

# Boards of Appeal Decisions Overview 2020 – Part II

This overview includes a selection of final decisions of the Boards of Appeal notified by the Registry between 01/01/2020 and 31/12/2020 as well as information on referrals to the Grand Board.

Please note that the summaries are provided for information purpose only and do not necessarily reproduce the exact wording of the decisions.

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## I. GRAND BOARD CASES

### 1. DECISIONS

[11/02/2020, R 2445/2017-G, Sandra Pabst](#)

**Bad faith – Legal certainty – Proof of use – Article 58(1)(a) EUTMR – Article 107 EUTMR – Decision confirmed – Cancellation rejected**

The Grand Board confirmed the decision of the Cancellation Division, namely that the revocation request had been filed as an abuse of rights and process.

These findings were reached taking into account the number of revocation requests (37) filed against the same company practically simultaneously, together with the attempt to acquire one of those trade marks (exerting disproportionate pressure on the EUTM proprietor which was done in a retaliatory manner), the nature of the company which filed the revocation request and the number of other cases launched by the same or economically linked companies, concerning their hundreds of revocation actions and thousands of trade mark filings and trade name registrations.

[29/06/2020, R 0379/2017-G, VICHY SPA \(fig.\) / SPA et al.](#)



**Common element – Conceptual dissimilarity – Likelihood of confusion – Due cause – Unfair advantage – Article 8(1)(b) EUTMR – Article 8(5) EUTMR – Decision annulled – Opposition rejected**

Bearing in mind the context in which the contested trade mark is intended to be used (hotel and restaurant services), the consumer will attribute to the element 'SPA' the meaning of 'spa' (wellness centre). As a result, the presence of this word in the contested mark – moreover as a secondary element underneath the word 'VICHY' – will fulfil a merely informative purpose and will not generate any likelihood of confusion with the earlier marks 'SPA' and 'LES THERMES DE SPA', in which the same element fulfils different purposes (designating a brand of mineral water and a geographical location in Belgium, respectively).

Use of the generic word 'SPA' in the contested mark is supported by due cause (informing the public of spa facilities in restaurants and hotels) and will not take any undue advantage of the reputation of the earlier marks.

It follows that the opposition fails as regards the two earlier marks and the two relative grounds for refusal.

## 2. REFERRALS

### [22/06/2020, R 0400/2018-2, RECIOJITO / RECIOTO DI SOAVE et al.](#)

#### **Collective mark – Likelihood of confusion – Article 8(1)(b) EUTMR – Article 8(4) EUTMR – Article 8(5) EUTMR – No decision on opposition**

On 22 June 2020, the Second Board of Appeal decided to refer case R 0400/2018-2, RECIOJITO / RECIOTO DI SOAVE et al. to the Grand Board.

This case concerns the sensitive issue of genuine use of an earlier collective mark coinciding with a Protected Denomination of Origin for wines (inter alia, [RECIOTO DI SOAVE](#)). The decision is expected to touch upon the legal issues of scope of protection and functions of those distinct IP rights in light of the recent case-law of the Court of Justice.

### [29/06/2020, R 1719/2019-5, ANIMAL FARM](#)

#### **Descriptive element – Distinctive character – Word mark - Article 7(1)(b) EUTMR – Article 7(1)(c) EUTMR – No decision on application**

On 29 June 2020, the Fifth Board of Appeal decided to refer case R 1719/2019-5, ANIMAL FARM to the Grand Board.

This case concerns the assessment of whether the title of a famous and well-known book – as such – will merely be perceived as indicating the content or subject matter of books, films, games or entertainment services in Classes 9, 16, or 41, being thus descriptive and devoid of distinctive character pursuant to Article 7(1)(b) and (c) EUTMR or to the contrary that additional factors must be present in order to reach the aforesaid conclusion. The Boards of Appeal have issued diverging decisions on this issue.

### [02/07/2020, R 1922/2019-5, 1984](#)

#### **Descriptive – Non-distinctive – Word mark – Article 7(1)(b) EUTMR – Article 7(1)(c) EUTMR – Article 37(1) EUTMDR – No decision on application**

On 29 June 2020 and 2 July 2020, the Fifth Board of Appeal decided to refer respectively cases R 1719/2019-5, ANIMAL FARM and R 1922/2019-5, 1984 to the Grand Board.

These cases concern the assessment of whether the title of a famous and well-known book – as such – will merely be perceived as indicating the content or subject matter of books, films, games or

entertainment services in Classes 9, 16, or 41, being thus descriptive and devoid of distinctive character pursuant to Article 7(1)(b) and (c) EUTMR or to the contrary that additional factors must be present in order to reach the aforesaid conclusion. The Boards of Appeal have issued diverging decisions on this issue.

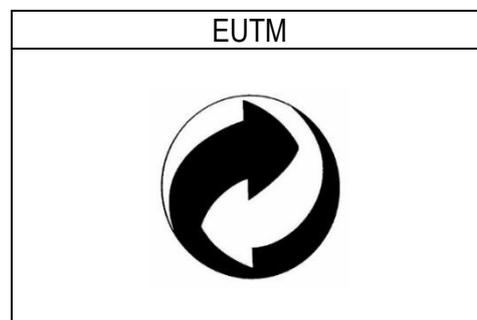
[02/07/2020, R 2248/2019-5, GEORGE ORWELL](#)

**Personal name mark – Descriptive – Non-distinctive – Word mark – Article 7(1)(b) EUTMR – Article 7(1)(c) EUTMR – No decision on application**

On 2 July 2020, the Fifth Board of Appeal decided to refer case R 2248/2019-5, GEORGE ORWELL to the Grand Board.

This case concerns the assessment of whether the name of a famous person will be merely perceived as indicating the content or subject matter of books, films, or entertainment, cultural or educational services in Classes 9, 16 or 41, being thus descriptive and devoid of distinctive character pursuant to Article 7(1)(b) and (c) EUTMR or to the contrary that it may still serve as an indicator of the origin of those goods and services. The Boards of Appeal have issued diverging decisions on this issue.

[02/07/2020, R 1304/2020-G, EIN KREIS MIT ZWEI PFEILEN \(fig.\)](#)



**Revocation action – Non-use – Collective mark – Article 18(1) EUTMR – Article 58(1)(a) EUTMR – Article 74 EUTMR**

On 2 July 2020, the Presidium of the Boards of Appeal decided to refer R 1357/2015-5, EIN KREIS MIT ZWEI PFEILEN (fig.) to the Grand Board as case number R 1304/2020-G.

This case concerns the requirements applicable for proving use of an EU collective mark. Furthermore, it concerns the link between, on the one hand, the indication of a producer's membership in an association that owns a collective mark and, on the other hand, the ensuing consumer's choice for purchasing the goods and/or services bearing the collective trade mark.

[25/11/2020, R 0964/2020-G, Zoraya / Viña zoraya](#)

**Similarity of the goods and services – Article 8(1)(b) EUTMR – Without deciding on the merits**

On 25 November 2020, the Fourth Board of Appeal decided to refer case R 0964/2020-4, Zoraya / Viña zoraya to the Grand Board.

