cheese market is characterised by many different cheese forms. As this shape is very simple, the relevant public will perceive it as a mere variant of the existing shapes and not as originating from a particular manufacturer (§ 22).

Insofar as the sector concerned is characterised by a wide variety of forms, the existing shapes of cheese on the market are a well-known fact. The BoA was allowed to take one of the shapes that are customary in the sector, namely the shape of the cheese strip, as a point of reference. There is no infringement of Article 95 EUTMR (§ 29).

Even if the shape differed from all other cheese shapes available on the market, the overall impression produced by the trade mark applied for is not significantly different from the customary forms of cheese available in the sector. The sign is consequently devoid of distinctive character (§ 32).

Novelty or originality are not relevant criteria in the assessment of the distinctive character of a mark. It does not suffice that the mark applied for is original (§ 33).



26/03/2020, T 343/19, Sonance / Conlance, EU:T:2020:124

RESULT: Action dismissed

KEYWORDS: Complementary goods and services, Dissimilarity of the goods and services, Likelihood of confusion, Phonetic similarity, Similarity of the signs, Visual similarity

FACTS:

The applicant sought to register the word mark SONANCE as an EUTM for goods in Class 9.

Pursuant to Article 8(1)(b) CTMR an opposition was filed. It was based on the earlier German word mark conlance, registered for goods and services in Classes 9, 35-38, 41 and 42. The Opposition Division (OD) rejected the opposition.

The opponent filed an appeal. The Board of Appeal (BoA) dismissed the appeal, finding no likelihood of confusion (LOC).

The opponent filed an action before the General Court (GC), relying on a single plea in law: infringement of Article 8(1)(b) EUTMR. The GC dismissed the action.

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SUBSTANCE:

INFRINGEMENT OF ARTICLE 8(1)(b) EUTMR.

COMPARISON OF GOODS AND SERVICES. The contested leather cases for tablet computer, leather cases for mobile phone, leather cases for smart phone, flip covers for mobile phone, flip covers for smart phone, which were found to be dissimilar to the goods of the earlier mark, cannot be considered essential or important for the use of computers covered by the earlier mark (§ 30). They have a different nature and purpose, are not manufactured by the same companies and are not in competition (§ 28).

COMPARISON OF SIGNS. Consumers will generally pay greater attention to the beginning of a mark than to its end: the first part of a mark normally has a greater impact, both visually and phonetically, than the last part (19/06/2018, T 859/16, EISKELLER (fig.) / KELER et al., EU:T:2018:352, § 68). An identical sequence of four letters at the end of the sign will not alter that conclusion (§ 39-40). The degree of similarity is, at most, average (§ 42). Although there is identity between the sequence of the three vowels 'o', 'a', and 'e', the German public will not pronounce the vowel 'e' and so the phonetic difference of the initial elements of the two signs is clearly perceived. The similarity between the signs is weak (§ 49-50). The signs are conceptually dissimilar (§ 54).



LIKELIHOOD OF CONFUSION. Even though some of the contested goods are identical to those of the earlier mark, overall there is no LOC, bearing in mind that the distinctive character of the earlier mark is normal (§ 62, 64).

26/03/2020, T 752/18, MARCHIO TRIDIMENSIONALE, EU:T:2020:130

RESULT: Action dismissed

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

FACTS:

The applicant sought to register the three-dimensional sign as an EUTM for goods in Classes 11 and 16, namely lamp bases, bases adapted for the mounting of lamps, terrestrial globes; celestial globes; geographical maps; books; atlases.

The Office partially refused to register the EUTM application because it was devoid of distinctive character pursuant to Article 7(1)(b) CTMR.

The applicant filed an appeal. After having invited the applicant to submit its observations, the Boards of Appeal (BoA) dismissed the appeal on the basis of Article 7(1)(e)(ii) CTMR, finding that the sign consisted exclusively of the shape of the product, or a part of it, necessary to obtain a technical result.

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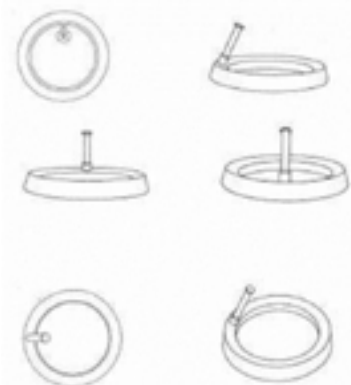
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The applicant filed an action before the General Court (GC), relying on a single plea in law: infringement of Article 7(1)(e)(ii) CTMR.

