

Similarity between beers and other beverages

Consistency Circle Goods and Services

July 2022

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1 Introduction

- 1 This report is a compilation of case-law from the Court of Justice (CJ), the General Court (GC) and the Boards of Appeal (the Boards or the BoA), drawn up with the aim of identifying and analysing the relevant case-law and trends on the topic.
- 2 The purpose is to further support the work of the BoA with a view to maintaining and enhancing the **consistency** of its decision-making practice with the case-law of the EU Courts and among the BoA. As such, it contributes to improving the **predictability** of decisions and legal certainty in general. Through divulging relevant legal information, it also serves to increase **knowledge, awareness and transparency** among the various BoA stakeholders.
- 3 It is a working document that reflects existing case-law and the result of discussions within the Consistency Circles and the General Consistency Meeting of the BoA at the given date of the report. **It does not have any binding effect on the BoA.** It has been made available to the staff of the BoA and the public in general for information purposes only.
- 4 This report focuses on the comparison between ‘beer’ as contained in Class 32 and other beverages. The ‘other beverages’ within the scope of this report are:
 - any non-alcoholic beverage as covered by the general indications ‘non-alcoholic beverages’, ‘mineral and aerated waters’ and ‘fruit beverages and fruit juices’ of Class 32;
 - any alcoholic beverage as covered by the general indication ‘alcoholic beverages, except beer’ of Class 33;
 - beverages that are classified in Class 29 such as milk and milk beverages with milk predominating, yogurt-based drinks and milk substitutes (almond milk, coconut milk, peanut milk, rice milk, soya milk etc.);
 - beverages that are classified in Class 30, namely, beverages with coffee, cocoa, chocolate or tea base.

2 Legal Framework

2.1 EU law

- 5 Article 8(1)(b) EUTMR provides: *‘Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered if, because of its identity with, or similarity to, the earlier trade mark and the **identity or similarity of the goods or services** covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark.’*
- 6 Article 33(7) EUTMR provides: *‘Goods and services shall not be regarded as being similar to each other on the ground that they appear in the same class under the Nice*

Classification. Goods and services shall not be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.'

2.2 General principles of comparison of goods and services

7 According to settled case-law, in assessing the similarity of goods or services, all the relevant factors relating to those goods and services should be taken into account. As established in **CANON**¹, these factors include, in particular their **nature**, their **intended purpose**, their **method of use** and whether they are **in competition with each other** or are **complementary**. Other factors may also be taken into account, such as the **distribution channels** of the goods or services concerned, namely, the fact that those goods or services are often sold or offered in the same specialist sales outlets or the same sections of department stores or supermarkets². **Market practice** is a relevant factor that may strengthen the impression in the eyes of the relevant public that the same undertaking is responsible for the goods or services at issue. Accordingly, the **usual commercial origin** of the goods or services concerned, **as perceived by the relevant public**, is of particular relevance, and in that respect, that **consumers would consider it usual** for the goods at issue to be sold under the same trade mark, which normally implies that a large number of producers or distributors of those products are the same³. If there are no reasons to consider that the average consumer would expect the goods or services concerned to have the same commercial origin, it is a strong indication that there is no similarity between them. However, market practices and the consumer's perception of market practices may change over time, so that the result of the comparison of goods and services may also change⁴. Finally, it is not necessary for all factors to be present for the goods and services to be regarded as similar; the similarity between the goods or services at issue may be based on a single criterion⁵.

2.3 Other instruments

8 The **Office's Guidelines** on the comparison of goods and services (Part C, Section 2, Chapter 2), apart from the general factors of comparison, do not provide any specific guidance on the comparison between beer and other beverages.

9 According to the Office's **Similarity Tool** which reflects first instance Office practice on the comparison of goods and services⁶, 'beer' is

(i) similar to a high degree to 'non-alcoholic beer' and on that account, also to the general category 'non-alcoholic beverages' covering those goods;

¹ 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 35.

² 11/07/2007, T-443/05, PiraÑAM diseño original Juan Bolaños (fig.) / PIRANHA, EU:T:2007:219, § 37; 02/06/2021, T-177/20, Hispano Suiza / Hispano Suiza, EU:T:2021:312, § 44.

³ 04/11/2003, T-85/02, Castillo, EU:T:2003:288, § 38; T-177/20, Hispano Suiza / Hispano Suiza, EU:T:2021:312, § 51 and the case-law cited; 18/07/2013, R 233/2012-G, PAPAGAYO ORGANIC / PAPAGAYO, § 67; 13/04/2022, R 964/2020-G, ZORAYA / VIÑA ZORAYA, § 33.

⁴ 13/04/2022, R 964/2020-G, ZORAYA / VIÑA ZORAYA, § 27-28.

⁵ T-177/20, Hispano Suiza / Hispano Suiza, EU:T:2021:312, § 53; 13/04/2022, R 964/2020-G, ZORAYA / VIÑA ZORAYA, § 35

⁶ <http://www.euipo.europa.eu/sim/search>.

- (ii) similar to an average degree to specific non-alcoholic beverages in Class 32, such as ‘mineral water’, ‘juices’, ‘soft drinks’ and ‘energy drinks’;
- (iii) dissimilar to non-alcoholic beverages in Classes 29 and 30, such as ‘coffee’, ‘tea’, ‘cocoa’ and milk-based drinks;
- (iv) similar to an average degree to low-alcohol content beverages, such as ‘cider’ and on that account, also to the general category ‘alcoholic beverages, except beer’ covering those goods;
- (v) similar to an average degree to ‘wine’;
- (vi) similar to an average degree to high-alcohol content beverages, such as ‘liqueur’, ‘whisky’ and ‘brandy’.
- 10 The report refers to the 2022 version of the 11th edition of the **Nice Classification**⁷, as in force from 1 January 2022.

3 Case-law Analysis

3.1 The scope of the general indication ‘beers’

- 11 It is appropriate to analyse first the scope of ‘beers’ as a general indication of the class heading of Class 32, i.e. whether it covers only the alcoholic beverage or also covers non-alcoholic beer. The issue is relevant, as it affects the outcome of the comparison with other non-alcoholic beverages. If, for example, ‘beers’ meant only the alcoholic drink, it could, at most, be considered similar to the general category of ‘non-alcoholic beverages’, but not identical. By contrast, if ‘beers’ also covered ‘non-alcoholic beer’, it would have to be considered identical to the general category of ‘non-alcoholic beverages’ due to an overlap between the categories. In summary, if ‘beers’ are understood as also covering ‘non-alcoholic beer’, it reduces the distance between ‘beers’ and any non-alcoholic beverage.
- 12 ‘Beer’, in its natural and usual (i.e. literal) meaning, is an alcoholic drink⁸. Although traditionally an alcoholic beverage, for certain historical and commercial reasons, it is placed in Class 32 of the Nice Classification that otherwise contains non-alcoholic beverages. *‘At the time the Classification was established, beers were included in Class 32 because they were often commercialized by the same companies that produced and/or sold soft drinks. They were also considered to be an alternative to soft drinks. Generally, beer has lower alcohol content than most beverages in Class 33, but it must be remembered that the classification of beer in Class 32 was not decided on the basis of its low alcohol content but rather taking into account channels of commerce. Therefore, with the exception of beers, all alcoholic beverages, even those*

⁷ Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks.

⁸ ‘An alcoholic drink made from yeast-fermented malt flavored with hops’ – Oxford University Press, Lexico Online Dictionary (<https://www.lexico.com/definition/beer>); ‘An alcoholic drink brewed from malt, sugar, hops, and water and fermented with yeast’ – Collins English Dictionary (<https://www.collinsdictionary.com/dictionary/english/beer>).

*with a low alcohol content, must be classified in Class 33*⁹. This is also the reason why Class 33, dedicated to alcoholic beverages, specifies the general indication of the class heading as ‘alcoholic beverages, except beers’.