The case concerns the assessment of the similarity between ‘non-alcoholic beverages; flavoured carbonated drinks; waters; vitamin-enriched mineral waters [beverages]’ and ‘wines, spirits and liqueurs’ within the context of an opposition based on Article 8(1)(b) EUTMR. The Boards of Appeal have taken different approaches when making this assessment. Their findings cannot all be reconciled with the decision of 21 January 2019 in Case R 1720/2017-G, ICEBERG (fig.) / ICEBERG et al. (relating to ‘vodka’ in Class 33). With a view to avoiding further divergent decisions, it was deemed necessary to refine the case-law on this point.

## II. PROCEDURAL MATTERS

### 1. ADMISSIBILITY BEFORE EUIPO

[no entry]

### 2. ESSENTIAL PROCEDURAL REQUIREMENTS

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



**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.

### 3. GENERAL PRINCIPLES OF EU LAW

[no entry]

## III. TRADE MARKS

### 1. ABSOLUTE GROUNDS (ARTICLE 7 EUTMR) / INVALIDITY (ARTICLE 59 EUTMR)

#### A. ARTICLE 7(1)(a) / 59(1)(a) EUTMR – SIGN OF WHICH AN EUTM MAY CONSIST

[no entry]

#### B. ARTICLE 7(1)(b) / 59(1)(a) EUTMR – NON-DISTINCTIVE SIGN

**Distinctive (no)**

[27/11/2019, R166/2019-1, 3D BLACKLIGHT MINIGOLF \(fig.\)](#)



**Figurative mark – Figurative element – Non–distinctive – Article 7(1)(b) EUTMR – Decision confirmed – Application rejected**

The applicant sought to register the figurative sign '3D BLACKLIGHT MINIGOLF', covering services in Class 41 (such as golf) and Class 43 (food and beverages). The examiner found that the relevant English-speaking consumer would immediately understand it as an indication of a black-lit 3D miniature golf. The sign was accordingly rejected as descriptive in respect of all the services applied for.

The trade mark applied for contains the English word 'BLACKLIGHT' and the internationally recognised terms '3D' and 'MINIGOLF'. A black light is mainly used for show effects, as this effect is mainly used in darkened rooms, where its radiation causes neon colors and other fluorescent substances to glow. Neither a minimum degree of interpretation by the relevant public is necessary in order to understand it, nor does it trigger a thought process. The relevant public, who has the most basic knowledge of English, will therefore recognise the meaning of the sign applied for easily and without the need for further reflection.

The statement '3D BLACKLIGHT MINIGOLF' is devoid of distinctive character with regard to all the services applied for, since it provides information about the subject or thematic content of these services and the place where they are offered. The Board notes that the applicant's statement that there are no restaurants or bars for use at minigolf courses was not proved in any way. On the contrary, as the examiner rightly indicated, it is customary for these installations to offer refreshments or snacks and the courses (§ 20).

The graphic representation of the trade mark applied for is not capable of offsetting the mark's lack of distinctive character. The figurative element of the purple golf ball merely emphasises the message of the word elements.

Consequently, the appeal is dismissed and the application is rejected.

#### [17/12/2019, R1866/2019-4, EASY TO CHOOSE, EASY TO USE](#)

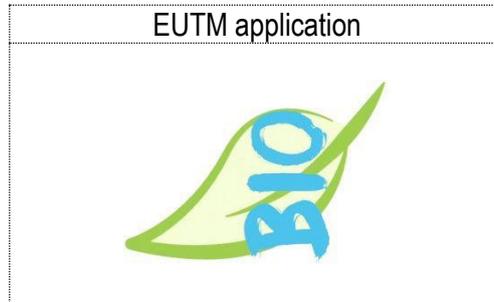
#### **Word mark – Laudatory mark – Slogan mark – Non-distinctive – Article 7(1)(b) EUTMR – Decision confirmed – Application rejected**

The applicant sought to register the word mark 'EASY TO CHOOSE, EASY TO USE' for goods and services in Classes 3, 35 and 44. The examiner refused the EUTM application on the basis of Article 7(1)(b) EUTMR, for all the goods and services, because the words would be perceived by the relevant public as a laudatory promotional slogan, which served as an indication of positive aspects and they would not indicate their commercial origin. The consumer would understand the sign as an option to choose from several options with no difficulty. Moreover, the examiner argued that although the words 'choose' and 'use' rhymed, this would not change the meaning of the slogan, hence, the perception of the consumer in relation to the goods and services.

The Board also finds that the mark is devoid of distinctive character as it serves as a laudatory and promotional statement rather than indicating the commercial origin of the goods and services specified, namely that they are easy to choose or use. The Board notes that the slogan applied for must be assessed as a whole. Therefore, the expression 'EASY TO CHOOSE, EASY TO USE' conveys a clear laudatory and promotional message which the relevant public will perceive first and foremost as such, rather than an indication as to their trade origin. In relation to the words which rhyme in the mark applied for, the Board cannot find any innovative or surprising element in order for the sign to be found distinctive. Furthermore, the fact that some of the goods in Class 3 are not cosmetics bears no merit in the decision, since what matters in the case at hand is the meaning of the slogan in connection with the goods and services applied for.

Consequently, the appeal is dismissed and the application is rejected.

[17/12/2019, R1507/2019-2, BIO \(fig.\)](#)



**Figurative mark – Descriptive – Non-distinctive – Article 7(1)(b) EUTMR – IR designating the EU rejected.**

The applicant sought to register the figurative sign ‘BIO’ for goods in Class 3 (such as cosmetics) and 5 (inter alia, sanitary and hygienic preparations and dietetic substances). The examiner found that the relevant public, even with a high level of attention, would perceive that the sign clearly conveyed obvious and direct information about the nature and quality of the contested goods. The word ‘BIO’ means ‘biological, organic’ in English.

The Board endorses the examiner’s finding that the relevant public will understand this word as conveying the message that all the contested goods consist of, or contain, biological, organic ingredients. There is a huge market for Class 3 and Class 5 goods just as those at issue, which are promoted as being natural or organic.

Even though the contested goods may also contain goods that do not consist or contain biological, organic ingredients, if the contested mark is descriptive or devoid of distinctive character for specific goods within the category of the goods applied for, the finding of descriptiveness or non-distinctiveness applies to the entire category.

Moreover the letters in the sign are depicted in a rather standard font. Their vertical depiction as well as the blue colour and stylisation of the word ‘BIO’ are rather banal. The figurative element of the mark, which depicts a green leaf (a commonplace symbol including its colour for biological/organic products) only reinforces, in the perception of the public at large and the professional public, the descriptive and non-distinctive message conveyed by the verbal element ‘BIO’ (10/09/2015, T-610/14, BIO organic, EU:T:2015:613, § 20).

Overall, the figurative elements used and the fact that the text is written vertically do not make the expression ‘BIO’ hard to read, nor do they detract from the descriptive message conveyed to relevant consumers.

Consequently, the appeal is dismissed and the protection of the IR designating EU is rejected.

