

Alicante News

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The EUIPO Academy Learning Portal

In our knowledge economy, intellectual property is fundamental. For businesses of whatever shape and size, for creators and innovators across a variety of disciplines, for students – the creators and innovators of tomorrow – intellectual property plays a fundamental role.

But intellectual property learning content can often be difficult to find and access, making it harder for those who want to know more about IP, at whatever level, to get the information they need.

This is where the [EUIPO Academy Learning Portal](#) comes in. It's a single access point to a huge variety of IP webinars, training courses, and other learning materials, on a wide variety of IP topics. Courses are free to access – currently there are nearly 900 courses in the portal – and many of them come with a certificate.

The content is aimed at all levels of IP knowledge – basic, intermediate and advanced – and is created by experts from inside and outside the EUIPO. In addition, to reinforce the EUIPO's SME Programme, the EUIPO Academy has created a [special SME learning area](#), which includes resources that are specially tailored for SMEs and their IP knowledge needs, such as [trade mark licensing](#), [case studies on the use of IP in industry](#), and [trade secrets](#). More



SME resources are being developed in line with the EUIPO's focus on SMEs in its Strategic Plan 2025.

For IP professionals, the course offer is extensive and geared towards being as up to date as possible. Current case law is analysed in webinars on (for example) the [Brompton case](#), [IP rights in an entertainment context](#), and [recent case law on geographical indications](#). Regular updates on the decisions of the Trimester at the EUIPO [Boards of Appeal](#) and the [Court of Justice and the General Court](#) form a key part of the catalogue. Expert analysis on issues like [design case law](#), [the assessment of the distinctiveness of shape marks at the EUIPO](#), [belated evidence](#), and the [distinctive functioning of EUTM courts](#) all help to keep practitioners and IP experts up to date with the Office's practice, as well as developments in the wider EU IP ecosystem.

In collaboration with EU national and regional IP offices, and through the European Cooperation function of the EUIPO, a [whole range of video tutorials](#) has been produced on IP issues, [in the language of each Member State](#), to give clear, basic information to would-be applicants at national or European level. With tutorials on [trade marks](#), [designs](#), and [the transposition of the new Directive in each EU Member State and its effects](#) all presented by experts from each of the relevant national IP offices, they represent a valuable source of information for users of the entire EU IP system.

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The learning catalogue is not just confined to trade mark and design issues. There are popular courses on [plant variety rights](#), [money laundering](#) and [copyright piracy](#), [artificial intelligence](#), and even on [the intricate technical bundle of IP and non-IP rights in video games](#). The portal is, in other words, a valuable resource for IP professionals, universities, users, businesses and students, who want to broaden and deepen their knowledge of IP for whatever purpose.

Underpinning all this activity is the Tuesday Webinar series at the EUIPO, where webinars are streamed live before being placed on the portal (and at which questions can be asked). This combination of live and recorded learning tools allows users to plan their learning needs around a time that suits them, in order to be as flexible as possible.

Regular updates on all our webinars are published every month in Alicante News, and the entire catalogue can be accessed and browsed through at any time at euipo.europa.eu/knowledge.

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Virtual meeting with CNIPA and signature of Agreement on exchange of trade mark information

On 25 September, Mr Shen Changyu, Commissioner of the China National Intellectual Property Administration (CNIPA) and Mr Christian Archambeau, Executive Director of the European Union Intellectual Property Office (EUIPO) held a virtual high-level meeting to discuss IP cooperation matters, namely to review the state of play of the bilateral cooperation activities with CNIPA, the IP Key China project implementation as well as the cooperation within the TM5 and ID5 forums.

This meeting also offered the occasion for the signature of the Agreement on the exchange of trade mark information, with which the CNIPA and the EUIPO agreed on the mutual exchange of Chinese national trade mark and European Union trade mark data. This Agreement also sets the basis for the CNIPA to share Chinese trade mark data on the TMview platform, making it available for consultation 24/7 worldwide.



Extended Working Groups on CP 11 and CP 12

As a result of the joint efforts of the CP11 Working Group members, MS IPOs, User Associations and non-EU IPOs, the final drafts of both work streams of the **CP11: New types of marks – examination of formal requirements and grounds for refusal** were approved in the Extended Working Group meetings which took place virtually on 7 and 8 September.

Similarly, the Extended Working Group meeting for **CP12: Evidence in trade mark appeal proceedings** met virtually on 9 September, where the participants, including representatives from internal and external Appeal Bodies, reached strong consensus on the final Common Practice document.

During the meetings, the participants addressed the feedback received from stakeholders through the Confirmation Forms during the final consultation period that ended on 6 July and incorporated the amendments that were accepted.

The CP11 and CP12 Common Practices will be presented for acknowledgement at the Liaison Meeting on Trade Marks on 7 October, and subsequently brought to the Management Board Meeting for adoption in November this year.

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The EUIPO takes this opportunity to again thank all the different stakeholders for their valuable dedication, collaboration, and investment in improving the European trade mark landscape.

Brexit: End of the transition period – Updated information

The EUIPO has updated the [Brexit section](#) on its website ahead of 31 December 2020, the day on which the UK's transition period after Brexit will end, as stipulated in the [Withdrawal Agreement](#) concluded between the EU and the UK.

As regards the situation from 1 January 2021, the Brexit section contains the relevant information on how the EUIPO intends to handle the circumstances that the EUTM and RCD Regulations will cease to apply to the UK as from the end of the transition period.

For more information, please consult the [relevant section on our website](#).

European Cooperation: front and back office integration in Romania

On 21 September 2020, the Romanian State Office for Inventions and Trademarks (OSIM) successfully integrated its front office and back office systems. This will allow trade marks and designs filed in the



front office to be automatically available in the back office application without any need for manual intervention.

This implementation is aligned with the EUIPO's guidelines, bringing enhanced benefits to users by reducing working times, avoiding potential data errors due to manual data handling, and improving the overall user experience. The OSIM and the EUIPO will continue to work together to further enhance both the front office and back office applications in 2020 and under the EUIPO's Strategic Plan 2025.

European Cooperation: Enhanced back office in the Greek Trademark Office (GGE)

The Greek Trademark Office (GGE), with the support of the EUIPO's European Cooperation Projects, has implemented several functional enhancements to its Back Office tool.

The upgrade, which took place on 9 September 2020, is designed to enhance user experience by simplifying back office communications, letters and search functionalities in order to **increase efficiency and operational effectiveness** when using the system.

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European Cooperation: Polish Patent Office (PPO) upgraded its back office system

The Polish Patent Office (PPO), with the support of the EUIPO's European Cooperation Projects, has upgraded its back office system.

The upgrade, which took place on 9 September 2020, is designed to increase the efficiency, operational effectiveness and security of the PPO's back office system, as well as to make maintenance easier.

The software package Back Office tool aids the management of tasks related to the examination and registration of trade marks and designs.

European cooperation: kick-off event in the newly certified 'Authenticity' of Thessaloniki

Following the recent certification of Thessaloniki (Greece) as the first **Authenticity** under the framework of the European Cooperation Project (ECP8) 'European Network of Authenticities', the [Hellenic Industrial Property Organisation](#) (OBI) and the [Municipality of Thessaloniki](#) held the [project kick-off event and media launch](#) on 11 September 2020.



The event was the first in a series of IP-related, awareness-raising activities that will take place locally over the next two years in the newly certified Authenticity.

The Executive Director of the EUIPO, Christian Archambeau, who joined the event via video, said:

"Authenticities is specifically designed to empower authorities at a local level to engage citizens and other stakeholders in the fight against counterfeits. The aim is to increase IP awareness at a local level and enhance the protection of these rights, which are so important for creating the quality, sustainable jobs that will help us recover from the current health and economic crisis."

The slogan of the Authenticities project "What is authentic is eternal" was presented at the event, as was the AUTHENTICITY THESSALONIKI app, which gives information on the project and allows users to make complaints about counterfeiting issues that occur in the city. These complaints are then re-directed to the municipal police for further action. The app has been developed for both IOS and Android.

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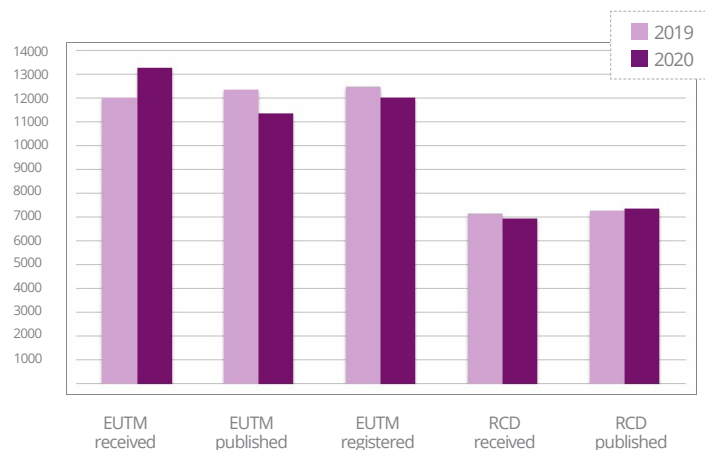
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Statistical Highlights

Monthly statistical highlights August*	2019	2020
European Union Trade Mark applications received	12 006	13 241
European Union Trade Mark applications published	12 359	11 346
European Union Trade Marks registered (certificates issued)	12 465	12 008
Registered Community Designs received	7 138	6 935
Registered Community Designs published	7 342	7 253

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





2020 User Satisfaction Survey

The results of the 2020 [User Satisfaction Survey](#) are now available on the EUIPO website. One of main feedback mechanisms used by the EUIPO, this survey aims to measure user satisfaction with our products and services, identify areas for improvement and facilitate change in line with evolving customer needs and expectations.

As in the last survey of 2018, the overall level of satisfaction with our core services is sustained at 88%. Satisfaction with our RCD and Register services score particularly well, at 93% and 91%, respectively. EUIPO Key Users (at 92%) and representatives (at 93%) also report high levels of overall satisfaction, the latter regaining its former high of 2015 while businesses filing directly with us continue to be less satisfied. Further improvements include satisfaction with the service provided by the EUIPO's examiners and with the Key User Programme, both of which report 2% increases on the last survey (at 86% and 83%, respectively).