- 13 There is a certain ambivalence in practice. According to one line, the general indication ‘beers’ covers only the alcoholic drink in its natural and usual (i.e. literal) meaning (Article 33(5) EUTMR). Therefore, ‘non-alcoholic beer’ is covered not by ‘beer’, but solely by the general indication ‘non-alcoholic beverages’, in the same class. In **CERVISIA**, the GC endorsed the Board’s finding that ‘beer’ was highly similar to ‘non-alcoholic beer’, but not identical¹⁰. In **STAROPILSEN**, the GC endorsed the Board’s assessment of the omnipresence of non-alcoholic beer on the market leading to a high degree of similarity between ‘beer’ and ‘other non-alcoholic drinks’, but not an identity¹¹. The GC endorsed the same approach in **PANINI**, finding a similarity between ‘beer’ and ‘non-alcoholic drinks’ due to the latter covering non-alcoholic beer, but not an identity¹². The GC’s reasoning in **STAR FOODS**¹³ considering beer as an alcoholic beverage also supports the view that the term ‘beer’ does not cover ‘non-alcoholic beer’. Had the GC considered otherwise, it may have affected the reasoning for finding ‘beers’ and the relevant beverages in Classes 29 and 30 dissimilar. For its part, the Board held, in **TES CERVEZA TASTE OF MEXICO CAN**¹⁴, that the contested ‘beer’ was highly similar to non-alcoholic beer, covered by the broad category of ‘non-alcoholic beverages’ of the earlier marks.
- 14 According to the other line, the general indication ‘beers’ also covers ‘non-alcoholic beer’¹⁵. In **SILICIUM ORGANIQUE G5 LLR-G5**, the GC endorsed the reasoning of the Board that ‘beers’ also covered non-alcoholic beer leading to an identity with the general category of ‘non-alcoholic drinks’¹⁶. The Board followed the same approach in **NATURELA**¹⁷, finding ‘beers’ and ‘non-alcoholic drinks’ identical. In **SPEZOOMIX**¹⁸, while the Board noted that ‘beers’ also covered ‘non-alcoholic beer’, it did not conclude on an identity between ‘beers’ and ‘non-alcoholic beverages’. In **DONAR**¹⁹, the Board considered that ‘beer’ also covered ‘non-alcoholic beer’ which led it to find an average degree of similarity between ‘beer’ and ‘mineral water’. In **ED EUROPEAN DRINKS**²⁰, based on the premise that ‘beer’ also covered non-alcoholic beer, the BoA found an average degree of similarity between ‘energy drinks’ and ‘beer’.

⁹ See [information note](#) added by WIPO to the class heading of Class 32 in the Nice Classification.

¹⁰ 13/03/2017, R 1241/2016-5, CERVISIA (fig.) / CERVISIA AMBAR, § 17-18; 07/12/2018, T-378/17, CERVISIA (fig.) / CERVISIA AMBAR, EU:T:2018:888, § 20.

¹¹ 20/06/2017, R 236/2017-4, STAROPILSEN; STAROPLZEN / STAROPRAMEN et al., § 17; 26/06/2018, T-556/17, STAROPILSEN; STAROPLZEN / STAROPRAMEN et al., EU:T:2018:382, § 17.

¹² 06/09/2012, R 2393/2011-2, PANINI (fig.) / GRANINI et al., § 20; 11/12/2013, T-487/12, Panini, EU:T:2013:637, § 26.

¹³ 11/05/2010, T-492/08, Star foods, EU:T:2010:186, § 29-34; 10/10/2012, T-333/11, Star foods, EU:T:2012:536, § 35.

¹⁴ 18/12/2019, R 924/2019-5, Tes Cerveza TASTE OF MEXICO CAN (3D) / COCA-COLA CAN (3D) et al. § 24.

¹⁵ ‘Nonalcoholic beer is beer that does not contain any alcohol.’ – Collins English Dictionary (<https://www.collinsdictionary.com/dictionary/english/nonalcoholic-beer>).

¹⁶ 11/06/2015, R 291/2014-1, SILICIUM ORGANIQUE G5 LLR-G5 (fig.) / Silicium Organique G5- Glycan 5-Si-Glycan-5-Si-G5 et al., § 35; 28/09/2016, T-539/15, SILICIUM ORGANIQUE G5 LLR-G5 (fig.) / Silicium Organique G5- Glycan 5-Si-Glycan-5-Si-G5 et al., EU:T:2016:571, § 33.

¹⁷ 12/09/2019, R 1510/2018-1, naturela (fig.) / Natureo et al., § 22.

¹⁸ 15/05/2014, R 941/2013-1, SPEZOOMIX / Spezi et al., § 21.

¹⁹ 19/12/2018, R 1822/2018-4, Donar / Donat et al., § 17-18.

²⁰ 30/07/2019, R 2158/2018-5, ed EUROPEAN DRINKS (fig.) / ED et al., § 25-27.

- 15 None of the two approaches establishes a prevailing trend. In **ZORAYA**²¹, the Grand Board also noted those possible interpretations without, however, elaborating on the reasons or deciding the line to follow, since the case did not concern the comparison between ‘beers’ and other beverages. Further guidance from the GC or the Grand Board is awaited.

3.2 ‘Beers’ versus non-alcoholic beverages in Class 32

3.2.1 ‘Beers’ versus ‘non-alcoholic beverages’ (general category)

- 16 It is appropriate to analyse first the case-law relating to the comparison between ‘beers’ and the **general category of ‘non-alcoholic beverages’**.
- 17 The **MYSTERY**²² judgment concerned a comparison between ‘beers and beverages containing beer’ (i.e. not merely ‘beers’) and ‘non-alcoholic beverages with the exception of non-alcoholic beer’ (i.e. expressly excluding ‘non-alcoholic beer’ from the general category of ‘non-alcoholic beverages’). The GC found a ‘great degree of similarity’ between these goods. It referred to the Board’s findings that *‘the earlier mark is protected not only in respect of beers but also of mixed beverages containing beer, which might be non-alcoholic’, that ‘beers and other [non-alcoholic] beverages could come, in particular in the bottling and marketing stages, from the same undertakings, could be sold side by side and had the same destination’ and that ‘mixed beverages based on beer might be substituted for either beer or non-alcoholic beverages’*. Regarding the possible distinction between the goods on the basis of their alcoholic content, the GC held that *‘the differences between certain beverages from the point of view of alcoholic content (beers with reduced alcohol content, beers without alcohol or mixed beverages) would tend to become blurred and would not prevent consumers from considering that both products were manufactured under the control of the same undertaking’*.
- 18 In **PANINI**²³, the GC confirmed the BoA’s assessment that found the contested ‘beers’ similar to ‘non-alcoholic drinks’. The judgment does not contain any independent reasoning in that regard. The BoA reasoned that the contested ‘beers’ were similar to ‘non-alcoholic drinks’ of the earlier marks due to the latter covering non-alcoholic beer²⁴.
- 19 In **SPEZOOMIX**²⁵, the GC confirmed the BoA’s assessment which found the contested ‘beers’ similar to ‘non-alcoholic beverages’. The judgment does not contain any independent reasoning in that regard. The BoA reasoned that these goods could come from the same undertakings, could be sold side by side and could be mixed with each other. While the BoA also noted that ‘beers’ also covered ‘non-alcoholic beer’, it did not conclude on an identity between these categories²⁶.

²¹ 13/04/2022, R 964/2020-G, ZORAYA / VIÑA ZORAYA, § 74-75.

²² 15/01/2003, T-99/01, Mystery (fig.) / Mixery, EU:T:2003:7, § 40-41, 48.

²³ 11/12/2013, T-487/12, Panini, EU:T:2013:637, § 26.

²⁴ 06/09/2012, R 2393/2011-2, PANINI (fig.) / GRANINI et al., § 20.

²⁵ 01/03/2016, T-557/14, SPEZOOMIX / Spezi et al., EU:T:2016:116, § 25.

²⁶ 15/05/2014, R 941/2013-1, SPEZOOMIX / Spezi et al., § 21.

- 20 In **SILICIUM ORGANIQUE G5 LLR-G5**²⁷, the GC confirmed the BoA's assessment that the contested 'non-alcoholic drinks' were identical to 'beers' of the earlier mark. The BoA reasoned that both 'non-alcoholic drinks' and 'beers' covered non-alcoholic beer²⁸.
- 21 In **STAROPILSEN**²⁹, the GC confirmed the BoA's assessment that 'beer' and 'other non-alcoholic drinks' were highly similar. The judgment does not contain any independent reasoning in that regard. The BoA emphasised that many beer manufacturers nowadays offer a line of non-alcoholic beers, and so the goods at issue may come from the same undertakings, share the same distribution channels and are also in competition with each other³⁰.
- 22 In **LA PASSIATA**³¹, the BoA found a high degree of similarity between the contested 'beers' and 'non-alcoholic beverages' of the earlier mark. The same conclusion was reached in numerous earlier BoA decisions, e.g. in **GOLDEN HORSE**³², **GREEN FLUTE**³³, **БАЛКАНИКА**³⁴.
- 23 In **HELLO FRESH**³⁵, the BoA found only an average degree of similarity between the contested 'beers; brewery products' and 'non-alcoholic beverages', essentially with the same reasoning as in the previous cases.
- 24 To conclude, the GC and BoA case-law establishes an average to high degree of similarity between 'beer' and the general category of 'non-alcoholic beverages', mainly due to the fact that the latter covers non-alcoholic beer that has the same purpose, often comes from the same undertakings, shares the same distribution channels and is also in direct competition with 'beer'.