[29/01/2020, R 912/2019-1, Polish Agro](#)



**Figurative mark – Non-distinctive – Article 7(1)(b) EUTMR – Decision Confirmed – Application rejected**

The relevant public would understand the sign as a reference to ‘Polish Agriculture’ since the term ‘agro’ was widely used for agriculture, while the term ‘Polish’ would indicate the respective country. As such, the sign would not indicate the commercial origin of the goods and services and had to be rejected pursuant to Article 7(1)(b) EUTMR.

The Board confirms that the sign is devoid of distinctive character. The goods and services applied for in Classes 1, 5, 31, 35, 39 and 44 relate mainly to agricultural products and respective services, which are addressed to agricultural professionals such as gardeners and farmers. The sign is composed of an expression which is widely used in English. Therefore, the assessment of the mark should be made from the point of view of English-speaking consumers. The term ‘Agro’ would be associated with agriculture while the word ‘Polish’ is used as an adjective, thus indicating a link to Polish agriculture. As a result, the sign would inform the relevant public of the nature of the goods and services and their geographical origin instead of distinguishing them from other goods and services relating to Polish agriculture. The Board also points out that the figurative elements of the sign would not provide distinctiveness when assessing the sign as a whole.

[24/02/2020, R 1991/2019-4, Neo](#)

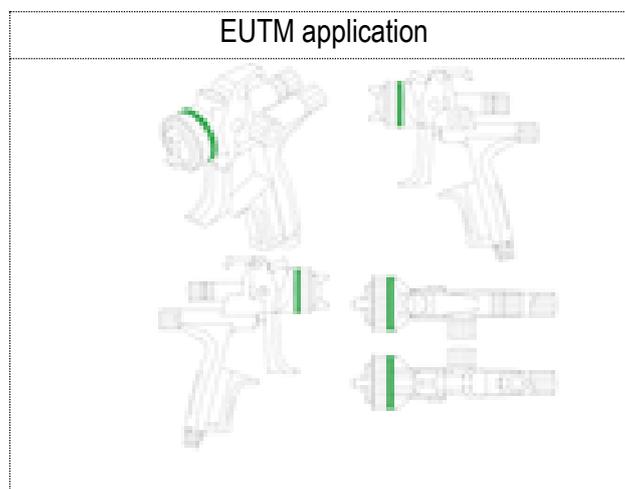
**Word mark – Laudatory mark – Non-distinctive – Article 7(1)(b) EUTMR – Decision Confirmed – Application rejected**

The word mark “NEO” in Classes 9 and 38 had to be rejected pursuant to Article 7(1)(b) and (c), combined with Article 7(1)(c), EUTMR on the premise that the mark was descriptive and would be perceived by Greek and Cypriot consumers as a descriptive message for the goods at hand such as “Communication equipment and Telecommunications. In relation to its descriptive meaning, the mark would necessarily be devoid of distinctive character.

The Boards confirms the contested decision. The mark applied for is the Latin transcription of the Greek word ‘neo’, in modern Greek written as ‘νεο’ or ‘νεος’. “NEO” is understood by the aforementioned consumer as something new or innovative. Furthermore, the Board notes that although the word ‘NEO’ derives from Greek, nowadays it is understood with the meaning of ‘new’ by many more languages. Regarding the goods in Class 9, namely ‘communications equipment, communication devices e.t.c.’ the mark applied for indicates that the good are either new or innovative in terms of technology. As such,

the sign is considered descriptive. The same reasoning applies for the goods in Class 38 namely 'telecommunications, telephone and telecommunications services'. Furthermore, the Board indicates that the promotional character of the mark applied for, makes it devoid of any distinctive character on the basis of 7(1)(b) EUTMR. As a result, on the basis that the sign 'NEO' is perceived by the relevant consumer as advertising information on the positive qualities of the goods applied for, the trade mark applied for acts as a promotional message and not as an indication to commercial origin.

**[02/03/2020, R 1161/2019-4, POSITION OF A GREEN BAND ON SPRAY PAINT GUN](#)**



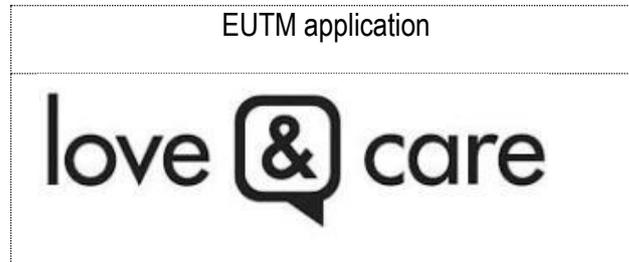
**Position mark –Non-distinctive – Article 7(1)(b) EUTMR – Decision confirmed – Application rejected**

The sign intended for 'paint spray guns' would be perceived as a banal decorative element or functioning as a connector ring rather than as an indication of commercial origin. The position mark applied for lacks distinctive character and shall be refused in accordance with Article 7(1)(b) EUTMR.

The Board considers that the sign merely combines a basic geometric shape corresponding to a band with green colour. There are no eye-catching features which may allow the relevant public to immediately perceive the contested sign as an indicator of the commercial origin of the claimed goods, even assuming a higher degree of attention of part of the relevant consumers.

In addition the 'particular' position of the sign applied for which is located at the rear part of the air cap ring in a paint spray gun and that extends around the circumference does not endow the contested sign with any distinctive character either. In fact, it could have been positioned in any other place of the spray gun with the same result, namely, that even an attentive consumer perceives this element as purely decorative or even as having a certain functionality.

[11/03/2020, R 1096/2019-1, love & care \(fig.\)](#)



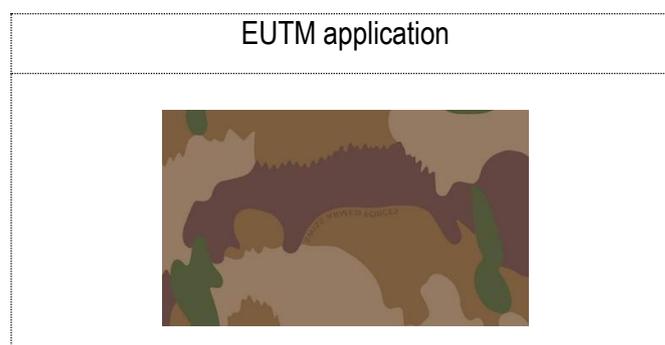
**Slogan mark – Non-distinctive – Article 7(1)(b) EUTMR – Decision confirmed – Application rejected**

At the present case the sign is to be rejected because it is a banal slogan, which merely aims to promote the goods in Class 5 'food for infants; infants formula' by appealing on the relevant consumer's strongest innate feelings towards infants.

Both of the word elements 'love' and 'care' are basic English terms commonly used in trade for goods and services addressed to parents of infants, in particular in the field of infant nutrition. Indeed, they refer to the more powerful and innate feelings of a parent towards its infant.

In this sense, the sign 'Love and care' conveys the idea that these goods were prepared by the producer with love and care, in accordance with highest quality standards and with all the elements that a loving and caring parent would wish to provide to its infants. Moreover, in the context of commercial communications, the banal framing of the ampersand symbol '&' in a dialogue box, would be at most perceived as a means to stress the importance of the second element 'care' of the merely promotional expression 'love AND care' coupled with an indication that the applicant would provide further help and advice through an online chat application.