EUTM



SUBSTANCE:
INFRINGEMENT OF ARTICLE 7(1)(e)(ii) CTMR.

According to Article 7(1)(e)(ii) CTMR, signs which consist exclusively of the shape of goods necessary to obtain a technical result are not to be registered (§ 25).

The sign applied for coincides with the shape of the goods necessary to obtain a technical result. The essential characteristics of the three-dimensional



sign (a basic ring structure and a cylindrical inclined body) are for supporting the lamp or the globe and acting as a pivot between the basic ring structure and the lamp or globe, respectively (§ 24-27).

The existence of other shapes that could achieve the same technical result does not impede the application of Article 7(1)(e)(ii) CTMR. When examining the functionality of a sign consisting of the shape of the goods, once the essential characteristics of the sign have been identified, it is only necessary to assess whether those characteristics perform the technical function of the product concerned (§ 32-33).

The shape of the product does not incorporate a major non-functional element, such as a decorative or imaginative element that plays an important role in that shape (§ 41-44).

02/04/2020, T 546/19, *Forme d'un récipient doré avec une sorte de vague (3D)*, EU:T:2020:138

RESULT: Action dismissed

KEYWORDS: Non-distinctive, Shape mark

FACTS:

The applicant sought to register the three-dimensional sign as an EUTM for butter in Class 29. The examiner refused the mark as non-distinctive pursuant to Article 7(1)(b) EUTMR.

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The Board of Appeal (BoA) dismissed the appeal. The BoA found that the sign was devoid of distinctive character since it was not significantly different from the norms and customs in the sector of goods in the same category, namely packaging for foodstuffs that are consumed together with butter, such as milk, jam or tomato pulp. It would therefore be perceived as a simple variant of similar packaging and not as a trade mark.

The applicant filed an action before the General Court (GC), relying on a single plea in law: infringement of Article 7(1)(b) EUTMR.

EUTM Application



SUBSTANCE:

INFRINGEMENT OF ARTICLE 7(1)(b) EUTMR.

Novelty and originality are not relevant criteria when assessing the distinctive character of a mark. The mark must differ substantially from the basic shapes of the product in question that are commonly used in the trade and not look like a mere variant of those shapes. Furthermore, it is not necessary to provide evidence of the usual character of the shape in the



trade (07/10/2015, T 244/14, Shape of a face in the form of a star (3D), EU:T:2015:764, § 38) (§ 24).

It does not follow from that case-law that it is necessary, for the purposes of comparison, to systematically restrict the sector to the actual goods for which registration is sought. Depending on the nature of the goods in question and the trade mark applied for, it may be necessary, for the purposes of assessing whether or not the trade mark is devoid of any distinctive character, to take into consideration a wider sector (12/01/2006, C 173/04 P, Standbeutel, EU:C:2006:20, § 32) (§ 27).

In particular, when the trade mark for which registration is sought consists of the three-dimensional shape of the packaging of the goods, the relevant norm or customs may be those that apply in the sector of the packaging of goods that are of the same type and intended for the same consumers as those goods for which registration is sought (12/01/2006, C 173/04 P, Standbeutel, EU:C:2006:20, § 33-34) (§ 28).

The BoA rightly referred to the existence on the market of packaging very similar to the trade mark applied for, on the one hand for butter and on the other hand for other goods used at the same time as butter, in particular at breakfast time, such as milk, tomato and jam (§ 30 32).

With regard to the material and gold colour of the trade mark applied for, it is not clear from the

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application for registration that the container is specifically made of aluminium (§ 36). Moreover, these elements are not capable of demonstrating that the mark significantly differs from the norm or customs of the sector (§ 37).

Whether or not a sign may be registered as an EUTM must be assessed solely on the basis of the EUTMR, as interpreted by the EU judicature, and not on the basis of previous decision-making practice. The BoA did not fail to state adequate reasons (§ 52-62).