3.2.2 'Beers' versus 'mineral and aerated waters'

- 25 Next, the case-law relating to the comparison between 'beer' and '**mineral and aerated waters**' will be analysed.
- 26 In **CERVISIA**³⁶, the GC endorsed the BoA's findings that 'beer' was similar to an average degree to the contested 'mineral and aerated waters'. The judgment does not contain any independent reasoning in that regard. The BoA reasoned that 'beer' and the contested 'mineral and aerated waters' shared the same distribution channels and were often mixed or consumed together³⁷.

²⁷ 28/09/2016, T-539/15, SILICIUM ORGANIQUE G5 LLR-G5 (fig.) / Silicium Organique G5- Glycan 5-Si-Glycan-5-Si-G5 et al., EU:T:2016:571, § 33.

²⁸ 11/06/2015, R 291/2014-1, SILICIUM ORGANIQUE G5 LLR-G5 (fig.) / Silicium Organique G5- Glycan 5-Si-Glycan-5-Si-G5 et al., § 35.

²⁹ 26/06/2018, T-556/17, STAROPILSEN; STAROPLZEN / STAROPRAMEN et al., EU:T:2018:382, § 17.

³⁰ 20/06/2017, R 236/2017-4, STAROPILSEN; STAROPLZEN / STAROPRAMEN et al., § 17.

³¹ 05/11/2018, R 928/2018-2, La passiate / Passina (fig.), § 27.

³² 17/12/2019, R 1167/2019-4, GOLDEN HORSE (fig.) / POWER HORSE (fig.) et al., § 17-18.

³³ 27/02/2018, R 8/2017-4, GREEN FLUTE (fig.) / AMBAR-GREEN, § 24.

³⁴ 24/05/2018, R 63/2018-1, Балканика (fig.) / Балканско et al., § 20.

³⁵ 13/08/2020, R 267/2020-4, Hello FRESH (fig.) / Hello et al., § 24-25.

³⁶ 07/12/2018, T-378/17, CERVISIA (fig.) / CERVISIA AMBAR, EU:T:2018:888, § 20.

³⁷ 13/03/2017, R 1241/2016-5, CERVISIA (fig.) / CERVISIA AMBAR, § 17-18.

- 27 On the other hand, in **STAROPILSEN**³⁸, the GC confirmed the BoA's assessment that 'beer' and 'aerated waters' were similar only to a low degree. The judgment does not contain any independent reasoning in that regard. The BoA reasoned that 'beers' and 'aerated waters' had the same purpose and that their distribution channels could coincide³⁹.
- 28 The majority trend in the BoA case-law is to find 'beers' and 'mineral waters' similar to an average degree. In **CASTELL**⁴⁰, which concerned 'beers, ginger ale' versus 'mineral and aerated waters', the Board stated, based on the premise that 'beer' covered also non-alcoholic beer, that *'although beers traditionally comprised alcohol, non-alcoholic beers or low-alcohol beers are now widely available on the market. Moreover, those beverages, whether alcoholic or not, and the opponent's 'mineral and aerated waters' are likely to be sold next to each other in supermarkets and grocery stores, are served in bars and restaurants, and are targeted at the general public. Furthermore, beers and non-alcoholic beverages are often mixed and consumed together; to some extent they are therefore complementary. It is settled case-law that they must therefore be considered to be similar (15/01/2003, T-99/01, Mystery, EU:T:2003:7, § 40).'*
- 29 Likewise, in **DONAR**⁴¹, the BoA, again based on the premise that 'beer' also covered non-alcoholic beer, found an average degree of similarity between 'beers' and 'mineral water; mineral water with high magnesium content'. The BoA, first, considered that the term 'beer' also included 'non-alcoholic beer'. The BoA found that the contested 'beer' (also covering non-alcoholic beer) and the earlier 'mineral water' served the same purpose (to quench one's thirst, to refresh, to accompany a meal or for relaxation/social ends), had the same (non-alcoholic beverages) or similar (low-alcohol content beverages) nature and the same method of use (drinking). The BoA also affirmed that these goods were in competition with each other, and could substitute each other because consumers who liked drinking beer could consume a non-alcoholic beer or mineral water instead, for instance in a situation where they would want to avoid the consumption of alcohol but also because they all usually would have comparable prices.
- 30 In the same vein, an average degree of similarity was found in **NOX**⁴² and in **SWEET AND SAFE SLY NUTRITIA**⁴³ between these goods. The Board came to the same conclusion of similarity in **AQUARTUS**⁴⁴, although without defining the degree.
- 31 On the other hand, in **GOUDEN CAROLUS**⁴⁵, following the line in **STAROPILSEN** (see above), the BoA held 'alcoholic beer' and 'waters, beverages; still water' to be similar only to a low degree. The BoA emphasised, first, the difference of these goods in terms of the presence or absence of alcohol. Secondly, it stated that they were usually not sold next to each other in shops. Thirdly, regarding the purpose and method of use, it found that while water is normally consumed to quench thirst, 'alcoholic beers' are often consumed for pleasure during social events. However, the BoA admitted that there

³⁸ 26/06/2018, T-556/17, STAROPILSEN; STAROPLZEN / STAROPRAMEN et al., EU:T:2018:382, § 17.

³⁹ 20/06/2017, R 236/2017-4, STAROPILSEN; STAROPLZEN / STAROPRAMEN et al., § 17.

⁴⁰ 07/04/2017, R 1590/2016-5, CASTELL / CASTELLO et al., § 21.

⁴¹ 19/12/2018, R 1822/2018-4, Donar / Donat et al., § 17.

⁴² 16/04/2021, R 1147/2020-2, Nox / Oxx, § 17-18.

⁴³ 30/01/2020, R 1087/2019-4, Sweet and safe sly nutritia / NUTRICIA et al., § 30.

⁴⁴ 27/05/2019, R 1526/2017-1, AQUARTUS / Aquintus, § 51.

⁴⁵ 18/09/2018, R 2208/2017-2, GOUDEN CAROLUS (fig.) / Carolus, § 62 to 66.

could be an overlap, since water might also be consumed during the same events, while ‘alcoholic beers’ could equally be consumed outside of social events to quench one’s thirst. Finally, it was held that the producers were not usually the same.

- 32 It appears from the analysis of the case-law that the **trend is to find an average degree of similarity between beer and water**.

3.2.3 ‘Beers’ versus other specific non-alcoholic beverages

- 33 In continuation, the case-law relating to the comparison between ‘beers’ and **other specific non-alcoholic beverages**, such as juices, soft-drinks and energy drinks, will be analysed.

- 34 In **CERVISIA**⁴⁶, the GC endorsed the BoA’s findings that ‘beer’ was similar to an average degree to the contested **‘fruits beverages and fruit juices’** and **‘other non-alcoholic drinks’** (not covering ‘non-alcoholic beer’ as that was claimed separately in the contested mark, see in 3.1 above). The judgment does not contain any independent reasoning in that regard. The BoA reasoned that ‘beer’ and the contested ‘fruits beverages and fruit juices’ and ‘other non-alcoholic drinks’ shared the same distribution channels and were often mixed or consumed together⁴⁷.

- 35 On the other hand, in **STAROPILSEN**⁴⁸, the GC confirmed the BoA’s assessment that ‘beer’ and **‘fruit juices’** were similar only to a low degree. The judgment does not contain any independent reasoning in that regard. The BoA reasoned that ‘beers’ and ‘fruit juices’ had the same purpose, their distribution channels could coincide and, furthermore, they could be mixed with each other to result in a fruit beer or a mixer with a proportion of beer⁴⁹.

- 36 The majority approach in the BoA case-law is to find ‘beers’ and **‘fruit juices; soft drinks; energy drinks’** similar to an average degree. In **ED EUROPEAN DRINKS**⁵⁰, based on the premise that ‘beer’ also covered non-alcoholic beer, the BoA found that **‘energy drinks’** and ‘beer’ had the same general purpose (to quench thirst), the same producers, distribution channels and relevant public. It was considered that ‘beer’ (also covering non-alcoholic beer) was also in competition with ‘energy drinks’. In **TES CERVEZA TASTE OF MEXICO CAN**⁵¹, an average degree of similarity was found between ‘beer’ and **‘soft drinks; cola drinks’** on account that these goods coincided in purpose, relevant public and distribution channels and as they were also in competition with each other. In **FLÜGEL**⁵², the BoA found ‘beers’ and **‘energy drinks’** similar to an average degree on account that they serve the same purpose to quench thirst, they are in competition with each other, and they also may be found in the same points of sale, such as restaurants, bars or side-by-side in supermarkets. In **ESEIIZA**⁵³, the BoA found ‘beer’ similar to an average degree to **‘fruit juices and beverages’**,

⁴⁶ 07/12/2018, T-378/17, CERVISIA (fig.) / CERVISIA AMBAR, EU:T:2018:888, § 20.

⁴⁷ 13/03/2017, R 1241/2016-5, CERVISIA (fig.) / CERVISIA AMBAR, § 17-18.