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



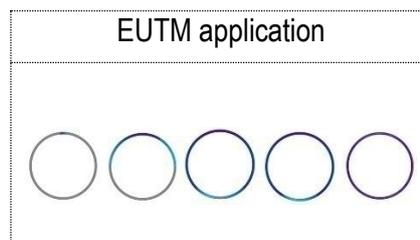
**Figurative mark – Non-distinctive – IR designating the EU – Article 7(1)(b) EUTMR – Decision confirmed – IR designating EU rejected**

The figurative mark designating the EU was refused on the basis of Article 7(1)(b) EUTMR, for goods and services in Classes 24 and 25. In the examiner's view, the shape of the sign did not differ from

other similar shapes for the relevant goods but it appeared to be a variant of those. The non-existence of any unusual combination or of a striking element, resulted in the rejection of the application.

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

[28/04/2020, R 1636/2019-2, MOTION OF A FLOWING CIRCULAR BLUE RING \(Motion Mark\)](#)



**Motion mark – Distinctive element – Article 7(1)(b) EUTMR – Decision confirmed –Application rejected**

The applicant sought to register the sign as a motion mark consisting of a flowing circular blue ring element, claiming the colour blue. However, in light of the fact that the movement represented by the mark was unremarkable and of a banal nature, the examiner rejected the application on the basis of Article 7(1)(b) EUTMR.

The Board confirms that the sign does not contain the required level of distinctiveness in order for it to function as a trade mark. The sign applied for consists of two colours ascending synchronously, both clockwise and counter clockwise, from the 6 o'clock position up to a full circle. Firstly, the Board notes that the motion mark is treated with the same principles as a figurative mark, as basically it is a fluent sequence of two-dimensional pictures. Also, the sign is not a mere circle, since its nature refers to the flowing motion. From this perspective, the Board indicates that the motion itself, in comparison to the resulting shape, impacts only to a limited degree on the perception of the public and, at any rate, cannot be considered distinctive. Moreover, in light of the fact that most of the goods and services applied for, relate to electronic devices or software, the flowing motion of the sign does not provide the mark with distinctiveness, as similar motions in marks are immediately perceived by the public as being associated with such a function.

[10/05/2020, R 1270/2020 –1, Treasure Hunter](#)

**Word Mark – Descriptive element – Non-distinctive – Article 7(1)(b) and (c) EUTMR – Appeal dismissed – Application rejected**

The applicant sought to register the words ‘Treasure Hunter’ for several goods and services in Classes 9 and 41. The examiner rejected the mark applied for on the basis of Article 7(1)(b) and (c) EUTMR, in conjunction with Article 7(2) EUTMR, for the goods and services in Classes 9 and 41.

As the sign applied for consists of the words ‘TREASURE HUNTER’, the Board indicates that according to case-law, the general meaning of a term is a well-known fact. The examiner referred to dictionary meanings and concluded that the relevant English-speaking consumer would understand the sign as: ‘a person or thing that goes on a search for objects of value following certain clues’.

The Board takes the view that the combination of words ‘TREASURE HUNTER’ does not have any unusual or ambiguous character, in light of English grammar rules, which would lead the relevant public into making a different kind of association. The expression ‘TREASURE HUNTER’ will not require any mental steps to set off a cognitive process on the relevant public’s part. The goods and services in this case are addressed to the public at large, in the entire territory of the European Union, whose degree of attention will be average. The relevant consumer would perceive the expression ‘TREASURE HUNTER’ as a direct and immediate description of the kind of games played by people (hunters) in search of treasure. Moreover, this combination of words is devoid of originality, imaginability and resonance. It is descriptive of these kinds of games.

The conceptual content conveyed by the contested mark only carries an informational and factual message relating to the relevant characteristics of the goods and services. It cannot guarantee the identity of the origin of the marked goods and services to the consumer or end-user by enabling him or her, without any possibility of confusion, to distinguish the said goods and services from others which have a different origin. It follows that, the sign applied for falls within the grounds of refusal stated in Article 7(1)(b) and (c) EUTMR.

Consequently, the examiner’s decision is confirmed and the appeal is dismissed.

[21/05/2020, R 2721/2019-4, SONIDO](#)

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

The applicant sought to register a sound mark by submitting an MP3 file to the Office. Its sound was found to be too short and non-distinctive by the examiner who rejected the application on the basis of Article 7(1)(b) EUTMR.

[Download sound file](#)

The Board agrees with the examiner's opinion and confirms the decision. The goods specified in Classes 9, 16, 35, 41 deal with education and training. The sign applied for consists of a sequence of electronically generated (synthetic) sounds that last 2-3 seconds. It is a sequence of different tones merged within a chord, that starts with several short tones which change into a longer and louder one. The Board notes that the sound is short, has no recognisable structure and, as such, cannot be perceived by the public as an identification of origin. Moreover, regarding the scientific and technical report submitted by the applicant, the Board notes that the small number, and the young age, of the participants on whom the report is based, cannot represent the EU's population. However, there is little scientific evidence to support the idea that the sound mark at hand when continuously associated with goods and services of the applicant (a university), such as teaching videos, could acquire distinctiveness; in other words, acquire distinctiveness through use. However, a claim based on Article 7(3) EUTMR was not submitted by the applicant, and as a result the decision is confirmed and the application is rejected.

[03/07/2020, R 2308/2019-1, YOuNGStYle \(fig.\)](#)

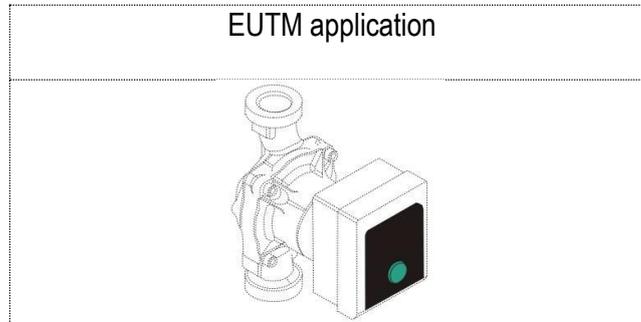


**Figurative Mark – Non-Distinctive – Article 7(1)(b) and (c) EUTMR – Decision confirmed – EUTM Application rejected**

The applicant sought to register the figurative mark consisting of several elements. The examiner rejected the application on the basis of Article 7(1)(b) and (c) EUTMR for goods in Classes 18, 20, 24 and 25.

The Board agrees with the examiner's conclusions and rejects the appeal. The mark consists of two words 'YOUNG' and 'STYLE' which means, in English, youthful and elegance, respectively, and thus should be assessed in relation to the English-speaking public. The Board indicates that the sign as a whole means a style specific to young people and will be related to the purpose and the characteristics of the goods, i.e. clothing and accessories for young people and thus should be considered as being descriptive. Furthermore, the Board notes that the mark emphasises the advantages of the goods since the sign 'YOUNGSTYLE' on goods such as clothing and accessories will be seen as a promotional message by relevant consumers. In relation to the graphic representation of the mark, the Board notes that the sign lacks distinctive character since the stylisation does not contain any elements that would divert the public's attention away from the non-distinctive message of the word element (paragraph 38). Consequently, the application is rejected.