Overall, EUIPO customers are satisfied to a high degree and the EUIPO is considered to be more accessible, efficient and transparent. We are delighted that the customer-driven actions inspired since the last survey have led to these positive outcomes.

Of course, there is room for improvement. Improvements related to the quality of Office products such as consistency in decisions will remain a priority and will be based on different feedback sources including the satisfaction survey and SQAP (Stakeholder Quality Assurance Panels) and the results of the internal quality checks. Based on the segmented approach as established in the newly launched SP2025, future actions envisage making our products and services more customer-centric, more adapted to the specific needs of our many different customer types. To keep satisfaction high we will continue to count on customer feedback as the motor to drive progress.

AG2Review: new quality initiative for Absolute Grounds

On 1 October, in accordance with [Decision No EX-20-06](#), the EUIPO is launching the 'AG2Review' initiative to enhance quality and consistency in absolute grounds examination. AG2Review is a peer-to-peer review of the Office's AG objection letters before their notification to the trade mark applicant. Letters that have been peer reviewed are easily identifiable by the presence of the AG2Review stamp and the reviewer's name. However, the responsibility for objecting to a trade mark remains exclusively with the examiner signing the objection letter.

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This initiative is a result of the [User Satisfaction Survey](#) and user feedback received by the Office from the [Stakeholder Quality Assurance Panel \(SQAP\)](#). It is an expression of the Office's continuous commitment to improvement and the provision of better services to its users.

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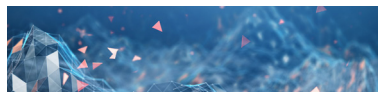
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EUIPO joins the WIPO Digital Access Service (DAS)

On 11 July 2020 the EUIPO became a participating intellectual property (IP) office of the WIPO Digital Access Service (WIPO DAS) as an **Office of First Filing**. Therefore, since that date RCD applicants have been able to take advantage of the service by agreeing to allow their RCD application to be exchanged via the system, and by requesting other offices to retrieve the priority documents as a participating member of the exchange service using a given WIPO DAS access code.

On 12 September 2020 the EUIPO became an **Office of Second Filing** allowing applicants to submit the documents required for priority claims by way of a reference to a WIPO DAS access code provided by the Office of First Filing.

What is WIPO DAS?

WIPO DAS (Digital Access Service) is an electronic system allowing priority documents and similar documents to be securely exchanged between participating IP offices.

The system enables applicants and offices to meet the requirements of the Paris Convention for the exchange and certification of priority documents in an electronic environment.

As the Paris Convention allows for countries to request certified copies of priority documents, WIPO DAS permits such documents to be exchanged without the necessity of requesting and then sending multiple certified paper copies, thus allowing participating offices to transmit and to access unpublished documents, with the security of knowing that the transmission has been permitted by the applicant or other authorised person.

Furthermore, WIPO DAS ensures that documents which are not yet publicly available remain confidential.

How does it work?

The system allows applicants to make certified priority documents available in a secure manner without the need to supply paper copies. Applicants can do this by asking the office in which priority is claimed (Office of Second Filing) to download a copy of the document from which it is claimed (Office of First Filing).

The way in which the Office of First Filing provides the documents requested depends on the requirements of the office. However, the request will result in the provision of an access code, which will permit the documents to be accessed by the Office of Second Filing when the code is provided to that office.

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The applicant then sends the access code to the Offices of Second Filing so that the documents can be accessed.

The system allows applicants to make their priority documents available to the Office of Second Filing. It does not mean that Offices of Second Filing have automatic access to certified copies for the purposes of priority examination: access must be granted by the applicant first. This means that access is granted to documents individually.

The advantages are that:

- it is a secure way for applicants to make priority documents available without having to request and send paper copies, or have them certified;
- it is a secure mechanism for uploading and downloading documents;
- applicants can control which offices have access to documents;
- offices can retrieve documents when needed;
- the confidentiality of documents which are not yet publicly available is ensured.

EUIPO as a participating IP office

As an Office of First Filing the Office allows applicants to request that their application be registered in the WIPO DAS system. The Office does this by allowing applicants to make such a request by way of a simple checkbox in the e-filing form.



The Office registers the application in WIPO DAS by providing the mandatory data elements in the registration request including IP type, priority office code, priority application number, priority application filing date and access code.

By checking the box to request the inclusion of the application in WIPO DAS, the applicant will automatically receive the access code, which they can then cite when claiming priority from the application in subsequent filings before other offices party to the WIPO DAS system.

As an Office of Second Filing the Office allows that applicants claiming priority can submit their priority documents by way of reference, using an access code, to a priority document registered in WIPO DAS, which is available to download immediately, or upon request.

It is important to note that priority documents can only be retrieved immediately if they are already available in WIPO DAS. Otherwise they need to be requested by the EUIPO as the Office of Second Filing to the Office of First Filing. In this latter scenario it can take 24 hours or more for priority documents to be made available, which may result in delays for fast-track applications.

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When filing an RCD application electronically using the EUIPO's e-filing system, where the applicant claims the priority of one or more previous applications registered in WIPO DAS, the applicant must provide the relevant details for the priority claim, namely, the file number, filing date and country of the previous application, together with the WIPO DAS access code in the pertinent fields in the application form in order for the Office to access and download those priority documents, as the Office of Second Filing. The WIPO DAS access code must be supplied at the time of filing, in order to substantiate a claim using the WIPO DAS system. Otherwise a copy of all priority documents must be submitted in due time (within 3 months of either the filing date or, as the case may be, receipt of the declaration of priority) along with, where applicable, translations thereof.

More information

The [guidelines on the Examination of Applications for Registered Community Designs](#) have been updated and provide more information on the requirements for priority claims before the EUIPO.



New and upcoming webinars from the EUIPO Academy

The following webinars are now available to watch again on the [EUIPO Academy Learning Portal](#):

EUTM courts: the distinctive functioning of a characteristic court

In the European Union, unitary trademarks valid throughout the EU have been established through the EU trade mark regulation (EUTMR), which has its own jurisdictional regime. The EUTMR does not establish a separate court system, but for infringement actions it grants international jurisdiction to certain specified courts, the EU trade mark courts, which are national courts functioning as EU courts in the adjudication of disputes involving unitary EU trade mark rights. This recorded webinar provides an overview and analysis of how these courts were established, as well as the (international) jurisdiction and procedure to follow before these courts in disputes concerning the validity and infringement of EU trade marks.

[Access the webinar here.](#)

Copyright Protection For AI Production? An EU Law Perspective

Recent years have witnessed incredible growth in the field artificial intelligence (AI), in step with rapidly expanding use of the same in creative industries. There is an ongoing debate as to whether copyright protection can apply to 'works' created by or with

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the help of AI. The answer to this question will shape the future of this industry. In this recorded webinar, we deliver an EU copyright law perspective on that issue, drawing upon recent developments of EU secondary law and the case law of the European Court of Justice.

[Access the webinar here.](#)

Artificial Intelligence and Change Management

Artificial intelligence (AI) is reshaping the business environment as a growing number of companies already experience its benefits. However, the implementation of AI often falls short of expectations. This recorded seminar examines the organisational factors that play a critical role in implementing AI and discusses a change management model to successfully implement AI technologies.

[Access the webinar here.](#)

Decision of the Trimester of the EUIPO Board of Appeal

This recorded webinar provides an overview of the most relevant decisions of the EUIPO Boards of Appeal during the third quarter of 2020.

[Access the webinar here.](#)

Trade secrets

This recorded webinar will examine the role of trade secrets in the innovation process of SMEs and businesses. You will find out how businesses can thrive using trade secrets and understand what the advantages and limitations are compared to other



mainstream intellectual property rights.

[Access the webinar here.](#)

Languages and trade mark examination:

In case C 142/19, the General Court (GC) confirmed that evidence provided by the cancellation applicant was sufficient to demonstrate the descriptiveness of the term 'PLOMBIR' for ice creams, based on this word being a transliteration into Latin script of the characters of the word 'Пломбир', meaning 'ice cream' in Russian. According to the Court, this term would be understood by the relevant Russian-speaking consumers, including that part of the general public within the EU that understood or spoke Russian in Germany and the Baltic States. For a closer look at language issues (non-distinctiveness, descriptiveness, generic signs, etc.) and language diversity within the European Union – touching on linguistic minorities, the influence of Europe's colonial past and the effects of constant migration, follow the webinar at:

[Languages and Trade mark examination.](#)

Upcoming webinars:

The following webinars are coming up in the [EUIPO's Tuesday Webinar series](#) :

- New application for action forms and the EORI (Economic Operators Registration and Identification number) [Tuesday, 6 October](#), 11.30 AM – 12.00 AM

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Overview of CJ/GC Case-law (Status: 01/01/2019 – 30/04/2020)



The Litigation Service of the International Cooperation and Legal Affairs Department prepares this [Overview of CJ/GC Case-law](#).

It contains a systematic compilation of the key points of judgments and of orders rendered by the Court of Justice and the General Court of the European Union on actions brought against decisions taken by the Office's Boards of Appeal (BoA) in trade mark and design matters. It also contains key points of judgments rendered by the Court of Justice in preliminary rulings on IP rights and their enforcement. The key points consist of new or infrequent statements or statements that, while not new, are relevant in confirming established case-law. Please note that the key points do not necessarily reproduce the exact wording of the judgments or orders. Each key point is preceded by keywords to allow the user to quickly identify the case-law of interest and the relevant issues.



The hyperlinks in the case reference lead to the Office's eSearch Case Law database, giving the user easy access to the full text of the judgment or order, together with any available translations of them, a summary of the case, and also further relevant information and documents (e.g. first instance and BoA decisions) and a link to the InfoCuria Database of the Court of Justice of the European Union. This compilation will be constantly updated with the corresponding key points of future judgments and orders, allowing users to search quickly and easily the most recent case-law.