⁴⁸ 26/06/2018, T-556/17, STAROPILSEN; STAROPLZEN / STAROPRAMEN et al., EU:T:2018:382, § 17.

⁴⁹ 20/06/2017, R 236/2017-4, STAROPILSEN; STAROPLZEN / STAROPRAMEN et al., § 17.

⁵⁰ 30/07/2019, R 2158/2018-5, ed EUROPEAN DRINKS (fig.) / ED et al., § 25-27.

⁵¹ 18/12/2019, R 924/2019-5, Tes Cerveza TASTE OF MEXICO CAN (3D) / COCA-COLA CAN (3D) et al., § 25.

⁵² 17/11/2016, R 282/2015-5, FLÜGEL / ... VERLEIHT FLÜGEL et al., § 46.

⁵³ 14/09/2021, R 1521/2018-1, eseiiza (fig.) / ESENZA (fig.), § 55.

reasoning that they had the same purpose and could be in competition with each other. Despite the differences in terms of alcohol content and production methods, they are addressed to the same users, through the same distribution channels, either in stores or in bars or restaurants.

- 37 On the other hand, some BoA decisions found only a low degree of similarity between ‘beer’ and certain types of non-alcoholic beverages. In **GOUDEN CAROLUS**⁵⁴, following the line in **STAROPILSEN** (see above), the BoA found only a low degree of similarity between ‘alcoholic beer’ and ‘juices; syrups for beverages; fruit-flavoured beverages; isotonic beverages, not for medical purposes; non-alcoholic malt free beverages, other than for medical use’. Likewise, in **ALBUFERA MONSTER**⁵⁵, the BoA concluded on a low degree of similarity between ‘beers’ and ‘energy drinks’.
- 38 It appears from the analysis that the **case-law trend is to find an average degree of similarity between ‘beers’ and specific non-alcoholic beverages**, such as juices, soft-drinks and energy drinks.
- 39 It is apparent from the analysis above that the argument that ‘beers’ are often consumed together or mixed with other beverages and are, for that reason, complementary, is often referred to in order to support a reasoning that the goods are similar to an average degree. Often, a reference is made in that regard to **MYSTERY**, § 40⁵⁶. However, a closer analysis reveals that the GC did not refer to the argument of complementarity in that judgment. Simply, the comparison in that case related to the earlier goods ‘beers’ and ‘beverages containing beer’. It was in that context that the GC referred to ‘mixed beverages based on beer’ in § 40 and not in the context that beer could be consumed together or mixed with other beverages.
- 40 Moreover, in **FLÜGEL** and **CHIC ÁGUA ALCALINA 9,5 PH**⁵⁷, the GC held that the **mere fact that different alcoholic and non-alcoholic beverages may be mixed and consumed as a mixture does not justify them to be regarded as complementary**. To consider that those categories of goods should be described as similar, for the simple reason that they may be mixed and consumed as a mixture, when they are not intended to be consumed in either the same circumstances, or in the same state of mind, or, as the case may be, by the same consumers, would put a large number of goods which can be described as ‘drinks’ into one and the same category for the

⁵⁴ 18/09/2018, R 2208/2017-2, GOUDEN CAROLUS (fig.) / Carolus, § 62-66.

⁵⁵ 10/06/2015, R 868/2014-2, ALBUFERA MONSTER (fig.) / MONSTER, § 21-24.

⁵⁶ ‘In that regard, the Board of Appeal found that the earlier mark is protected not only in respect of beers but also of mixed beverages containing beer, which might be non-alcoholic. The Board of Appeal also found that beers and other beverages could come, in particular in the bottling and marketing stages, from the same undertakings, could be sold side by side and had the same destination. Furthermore, in the minds of consumers, mixed beverages based on beer might be substituted for either beer or non-alcoholic beverages. The Board of Appeal therefore rightly concluded that the goods concerned in Class 32 were similar.’

⁵⁷ 04/10/2018, T-150/17, FLÜGEL / ... VERLEIHT FLÜGEL et al., EU:T:2018:641, § 80-81 (judgment dealt with the comparison between ‘alcoholic beverages, except beers’ and ‘energy drinks’, concluding that they were dissimilar); 22/09/2021, T-195/20, chic ÁGUA ALCALINA 9,5 PH (fig.) / Chic Barcelona et al., EU:T:2021:601, § 54 (judgment dealt with the comparison between ‘alcoholic beverages, except beers’ and ‘mineral water’, concluding that they were dissimilar).

purposes of the application of Article 8(1)(b) EUTMR. The Grand Board took the same approach in **ICEBERG**⁵⁸.

- 41 Furthermore, both judgments emphasise that the **presence or absence of alcohol** in a beverage is a significant factor differentiating the nature of the beverage for the general public of the EU. The general public in the EU is observant and differentiates between alcoholic and non-alcoholic beverages even when it chooses a beverage on impulse⁵⁹. On the other hand, in **ZORAYA**⁶⁰, the Grand Board nuanced the relevance of the alcoholic content of beverages for the outcome of the comparison in view of the noted evolution of market practice that producers of alcoholic products also, increasingly, produce non-alcoholic versions of their beverages to meet different consumer needs. As a result, these goods are also increasingly in competition with each other.
- 42 The GC adds in **CHIC ÁGUA ALCALINA 9,5 PH** that the fact that goods may be **sold in the same commercial establishments**, such as large shops and supermarkets, is not particularly significant since very different kinds of goods may be found in such shops, without consumers automatically believing that they have the same origin. Only the presence of those goods **in the same section** of such shops would be an indication of their similarity⁶¹. It is indeed questionable whether ‘beers’ are sold in the ‘same section’ of a supermarket as, for example, ‘mineral water’ and ‘juices’.
- 43 It, therefore, remains for the GC or the Grand Board to further develop whether an average degree of similarity between ‘beers’ and different non-alcoholic beverages can be sustained, in view of the most recent case-law.

3.3 ‘Beers’ versus non-alcoholic beverages in Classes 29 and 30

- 44 Apart from the comparison between ‘beers’ and non-alcoholic beverages in Class 32, it is also opportune to analyse the case-law relating to the comparison between ‘beers’ and the **non-alcoholic beverages in Class 29** (such as milk, milk or yogurt-based drinks and milk substitutes) **and Class 30** (such as tea, coffee, cocoa or chocolate-based drinks).
- 45 In **STAR FOODS**⁶², the GC endorsed the BoA’s finding that ‘beer’, on the one hand, and ‘milk-based beverages’ in Class 29 and ‘tea, cocoa-based beverages, coffee-based beverages, chocolate-based beverages, non-medicinal infusions’ in Class 30, on the other, were dissimilar. The GC underlined, referring to **MEZZOPANE**, that the nature of those goods is different in view of beer being an alcoholic beverage which also implies that it is consumed on different occasions than beverages of the earlier mark. Moreover, although the distribution channels and sales outlets of the goods at stake could be the same, this does not suffice to find a similarity between them, since

⁵⁸ 21/01/2019, R 1720/2017-G, ICEBERG (fig.) / ICEBERG et al., § 60-61. (The decision dealt with the comparison between ‘vodka’ and ‘mineral water; non-alcoholic beverages; fruit juices’, concluding that they were dissimilar, § 79.)

⁵⁹ 04/10/2018, T-150/17, FLÜGEL / ... VERLEIHT FLÜGEL et al., EU:T:2018:641, § 82-84; 22/09/2021, T-195/20, chic ÁGUA ALCALINA 9,5 PH (fig.) / Chic Barcelona et al., EU:T:2021:601, § 41-42.

⁶⁰ 13/04/2022, R 964/2020-G, ZORAYA / VIÑA ZORAYA, § 27-28, 56-65, 68, 70, 72, 80, 84.

⁶¹ 22/09/2021, T-195/20, chic ÁGUA ALCALINA 9,5 PH (fig.) / Chic Barcelona et al., EU:T:2021:601, § 73.

⁶² 11/05/2010, T-492/08, Star foods, EU:T:2010:186, § 29-34; T-333/11, Star foods, EU:T:2012:536, § 25, 35.

beers are generally not offered for sale in the same sections of supermarkets as the non-alcoholic beverages in Classes 29 and 30 at issue.