[04/08/2020, R 2707/2019-5, Farbmarke an sich](#)



**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.

[24/09/2020, R 589/2020-5, Triangular Shaped Notches In Three Double Chains \(3D\)](#)

**Shape mark – Well-known facts need no evidence - Article 7(1)(b) EUTMR - Non-distinctive - Technical result – Article 7(1)(e)(ii) EUTMR - Decision partially annulled - Application partially allowed**



The applicant sought to register the 3D shape mark above for connectors in Classes 6, 7, 8, 9, 17 and 20. The examiner refused the application on the grounds of Article 7(1)(b) and 7(1)(e)(ii) EUTMR. The contested decision stated that the mark did not differ substantially from various shapes commonly used in trade and was therefore not distinctive. In addition, the triangular notches upon the surface of the goods performed a technical function of providing an improved grip.

The applicant filed an appeal arguing that the mark did not consist exclusively of a shape with a technical function and stated that such patterns upon connectors were generally recognised by relevant consumers as trade marks. It was argued that a mere company logo would not be legible on such a small connector and that a patterned sleeve was therefore a convenient way to identify the manufacturer. The applicant pointed to the previous acceptance for registration by the Office of various 3D marks including other shapes of connectors. Furthermore, the applicant asserted that the shape did not improve grip, and that grip was not an essential function for these types of goods. In this regard the applicant relied upon the evidence of experts in the field of industrial design, who attested to the mark's uniqueness and stated that the mark provided no significant increase in friction or grip, possibly even having the opposite effect.

The Board notes the experts' statements on the functionality question and concludes that the grip is not in fact an essential function of a connector. Consequently, the Board therefore annuls the objections raised to the extent they were based on Article 7(1)(e)(ii) EUTMR. Nevertheless, having given careful consideration to the variety of patterns used on the goods on the market, the Board maintains that the sign applied for does not depart significantly from the norms and customs of the particular market sector and that relevant consumers in this sector would not be capable of perceiving it as an origin-indicating sign for the goods at hand.

Consequently, the examiner did not commit an error when he found the mark to be devoid of inherent distinctive character, within the meaning of Article 7(1)(b) EUTMR.

[05/10/2020, R 491/2020-1, SAFEAIR](#)

**Word mark – Descriptive element – Non-distinctive – Article 7(1)(b) and (c) EUTMR – Appeal dismissed – Application partially rejected**

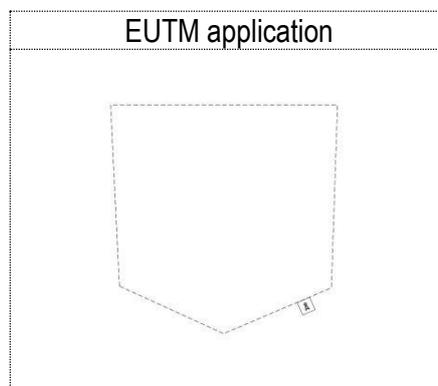
The applicant sought to register the word mark above for several goods in Classes 7 and 10, mainly dealing with electrical generators for providing power to medical and surgical apparatuses, medical

grade smoke and gas removal devices and medical and surgical kits; the goods belonging to a highly specialised market sector.

The Board notes that the sign consists of two words 'SAFE' and 'AIR'. The word 'SAFE' is defined as 'something that does not cause physical harm or danger', while 'AIR' is 'the mixture of gases from which the Earth's atmosphere is constituted and of which we breathe'. The relevant consumer would perceive the sign as an indication of its nature or its intended purpose, namely for devices that remove smoke and other gases from surgical sites and parts and filters for such devices. With this consideration in mind, the sign describes the kinds of goods offered, which falls under Article 7(1)(c) EUTMR. The Board concludes that the descriptive meaning of the sign 'SAFEAIR' in relation to all the goods at issue would be immediately perceived by the relevant public. Even if the relevant public were to display a high level of attention, the mark applied for would be no less subject to the absolute grounds of refusal. The sign applied for is devoid of distinctive character, for the same goods, within the context of Article 7(1)(b) EUTMR.

Consequently, the examiner's decision is confirmed and the appeal is dismissed.

[04/11/2020, R 488/2020-1, Square fabric tab with the letter 'Å' on it, attached to the lower edge of a pocket \(position mark\)](#)



**Position mark – Distinctive Character – Article 7(1)(b) EUTMR – Decision annulled – Application remitted for continuation of proceedings**

The applicant sought to register a position mark consisting of a square fabric tab, with the letter 'Å' on it, attached to the lower edge of a trouser pocket. The application was filed for articles of clothing in Class 25. The examiner refused the mark applied for pursuant to Article 7(1)(b) EUTMR for all the goods applied for on the grounds that the sign, bearing in mind its small size and that the goods concerned were targeted at the general public with an average level of attention, would merely be perceived as a decorative element of the item of clothing. Thus, it was concluded that the sign lacked distinctive character.

The Board finds the appeal well founded. Firstly, the Board notes that the fact that the mark applied for is a position mark does not make the assessment of its distinctive character different from other types of marks. Secondly, the Board finds that the contested decision did not provide any specific arguments

as to why the stylised letter 'Å' which is located on a tab of a trouser pocket is not distinctive per se (all the more so as this stylised letter 'Å' is registered as European Union trade mark) and why the sign containing this letter should be perceived by the relevant public exclusively as a decorative element. The Board emphasises that the size in the representation of the otherwise eligible trade mark on the product cannot be a registration criterion. In the clothing sector the customer is accustomed to seeing trade marks that are small in size located on the back pocket of a pair of trousers. The Board concludes that the position mark applied for is capable of fulfilling the individualising function of a trade mark. It possesses a degree of distinctiveness that is sufficient to indicate its commercial origin in respect of the goods applied for.

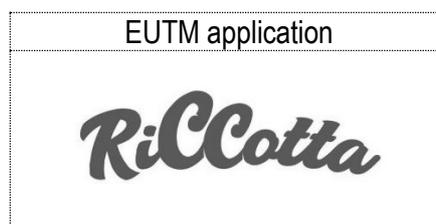
[18/11/2020, R 1284/2020-5, microCBD](#)

**Word mark – Descriptive element – Non-Distinctive – Article 7(1)(b) and (c) EUTMR – Article 7(2) EUTMR – Appeal dismissed**

The applicant sought to register the word mark 'microCBD' for goods in Classes 5 and 32, mainly dealing with vitamin supplements, vitamin beverages, non-alcoholic beverages and non-alcoholic preparations for making beverages. The examiner refused the application on the grounds of Article 7(1)(b) and (c) EUTMR.