Luxembourg trade mark and design news

A: Court of Justice: Orders, judgments and Preliminary Rulings

16/07/2020, [C 714/18](#) [P](#), [tigha](#) / [TAIGA](#), [EU:C:2019:1139](#)

RESULT: Action dismissed

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

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FACTS:

The applicant sought to register the word mark tigha as an EUTM for goods, inter alia, in Class 25, such as clothing, footwear, headgear; suits; clothing of imitations of leather. Pursuant to Article 8(1)(b) CTMR, an opposition was filed based on the earlier EU word mark TAIGA, covering, inter alia, clothing; outer clothing; underwear; footwear; headgear for wear and headwear; work shoes and boots; working overalls; gloves; belts and socks in Class 25.

The Opposition Division (OD) rejected the opposition and the opponent filed an appeal. The Board of Appeal (BoA) partially upheld the appeal and rejected the EUTM for all the goods in Class 25. The BoA considered use of the earlier mark to have been proved for certain goods in Class 25, which were identical or similar to the contested goods. It also found that the signs were visually highly similar, phonetically identical (for English-speaking consumers) and no concept could be linked to them. The BoA concluded that there was a likelihood of confusion (LOC) on part of the public for the goods in Class 25.

The applicant filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of Article 42(2) CTMR, and (ii) infringement of Article 8(1)(b) CTMR. The GC dismissed the action.

As to proof of genuine use of the earlier mark, the GC considered that the articles covered by

the evidence did not constitute an independent subcategory of goods in Class 25: those articles had 'the same purpose, since they [were] intended to cover the human body, to conceal, adorn and protect it against the elements' and they could not 'in any event, be regarded as "substantially different"' (14/07/2005, T 126/03, Aladin, EU:T:2005:288, § 46). Moreover, their particular characteristics (namely those consisting of weather protection) were irrelevant ('the characteristics of the goods are not, as such, relevant to the definition of subcategories of goods or services', 18/10/2016, T 367/14, Fruitfuls, EU:T:2016:615, § 32). Taking into account the average distinctiveness of the earlier mark, the visual and phonetic similarity of the signs, their lack of clear and specific meaning for a significant part of the relevant public, and the similarity or identity of the goods, the GC confirmed a LOC.

The applicant appealed to the Court of Justice of the European Union (CJ) raising two grounds: (i) infringement of Article 42(2) CTMR and (ii) infringement of Article 8(1)(b) CTMR. The CJ dismissed the appeal.

SUBSTANCE:

(i) INFRINGEMENT OF ARTICLE 42(2) CTMR.

The appellant criticises the GC for finding that the articles of clothing (with a particular weather-protection characteristic), referred to in the

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evidence submitted by the opponent, all had the same purpose and also for holding that those goods did not constitute an independent subcategory of goods in Class 25 (§ 24). In particular, the GC should not have based its assessment on the goods referred to in that evidence, but on those for which the earlier mark had been registered (§ 25). In addition, the GC failed to take into account that the earlier mark's clothing was intended for different ranges of use (namely to cover, conceal, adorn or protect the human body), targeted different publics and was sold in different shops (§ 26).

a) Admissibility

The appellant calls into question the methodology and criteria applied by the GC to define use 'in relation to part ... of the goods or services', within the meaning of Article 42(2) CTMR. Since this ground of appeal concerns criteria for which the GC must assess the existence of genuine use, that ground raises a question of law which can be subject to review by the CJ on appeal (12/12/2019, C 143/19P, EIN KREIS MIT ZWEI PFEILEN (fig.), EU:C:2019:1076, § 51 and the case law cited therein (§ 29).

b) On the question of whether the only articles referred to in the proof of use constituted an independent subcategory in relation to the goods in Class 25.

From the wording of the last sentence of Article 42(2) CTMR and the principles established by case-law (11/12/2014, C 31/14 P, Premeno, EU:C:2014:2436, § 37, 39) (§ 39-42), it follows that it is important to assess in a concrete manner — principally in relation to the goods for which the proprietor of the earlier mark has submitted proof of use of the earlier mark — whether those goods constitute an independent subcategory in relation to the goods falling within the class of goods concerned, so as to link the goods for which genuine use of the earlier mark has been proved to the category of goods covered by the application for registration of that trade mark (§ 46).

The GC correctly examined whether the articles referred to in the proof of use ('weather-protective outdoor clothing') constituted an independent subcategory in relation to the more general goods in Class 25, for which the earlier trade mark was registered, and linked those articles to that more general category, before concluding that those articles could not be regarded as substantially different (§ 47).

c) Application of the criterion of the purpose and intended use of the goods in order to determine an independent subcategory of goods.

The aim of the criterion of the purpose and intended use of the goods is not to provide an abstract or artificial definition of independent subcategories of goods; it must be applied coherently and specifically

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(11/12/2014, C 31/14 P, Premeno, EU:C:2014:2436, § 37, 39, 41) (§ 50). Accordingly, if, as in the present case, the goods concerned have several purposes and intended uses — as is often the case — determining whether there is a separate subcategory of goods by considering in isolation each of the purposes that those goods may have will not be possible. Indeed, such an approach would not enable independent subcategories to be identified coherently and would have the effect of limiting excessively the rights of the proprietor of the earlier mark, inter alia, in that their legitimate interest in expanding their range of goods or services for which their trade mark is registered would not be sufficiently taken into consideration (§ 51).

The GC was therefore right not to take into account each of the uses of the goods — to cover, conceal, adorn or protect the human body — in isolation, those different uses combining for the purpose of putting those goods on the market (§ 52).

The appellant's claim that the GC failed to take into account the fact that the goods targeted different publics and were sold in different shops must also be rejected as unfounded: such criteria are not relevant for defining an independent subcategory of goods, but for assessing the relevant public (11/12/2014, C 31/14 P, Premeno, EU:C:2014:2436, § 37, 41) (§ 53).

(ii) INFRINGEMENT OF ARTICLE 8(1)(b) CTMR.

The appellant claims that since the GC misapplied the conditions for genuine use it incorrectly concluded that the contested clothing and headgear were identical to the opponent's goods. In addition, the appellant challenges the GC's assessment of the conflicting signs' visual, phonetic and conceptual similarity.

Since the GC did not err in the application of the conditions for genuine use, that claim is rejected as unfounded (§ 58).

Insofar as the appellant seeks to have the CJ make a fresh assessment of the phonetic and visual similarity of the signs, without invoking any distortion of the facts or evidence, the claim is rejected as inadmissible (§ 67-68).

Insofar as the appellant criticises the GC's application of the rules on the burden of proof, the claim is rejected as unfounded: the GC did not err in law by taking into account that the applicant had not adduced evidence to challenge the BoA's assessment that the first syllables 'ti' and 'tai' were pronounced identically for the English-speaking public and the appellant did not show the errors which would vitiate the contested decision (§ 70-71).

Insofar as the appellant criticises the GC for finding that there was nothing in the file to establish that

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the word 'taiga' had a 'specific and immediate meaning' for average English-speaking consumers and consumers from the south of the 'European continent', without identifying the error of law and without invoking any distortion of facts or evidence, the claim is rejected as inadmissible (§ 72-73).

Insofar as the appellant criticises the GC for finding that it had not shown that the word 'taiga' had a 'specific and immediate meaning' for the relevant public made up of EU consumers as a whole, the GC did not err in law in taking into account that the applicant had not adduced evidence that, for a substantial part of the relevant public, the term 'taiga' had a 'specific and immediate meaning' (§ 78). Under Article 8(1)(b) CTMR, an opposition must be upheld where it is established that there is a LOC in part of the EU (22/09/2016, C 223/15, COMMIT, EU:C:2016:719, § 26) (§ 76). Consequently, if visual or phonetic similarities between the signs exist for a substantial part of the relevant public, for which conceptual differences between those signs, liable to counteract those similarities, have not been proved, the GC must carry out a global assessment of the LOC (04/03/2020, C 328/18 P, BLACK LABEL BY EQUIVALENZA (fig.) / LABELL (fig.) et al., EU:C:2020:156, § 74-76) (§ 77). The claim is rejected as unfounded (§ 76-79).

Insofar as the appellant claims that there is no LOC, the claim is rejected as unfounded since the appellant does not identify any paragraph of the judgment under appeal which it is challenging nor does it allege any error of law (§ 83).



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

08/07/2020, T 328/19, SCORIFY (fig.) / Scor et al., EU:T:2020:311

RESULT: Action dismissed

KEYWORDS: Admissibility, Figurative element, Likelihood of confusion, Similarity of the goods and services, Similarity of the signs

FACTS:

The applicant sought to register the figurative mark SCORIFY as an EUTM for various services in the fields of insurance, finance and real estate in Class 36.

Pursuant to Article 8(1)(b) EUTMR, an opposition was filed based on, inter alia, the earlier EUTM word mark SCOR, covering services in Class 36. The Opposition Division (OD) partially upheld the opposition and rejected the EUTM application for all the services, with the exception of some services concerning real estate which were regarded as being different from the services covered by the earlier mark.

The applicant filed an appeal. The Board of Appeal (BoA) dismissed the appeal. BoA found that: the services were aimed at the general public and at professionals (both displaying a high degree of attention) and were either identical or similar to various degrees; the signs were visually and

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phonetically similar to an average degree (the conceptual comparison being neutral); there was a LOC.

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

EUTM Application



Earlier trade mark

SCOR

ADMISSIBILITY:

The applicant's general reference to the arguments submitted in the administrative proceedings before the Office is inadmissible: it is not for the GC to assume the role of the parties by seeking to identify the relevant material in the documents to which they refer (16/11/2017, T 767/16, metals (fig.), EU:T:2017:809, § 32) (§ 21).

The annex produced for the first time before the GC is inadmissible: it is not the GC's function to review the facts in the light of evidence produced for the



first time before it (24/11/2005, T 346/04, Arthur et Félicie, EU:T:2005:420, § 19) (§ 24)

SUBSTANCE:

The relevant public for the services in question (financial, monetary and insurance services in Class 36) is the general public and professionals in the European Union. They display a high level of attention (§ 38).