- 46 The dissimilarity between ‘beers’ and ‘coffee; tea; drinking chocolate; cocoa’ in Class 30 was also confirmed in **CRYSTAL**⁶³. The GC indicated that the BoA was right in finding that the very nature of the beverages covered by the marks at issue differed in terms of the presence or absence of alcohol. This aspect was regarded as relevant in the perception of the relevant public as a significant difference as regards the nature of the beverages in question. Furthermore, the ‘socializing’ function which the applicant attributed to coffee, relying on the custom in Portugal of going to a restaurant or bar and, during the meal, drinking a beer and ordering a coffee, was considered by the GC irrelevant. It was held that the beverages at stake were consumed on different occasions and satisfied different needs. They were also not in competition with each other, as the mere fact that all these goods could be offered in a restaurant or bar did not make it possible to conclude that a consumer would regard coffee, tea, drinking chocolate or cocoa as alternatives to beer. The GC also held that the mere fact that some breweries added coffee or tea to beers was not sufficient to establish that coffee or tea and beer were complementary goods. Finally, the GC stated that the opponent failed to produce evidence that producers of beers also manufactured coffee, tea, drinking chocolate and cocoa.
- 47 The BoA case-law follows the same tendency of finding ‘beers’ and non-alcoholic beverages in Classes 29 and 30 dissimilar. See, e.g. in **HAMADRYA**⁶⁴ and in **ST MICHEL**⁶⁵.
- 48 The analysis shows that the case-law is **consistent in finding a dissimilarity between ‘beers’ and the various non-alcoholic beverages in Classes 29 and 30.**

3.4 ‘Beers’ versus alcoholic beverages in Class 33

3.4.1 ‘Beers’ versus ‘alcoholic beverages, except beers’ (general category)

- 49 It is appropriate to start the analysis of the relationship between ‘beers’ and alcoholic beverages in Class 33 with the case-law relating to the comparison between ‘beers’ and the **general category of ‘alcoholic beverages (except beers)’**.
- 50 ‘Alcoholic beverages, except beers’ is a broad category that covers a wide range of beverages that differ in their ingredients, methods of manufacturing, alcohol content, occasions in which they are consumed and their usual origin. For the comparison between ‘beers’ and the general category of ‘alcoholic beverages’ it is of particular relevance that there are alcoholic beverages of low-alcohol content, such as ‘cider’ and ‘alcopops’ which have more factors in common with ‘beer’ than other alcoholic beverages of a higher alcohol content.

⁶³ 12/12/2019, T-648/18, Crystal / CRISTAL, EU:T:2019:857, § 25-39.

⁶⁴ 15/01/2016, R 1154/2015-1, Hamadrya / HAMA (fig.) et al., § 26-27.

⁶⁵ 20/01/2017, R 326/2016-2, St Michel (fig.) / SAN MIGUEL et al., § 40, 43-45.

- 51 In **BUDWEISER**⁶⁶, the GC held that ‘*the term ‘alcoholic beverages’ includes cider and alcopops, which are very similar to beer, and that, with the exception of wines and spirits, alcoholic drinks, including beer, are consumed for a common motive and have the same distribution outlets.*’ The GC followed the same reasoning in **YAKUT**⁶⁷, concluding that these goods were similar to a high degree.
- 52 In **ROSALIA DE CASTRO**⁶⁸, the GC held that ‘beers’ and the general category of ‘alcoholic beverages, except beers’ were similar, because both intended to quench thirst and be consumed on the same occasions and in the same places. Moreover, ‘beer’, itself an alcoholic beverage (even if classified in Class 32), was offered in the same commercial establishments, placed in the same or adjacent sections. Also, in **CERVISIA**⁶⁹, the GC found these goods to be similar given their same nature, end users and distribution channels. In **AROA**⁷⁰, the GC held that ‘beers’ were similar to an average degree to the general category of ‘alcoholic beverages, except beers’.
- 53 The BoA decision-making practice is consistent with the above case-law finding a similarity between ‘beers’ and the general category ‘alcoholic beverages’. There are, however, discrepancies insofar as the degree of similarity is concerned:
- similar to a high degree (**TRADICIÓN CZ, S.L., SHAMAN, AUTÉNTICO NATIVO, ALAMBIC GIN**⁷¹), specifically referring to case-law in **BUDWEISER** and **YAKUT**;
 - similar to an average degree (**COSTANEGRA, THE POOL - CHEFS COMPANION, DOSOL, PASIONBLUE**⁷²);
 - similar, without specifying any degree (**CRAFT, BLACKS, 1913 PREMIUM COLOMBIAN AGED GIN** and **DALANA**⁷³).
- 54 To conclude, the GC and BoA case-law establishes an average to high degree of similarity between ‘beers’ and the general category of ‘alcoholic beverages, except beer’. That finding is based mainly on the fact that the general category of ‘alcoholic beverages (except beer)’ in Class 33 also includes low-alcohol content beverages, such as ‘cider’ and ‘alcopops’, while ‘beer’ is itself a low-alcohol content beverage. These goods are close in nature, consumed for a common motive and in the same places, and share the same distribution channels.

⁶⁶ 15/11/2006, T-366/05, Budweiser, EU:T:2006:347, § 45.

⁶⁷ 21/06/2012, T-276/09, Yakut, EU:T:2012:313, § 29-32.

⁶⁸ 05/10/2011, T-421/10, Rosalia de Castro, EU:T:2011:565, § 31-32.

⁶⁹ 07/12/2018, T-378/17, CERVISIA (fig.) / CERVISIA AMBAR, EU:T:2018:888, § 20.

⁷⁰ 11/09/2014, T-536/12, Aroa, EU:T:2014:770, § 23.

⁷¹ 04/02/2019, R 257/2018-2, Tradición cz, s.l. / Rivera cz et al., § 63; 01/07/2019, R 2521/2018-2, Shaman / Shaman Energy Drink, § 24; 26/08/2019, R 272/2019-4, AUTÉNTICO NATIVO (fig.) / Nativa (fig.) et al., § 11-12; 25/05/2022, R 1613/2020-5 & R 1620/2020-5, ALAMBIC GIN / RIVES EL ALAMBIQUE, § 55.

⁷² 26/06/2018, R 1624/2017-2, COSTANEGRA (fig.) / COSTASERA et al., § 24; 19/07/2019, R 2543/2018-4, The pool - chefs companion / Pool (fig.) et al., § 15; 19/09/2019, R 382/2019-4, DOSOL / DELSOL, § 17-23; 11/03/2020, R 938/2019-2, PASIONBLUE Rie, comparte, celebra en azul (fig.) / Pasion de muscatel (fig.), § 28.

⁷³ 30/06/2020, R 1552/2019-5, Craft HANDCRAFTED BEER MICROBREWERY The First Microbrewery (fig.) / Absolut craft, § 32; 22/06/2020, R 2389/2019-5, BLACKS (fig.) / Miss Black, § 29-30; 19/12/2019, R 1335/2019-4, 1913 Premium COLOMBIAN Aged Gin (fig.) / Colombiana la nuestra (fig.), § 18-22; 02/09/2019, R 430/2019-5, Dalana / Lalama, § 23.

3.4.2 'Beers' versus low-alcohol content beverages

55 As seen in the previous point, according to case-law⁷⁴, there is a **high degree of similarity between 'beers' and low-alcohol content beverages**, such as 'cider'⁷⁵, 'perry'⁷⁶ or 'alcopops'⁷⁷. These goods are close in nature, consumed for a common motive and in the same places, and share the same distribution channels.

56 For instance, in **AMBRA ROSA**⁷⁸, the BoA found – referring to **BUDWEISER, YAKUT, ROSALIA DE CASTRO** and **CERVISIA** – that there is at least an average, if not a high similarity between 'beer' and 'cider'. While it concerned a comparison with the general category of 'alcoholic beverages (except beer)', the BoA expressly found in **ALAMBIC GIN**⁷⁹ that 'cider' and 'alcopops', covered by that broad category, were highly similar to 'beer'.

3.4.3 'Beers' versus 'wines'

57 Next, it is pertinent to continue with the analysis of the case-law relating to the comparison between 'beer' and '**wine**' (including sparkling wines and fortified wines).

58 In **MEZZOPANE**⁸⁰, the GC compared in detail 'beers' and 'wines' and found only 'little similarity' between these goods for the average Austrian consumer.

59 First, regarding nature, method of use and end users, the GC stated that although both 'wines' and 'beers' are alcoholic beverages obtained by a fermentation process and consumed during a meal or drunk as an aperitif, *'the basic ingredients of those beverages do not have anything in common. Alcohol is not an ingredient used in the production of those beverages, but is one of the constituents generated by that production. Moreover, although the production of each of those beverages requires a fermentation process, their respective methods of production are not limited to fermentation and are fundamentally different. Thus, crushing grapes and pouring the must into barrels cannot be assimilated to the brewing processes of beer. Moreover, the fact that beer is obtained through the fermentation of malt, whereas wine is produced through the fermentation of the must of grapes, means that the end products generated differ in colour, aroma and taste. That difference in colour, aroma and taste leads the relevant consumer to perceive those two products as being different. In addition, despite the fact that wine and beer may, to a certain extent, satisfy the same need – enjoyment of a drink during a meal or as an aperitif – the Court considers that the relevant consumer perceives them as two distinct products. The Board of Appeal was therefore correct to consider that wines and beers do not belong to the same family of alcoholic beverages.'*

⁷⁴ 15/11/2006, T-366/05, Budweiser, EU:T:2006:347, § 45; 21/06/2012, T-276/09, Yakut, EU:T:2012:313, § 29-30.