The Board confirms the decision and dismisses the appeal. The sign applied for is a mere combination of the word 'micro', which is commonly used to form compound words with the meaning 'very, extremely small', and the word component 'CBD', which is the customary abbreviation for 'cannabidiol', an active ingredient that can be used in beverages and vitamin preparations. Thus, the term 'microCBD' makes it immediately clear to consumers that the goods concerned contain a very small amount of cannabidiol. There is therefore a clear connection between the meaning of the sign and the designated goods. The Board dismisses the applicant's argument that the sign applied for is a fanciful word. It recalls that the mere fact that the term is not included in dictionaries does not mean that the consumer would not understand it. Consequently, the sign 'microCBD' is a descriptive indication within the meaning of Article 7(1)(c) EUTMR, in conjunction with Article 7(2) EUTMR. The Board also confirms that in respect of the goods applied for the sign is devoid of distinctive character within the context of Article 7(1)(b) EUTMR. Referring to established case-law the Board dismisses as unfounded the applicant's argument, in support of the registrability of the sign at hand, that it had succeeded in registering other EUTMs with the word element 'micro'.

[27/11/2020, R 1682/2020-1, RiCotta](#)



**Figurative mark – Descriptive element – Figurative element – Non-distinctive – Misspelled word mark – Article 7(1)(b) and (c) EUTMR – Decision confirmed – Application rejected**

The applicant sought to register a figurative mark depicting the word element 'RiCCotta' for goods in Class 29, namely 'ricotta'. The examiner refused the mark applied for pursuant to Article 7(1)(b) and (c) EUTMR for all the goods applied for. According to the examiner, despite the presence of the sequence of letters 'CC' written in stylised capital letters, the sign would be understood as meaning 'Ricotta', an Italian cheese, by the Italian-speaking part of the public of the European Union. Furthermore, it was found that the stylisation of the sign was not sufficient to allow the relevant public to perceive the mark as an indication of commercial origin for the goods applied for. Thus, it was concluded that the sign was descriptive and lacked distinctive character.

The Board confirms the contested decision and rejects the sign applied for on the grounds of Article 7(1)(b) and (c) EUTMR. Firstly, the Board notes that the word element of the sign at hand is clearly and immediately recognisable by the relevant public as a simple and obvious misspelling of the word 'Ricotta', the Italian cheese. The double 'CC' in capital letters does not allow the word element to be perceived as a neologism, given that the mere spelling error does not in any way change the concept conveyed by the sign, which remains clearly understandable and obvious. The Board confirms the examiner's assessment that the Italian-speaking part of the public of the European Union will not perceive the expression contained in the sign 'RiCCotta' as unexpected or distinctive in itself. Secondly, the Board finds that the graphic representation of the contested sign will not be capable of significantly altering the purely descriptive impact of the word element so as to render the sign distinctive for the relevant consumer. Consequently, the decision is confirmed and the application rejected.

**Distinctive (yes)**

**C. ARTICLE 7(1)(c) / 59(1)(a) EUTMR – DESCRIPTIVE SIGN**

**Descriptive (yes)**

[08/04/2020, R 2409/2019-5, black FOREST](#)

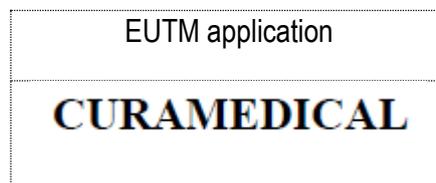


**Word Mark – Geographical Origin – Article 7(1)(c) EUTMR – Decision Confirmed – EUTM Cancelled**

The application for a declaration of invalidity was accepted for all the goods applied for in Class 25 (clothing). The Cancellation Division found that the relevant public would establish a link between the goods in Class 25 and the term 'black FOREST' which would be perceived as a descriptive indication of geographical origin.

The Board confirms the decision. The contested mark consists of the words 'black FOREST', which are associated with the popular region of the Black Forest in south-west Germany. Based on the documents submitted, it is a large German mountain range which extends over a wide area. The Board notes that Article 7(1)(c)EUTMR does not, in principle, preclude the registration of geographical names that are not known in the trade circles involved and that not every geographical indication acts as an indication of origin. However, it is emphasised that the relevant English-speaking public will associate the mark with the region of the Black Forest. In light of the above, after examining if the specific geographical indication could be associated with the goods applied for (clothing), the Board concludes that there is a sufficient connection between the geographical region of the Black Forest and the goods, based on the fact that the relevant public will perceive the term 'black FOREST' as a descriptive indication of geographical origin, the decision is confirmed and the EUTM is cancelled.

[28/05/2020, R 2613/2019-5, Curamedical](#)



**Word Mark – Descriptive – Non-distinctive – Article 7(1)(b) EUTMR – Decision confirmed – Application rejected**

The applicant sought to register the word mark for goods and services in Classes 5, 35, 42 and 44 which were mainly connected to the pharmaceutical sector. However, in light of the fact that the relevant public would perceive the sign as providing information as regards the quality of the goods and that the elements making up the sign 'CURA' and 'MEDICAL' were descriptive, the examiner rejected the application on the basis of Article 7(1)(b) and (c) EUTMR.

The Board confirms that the sign does not contain the required level of distinctiveness in order for it to function as a trade mark. It is noted that in order for a combination of words to be regarded as descriptive under Article 7(1)(c) EUTMR, not only do each of the components have to be descriptive but also the combination itself. The Board confirms the examiner's conclusion that the word 'CURA' will be understood by Spanish, Italian and Portuguese consumers as having the meaning of 'cure' or 'therapy'. As far as word 'MEDICAL' is concerned, it will be understood as medical in the aforementioned countries of relevance. The Board confirms that as a combination the sign will be perceived as a sign providing information on the nature of the goods and services applied for. In other words, the relevant public will see it as a description of the characteristics of the goods and services applied for.

[05/06/2020, R 176/2020-2, KÖLNER DOM](#)

**Word mark – Descriptive element – Article 7(1)(b) and (c) EUTMR – Decision partially rejected – EUTM partially accepted**

The applicant sought to register the sign as a word mark consisting of two German words 'KÖLNER' and 'DOM', which in English means Cologne Cathedral, an UNESCO World Heritage Site. The examiner partially rejected the application on the basis of Article 7(1)(b) and (c), in connection with Article 7(2), EUTMR. The application was rejected, among others, for goods and services in Classes 16, 19, 35, 41 and 42.

The Board partially annuls the examiner's decision for some of the goods and services in Classes 19, 41 and 42. Firstly the Board notes that Cologne Cathedral is one of the five most visited tourist attractions in Germany. For this reason, the relevant public in Germany and Austria will create a direct link to Cologne Cathedral for most of the goods and services applied for. Nevertheless, goods applied for in Class 19 'Marble; Clay', which are considered to be mineral materials, the sign will not be perceived by the public as a source of origin of the goods, as well as for the following services applied for in Class 41 'Providing nurseries, schools, boarding schools, and colleges' and in Class 42 'Land surveys; Urban planning'. For the services rejected in Class 42, the Board also notes that it is not obvious that the words 'KÖLNER DOM' will be perceived as a reference to an earlier project.

**Descriptive (no)**

[18/06/2020, R 21/2020-4, E \(fig.\)](#)



**Figurative Mark – Non – descriptive – Article 7(1)(b) and (c) EUTMR – Decision partially annulled – EUTM application accepted**

The applicant sought to register the figurative mark consisting of the letter 'E' within a circle. The examiner rejected the application on the basis of Article 7(1)(b) and (c), in connection with Article 7(2), EUTMR. The application was rejected for the services in Class 35.