The services in dispute (all included in Class 36) are identical or similar to various degrees. When carrying out the comparison, it is necessary to take into account the services covered by the marks, not the services actually marketed under those marks (21/09/2017, T 620/16, Idealogistic (fig.) / IDEA et al., EU:T:2017:635, § 35) (§ 48). There is no obligation on the opposing party, in opposition proceedings, to adduce evidence as to the similarity of the services at issue (09/02/2011, T 222/09, Alpharen, EU:T:2011:36, § 22) (§ 51).

It is unlikely that the consumer will refer to the mark applied for by describing its figurative element representing a simple geometric form (§ 59). Furthermore, where the verbal element of a mark is substantially longer than the figurative element of that mark, it attracts more attention on the part of the average consumer because of its larger size (06/09/2013, T 349/12, Revaro, EU:T:2013:412, § 19 and 24) (§ 60). Therefore, the verbal element is the dominant and more distinctive element of the mark applied for.

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The signs have an average degree of visual similarity because they share the letter combination 'scor' and, in particular, this appears at the beginning of the verbal element of the mark applied for. The initial part of the verbal elements of a mark is liable to attract the consumer's attention more than the following parts (03/09/2010, T 472/08, 61 a nossa alegria, EU:T:2010:347, § 62 and case law cited) (§ 65 66).

The signs have an average degree of phonetic similarity, despite a difference in the number of syllables (§ 67 70).

The conceptual comparison remains neutral because a significant number of the relevant EU public has no or only a basic knowledge of English, and therefore the signs do not convey any concept (§ 71, 78 79).

A list of registered marks which contain the element 'scor' is insufficient to show that the element is not distinctive or has only a weak distinctive character. The mere presence of marks containing a certain term in the Register of EU trade marks without any reference to their use on the market and to any challenge to those marks on account of the existence of a LOC, cannot prove that the distinctive character of that term has been reduced (06/07/2016, T 97/15, Alfredo alla Scrofa, EU:T:2016:393, § 39 and case law cited). Therefore, the distinctive character of the earlier mark is normal (§ 84).

BoA was right to consider that there was a LOC (§ 88).

08/07/2020, T-533/19, sflooring (fig.) / T-flooring, EU:T:2020:323

RESULT: Action upheld (BoA decision annulled)

KEYWORDS: Belated evidence, Catalogue, Evidence of use, Promotional material, Proof of use

FACTS:

The applicant sought to register the figurative mark sflooring as an EUTM for goods and services in Classes 19, 27 and 37.

An opposition was filed pursuant to Article 8(1) (b) CTMR for all the goods and services covered. It was based on the earlier Spanish word mark T-FLOORING for floor covering in Class 27.

The Opposition Division (OD) upheld the opposition. It found that the opponent had proved genuine use of the mark in Spain and that there was a likelihood of confusion (LOC).

The applicant filed an appeal with the Board of Appeal (BoA). The BoA dismissed the appeal, confirming the OD's decision.

The applicant filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of Articles 42(2) and (3) CTMR and (ii) infringement of Article 8(1)(b) CTMR.

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EUTM Application



Earlier trade mark

T-FLOORING

SUBSTANCE:

Admissibility of a claim

The applicant's claims to have the contested decision amended and its trade mark application granted must be rejected as inadmissible (§ 17-18).

On the substance

(i) INFRINGEMENT OF ARTICLES 42(2) AND (3) CTMR

The period for which genuine use of the earlier mark had to be proved was 26/08/2008-25/08/2013 (§ 24). The BoA's reference to 11/07/2006-10/07/2011 as the relevant period was a clerical error owing to the BoA's having incorrectly stated the date of publication of the EUTM application (§ 23). However, the BoA did not challenge the OD reference to the



correct period and itself assessed evidence dated outside the period 2006-2011 (§ 23-28). Therefore, the BoA's error cannot affect the validity or legality of its decision (§ 28).

Catalogues

The opponent did not provide any information on whether or to what extent the catalogues were actually distributed (§ 40). Moreover, the invoices relating to the catalogues show that they were distributed over a 2-month period in 2012 (§ 41).

Invoices

The invoices related to sales not of floor covering but only to parts related to 'floor coverings' (§ 47). Furthermore, they were for very small sums (sale of 15 products related to 'floor coverings' for a total of EUR 72) and were spread over a period of only 8 months (§ 48).

There is no evidence to suggest that 'floor coverings' were sold on even one occasion, not even outside the relevant period (§ 49).

Therefore, the BoA had incorrectly found that the invoices proved the sale of products covered by the earlier mark in only small quantities but on a regular and continuous basis throughout the entire relevant period (§ 50).

The affixing of a trade mark to a magazine, periodical, review, journal or catalogue is in principle capable of constituting 'valid use of the sign' as a

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trade mark for the goods and services designated by that mark if the content of the publications confirms use of the sign for goods and services covered by it (05/02/2020, T 44/19 TC Touring Club (fig.) / TOURING CLUB ITALIANO et al., EU:T:2020:31, § 67) (§ 51). The invoices related to catalogue sales show a very small number of catalogues sold over a period of 2 months other than the months in which the products related to 'floor coverings' were sold (§ 54).

When assessing genuine use of an earlier mark, account may be taken, where appropriate, of evidence produced after the relevant date, in order to better assess the extent of use of the earlier mark during the relevant period (28/02/2019, T 459/18, PEPERO original (fig.) / REPRÉSENTATION D'UN BATÔNNET (fig.), EU:T:2019:119, § 63). However, a sales volume assessment cannot be called into question by taking into account invoices that postdate the relevant period by 3 months (§ 56).

The other invoices submitted by the opponent refer neither to the relevant period nor to sales of the opponent's goods (§ 58).

Advertisements

The advertisements from a Spanish magazine cannot be taken into account, as they post date the reference period by more than 8 months (§ 59, 61).

Brochures and posters

The brochures and posters are undated, and there is no evidence on the scale of their distribution. Moreover, it can be assumed, given their technical content, that they are internal company documents (§ 62-64).

Additional evidence

Although the additional evidence was submitted out of time, the OD and the BoA rightly used the discretion conferred on them by Article 76(2) CTMR, since they considered that evidence relevant (§ 67-69).

The additional evidence is a 2010 catalogue and an advertisement. There is no information on how widely the catalogue was distributed (§ 71). The advertisement was for a promotion to celebrate the earlier mark's 20th anniversary (1998-2008). Although there is no date on the advertisement, it cannot be ruled out that it covers at least the beginning of the relevant period (§ 72).

Overall assessment

Taken as a whole, and contrary to the BoA's findings, the evidence submitted by the opponent does not make it possible to establish a relatively constant use of the earlier mark such as would be capable of offsetting the low volume of sales under that mark (§ 76).

Therefore, the BoA's decision must be annulled without any need to examine the other plea (§ 77).

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08/07/2020, T 659/19, kix (fig.) / kik, EU:T:2020:328

RESULT: Action dismissed

KEYWORDS: Functional continuity, Identity of the good and services, Likelihood of confusion, Restriction of the list of goods and services, Revocation of decision, Right to be heard, Scope of proceedings, Similarity of the goods and services, Similarity of the signs

FACTS:

The applicant sought to register the figurative mark 'kix' as an EUTM for services in Class 35, namely retailing of the following goods through a chain of stores: clothing, footwear, fashion accessories, goods of leather and imitations of leather, headwear, clothing and sports footwear.

Pursuant to Article 8(1)(b) CTMR, an opposition was filed on the basis of the earlier international registration (IR) and German registration for the word mark kik for the following services in Class 35: retail sale services in connection with textiles, cosmetic products, toys, household products and other products for everyday use. Upon the applicant's request, the opponent submitted evidence of use of the earlier marks.

The Opposition Division (OD) upheld the opposition and rejected the EUTM application for all the services on the basis of the earlier German mark.

The applicant filed an appeal before the Board of Appeal (BoA). By a first decision of 6 September 2016, the BoA annulled the OD's decision and dismissed the opposition. It found that genuine use of the earlier national mark had not been proved since the earlier mark's retail sale services in connection with textiles did not cover the services that appeared in the evidence of use and which were essentially retail of clothing and other textile goods.

The opponent filed an action before the General Court (GC) against this first decision.

In the meantime, it requested a limitation of the list of services of the earlier national mark. The German Patent and Trade Mark Office accepted the limitation.

Subsequently, the BoA revoked its first decision because of a manifest procedural error and the GC issued an order holding that there was no longer any need to adjudicate in the case (16/03/2018, T 822/16, kix (fig.) / kik, EU:T:2018:174).

The case was reallocated to another BoA which, by decision of 4 July 2019 ('the contested decision'), dismissed the appeal. It examined the opposition based on the earlier German mark, after the limitation of the list of services, and concluded that there was a likelihood of confusion (LOC).

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The applicant filed an action before the General Court (GC), relying on six pleas in law: (i) infringement of Article 8(1)(b) EUTMR, (ii) infringement of the principles of legitimate expectations and legal certainty, (iii) infringement of the principle of impartiality in relation to the request for proof of use, (iv) infringement of the principles of equality and impartiality as regards the limitation of the list of services, (v) misuse of powers and (vi) infringement of the right to a fair hearing.

EUTM application



Earlier trade mark

Kik

SUBSTANCE:

(i) ON THE LIMITATION OF THE LIST OF SERVICES COVERED BY THE EARLIER NATIONAL MARK

After the adoption of the BoA's first decision, the initial list of services in Class 35 covered by the earlier German mark (retail sale services in connection



with textiles, cosmetic products, toys, household products and other products for everyday use) was amended as follows: retail sale services in connection with textiles, namely clothing, headgear made of textile materials, household linen, bed linen and table linen, as well as in relation to cosmetics, toys, household products and other products for everyday use (§ 26).

Since the list of services does not refer to goods in Classes 24 and 25, but to retail services in Class 35, it is irrelevant that textiles in Class 24 do not include clothing, headgear, etc. in Class 25. What is relevant is whether the opponent was able usefully to limit the list for the retail services in Class 35 by adding the words namely clothing, headgear made of textile materials, household linen, bed linen and table linen (§ 29).