⁷⁵ 'An alcoholic drink made from fermented apple juice' – Oxford University Press, Lexico Online Dictionary (<https://www.lexico.com/definition/cider>).

⁷⁶ 'An alcoholic drink made from the fermented juice of pears' – Oxford University Press, Lexico Online Dictionary (<https://www.lexico.com/definition/perry>).

⁷⁷ 'A ready-mixed drink that resembles a soft drink but contains alcohol' – Oxford University Press, Lexico Online Dictionary (<https://www.lexico.com/definition/alcopop>).

⁷⁸ 03/02/2022, R 1037/2021-2, AMBRA ROSA (fig.) / AMBAR RADLER (fig.) et al., § 31, 34.

⁷⁹ 13/04/2022, R 964/2020-G, ZORAYA / VIÑA ZORAYA, § 55.

⁸⁰ 18/06/2008, T-175/06, Mezzopane, EU:T:2008:212, § 63-70.

- 60 Second, regarding their purported complementarity, the GC found that ‘wine’ was neither indispensable nor important for the use of ‘beer’ and vice versa. There was nothing to support the conclusion that a purchaser of one of those products would be led to purchase the other.
- 61 Third, as to whether ‘wine’ and ‘beer’ are in competition with each other, the GC found that ‘wine’ and ‘beer’ were, to a certain extent, capable of meeting identical needs, which meant that a certain measure of mutual substitutability had to be acknowledged. Nevertheless, in view of the significant differences in quality – and, accordingly, in price – between wines, the decisive competitive relationship between ‘wine’ and ‘beer’, a popular and widely consumed beverage, had to be established by reference to those wines which were the most accessible to the public at large, generally speaking, the lightest and least expensive varieties.
- 62 Finally, the GC confirmed the BoA’s finding that the average Austrian consumer would consider it normal for wines, on the one hand, and beers, ale and porter, on the other, to come from different undertakings and that those beverages did not belong to the same family of alcoholic beverages.
- 63 There is a certain incongruence in the global assessment of the likelihood of confusion where the GC refers to the ‘lack of similarity’ between the goods at issue (§ 107-108). However, it would be difficult to construe that as ‘dissimilarity’, otherwise, the likelihood of confusion could have been ruled out on that sole basis, and not, as the GC has done, in a careful weighing up of all the relevant factors.
- 64 The GC had again the opportunity to pronounce itself on the comparison between ‘beers’ and ‘wines’ in **IN.FI.NI.TU.DE**⁸¹ and **CÍCLIC**⁸². In both cases, the GC considered that the BoA erred in holding that there was an average degree of similarity between these goods. The GC indicated, referring to **MEZZOPANE**, that, even if beer and wine both constituted alcoholic beverages, obtained by a fermentation process and consumed during a meal or drunk as an aperitif and were, to a certain extent, competing products, they differed significantly as regards their composition and their method of production, so that they had to be considered similar only to a low degree.
- 65 Apart from those two cases, the BoA decision-making practice has consistently found ‘beer’ and ‘wine’ similar to a low degree only. In **SUMMUM ESSENTIAL**⁸³ concerning ‘beers’ versus ‘alcoholic beverages (except beers), in particular wines and spirits’ the BoA considered that at least a low degree of similarity between them could not be denied. The BoA emphasised that specifically ‘beer’ and ‘wine’ were in competition with each other. It indicated that these ‘*goods are, to a certain degree, mutually substitutable, and thereby there is competition between them, since they are capable of meeting identical needs. It is also true that they are more often than not served in the same circumstances and on the same occasions, e.g. in bars and restaurants or private events and can be drunk together for pleasure. Whether one consumes alcohol, be it wine or beer, it is of less importance than the choice between a juice and beer, when considering one’s age, health, religion, or whether one has to drive a vehicle.*

⁸¹ 23/09/2020, T-601/19, in.fi.ni.tu.de / Infinite et al., EU:T:2020:422, § 101-103.

⁸² 15/09/2021, T-673/20, Cíclíc (fig.) / CYCLIC, EU:T:2021:591, § 34.

⁸³ 07/12/2017, R 739/2017-1, SUMMUM ESSENTIAL / SUMMUM (fig.), § 49-53.

This is due to the fact that on a more general level, beer still belongs to alcoholic beverages and is competing with alcoholic beverages in general, especially with wine, owing to the lower percentage of alcohol, and in comparison to wine, the lower price.'

- 66 In **GIOLINA**⁸⁴, the BoA compared 'beer and brewery products' with 'wine'. It stated that *'although production processes differ, as do raw materials, both are the result of a fermentation process, and thus belong to the same category (nature) of alcoholic beverages intended for the general public. These drinks can be served in restaurants and bars and are for sale in supermarkets and grocery stores. They do not, in the main, come from the same companies. Although both can be drunk at special occasions and at social or family gatherings, wines are typically taken with food, while beers are not. These products are therefore similar to a low degree'*. In the same vein, a low degree of similarity was found in **INFERNO**⁸⁵ and, between 'beers' and 'dessert wines', in **SAMSON 1795**⁸⁶.
- 67 With regard to 'fortified wines' versus 'beers' the BoA found in **BURMESTER EST D 1750 SEMPER IDEM**⁸⁷, referring essentially to the findings in **MEZZOPANE**, that there was a low degree of similarity between 'beer' and 'Port complying with the specifications of the PDO 'Porto'.
- 68 At last, in some cases, the Board found 'beer' and 'wine' similar, without specifying the degree (e.g. **DOROVERDE**⁸⁸, **PASIONBLUE**⁸⁹ and **PALACIO DOMECCQ 1778**⁹⁰).
- 69 The analysis shows that the case-law is **consistent in finding 'beers' and 'wines' similar to a low degree**.

3.4.4 'Beers' versus high-alcohol content spirits and liqueurs

- 70 The analysis of the relationship between 'beers' and alcoholic beverages should conclude with the analysis of case-law relating to the comparison between 'beers' and **high-alcohol content spirits**⁹¹ and **liqueurs**⁹², the two categories (often used as synonyms) encompassing a wide range of specific alcoholic drinks, such as rum, gin, vodka, whisky, brandy or tequila (GI).
- 71 In **TEQUILA MATADOR HECHO EN MEXICO**⁹³, the GC analysed in detail the applicability of **MEZZOPANE** (finding 'little similarity' between 'beer' and 'wine', see above) to the comparison between 'beer' and 'tequila originating in Mexico, alcoholic cocktails containing tequila originating from Mexico, [and] tequila liqueurs originating in

⁸⁴ 17/05/2021, R 501/2020-1, Giolina / Collina, § 20.

⁸⁵ 16/09/2021, R 1202/2016-5, Inferno / Val do Inferno, § 38.

⁸⁶ 01/03/2017, R 1457/2015-2, SAMSON 1795 / Device of a bottle (fig.), § 81.

⁸⁷ 05/08/2021, R 2300/2020-5, BURMESTER EST D 1750 SEMPER IDEM (fig.) / Burgemeester, § 57-63.

⁸⁸ 05/02/2016, R 476/2015-5, DOROVERDE / VINHO VERDE et al., § 42.

⁸⁹ 11/03/2020, R 938/2019-2, PASIONBLUE R e, comparte, celebra en azul (fig.) / Pasion de muscatel (fig.), § 29.

⁹⁰ 17/05/2021, R 867/2018-1, Palacio domeccq 1778 (fig.) / Domeccq et al., § 33.

⁹¹ 'Strong distilled alcoholic drink such as brandy, whisky, gin, or rum' – Oxford University Press, Lexico Online Dictionary (<https://www.lexico.com/definition/spirit>).

⁹² 'A strong, sweet alcoholic spirit, usually drunk after a meal' – Oxford University Press, Lexico Online Dictionary (<https://www.lexico.com/definition/liqueur>).

⁹³ 03/10/2012, T-584/10, TEQUILA MATADOR HECHO EN MEXICO (fig.) / MATADOR, EU:T:2012:518, § 49-63, 71-73.