The Board disagrees with the examiner's opinion and confirms that the sign can proceed to registration for all goods and services in Classes: 8, 22, 24 and 35. There is no specific 'electronic' advertising. "Advertising" is aimed at companies that want to advertise their goods and services, not at the addressee of an advertising measure. The Board cannot see what characteristic the letter 'E' could describe in the sense that competing advertising services or business management services would not have that characteristic. If the letter "E" cannot be attributed a clear meaning relevant to the services in class 35, then the inherent distinctiveness even with a minimum degree can be retained. Furthermore,

the sign applied for consists, in addition to the letter 'E', of another element, the circle in which the 'E' is located. Even if that circle is in itself a simple geometric representation which cannot be protected, the fact remains that the distinctive character of the sign applied for must be taken into account as a whole and may also result from the combination of the two elements.

Consequently, the application must also be allowed to proceed to publication pursuant to for the services applied for in Class 35.

**[30/06/2020, R 1688/2019-2, Beaches Jamaica Bloody Bay](#)**

**Word mark – Descriptive element – Geographical Origin – Article 7(1)(b) and (c) EUTMR – Decision partially rejected – EUTM partially accepted.**

The applicant sought to register the words 'Beaches Jamaica Bloody Bay' for several goods and services in Classes 16, 25, 35, 36, 39, 43, 41, 44 and 45. The examiner partially rejected the application on the basis of Article 7(1)(b) and (c) EUTMR, in particular for goods and services in Classes 16, 35, 39, 41, 43, 44 and 45, as consumers would perceive the sign applied for as providing information that the goods in Class 16 and the services in Class 35 were about, or related to, Bloody Bay Beach in Jamaica. In relation to the rest of the classes applied for such as Classes 39, 41, 43, 44 and 45 the sign would be understood as an indication of the destination of the services.

The Board confirms the contested decision. The word combination 'Beaches Jamaica Bloody Bay' will be understood as the resort of Negril in Jamaica, where 'Bloody Bay' is one of the favorite Jamaican beaches. The Board notes that, for the services in Class 39 such as transport, the sign indicates the content of the services in the sense of transport to 'Bloody Bay' and hence should be counted as being descriptive. Furthermore, in relation to goods and services in Classes 31, 41, 43 and 45, the Board confirms that the sign is understood as an indication of origin within the meaning of Article 7(1)(c) EUTMR. The sign will be understood by the relevant public as descriptive in the sense of the destination of the journey, the place where the provision of the services takes place or the subject matter of advertising services or goods. Moreover, the sign conveys a positive message in relation to the goods and services applied for in order to highlight their quality and their positive aspects. Hence, the sign does not possess the required level of distinctiveness within the sense of Article 7(1)(b) EUTMR. Consequently, the decision is confirmed and the application is partially rejected.

**[30/06/2020, R 1688/2019-2, Beaches Jamaica Bloody Bay](#)**

**Word mark – Descriptive element – Geographical Origin – Article 7(1)(b) and (c) EUTMR – Decision partially rejected – EUTM partially accepted.**

The applicant sought to register the words 'Beaches Jamaica Bloody Bay' for several goods and services in Classes 16, 25, 35, 36, 39, 43, 41, 44 and 45. The examiner partially rejected the application on the basis of Article 7(1)(b) and (c) EUTMR, in particular for goods and services in Classes 16, 35, 39, 41, 43, 44 and 45, as consumers would perceive the sign applied for as providing information that the goods in Class 16 and the services in Class 35 were about, or related to, Bloody Bay Beach in

Jamaica. In relation to the rest of the classes applied for such as Classes 39, 41, 43, 44 and 45 the sign would be understood as an indication of the destination of the services.

The Board confirms the contested decision. The word combination 'Beaches Jamaica Bloody Bay' will be understood as the resort of Negril in Jamaica, where 'Bloody Bay' is one of the favorite Jamaican beaches. The Board notes that, for the services in Class 39 such as transport, the sign indicates the content of the services in the sense of transport to 'Bloody Bay' and hence should be counted as being descriptive. Furthermore, in relation to goods and services in Classes 31, 41, 43 and 45, the Board confirms that the sign is understood as an indication of origin within the meaning of Article 7(1)(c) EUTMR. The sign will be understood by the relevant public as descriptive in the sense of the destination of the journey, the place where the provision of the services takes place or the subject matter of advertising services or goods. Moreover, the sign conveys a positive message in relation to the goods and services applied for in order to highlight their quality and their positive aspects. Hence, the sign does not possess the required level of distinctiveness within the sense of Article 7(1)(b) EUTMR. Consequently, the decision is confirmed and the application is partially rejected.

[30/06/2020, R 1688/2019-2, Beaches Jamaica Bloody Bay](#)

**Word mark – Descriptive element – Geographical Origin – Article 7(1)(b) and (c) EUTMR –  
Decision partially rejected – EUTM partially accepted**

The applicant sought to register the words 'Beaches Jamaica Bloody Bay' for several goods and services in Classes 16, 25, 35, 36, 39, 43, 41, 44 and 45. The examiner partially rejected the application on the basis of Article 7(1)(b) and (c) EUTMR, in particular for goods and services in Classes 16, 35, 39, 41, 43, 44 and 45, as consumers would perceive the sign applied for as providing information that the goods in Class 16 and the services in Class 35 were about, or related to, Bloody Bay Beach in Jamaica. In relation to the rest of the classes applied for such as Classes 39, 41, 43, 44 and 45 the sign would be understood as an indication of the destination of the services.

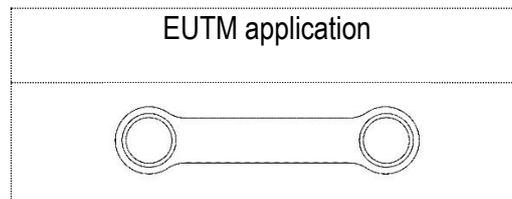
The Board confirms the contested decision. The word combination 'Beaches Jamaica Bloody Bay' will be understood as the resort of Negril in Jamaica, where 'Bloody Bay' is one of the favorite Jamaican beaches. The Board notes that, for the services in Class 39 such as transport, the sign indicates the content of the services in the sense of transport to 'Bloody Bay' and hence should be counted as being descriptive. Furthermore, in relation to goods and services in Classes 31, 41, 43 and 45, the Board confirms that the sign is understood as an indication of origin within the meaning of Article 7(1)(c) EUTMR. The sign will be understood by the relevant public as descriptive in the sense of the destination of the journey, the place where the provision of the services takes place or the subject matter of advertising services or goods. Moreover, the sign conveys a positive message in relation to the goods and services applied for in order to highlight their quality and their positive aspects. Hence, the sign does not possess the required level of distinctiveness within the sense of Article 7(1)(b) EUTMR. Consequently, the decision is confirmed and the application is partially rejected.