The word 'namely' is exhaustive and limits the scope of protection only to the specifically listed goods or services and thus clarifies the scope of protection (§ 30).

As the earlier right is a German trade mark, the meaning of the term 'textiles' in the common German language is decisive. The German term 'Textilien' refers not only to textile materials, fabrics and textiles, but also to 'clothing' and 'products made from textiles'. The addition is a limitation and not an extension or amendment of the original list of services (§ 31).

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According to Article 71(1) EUTMR, enshrining the principle of functional continuity, the BoA is under no obligation to remit the case to the OD for a decision on new factors liable to alter the outcome of the case. The limitation of the list of services did not therefore require the BoA to remit the case to the OD (§ 34).

Since both parties were invited to submit their observations on the comparison of services and the limitation of the scope of protection of the earlier rights after the OD's decision, the BoA did not infringe the right to be heard (§ 35).

(ii) ON THE PROOF OF GENUINE USE.

When the issue of genuine use of the earlier mark is not specifically raised before the BoA, it does not constitute a question of law which must necessarily be examined by the BoA in order for the dispute before it to be settled. Consequently, it must not be regarded as the subject matter of the proceedings before the BoA (05/10/2017, T 36/17, COLINEB / Colina (fig.), EU:T:2017:690, § 21 and the case-law cited therein). Since, in the first BoA proceedings, the applicant did not raise the issue of genuine use of the earlier national mark and of the possible impact of the limitation of the list of services covered by that mark, the issue of genuine use of the earlier national mark was not the subject of the dispute. The BoA was not obliged to re-examine the issue of genuine use to take into account the limitation

(§ 39-41). In any event, any re-examination of that question by the BoA with regard to that limitation could not have led to the annulment of the OD's decision on that point, since there was still a match between the services for which the opponent had submitted evidence of genuine use in accordance with the OD decision and the services set out in the list of services as amended (§ 42-43).

(iii) ON THE APPLICATION OF ARTICLE 8(1)(b) EUTMR.

The relevant public is the general public in Germany, whose level of attention is normal (§ 50, 52, 54-57).

Retailing of the following goods through a chain of stores: clothing (mentioned twice), headwear' covered by the mark applied for is identical to the retail services in connection with clothing, headgear made of textile materials covered by the earlier national mark (§ 60, 64, 66, 71). The remaining services are similar (§ 61) since they have the same nature and a similar purpose and use. In addition, the products to which those services relate are commonly sold in retail in the same outlets and their relevant public and distribution channels are the same (§ 61, 71).

The signs have an average degree of visual similarity: the verbal element of the earlier national mark is more distinctive than its figurative element and the signs coincide in the combination of the letters 'ki'; the underscore will have no lasting visual impact

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because of its small size and the black rectangle and the white and green colouring of the word 'kix' will be perceived only as essentially decorative elements (§ 74, 76-78, 85). The signs have a high degree of phonetic similarity: in German, they are pronounced 'kik' and 'kiks' respectively (§ 74, 80, 85). The signs are devoid of any concrete meaning or semantic content, so a conceptual comparison is not possible (§ 74, 84, 85).

For the general public with a normal level of attention, there is a LOC resulting from the identity of or similarity between the services and the visual and phonetic similarity of the signs, which cannot be neutralised by a conceptual difference (§ 89-94).

08/07/2020, T 686/19, Gnc live well, EU:T:2020:320

RESULT: Action dismissed

KEYWORDS: Evidence of use, Extent of use, Use not as registered, Nature of use, Place of use, Lack of reasoning

FACTS:

The proprietor registered the word mark Gnc live well as an EUTM for goods and services in Classes 5, 35 and 42.

An application for revocation was filed pursuant to Article 51(1)(a) CTMR. The Cancellation Division

(CD) partially upheld the application for revocation, declaring the trade mark revoked, except for some of the goods in Class 5, namely dietetic substances adapted for medical use; including dietary food supplements, especially nutritional food supplements containing vitamins, minerals and herbs in the form of capsules, tablets, powders and liquids ('the contested goods').

The revocation applicant filed an appeal. The Board of Appeal (BoA) dismissed the appeal. The BoA found that the proprietor was required to prove genuine use of the registered mark during the period from 23 August 2011 to 22 August 2016 (not disputed) and that it established the place and the duration of use of the registered mark. It assessed the nature of use of the registered mark in a stylised letter font, different colours or highlighting the three grouped letters 'gnc' compared to the words 'live well' and it found that such use did not alter the distinctive character of the registered mark. It found that there was sufficient evidence that proved genuine use of the registered mark during the relevant period for the contested goods.

The revocation applicant filed an action before the General Court (GC), relying on a single plea in law: infringement of Article 51(1)(a) CTMR which comprises, in essence, two parts, (i) the claim that the reasoning of the contested decision was deficient, contrary to the first sentence of Article 94(1) EUTMR, and (ii) the claim that the BoA incorrectly assessed

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the evidence provided regarding the use of the registered mark for the contested goods. The GC dismissed the action.

SUBSTANCE:

INFRINGEMENT OF ARTICLE 51(1)(a) CTMR.

(i) THE REASONING OF THE CONTESTED DECISION, ARTICLE 94(1) EUTMR.

The statements of reasons for the contested decision are adequate. Given the continuity in terms of function between the CD and the BoA, to which Article 71(1) EUTMR attests, the statement of reasons concerning the evidence contained in the CD's decision must be taken into account and forms part of the context in which the BoA's decision was adopted, a context which is known to the parties and enables the Court to carry out fully its review (21/11/2007, T 111/06, *Vital & Fit*, EU:T:2007:352, § 64, 16/01/2019, T 489/17, *DARSTELLUNG EINES FLASCHENVERSCHLUSSES* (3D), EU:T:2019:9, § 31). The BoA, by setting out the CD's analysis, listing the evidence and referring to that evidence which confirms the place, duration, nature and scope of use of the registered mark, in relation to the contested goods, did not disregard its duty to state reasons (§ 20, 24-25).

(ii) ASSESSMENT OF THE EVIDENCE OF USE.

As regards the place and duration of use of the registered mark, the BoA, taking account of the affidavit, even though provided by the vice-president of the proprietor's parent company, that was corroborated by other evidence, pursuant to the case of 12/03/2020, T 321/19, *Jokers WILD Casino* (fig.), EU:T:2020:101, § 46, was fully entitled to conclude that the registered mark was objectively present on the market during the relevant period and in the territory of the EU (§ 44-48, 49-50).

Labels, photographs of shop windows and posts on social media may be intended to show the range of goods for which the registered mark was used and how that mark was displayed on the contested goods, which does not require that they be dated (13/02/2015, T 287/13, *HUSKY*, EU:T:2015:99, § 68) (§ 45).

Provided that there is proof of use which relates to the relevant period, as in the present case, the documents from only just outside that period, far from being irrelevant, can be taken into account and evaluated together with the rest of the evidence, since they can offer proof of real and genuine commercial exploitation of the mark (08/04/2016, T 638/14, *FRISA / FRINSA F*, EU:T:2016:199, § 38-40) (§ 46).

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As regards the nature of use, the BoA was correct in holding that, despite the addition of figurative elements and variations to the registered word mark (namely the use of distinct colours, a different typeface, a coloured background surrounding the word element comprising three letters and two words 'gnc live well' and the positioning of the three letters and the two words on one or two lines) the form in which that mark was used did not alter its distinctive character, especially because the figurative elements in question play only a secondary role, so that the proof of use related to that mark constituted evidence of the use of that mark (§ 56-62, 63).

As regards the extent of use, the BoA was fully entitled to evaluate all the evidence submitted within a global assessment rather than to examine each item of evidence in isolation (§ 35, 78).

The overall volume of income proved by the invoices, namely USD 34 733.82, cannot be regarded as token, considering the unit price of between USD 2.57 to USD 34.37 at which the contested goods are sold and which is set out in those invoices. In any event, the invoices provided by the proprietor are not numbered consecutively and relate to different years and months. They are, therefore, examples which do not represent the overall amount of the actual sales of the products bearing the registered mark. (§ 71-72).

Consequently, taken as a whole, the evidence is sufficient to prove genuine use of the registered mark for the contested goods (§ 81). The lack of a translation of some of the items of evidence into the language of the proceedings did not affect the exercise of the revocation applicant's rights of defence, since it was in a position to challenge the documents before the GC (08/05/2017, T 680/15, L'ECLAIREUR, EU:T:2017:320, § 23) (§ 85). In addition, it is clear from a number of the applicant's claims that it had understood the content of the evidence, even when submitted in a language other than the language of the proceedings (§ 84).

08/07/2020, T 696/19, [Moins de migraine pour vivre mieux](#), EU:T:2020:329

RESULT: Action dismissed

KEYWORDS: Non-distinctive, Slogan mark

FACTS:

The applicant sought to register the word mark *Moins de migraine pour vivre mieux* as an EUTM for printed materials relating to the treatment of migraines in Class 16 and providing information relating to the treatment of migraines in Class 44.

The examiner refused to register the EUTM application pursuant to Article 7(1)(b) EUTMR for all the goods and services, as it was devoid of distinctive character.

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The Board of Appeal (BoA) dismissed the appeal: the mark was considered devoid of distinctive character since it would be perceived as a promotional slogan relating to the quality of the goods and services.

The applicant filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of Article 7(1)(b) EUTMR and (ii) infringement of the principle of equal treatment and 'consistency of case-law' in relation to the assessment of distinctiveness within the meaning of Article 7(1)(b) EUTMR. The GC dismissed the action.

SUBSTANCE:

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

The 'average consumer' cannot be understood as only the consumer who is part of the 'general public', but the consumer who is part of the public specifically targeted by the goods and services in question. Thus, the 'average consumer' may be a professional whose degree of specialisation is high, if the goods and services are aimed specifically at such a public, even if it is conceivable that those goods and services are also, on occasion, purchased by uninformed consumers who are part of the general public (08/11/2017, T 80/17, IST (fig.) / ista (fig.) et al., EU:T:2017:784, § 25) (§ 19).

To define the relevant public, the BoA expressly referred to the general public that would perceive

the mark as a promotional slogan indicating that the goods and services may be useful in alleviating migraines and thus improving quality of life (§ 21-24).