02/04/2020, T 307/19, Innerbarend, EU:T:2020:144

RESULT: Action dismissed

KEYWORDS: Descriptive

FACTS:

The proprietor registered the word mark Innerbarend for goods in Class 12, such as handlebars.

The examiner refused the application pursuant to Article 7(1)(b) and (c) in conjunction with Article 7(2) EUTMR.

The Board of Appeal (BoA) dismissed the appeal. It found that the trade mark applied for was descriptive for handlebars on the market for bicycles that allowed a more comfortable hand position and a more aerodynamic position of the arms and the torso.

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. The GC dismissed the action as manifestly devoid of any foundation in law.

SUBSTANCE:

(i) INFRINGEMENT OF ARTICLE 7(1)(c) EUTMR.

The relevant public consists of English-speaking general consumers (not disputed) (§ 20).

The trade mark is composed of three English words, namely 'inner', 'bar' and 'end', which the relevant public understands as meaning 'inside', 'handlebar' and 'end piece'. In addition, the terms 'bar end' and 'barend' are understood as 'handlebar end' or 'grip' which, since their introduction in the 1990s, are typically mounted on handlebars (not disputed) (§ 21).

The neologism, composed of elements, each of which is descriptive of characteristics of the goods, is itself descriptive of the characteristics of those goods since there is no perceptible difference between the neologism and the mere sum of its parts (§ 24-28). Therefore, the sign is descriptive for the goods (§ 40).

(ii) INFRINGEMENT OF ARTICLE 7(1)(b).

The plea is rejected as ineffective since one absolute ground for refusal is sufficient (§ 41).

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New Decisions from the Grand Board

19/11/2019, R 1508/2019-5, Zara

Outcome: No decision on application

Norms: Article 139(2)(b) EUTMR

Keywords: Word mark

Summary:

On 19 November 2019, the Fifth Board of Appeal decided to refer case R 1508/2019-5 Zara to the Grand Board.

This case concerns the correct handling of a request for conversion and when and how the Office must put into action the exception foreseen under Article 139(2)(a) EUTMR. This exception might raise questions of jurisdiction related to whether it is the EUIPO or the national offices that have to deal with the verification of the conditions of use. The case also concerns the observation of the principle of sound administration by the Office.

There are very few decisions of the Boards of Appeal on conversion and none has ruled on the specific subject matter contained in the present appeal.

In the light of the importance of the legal issue concerned, the case was remitted to the Grand Board which should take a decision in order to establish a harmonised approach in similar cases.



Pursuant to Article 37(6) EUTMDR, groups or bodies representing manufacturers, producers, suppliers of services, traders or consumers which can establish an interest in the result of this case may submit written observations within two months following the publication of the interim decision of the Fifth Board in the EUIPO OJ on 4 May 2020.

New Decisions from the Boards of Appeal

08/04/2020, R 1791/2019-1, SWISS ARMED FORCES (fig.)

EUTM application



Figurative mark – Non-distinctive – IR designating the EU – Article 7(1)(b) EUTMR – Decision confirmed – IR designating EU rejected

The figurative mark designating the EU was refused on the basis of Article 7(1)(b) EUTMR, for goods and

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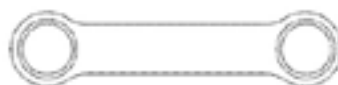
services in Classes 24 and 25. In the examiner's view, the shape of the sign did not differ from other similar shapes for the relevant goods but it appeared to be a variant of those. The non-existence of any unusual combination or of a striking element, resulted in the rejection of the application.

The Board confirms that the sign is devoid of distinctive character. Firstly, the word element of the sign 'SWISS armoured forces' is not clearly visible and occupies a limited position on the surface of the pattern at hand. As such, it cannot constitute an essential characteristic because of its minor impact in the sign. Secondly, the specific camouflage pattern of the sign at hand, will be understood by the relevant public as being used for aesthetic purposes and not in order to distinguish the goods and services of the undertaking from those of other undertakings. Lastly, in relation to the applicant's claim that similar marks have been granted registration by the Office and similar signs have been granted registration in other countries such as the United States and China, the Board notes, on the one hand, that it is not bound by decisions of the EUIPO's lower instances and, on the other hand, the registrability of an EU trade mark is based solely on the EU trade mark regime.



16/03/2020, R 757/2019-5, DEVICE OF TWO CIRCLES WITHIN AN ELONGATED BAND (fig.)