Mexico'. It concluded that 'beer' and '**tequila (GI)**' were dissimilar. The GC reasoned that the differences between these goods, in respect of all the relevant factors, were clearer and more substantial than the differences between 'beer' and 'wine' established in **MEZZOPANE**, with the result that those differences made it even more unlikely that the relevant public would believe that the same undertaking would produce and market the two types of beverage at the same time. *'While the goods to be compared in the present case belong to the same general category of beverages, and more specifically to the category of alcoholic beverages, they are different in particular as regards their ingredients, method of production, colour, smell and taste, with the result that the average consumer perceives them to be different in nature. Those goods are not normally displayed in the same shelves in the areas of supermarkets and other outlets selling drinks. As regards their use, a significant difference between the goods is that beer quenches thirst which is not normally the case for the alcoholic beverages covered by the mark applied for. While it is true that those goods may be consumed in the same places and on the same occasions and satisfy the same need – for example, enjoyment of a drink during a meal or as an aperitif – the fact remains that they do not belong to the same family of alcoholic beverages and that the consumer perceives them as two distinct products, as the Court held, so far as concerns beer and wine, in paragraph 66 of MEZZOPANE.'* The GC also emphasised that *'the existence of alcoholic cocktails which mix beer with other alcohol, in particular tequila, does not remove the differences between the goods referred to above, since it is true of many drinks which are not similar'*. Accordingly, the GC considered unfounded the argument that the goods should be considered to be complementary and in competition with each other.

- 72 By contrast, in **THE KING OF SOHO**⁹⁴, the GC found a similarity, not merely low⁹⁵, between 'beers' and '**liqueurs**'. The GC found that their nature was similar (having a certain degree of alcohol), their purpose, use and method of consumption were similar (in particular, served during events), and they targeted the same adult public. Moreover, the distribution channels were the same, those goods being found in the same outlets. The GC also observed that the difference in composition and method of production of 'beers' and 'liqueurs' had no bearing on the perception of the relevant public. It is well-known that many undertakings produce both beer and liqueurs often based on beer. Distinguishing the case from **TEQUILA MATADOR HECHO EN MEXICO**, § 55, the GC here considered that there was complementarity between 'beers' and 'liqueurs' on the ground that the purpose of some liqueurs was precisely to be mixed, in particular with beer.
- 73 The BoA case-law shows a conservative approach, rather in the line of **TEQUILA MATADOR HECHO EN MEXICO**, finding 'beers' and the various high-alcohol content beverages dissimilar, or at most, similar to a low degree.
- 74 In **SOHO BREWERY LTD**⁹⁶, the BoA found 'beers' and '**liqueurs**' dissimilar. The BoA considered that, although both types of beverage contained alcohol, they did not compete with one another and were neither interchangeable nor substitutable for one another, or complementary. As regards their use, the BoA stressed that a significant

⁹⁴ 28/04/2021, T-31/20, THE KING OF SOHO (fig.) / SOHO, EU:T:2021:217, § 67-72.

⁹⁵ In § 77 and 121 of the judgment, the GC expressly found a 'low degree of similarity' between liqueurs and two other categories of goods claimed by the contested mark that were not 'beers'. It follows that the 'similarity' established between 'liqueurs' and the contested 'beers' was not considered to be merely of a low degree.

⁹⁶ 13/11/2017, R 488/2017-2, Soho Brewery Ltd (fig.) / SOHO, § 21-35.

difference between the goods was that beer quenched thirst, which was not normally the case for the liqueurs covered by the earlier mark. It indicated that there was also a significant difference in the way in which the drinks were made available. Although liqueurs and beer could be found in the alcoholic beverage section of supermarkets or in special retail outlets for alcoholic beverages, they were placed in different groups within this section.

- 75 Likewise, in **GARAGE BEER CO BARCELONA RIBA CERVEZA AUTENTICA DE BARCELONA MMXIV ZAMBO**⁹⁷, the BoA found that the contested ‘beers’ were dissimilar to the opponent’s ‘gin; spirits’. The BoA first referred to the Grand Board’s decision in **ICEBERG**⁹⁸, reiterating that ‘*the average consumer is used to and is aware of the distinction between alcoholic and non-alcoholic drinks, which is, moreover, necessary, since some consumers do not wish to, or cannot, consume alcohol.*’ Further, referring to **TEQUILA MATADOR HECHO EN MEXICO**, the BoA stated that ‘*while it is true that ‘beers’ on the one hand, and ‘gin’ and spirits on the other, are all types of alcoholic beverages, they are different as regards their ingredients, method of production, colour, smell and taste and manner of consumption, with the result that the average consumer perceives them to be different in nature.*’ In the Board’s view, the same principles, as laid down in **TEQUILA MATADOR HECHO EN MEXICO**, could be applied to the comparison between ‘beers’ and other spirits differing from tequila, including gin. In particular, ‘*spirits, including gin, and beers are not normally displayed on the same shelves in the areas of supermarkets and other outlets selling drinks. Moreover, while beer is seen to quench thirst, the same usually does not hold true for gin, spirits or drinks containing gin or other spirits. Nor are these goods complementary or in competition with each other, inter alia because gin and spirits have significantly more alcohol and are generally much more expensive than beers.*’
- 76 In **EF**⁹⁹, the BoA found ‘beer’ and ‘brandy’ dissimilar. It held that despite some factors in common, these goods were different as regards their ingredients, methods of production, colours, smells and tastes, and the manner in which they were consumed, with the result that the average consumer perceived them to be different in nature. Furthermore, the BoA held, that ‘beer’ and ‘brandy’ were usually not interchangeable; they were not substitutes for one another, nor were they complementary. The fact that both categories of goods were alcoholic beverages was considered a very general factor which becomes secondary when considering the specific qualities of ‘beer’ and ‘brandy’ (*‘beer is obtained through the fermentation of malt, whereas brandy is made from a distilled wine or a fermented fruit mash’*). As regards the factors of distribution channels and usual commercial origin of the goods at stake, the BoA held that ‘*the fact that the goods in conflict can be sold in the same shops is not enough to consider them complementary or substitutable for one another as they are usually not displayed on the same shelves*’ and ‘*the average consumer will consider it normal for ‘brandy’, on the one hand, and ‘beers’, on the other, to come from different undertakings – and will therefore expect this – and will also find it normal that those beverages do not belong to the same family of alcoholic beverages. There is nothing to suggest that the public*

⁹⁷ 08/05/2019, R 1258/2018-2, GARAGE BEER CO Barcelona RIBA CERVEZA AUTENTICA DE BARCELONA MMXIV Zambo (fig.) / Rives et al., § 24.

⁹⁸ 21/01/2019, R 1720/2017-G, ICEBERG (fig.) / ICEBERG et al., § 62. (The decision dealt with the comparison between ‘vodka’ and ‘mineral water; non-alcoholic beverages; fruit juices’, concluding that they were dissimilar, § 79.)

⁹⁹ 04/02/2022, R 729/2021-5, EF (fig.) / E & J, § 110-115.

is not aware, and does not notice the characteristics distinguishing these goods, as regards their composition, taste, alcohol content and method of production. On the contrary, those differences are perceived as making it unlikely that the same undertaking would produce and market the two types of beverages’.

77 In **MAIS AMOR**¹⁰⁰, the BoA compared ‘beer and brewery products’ and ‘**liqueurs**’. The BoA found these goods different in their nature, usual origin, ingredients, method of production and destination. Furthermore, they were usually not interchangeable; they were not substitutes for one another, nor were they complementary. The average consumer expected ‘beers and brewery products’, on the one hand, and ‘liqueurs’ on the other, to come from different undertakings. Thus, the BoA found that those goods displayed, if any, a very low degree of similarity. Identically, in **NORD GOLD EXQUISIT**¹⁰¹, the BoA found that the fact that both ‘beers’ and ‘**liqueurs**’ are alcoholic beverages, was a very general factor which became secondary when considering their specific qualities and concluded that the goods had, if any, a very low degree of similarity. A low degree of similarity between ‘beers’ and ‘**liqueurs**’ was found also in **MUNIN**¹⁰²

78 In **MAMA CARIBA**¹⁰³, the BoA provided a detailed analysis for the comparison between ‘beer and brewery products’ and ‘**rum**’, concluding that they were ‘at most, similar only to a low degree’. The Board referred to the findings of the Grand Board in **PAPAGAYO ORGANIC**¹⁰⁴:

‘While it is true that beers on the one hand and rum on the other are types of alcoholic beverages, they are different as regards their ingredients, method of production, smell, taste and manner of consumption, with the result that the average consumer does not necessarily perceive them to be alike in nature’.

‘The basic ingredients of beer and rum (cereal grains vs. sugarcane or molasses) do not have anything in common. Despite the fact that in both cases alcohol is not directly used in production but is generated in the fermentation process, the respective methods of production are also fundamentally different. The fermentation of sugar cane or molasses followed by distillation to make rum cannot be assimilated to the brewing processes of beer’.

‘Beer and rum are both alcoholic beverages. However, it is one very general factor, which becomes secondary when considering the specific qualities of these goods. They significantly differ in their alcoholic strength, since rum tends to have an alcohol per volume percentage of 40 % to 45 %, while the alcohol content of beer generally ranges from 4 % to 6 %, thus far less than rum. Considering the significant effects that alcohol consumption may have on the human body, it is likely that the relevant public will choose its alcoholic beverage of preference also on the basis of its alcoholic content (18/07/2013, R 233/2012-G, PAPAGAYO ORGANIC, § 63).’