All marks made up of signs or indications that are also used as advertising slogans convey by definition, to a greater or lesser extent, an objective message, even a simple one, and can still be capable of indicating to the consumer the commercial origin of the goods or services, in particular where those marks are not merely an ordinary advertising message, but possess a certain originality or resonance, requiring at least some interpretation or setting off a cognitive process (21/01/2010, C 398/08 P, Vorsprung durch Technik, EU:C:2010:29, § 56-57; 25/05/2016, T 422/15 and T 423/15, THE DINING EXPERIENCE (fig.), EU:T:2016:314, § 48) (§ 27).

The sign is not unusual in terms of the rules of French syntax, grammar, phonetics or semantics and it conveys a simple, clear and unequivocal message to the relevant public, which is not likely to confer any particular originality or resonance which would require at least some interpretation or set off a cognitive process (§ 28).

The mark has a mere promotional character because it simply encourages the relevant public to discover the goods and services in question by promising to improve daily life. As the mark is not capable of indicating the commercial origin of the

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goods and services, it is devoid of any distinctive character within the meaning of Article 7(1)(b) EUTMR (§ 30-31).

(ii) INFRINGEMENT OF THE PRINCIPLE OF EQUAL TREATMENT

In its review of legality, the GC is not bound by a previous decision of the Office to register as an EUTM a sign allegedly similar to the mark applied for, as acknowledged by consistent case-law (03/09/2015, T 225/14, IDIRECT24, EU:T:2015:585, § 60) (§ 36).

Moreover, as explained by the BoA, the EU trade mark 'LESS MIGRAINE, MORE MOMENTS', relied on by the applicant, was distinguishable from the mark applied for because of its vague and unusual character (10/03/2011, C 51/10 P, 1000, EU:C:2011:139, § 73-77 and 28/06/2018, C 564/16 P, DEVICE OF A JUMPING ANIMAL (fig.) / PUMA (fig.) et al., EU:C:2018:509, § 61 (§ 38).

08/07/2020, T 697/19, Weniger Migräne. Mehr vom Leben, EU:T:2020:330

RESULT: Action dismissed

KEYWORDS: Non-distinctive, Slogan mark

FACTS:

The applicant sought to register the word mark Weniger Migräne. Mehr vom Leben as an EUTM for printed materials relating to the treatment of migraines in Class 16 and providing information relating to the treatment of migraines in Class 44.

The examiner refused to register the EUTM application pursuant to Article 7(1)(b) EUTMR for all the goods and services, as it was devoid of distinctive character.

The Board of Appeal (BoA) dismissed the appeal: the mark was considered devoid of distinctive character since it would be perceived as a promotional slogan relating to the quality of the goods and services.

The applicant filed an action before the General Court (GC), relying on two pleas in law: (i) infringement of Article 7(1)(b) EUTMR and (ii) infringement of the principle of equal treatment and 'consistency of case-law' in relation to the assessment of distinctiveness within the meaning of Article 7(1)(b) EUTMR. The GC dismissed the action.

SUBSTANCE:

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

The 'average consumer' cannot be understood as only the consumer who is part of the 'general public', but the consumer who is part of the public

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specifically targeted by the goods and services in question. Thus, the ‘average consumer’ may be a professional whose degree of specialisation is high, if the goods and services are aimed specifically at such a public, even if it is conceivable that those goods and services are also, on occasion, purchased by uninformed consumers who are part of the general public (08/11/2017, T 80/17, IST (fig.) / ista (fig.) et al., EU:T:2017:784, § 25) (§ 19).

To define the relevant public, the BoA expressly referred to the general public that would perceive the mark as a promotional slogan indicating that the goods and services may be useful in alleviating migraines and thus improving quality of life (§ 21-24).

All marks made up of signs or indications that are also used as advertising slogans convey by definition, to a greater or lesser extent, an objective message, even a simple one, and can still be capable of indicating to the consumer the commercial origin of the goods or services, in particular where those marks are not merely an ordinary advertising message, but possess a certain originality or resonance, requiring at least some interpretation or setting off a cognitive process (21/01/2010, C 398/08 P, Vorsprung durch Technik, EU:C:2010:29, § 56-57; 25/05/2016, T 422/15 and T 423/15, THE DINING EXPERIENCE (fig.), EU:T:2016:314, § 48) (§ 27).

The sign is not unusual in terms of the rules of German syntax, grammar, phonetics or semantics and it conveys a simple, clear and unequivocal message to the relevant public, which is not likely to confer any particular originality or resonance which would require at least some interpretation or set off a cognitive process (§ 28).

The mark has a mere promotional character because it simply encourages the relevant public to discover the goods and services in question by promising to improve daily life. As the mark is not capable of indicating the commercial origin of the goods and services, it is devoid of any distinctive character within the meaning of Article 7(1)(b) EUTMR (§ 30-31).

(ii) INFRINGEMENT OF THE PRINCIPLE OF EQUAL TREATMENT

In its review of legality, the GC is not bound by a previous decision of the Office to register as an EUTM a sign allegedly similar to the mark applied for, as acknowledged by consistent case-law (03/09/2015, T 225/14, IDIRECT24, EU:T:2015:585, § 60) (§ 36).

Moreover, as explained by the BoA, the EU trade mark ‘LESS MIGRAINE, MORE MOMENTS’, relied on by the applicant, was distinguishable from the mark applied for because of its vague and unusual character (10/03/2011, C 51/10 P, 1000,

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EU:C:2011:139, § 73-77 and 28/06/2018, C 564/16 P, DEVICE OF A JUMPING ANIMAL (fig.) / PUMA (fig.) et al., EU:C:2018:509, § 61 (§ 38).

08/07/2020, T-729/19, Favorit, EU:T:2020:314

RESULT: Action dismissed

KEYWORDS: Admissibility, Non-distinctive, Slogan mark

FACTS:

The applicant sought to register the word mark Favorit as an EUTM for goods and services in Classes 16, 40, 41 and 42. The examiner refused the application pursuant to Article 7(1)(b) and Article 7(2) EUTMR.

The Board of Appeal (BoA) dismissed the appeal, stating that the German-, English-, French-, Italian-, Croatian-, Portuguese-, Romanian-, Slovenian-, Spanish-, Czech-, Hungarian- and Polish-speaking consumers would understand the term 'favorit' as meaning 'favourite' or 'preferred'. This laudatory term conveyed a simple promotional message informing consumers that the goods and services covered by the sign have very positive aspects that fulfil their expectations. Accordingly, the sign applied for is non-distinctive pursuant to Article 7(1)(b) EUTMR and it is not necessary to consider the ground for refusal in Article 7(1)(c) EUTMR.

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

ADMISSIBILITY:

Although the applicant does not indicate whether its sole plea relates to the infringement of Article 7(1)(b) or Article 7(1)(c) EUTMR, it is clear from the content of the appeal application that it wants to argue, firstly, that the BoA erred in considering that the sign was merely a promotional message when, in its view, it is sufficiently distinctive to be registered, and, secondly, that the sign does not constitute a descriptive indication of the goods and services applied for (§ 15).

The applicant submits in essence that the sign does not fall within the grounds for refusal of Article 7(1)(b) and (c) EUTMR. The submission of the two sets of arguments above emerges with sufficient clarity from the application in accordance with established case-law (28/04/1993, T 85/92, De Hoe v Commission, EU:T:1993:39, § 21 and 25/09/2018, T 435/17, HIPANEMA (fig.) / Ipanema (fig.) et al., EU:T:2018:596, § 17) (§ 12). Furthermore, it is apparent from the response that the Office was able to prepare its defence (§ 17). Therefore, the action cannot be regarded as inadmissible pursuant to Article 177(1)(d) of the RoPGC (§16-18).

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SUBSTANCE:

(i) ON THE ARGUMENTS RELATED TO THE GROUND FOR REFUSAL OF ARTICLE 7(1)(B) EUTMR.

The applicant did not dispute the meaning of the term 'favorit' for the relevant public or the positive connotation it conveys. Although the term does not allow the consumer to imagine what kind of goods or services it relates to, precisely because of its customary use both in everyday language and in trade as a generic laudatory term, it is not capable of indicating the origin of the goods and services which it designates (§ 29-31).

In light of established case-law (§ 24-27), the BoA rightly concluded that the sign lacks distinctive character because it is a mere promotional slogan (§ 32). Even a sign consisting of a single word with a clear laudatory character is capable of constituting a promotional formula that is unfit to identify the commercial origin of the goods and services it designates (§ 37). In addition, the mere absence of a qualifier of the term does not imply that the sign has a certain originality (§ 38).

The GC is not bound by judgments issued by the Bundespatentgericht (Federal Patent Court, Germany) because the EU trade mark regime is an autonomous system with its own set of objectives and rules, as acknowledged by consistent case-law (06/06/2018, C 32/17P, PARKWAY (fig.), EU:C:2018:396, § 31-32) (§ 39).



The judgments delivered by the EU judicature put forward by the applicant are not relevant (§ 40).

(ii) ON THE ARGUMENTS RELATED TO THE GROUND FOR REFUSAL OF ARTICLE 7(1)(C) EUTMR.

Since one of the absolute grounds for refusal listed in Article 7(1) EUTMR applies, the applicant's arguments concerning the lack of descriptiveness must be dismissed.

08/07/2020, [T 800/19](#), [AIR](#), [EU:T:2020:324](#)

RESULT: Action dismissed

KEYWORDS: Distinctive element, Evidence of use, Use not as registered

FACTS:

The predecessor of the current EUTM proprietor registered the word EU mark AIR (EUTM No 2 309 110) for goods in Class 34.

A revocation for lack of use of the abovementioned EUTM was filed for all of the goods covered pursuant to Article 51(1)(a) CTMR. The Cancellation Division (CD) upheld the application for revocation entirely.

The EUTM proprietor filed an appeal. The Board of Appeal (BoA) dismissed the appeal, finding that the differences between the contested mark and the

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mark as used altered the distinctive character of the contested mark.