EUTM application



Figurative mark – Functional element – Article 7(1)(e)(ii) EUTMR – Decision confirmed – Application rejected

The applicant sought to register the figurative mark at hand for goods and services in Class 25. The application was rejected pursuant to Article 7(1)(b), combined with Article 7(2), EUTMR on the premise that the mark was devoid of any distinctive character.

The Board endorses the examiner's opinion that the mark at hand is devoid of distinctive character. The sign applied for falls within the provision of Article 7(1)(e)(ii) EUTMR, the essential characteristics of the sign serve a technical function, specifically in the hanging of an item of clothing such as a jacket. As a result, the possibility of hanging a piece of clothing in a secure way on a hook performs a technical function of the goods at hand. Moreover, even if there are technical alternatives for relevant

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competitors it does not preclude the application of Article 7(1)(e)(ii) EUTMR since if such a sign were registered, there would be an impairment in relation to the goods that serve the same technical function. The fact, that the sign consists of two decorative elements i.e. the two smaller inner circles, does not alter the fact that the sign serves a technical function since those inner circles are arbitrary minor elements in the mark applied for.

01/04/2020, R 1714/2019-4, **Royal Bavarian beer**

Word Mark – Distinctive element – Descriptive – Article 7(1)(b) EUTMR – Decision Confirmed – IR designating the EU partially rejected

The sign 'Royal Bavarian Beer' in Class 32 was rejected on the basis of Article 7(1)(b) and (c) EUTMR as it was found devoid of any distinctive character as well as being descriptive.

The Board confirms the contested decision. The word element 'Bavarian' designates the geographical origin of the goods while the word 'royal' describes their superior quality. As such, the mark as a whole informs about the quality, geographical origin and type of goods at hand, thus, constituting the descriptiveness of the mark. The evaluation of the word element 'royal' is assessed as regards the perception of the English-speaking public, following the examiner's opinion. The word 'royal' also serves



a promotional purpose concerning the quality of the goods and services at hand and does not allow the sign applied for to distinguish the undertaking from other ones, besides their geographical origin.

30/03/2020, R 81/2019-4, **Tekbond / TECHNOBOND (fig.)**

Earlier trade mark



Contested sign

TEKBOND

Word mark – Visual similarity – Similarity of the goods and services – Likelihood of Confusion – Article 8(1)(b) EUTMR – Decision confirmed – Opposition allowed

The opposition based on Article 8(1)(b) EUTMR was upheld in its entirety, namely for goods in Classes 1, 16 and 17, thus, rejecting the application for the contested sign. Due to the visual and aural similarities, as well as the goods at hand, such

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as 'plastic substances', a likelihood of confusion between the two marks was established.

The Board endorses the Opposition's Division opinion. The comparison between the two marks and the overall impression given by them, is considered from the perception of the Spanish public. The word element 'TECHNO' of the earlier mark is understood by the relevant public as referring to 'technology', while 'BOND' is not associated with a specific meaning. Visually, the two signs share the letters 'TE' and 'BOND', which comprise the initial and end elements of both signs. The contested sign thus includes six out of the ten letters of the earlier mark. Their differences, in the letters 'NO' as well as in the graphic elements and colours of the earlier trade mark, do not alter the visual similarity between the two marks. Aurally, the signs are similar to an average degree since the pronunciation of the signs only differs in the middle letters 'NO' which do not have the same impact as the initial and end letters of the two words. Moreover, the Board notes that the Spanish public will not associate either mark as a whole with a specific concept thus resulting in a neutral conceptual comparison between the two marks. Therefore, in light of the overall similarity between the signs and the goods at hand, a likelihood of confusion is established and the contested decision is confirmed.



17/04/2020, R 1132/2019-4, [Champagnola](#) / [Champagne](#)

Earlier protected sign

CHAMPAGNE

Contested sign

Champagnola

Word mark – Geographical origin – Article 8(6) EUTMR – Decision annulled – Opposition allowed

The opposition based on Article 8(6) EUTMR, in conjunction with various provisions of other EU Regulations relating to the 'Protected Designation of Origin' (PDO) and French law, for goods in Classes 30 and 40 was rejected. The Opposition Division found that the contested goods which were 'foodstuffs' or related to 'foodstuffs' could not be compared to the earlier mark's goods which were 'wines' because of their different natures. Moreover, the fact that the two marks coincided in the letters 'Champagn(...)' was considered insufficient in order to establish the connection between the contested goods and services with the protected product 'wine coming from the Champagne region'.