¹⁰⁰ 17/10/2017, R 2375/2016-2, MAIS AMOR / AMOR LICOR et al., § 59-73.

¹⁰¹ 05/03/2018, R 809/2017-2, NORD GOLD EXQUISIT (fig.) / NORDPOL, § 93-104.

¹⁰² 05/04/2019, R 2459/2018-1, Munin / Monin et al., § 33.

¹⁰³ 15/06/2020, R 2521/2019-2, Mama cariba / Cariba, § 41-49.

¹⁰⁴ 18/07/2013, R 233/2012-G, PAPAGAYO ORGANIC / PAPAGAYO, which dealt with the comparison between ‘wines, all of the aforesaid being organic’ and ‘rum’, concluding that they were ‘at most similar to a very low degree’ (§ 71).

'Moreover, the fact that beer is obtained through the fermentation of cereal grains, most commonly malted barley, whereas rum is produced through the fermentation of sugar cane or molasses, means that the end products generated differ in colour, aroma and taste. These differences lead the relevant consumer to perceive those two products as not belonging to the same family of alcoholic beverages.'

'The goods also differ with respect to their manner of use. Beer is considered to be a beverage that quenches thirst, while this is not (normally) the case for rum. Rather, while rum may be consumed at the beginning of a meal as an aperitif or at the end of a meal as a digestive or as a popular ingredient of cocktails such as mojitos or piña coladas, it is not considered to be a typical accompaniment of a meal enhancing or complementing its flavor (18/07/2013, R 233/2012-G, PAPAGAYO ORGANIC, § 65). Beer, on the other hand, may be consumed at any time of day, especially in Spain, and often in accompaniment of a meal.'

'Further, beer and rum generally do not have the same commercial origin. Beer breweries are usually not equipped to also produce agricultural or industrial rum, and vice versa, given that both production processes require their own highly elaborated system and know how. The differences in the method of production make it unlikely that the same undertaking would produce and market beer and rum at the same time.'

- 79 The BoA also declined the existence of complementarity between 'beers' and 'rum', considering that *"'rum' is neither indispensable nor important for the use of 'beer and brewery products', nor the other way round. There is indeed nothing to support the conclusion that a purchaser of one of those products would then automatically be led to purchase the other. It is instead much more likely that a person will at any given moment have a clear preference either for beer or for rum. In addition, the fact that the conflicting goods can be sold in the same shops is not enough to consider them complementary or substitutable for one another, given that they are usually not displayed on the same shelves"*. The BoA also referred to the GC's finding in **TEQUILA MATADOR HECHO EN MEXICO** that *'even though it is theoretically possible to mix a cocktail which contains both products, this does not remove the differences between the goods'*.
- 80 Notwithstanding the above, the BoA considered that there were also certain minor similarities between 'rum' and 'beers', and it would, therefore, be incorrect to consider them entirely dissimilar. It held that, *'these goods may be sold in the same outlets or in the same section of a supermarket, (although as mentioned above not on the same shelves). Also, particularly in Spain they may be consumed in the same places and occasions in order to satisfy the same need of enjoying an afternoon drink or an aperitif'*.
- 81 The BoA reached the same conclusion that 'beers' and '**rum**' were 'at most, similar only to a very low degree' in **PLANTATION TROIS RIVIÈRES DEPUIS 1660**¹⁰⁵.
- 82 In **Premium COLOMBIAN AGED GIN**¹⁰⁶, the BoA held that there was a low degree of similarity between 'beer' and '**gin**' with the reasoning that *'in spite of the fact that the*

¹⁰⁵ 28/09/2017, R 1939/2016-2, PLANTATION TROIS RIVIÈRES DEPUIS 1660 (fig.) / PLANTATION et al., § 43-50.

¹⁰⁶ 19/12/2019, R 1335/2019-4, 1913 Premium COLOMBIAN Aged Gin (fig.) / Colombiana la nuestra (fig.), § 24.

*contested 'gin' is a specific distilled spirit drink that derives its predominant flavour from juniper berries, both beer and gin are suitable for pleasure on certain occasions, however, it is true that in contrast to the earlier 'beer', the contested 'gin' is not consumed for the purpose of thirst-quenching. However, both types of drinks, 'gin' and 'beer' are alcoholic beverages and thus, their nature and method of use are identical. They have the same distribution outlets and may be sold together in the same stores and alongside one another'. The same conclusion of a low degree of similarity between 'beer' and 'gin' was reached in **GOTHIC GIN**¹⁰⁷. The BoA held that, 'although their production processes are different, these goods belong to the same category of alcoholic drinks intended for the general public. They can be served in restaurants and in bars and are on sale in supermarkets, grocery stores or specialised shops. These drinks can be found in the same or adjacent section of supermarkets, although they can also be distinguished to some extent by product sub-category. [...] It follows from the above mentioned factors that the relevant public may reasonably think that both types of alcoholic beverages are manufactured under the control of the same undertaking or of economically-linked undertakings'.*

- 83 The analysis shows that **'beers', on the one hand, and 'spirits', 'liqueurs' and other specific high-alcohol content beverages, on the other hand, are considered to be dissimilar or only at most similar to a very low degree**. Although many Board decisions qualify even the low degree of similarity found ('at most', 'if any', 'very low'), it remains for the GC to further develop whether or not the dissimilarity found between 'beers' and 'tequila (GI)' in **TEQUILA MATADOR HECHO EN MEXICO** should be extended to all high-alcohol content beverages.
- 84 Furthermore, recent case-law in **FLÜGEL, CHIC ÁGUA ALCALINA 9,5 PH** and **ICEBERG** (see 3.2.3 above) regarding the irrelevance of the argument that different beverages are often consumed together or mixed and that it is only the presence of these goods in the same section of supermarkets that could serve as an indication of similarity, also seem relevant for the comparison between 'beer' and other high-alcohol content beverages. It, therefore, remains for the GC or the Grand Board to further develop whether even a low degree of similarity between 'beers' and different high-alcohol content beverages can be sustained, in view of the most recent case-law.

4 Conclusions

- 85 The following conclusions can be drawn from the above case-law analysis in order to safeguard consistency in the BoA decision-making practice.

(i) *'Beers' versus 'non-alcoholic beverages' (general category) in Class 32*

The analysis has revealed discrepancies in case-law regarding the degree of similarity, ranging between average to high. Nevertheless, there is a predominant trend suggesting a **high degree of similarity** between these goods. The general category 'non-alcoholic beverages' encompasses non-alcoholic beer that has the same purpose, usually comes from the same undertakings and is also in direct competition with 'beer'.

¹⁰⁷ 23/05/2022, R 1409/2021-4, Gothic gin / Gothic, § 30-37.

- (ii) *'Beers' versus specific non-alcoholic beverages in Class 32, such as 'mineral water', 'juices', 'soft drinks' and 'energy drinks'*

The case-law trend is to find an **average degree of similarity**. Until further guidance from the GC or the Grand Board on the possible repercussions of more recent case-law (**FLÜGEL, CHIC ÁGUA ALCALINA 9,5 PH, ICEBERG, ZORAYA**) on the degree of similarity, it is suggested to continue with the current trend.

- (iii) *'Beers' versus non-alcoholic beverages in Classes 29 and 30, such as 'coffee', 'tea', 'cocoa' and 'milk-based drinks'*

The case-law is consistent in finding these goods **dissimilar**.

- (iv) *'Beers' versus 'alcoholic beverages, except beers' (general category) and low-alcohol content beverages such as 'cider', 'perry' and 'alcopops' in Class 33*

The analysis has revealed discrepancies in case-law regarding the degree of similarity, ranging between average to high. While, in general, this may have little impact on the final outcome, for the sake of precision and greater coherence in the reasoning, it is suggested that a **high degree of similarity** is found. This is essentially due to the fact that the general category 'alcoholic beverages, except beers' encompasses low-alcohol content beverages such as 'cider', 'perry' or 'alcopops' that are close in nature, consumed for a common motive and are often in competition with 'beer'.

- (v) *'Beers' versus 'wines'*

The case-law is consistent in finding these goods **similar to a low degree**.

- (vi) *'Beers' versus high-alcohol content spirits and liqueurs*

The analysis has revealed discrepancies in case-law as to whether these goods are similar to a low degree or dissimilar. This may have an impact on the final outcome. Although many BoA decisions qualify the low degree of similarity found between those goods ('at most', 'if any', 'very low'), it remains for the GC or the Grand Board to further develop whether or not dissimilarity would be the more appropriate outcome in light of the most recent case-law (**TEQUILA MATADOR HECHO EN MEXICO, FLÜGEL, CHIC ÁGUA ALCALINA 9,5 PH** and **ICEBERG**).

Annex
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