The EUTM proprietor filed an action before the General Court (GC), relying on a single plea in law: infringement of Article 51(1)(a) CTMR read in conjunction with Article 15(1) CTMR.

EUTM as registered

AIR

Mark as used



MEMPHIS AIR BLUE

MEMPHIS AIR BLUE 100

SUBSTANCE:

INFRINGEMENT OF ARTICLE 51(1)(a) CTMR READ IN CONJUNCTION WITH ARTICLE 15(1) CTMR

The BoA correctly considered the period from 25 August 2011 to 24 August 2016 as relevant to



assess genuine use of the contested mark as the application for revocation was filed on 25 August 2016 (§ 29).

Considering the goods at issue, the words 'memphis', 'air' and 'blue' have an average distinctive character. While the word 'blue' is often used on the tobacco market by various manufacturers, there is no evidence that the relevant public would perceive that word or the colour blue as having a descriptive purpose and indicating a milder taste. The fact that the word 'blue' appears on invoices in the abbreviate form 'bl' does not demonstrate any descriptiveness in relation to the contested goods since the descriptive character must be assessed in relation to the goods and not the details on the invoices. Moreover, the recipients of invoices are professionals and not the general public in relation to which the genuine use of the contested mark must be assessed (§ 30)

The BoA was right in observing that some of the evidence submitted (printouts of websites and undated photographs of products at the point of sale) contained no indication of the contested sign or its variation. Moreover, none of the other evidence (distribution agreements, invoices, photos of the cigarette packets, graph of sales history) referred to the mark AIR in isolation, but it is always used in combination with 'blue' or 'blue 100'. The way in which the combination 'air blue' or 'air blue 100' is used in the evidence submitted alters the

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distinctive character of the contested mark AIR as registered (§ 32).

The BoA was right in finding that the elements 'air' and 'blue' are systematically juxtaposed and form a unit. Moreover, the element 'blue' is visually equally important as the element 'air' since it is composed of four letters and is always clearly visible in a primary position (§ 33).

The alteration of the distinctive character of the contested mark AIR is reinforced by the fact that the combination 'air blue' is always subordinated to the element 'memphis' on the packaging of the goods, which introduces a further differentiating factor in comparison with the mark as registered (§ 34).

The element 'memphis' is always clearly visible in a dominant position in the overall impression produced by the trade mark as used. Even if that element was a 'house mark', that circumstance would not call into question the fact that that word alters the distinctive character of the contested mark AIR, since the relevant public no longer perceives the element 'air' as an indication of the origin of the goods in question (18/07/2013, C-252/12, Specsavers, EU:C:2013:497, § 26) (§ 35).

Since the form of the sign used in trade does not differ only in insignificant respects from the form in which that sign was registered, the contested mark AIR cannot be regarded as broadly equivalent

to the word combinations MEMPHIS AIR BLUE and MEMPHIS AIR BLUE 100 or the figurative combination (§ 36), as the BoA correctly concluded (§ 37-39).

10/07/2020, T 616/19, [Wonderland / Wondermix et al.](#), EU:T:2020:334

RESULT: Action dismissed

KEYWORDS: Conceptual similarity, Common element, Likelihood of confusion, Phonetical similarity, Visual similarity

FACTS:

The applicant sought to register the word mark WONDERLAND for goods in Class 30, such as flavourings, other than essential oils, for beverages; baking powder; pastries; cookies; sweetmeats [candy]; fizzy lollipops. Pursuant to Article 8(1)(b) CTMR, an opposition was filed based on the earlier Benelux word mark WONDERMIX, registered for goods in Class 30, namely candy, including chewing gum and liquorice, wine gums, fruit gums and confectionery. The Opposition Division (OD) upheld the opposition.

The applicant filed an appeal before the Board of Appeal (BoA). The BoA partially annulled the OD's decision for some goods which it found dissimilar: even though the earlier mark was of lower than

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average distinctiveness, there was a likelihood of confusion (LOC) for the Benelux general public with a low level of attention in view of the degree of similarity of the signs for the identical or similar goods in Class 30.

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 as manifestly lacking any foundation in law (Article 126 RPGC).

SUBSTANCE:

(i) ON THE ADMISSIBILITY

Even though the BoA partially upheld the applicant's appeal, the applicant's head of claim seeking annulment of the contested decision is interpreted as seeking annulment of the contested decision in part (26/02/2015, T 713/13, 9flats.com, EU:T:2015:114, § 19).

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

The relevant public is the general public in Belgium, Luxembourg and the Netherlands whose level of attention is low with relation to low-priced confectionery and candy designed for mass consumption (§ 27-29).

The goods covered by the contested mark are, in part, identical and, in part, similar to the goods of the earlier Benelux trade mark (not disputed) (§ 38).

As regards the comparison of the signs, Benelux consumers will recognise the Dutch words 'wonder' and 'land' as well as 'mix'. The beginning, 'wonder', does not describe any characteristics of the goods and will not be neglected in the overall impression produced by the signs (§ 41). The signs are visually similar to an average degree: they share the identical beginning 'wonder' and have an almost identical length, while they differ only in the ending, 'land' and 'mix' respectively (§ 42-44). The signs are phonetically similar to an average degree due to the first two (out of three) identical syllables (§ 46). In addition, the first part of a word mark normally leaves a stronger visual and phonetic impression than the last part (§ 44 and 46). Conceptually, the signs are similar to an average degree: Benelux consumers will understand the meaning of the common element 'wonder' (§ 52-54) and the difference between the elements 'mix' and 'land' is insufficient to counteract the similarity (§ 55-57).

Overall, due to the average degree of similarity of the signs, for the general Benelux public with a below-average level of attention, there is LOC for the identical or similar goods in Class 30 even though the distinctiveness of the earlier mark is somewhat weakened (because of the element 'mix' that may be understood as a reference to a mixture of various products, namely a range of confectionery) (§ 62).

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15/07/2020, T-371/19, **FAKEDUCK (fig.) / Save the duck (fig.) et al.**, EU:T:2020:339

RESULT: Action dismissed

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

FACTS:

The EUTM applicant sought to register the figurative EUTM FAKEDUCK for the goods in Classes 18 and 25.

An opposition, pursuant to Article 8(1)(b) CTMR and based on the earlier figurative EUTM SAVE THE DUCK for goods in Classes 18 and 25, was filed for all the goods covered. The Opposition Division (OD) upheld the opposition. It found that there was a likelihood of confusion (LOC).

The EUTM applicant filed an appeal. The Board of Appeal (BoA) dismissed the appeal. It found that, considering the average level of attention of the relevant public, the identity of the goods covered by the marks, the average degree of visual similarity, the high degree of phonetic and conceptual similarity, and the enhanced distinctive character of the earlier mark, there was a LOC.

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



EUTM application



Earlier EUTM



SUBSTANCE

On the admissibility

It is not for the GC to issue directions to the EUIPO but for the latter to give due effect to the grounds and operative part of the GC's judgments (11/07/2007, T-443/05, Pirañam, EU:T:2007:219, § 20). Therefore, the applicant's conclusions that the GC orders the EUIPO to accept the application are inadmissible (§ 13).

The EUIPO is not required to refuse an EUTM application on all the grounds for refusal of

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registration put forward in support of the opposition (11/05/2006, T 194/05, Teletech International, EU:T:2006:124, § 27). The BoA based the contested decision on one of the seven trade marks invoked in support of the opposition (§ 15).

Since it is not up to the Court to rule on an issue that has not been considered by the BoA (08/07/1999, T 163/98, BABY-DRY, EU:T:1999:145, § 51), it is not for the Court to rule on the applicant's arguments concerning the other trade marks invoked in support of the opposition (§ 16).

On the substance *The relevant public*

The BoA was right in considering the level of attention of the relevant public as average since the goods in Classes 18 and 25 are goods for mass consumption, frequently purchased and used by the average consumer. The degree of attention of the relevant public is no higher than average since the goods in question are not costly or rare and no specific knowledge is required for the purchase (20/10/2009, T 307/08, 4 OUT Living, EU:T:2009:409, § 21) (§ 26-29).

The comparison of goods

The BoA was right in finding the goods covered by the marks as identical or, at least, very similar (§ 31-32).

The comparison of the signs

The visual similarity

The BoA was right in finding an average degree of visual similarity between the marks (§ 40; 44).

Both marks contain a similar duck in terms of colour, shape and size. Their differences, such as the position, the orientation, colour and the ducks' mood are negligible elements. Moreover, the geometrical elements around the earlier mark are secondary (§ 38) and both marks contain the word 'duck' that corresponds to their figurative elements (§ 39).

Although there are other marks containing the term 'duck' and the EUIPO must, when examining an application for registration of an EUTM, take into account the decisions already taken for similar applications, the way in which the principles of equal treatment and sound administration are applied must be consistent with the respect for legality, also considering that the examination must be undertaken in each individual case (10/03/2011, C 51/10 P, 1000, EU:C:2011:139, § 73-77) (§ 42).

The judgment GELENGGOLD (07/05/2015, T 599/13, GELENGGOLD/ FORMEINES TIGERS et al., EU:T:2015:262) is not relevant since the marks at issue cannot be compared to the marks in that judgment (§ 43).

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The phonetic similarity

The BoA was right in finding a high degree of phonetic similarity between the marks (§ 51) due to the common last word element 'duck' on which the tonic falls and the similarity between the elements 'save' and 'fake' that have the same vowels. The term 'the' is not enough to lessen the high phonetic similarity between the marks (§ 48).

The different number of syllables is not enough to exclude the similarity between the signs since the similarity is assessed considering the overall impression made by the complete pronunciation (§ 49). Although the public usually gives more importance to the initial part of a mark, the fact that the tonic falls on the word 'duck' makes the marks highly similar (§ 50).

The conceptual similarity

The conceptual similarity is average (and not high, as the BoA found, § 57). The English-speaking part of the relevant public will understand the meaning of the words 'save' and 'fake' which evoke different ideas when associated with the term 'duck' and the object of the ideas evoked in both is the word 'duck' (§ 56-57).