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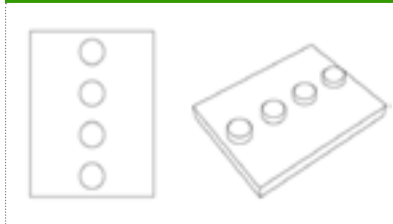
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The Board disagrees with the contested decision. Regulation No 1308/2013 provides protection against identical use or evocation either against comparable products or against other goods and services, only if the contested sign 'exploits the reputation of the PDO'. The essential function of a geographical indication is to protect the geographical name against products that do not have the specific geographical origin. Furthermore, the contested sign begins with 'Champagn' and can be seen as a derivative form of the word 'Champagne'. This would fall under the concept of 'evocation' in the sense that use of the term 'Champagn' is used in order for the consumer to make the connection with the specific geographical designation. The evocation principle should be assessed for both comparable and different goods. Even though, the contested goods are mainly breakfast food items they can all be consumed with sparkling wine in order for them to taste better, and will be associated as such by the relevant consumer. On the basis of the aforementioned, the Board concludes that since the exploitation of the reputation of 'Champagne' is evident as regards the contested sign, it annuls the contested decision and upholds the opposition.



10/04/2020, R 31/2018-3, **Building blocks from a toy building set**

Contested design 1664338-0006



Technical function of the design – Article 8(1) CDR – Decision annulled – RCD invalidated

The Design Division rejected the application for a declaration of invalidity as unfounded. It was noted that the features of the appearance of the RCD, such as the shape of the block showed the creativity of the designer.

The Board does not endorse the contested decision. In the present case the appointment of an expert is not necessary because the technical information that the expert would provide is already known by both parties and the Board. The applicability of Article 8(1) CDR is based on several factors, specifically (i) the identification of the product in which the design is incorporated, (ii) its technical function, (iii) the features of the appearance of the product, (iv) determine that considerations other than the need for that product to fulfil its technical

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function. Firstly, the product 'building block from a toy building set' clearly identifies the product i.e. a brick and shows its purpose, which is to build objects with those bricks. Secondly, the technical function that must be fulfilled is the capability of the bricks to be assembled with each other in order to form a larger toy building. Thirdly, all the features of the appearance of the contested RCD such as the row of studs on the upper face of the brick or the thickness of the wall of the brick are solely dictated by the technical function of the brick, which is to assemble and disassemble them from the rest of the bricks of the set. As a result, the contested decision is annulled and the contested design is declared invalid.

19/03/2020, R 2449/2018-3, *Pendenti*

Earlier word mark

PIANEGONDA

Contested design 2100-0001



Conflict of design with prior trade mark – Article 25(6) CDR – Decision annulled – RCD partially invalidated

The Design Division rejected the request of the invalidity applicant to maintain the design in an amended form based on Article 25(6) CDR. The application for invalidity was based on earlier EU trade mark 'PIANEGONDA'.

Based on Article 25(6) CDR 'a registered Community design that has been declared invalid may be maintained in an amended form, if that form complies with the requirements of protection'. The Board indicates that the invalidity applicant has not contested the validity of the registered design but the use of the sign, which is in breach of its exclusive rights based on the trade mark 'PIANEGONDA'. While the invalidity applicant's request for the design holder to maintain the design in an amended form was rejected, the Board notes that the above request should have been granted since it balances the rights owned by the two parties. In order for the amended form of the design to be accepted, the latter must fulfil the requirements of protection as a design while preserving its identity. In other words, the new design must comply with novelty and individual character. In the Board's opinion the invalidity of the mark will not affect the identity of the design, which is primarily determined by the heart shape of the jewel and its minimalistic stylisation. As a result, the decision is annulled, the contested

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RCD is declared invalid insofar as it uses the trade mark PIANEGONDA, and a partial invalidity (the RCD is declared invalid insofar as it uses the trade mark PIANEGONDA) on the basis of Article 25(6) CDR is accepted.

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