LOC

The BoA was right in finding a LOC between the marks due to the identity or high degree of similarity

of the goods, the average degree of visual and conceptual similarity, the high degree of phonetic similarity and the enhanced distinctiveness of the earlier mark (the latter not contested by the EUTM applicant) (§ 65).

In clothes shops, customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. While oral communication is not excluded, the choice of the item of clothing is generally made visually. The visual perception of the marks in question will generally take place prior to purchase and, therefore, the visual aspect plays an important role in the global assessment of the LOC (06/10/2004, T 117/03 -T 119/03 & T 171/03, NL, EU:T:2004:293, § 50) (§ 66).

The average visual similarity between the signs at issue is such as to give rise to confusion on the part of the consumer as to the commercial origin of the goods concerned. Moreover, the high phonetic similarity may create the same perception when the consumer's choice is based on oral communication (§ 66).

Since the more distinctive the earlier mark, the greater will be the likelihood of confusion, marks with a high distinctive character enjoy more extensive protection than those with a lower distinctive character (11/11/1997, C 251/95, Sabèl, EU:C:1997:528, § 24; 22/06/1999, C 342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 20). Therefore,

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contrary to the applicant's claims, the enhanced distinctiveness of the earlier mark increases LOC (§ 67).

Therefore, the action is dismissed (§ 68).

16/07/2020, T 309/20, Travelnetto / Nett-Travel et al., EU:T:2020:356

RESULT: Action dismissed

KEYWORDS: Admissibility

FACTS:

The applicant filed an action before the General Court (GC) via e Curia on 27 May 2020. The supporting documents required for validating the access account were received only on 8 June 2020.

SUBSTANCE:

MANIFEST INADMISSIBILITY OF THE ACTION

If a procedural document is submitted via e Curia before the supporting documents required for validating the user account have been submitted, those supporting documents must be received in hard copy at the GC Registry within 10 days of submission of the procedural document (Article 56 a(4) RPGC). This time limit may not be extended and Article 60 RPGC does not apply (§ 5).

Since the supporting documents were submitted too late, the lodging of the application via e Curia does not satisfy the requirements of Article 56 a(4) RPGC (§ 10).

Thus, the action is manifestly inadmissible (Article 126 RPGC) (§ 11).

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07/09/2020, R 1504/2020-5, FLORVERDE SUSTAINABLE FLOWERS (fig.)

EUTM application



Certification mark – Regulation of use of the certification trade mark – Article 83(1) and (2) – Article 84(1) and (2) EUTMR – Article 85(1) and (2) EUTMR – Article 17 EUTMIR – Decision annulled – Application allowed

The applicant sought to register the certification mark for goods in Class 31 covering natural plants and flowers. The examiner notified the applicant that the regulations governing use of the certification mark submitted contained deficiencies that had to be remedied in accordance with Article 83(2) EUTMR i.e. a declaration by the applicant that



it would not carry on any business involving the supply of goods or services of the kind certified. The applicant responded to the objection amending the regulations governing use of the certification mark. The examiner finally rejected the application for the certification mark on the grounds that the regulations governing use did not comply with Article 17(f) EUTMIR and that they were not duly amended, pursuant to Article 85(2) EUTMR: the public could be misled as regards the character or the significance of the mark, in particular if it was likely to be taken as something other than a certification mark.

The Board annuls the examiner's decision, and allows the EUTM application. The Board notes that as a result of the amendment to the regulations governing use of the certification mark, the application meets the requirements of Article 85(2) EUTMR. The amendment removes the reference to the possible use of the certified trade mark for mixtures where 'at least 70 % of the flowers corresponds to the certified product'. To that extent, the Board considers that the examiner's objection has been remedied correctly.

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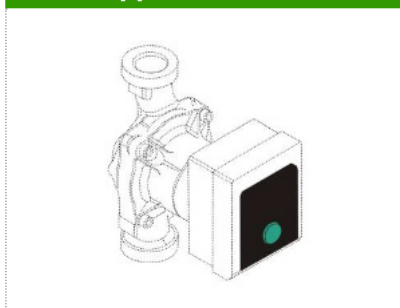
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04/08/2020, R 2707/2019-5, **Farbmarke an sich**

EUTM application



Colour mark – Non-distinctive – Article 7(1)(b) EUTMR – Decision confirmed – Application rejected

The applicant sought to register the colour mark at hand for goods and services in Classes 7 and 9. The colour mark was described by the applicant as follows: The sign consists of the combination of the colours green (Pantone 334) and black (Pantone C) for operating, positioning and control devices for circulating pumps, namely the green for a roof button and black for the surface of the operation.

The examiner rejected the colour trade mark application pursuant to Article 7(1)(b) EUTMR, on the premise that the mark was devoid of any distinctive character. According to the examiner, the colours black and green were in common use



for buttons and operating surfaces, including in the field of heating technology and they would not be perceived as an indication of commercial origin. Moreover, the colour combination used was no different from combinations that were customarily used in the sector.

The Board confirms the contested decision and rejects the sign applied for on the grounds of Article 7(1)(b) EUTMR. The Board notes that the colour combination of green and black is not unusual or uncommon for circulating pumps or their operational buttons. The Board indicates that the relevant public will immediately assume that the colour combination serves decorative purposes and the green colour button has a signalling function. Therefore, the colour combination applied for is devoid of distinctive character.

14/09/2020, R 638/2020-4, **PLUSCARD (fig.)**

IR designating the EU



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Figurative Mark – Descriptive element – Non-Distinctive – Article 7(1)(b) and (c) EUTMR – Decision confirmed – IR designating EU partially rejected

The applicant sought to register the figurative mark above for several goods and services in Classes 36 and 38, among others, mainly dealing with payment card services. The examiner partially rejected the IR designating the European Union on the basis of Article 7(1)(b) and (c) EUTMR, as the sign would be understood by relevant English consumers as a card with extra advantages for its holder and as such would be seen as being descriptive.

The Board agrees with the examiner's conclusions and rejects the appeal. The sign consists of two words 'PLUS' and 'CARD'. The meaning of the word 'PLUS' is 'involving extra gain or advantage'. Hence, it is used and will be understood by the relevant public as 'used for describing a positive quality' of the goods. The Board indicates, that the meaning of the words as a whole 'PLUSCARD' will be understood as providing extra advantages for its holder such as special discounts, price advantages or price offers. With this meaning, the sign describes the kinds of services offered, thus falling under Article 7(1)(c) EUTMR. In relation to the figurative elements of the mark, the Board notes that they are insufficient to change the descriptive meaning of the sign. The Board concludes that the descriptive meaning of the sign 'PLUSCARD' in relation to all the services at issue will be immediately perceived by the relevant public without a moment's hesitation.



On the request for oral proceedings, the Board underlines the fact that the IR holder has had ample opportunity to present all its legal and factual arguments in writing in its observations at first instance as well as in the statement of grounds. The IR holder did not contest the meaning of the words 'PLUS' and 'CARD' as such and did not explain which further facts or arguments it could present in oral proceedings.

03/09/2020, R 2751/2019-4, **TORO DE PIEDRA** (fig.) / **Toro denominación de origen et al.**

Earlier trade marks

TORO Denominación de Origen



Contested sign



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Likelihood of confusion – Reputation – Proof of use (insufficient) – Nature of use – Dissimilarity of the signs – Opposition rejected

An opposition was filed against the EUTM application above based on Article 8(1)(b) and Article 8(5) EUTMR. The goods applied for comprised wine (complying with the specifications of the protected designation of origin 'TORO'), alcoholic beverages (except beers and wines) and spirits in Class 33. The applicant requested that the opponent prove genuine use of its earlier trade marks. The first-instance department rejected the opposition.

The Board of Appeal confirms this decision. Since the signs are dissimilar, no likelihood of confusion may arise since one condition of Article 8(1)(b) EUTMR is not fulfilled. Even if there were some similarity between the signs based on the common element 'Toro', still, no likelihood of confusion would arise.

The proof of use provided by the opponent was insufficient to prove genuine use of the earlier trade marks. A PDO is not normally used by the Consejo de Regulador for wine, but only for the 'certification' that the wine is made in accordance with the regulations governing use. No use was shown in accordance with the essential function of the trade mark. The opposition, based on the two figurative trade marks, has to fail. The opponent did not submit any evidence as regards its marks' enhanced distinctive character or reputation, so for



that reason Article 8(5) EUTMR is also not applicable.

11/08/2020, R 2514/2018-1, Fitadium / Fitadium et al.

Word Mark – Domain names – Likelihood of confusion – Article 8(1)(b) EUTMR – Decision annulled – Opposition allowed

The applicant sought to register the word mark for goods and services in Classes 5, 25, 41 and 44, such as dietary supplements and sports services. The opposition was based on Article 8(4) EUTMR and French law as well as the word mark 'Fitadium' which was used as a trade name, a brand name and in the domain name 'fitadium.com'. The opposition was rejected by the Opposition Division.

The Board annuls the contested decision and allows the opposition. The Board indicates that under Article 8(4) EUTMR there are certain cumulative conditions in order to oppose an EUTM application on the basis of a sign other than a registered trade mark, namely: i) the sign must be used in the course of trade, ii) it must be of more than mere local significance, iii) the right to sign must have been acquired in accordance with the law of the Member State in which the sign was used and iv) the sign must confer on its proprietor the right to prohibit the use of a subsequent trade mark. The last two conditions must be assessed in light of the law governing the

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sign relied on, while the first two are assessed on the basis of EU law. Moreover, the Board notes that the provision of Article 8(4) EUTMR refers to the obligation to provide a clear identification of the content of national law relied upon by adducing publications of the relevant provisions.

In relation to the cumulative conditions of the provision, the Board indicates that i) there is evidence that the sign is used in the course of trade in the field of health and nutrition and ii) its use is not of a mere local significance as the site fitadium.com lists a number of visitors from more than 100 countries. Furthermore, the opponent is a well-established online business that is well known throughout France.

In relation to the comparison of the goods and services between the two marks, the goods in Class 5 such as disinfectants for medical instruments are found to be dissimilar by the Board while for the remaining goods, a likelihood of confusion is established. Consequently, the decision is annulled and the opposition allowed.

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