**D. ARTICLE 7(1)(d) / 59(1)(a) EUTMR – CUSTOMARY SIGN**

[no entry]

**E. ARTICLE 7(1)(e) / 59(1)(a) EUTMR – SHAPE**

[16/03/2020, R 757/2019-5, DEVICE OF TWO CIRCLES WITHING AN ELONGATED BAND \(fig.\)](#)



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

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

The Board endorses the examiner's opinion that the mark at hand is devoid of distinctive character. The sign applied for falls within the provision of Article 7(1)(e)(ii) EUTMR, the essential characteristics of the sign serve a technical function, specifically in the hanging of an item of clothing such as a jacket. As a result, the possibility of hanging a piece of clothing in a secure way on a hook performs a technical function of the goods at hand. Moreover, even if there are technical alternatives for relevant competitors it does not preclude the application of Article 7(1)(e)(ii) EUTMR since if such a sign were registered, there would be an impairment in relation to the goods that serve the same technical function. The fact, that the sign consists of two decorative elements i.e. the two smaller inner circles, does not alter the fact that the sign serves a technical function since those inner circles are arbitrary minor elements in the mark applied for.

**F. ARTICLE 7(1)(f) / 59(1)(a) EUTMR – PUBLIC POLICY / MORALITY**

[07/07/2020, R 2387/2019-4, SULA](#)



**Figurative mark – Contrary to public policy or accepted principles of morality – Article 7(1)(f) EUTMR and Article 7(2) EUTMR – Decision confirmed – Application rejected**

The applicant sought to register the figurative trade mark in the European Union for goods in Classes 29 and 32. The examiner rejected all the goods applied for on the basis of Article 7(1)(f) EUTMR.

The Board dismisses the appeal. Firstly, the Board notes that the verbal element 'SULA' is a word in Romanian and, therefore, the Romanian relevant public must be considered in order to assess the applicability of this absolute ground. The contested sign is composed of the verbal element 'SULA' and a figurative element of a red and yellow medal. The Board confirms that 'SULA' is a colloquial word which means 'male organ, penis, cock' in Romanian and declares the sign contrary to public policy and accepted principles of morality. The Board also confirms that the word 'SULA' can have two other definitions in Romanian 'tool' and 'a kind of fish', however, the word will be understood by the relevant public with the abovementioned definition.

Regarding the goods in Classes 29 and 32, even if they do not have a direct connection with a 'male organ', the Board notes that signs which are particularly offensive may be considered contrary to public policy and accepted principles of morality, without taking into consideration the contested goods.

(see also [07/07/2020, R 2388/2019-4, SULA](#))

**G. ARTICLE 7(1)(g) / 59(1)(a) EUTMR – DECEPTIVE SIGN**

[07/09/2020, R 1589/2019-2, Vichy Barcelona](#)

[07/09/2020, R 1588/2019-2, Vichy d'or](#)

**Geographical origin - Common element - Relevant territory - Article 7(1)(g) EUTMR - Article 59(1)(a) EUTMR - Deceptive element – Decision Annulled**

The word mark 'VICHY BARCELONA' was registered for foodstuffs, drinks and beverages in Classes 5 and 32. The French Republic and the Compagnie de Vichy filed an application for a declaration of invalidity on the basis of Article 59(1)(a) EUTMR, in conjunction with Article 7(1)(g) EUTMR, arguing that the EUTM would lead consumers to believe that the contested goods came from the town of Vichy, located in central France, when in fact they did not. The town of Vichy was famous as a spa town containing thermal spring water that was naturally rich in minerals and trace elements, which had long been considered to have therapeutic effects. The Cancellation Division rejected the application for a declaration of invalidity in its entirety.

The Board notes that the term 'VICHY' would, in connection with water, be understood by relevant French consumers as indicating that the water in question originates from the town of Vichy, France, and that they would expect such 'VICHY' water to possess the same therapeutic qualities generally associated with water originating from the town of Vichy. Taking into account that French consumers would not associate Barcelona with the relevant products, the additional presence of 'BARCELONA' or 'D'OR' is not capable of altering this conclusion.

The cancellation applicants successfully argued on the basis of the renown in France of the town of Vichy as a thermal resort as well as French dictionary definitions. Since there is a serious risk that relevant French consumers will believe that the goods bearing the marks 'VICHY BARCELONA' or 'VICHY D'OR' possess certain characteristics – namely, that they originate from Vichy, France and feature the therapeutic qualities generally associated with mineral water from Vichy – which they do not in fact possess, the Board considers that the contested EUTM must be declared invalid on the grounds of it being deceptive within the meaning of Article 7(1)(g) EUTMR.

The decisions also follow many of the principles set out in [R 1499/2016-G, La Irlandesa](#) (under appeal T-306/20) and cites [T-86/19, Bio Insect Shocker](#).

#### **H. ARTICLE 7(1)(h) / 59(1)(a) EUTMR – ARTICLE 6TER PARIS**

[no entry]

#### **I. ARTICLE 7(1)(i) / 59(1)(a) EUTMR – OTHER EMBLEMS**

[no entry]

#### **J. ARTICLE 7(1)(j) / 59(1)(a) EUTMR – GEOGRAPHICAL INDICATIONS**

[no entry]

#### **K. ARTICLE 7(1)(k) / 59(1)(a) EUTMR – TRADITIONAL TERMS FOR WINE**

[no entry]

**L. ARTICLE 7(1)(l) / 59(1)(a) EUTMR – TRADITIONAL SPECIALITIES GUARANTEED**

[no entry]

**M. ARTICLE 7(1)(m) / 59(1)(a) EUTMR – PLANT VARIETY DENOMINATIONS**

[no entry]

**N. ARTICLE 59(1)(b) EUTMR – BAD FAITH**

[no entry]

**O. ARTICLES 7(3) / 59(2) EUTMR– ACQUIRED DISTINCTIVENESS**

## 2. GROUNDS FOR REVOCATION (ARTICLE 58 EUTMR)

[no entry]

### A. ARTICLE 58(1)(a) EUTMR – REVOCATION FOR NON-USE

[18/05/2020, R 2254/2019-1, KOROVKA \(fig.\)](#)



#### **Figurative Mark – Revocation Grounds – Article 58(1)(a) EUTMR – Decision confirmed – EUTM Partially revoked**

The application for a declaration of revocation was partially accepted for all the goods applied for, except for some goods in Class 30. After reviewing all the documents submitted by the EUTM proprietor, as regards the time of use, the place of use, the commercial volume and the nature of the use in relation to the registered goods, the Cancellation Division revoked the EUTM only partially.

The Board confirms the decision. In relation to the time of use of the registered mark, the Board notes that the evidence submitted which deals with use outside of the relevant time period, confirms the use of the mark in the relevant time period. Secondly, since the mark is an EUTM, the use of it in Germany and Bulgaria as derives from the evidence is found sufficient by the Board. In relation to the extent of use, the Board indicates that the goods under the sign 'KOROVKA' have been continuously used in Germany and Bulgaria, where they were imported and offered for sale. Moreover, the volume of sales is sufficient to establish the fact that the EUTM proprietor tried to acquire a commercial position on the market. Thirdly, it is emphasised that even if the contested mark were used in two different ways on the market 'KOPOBKA' (in Cyrillic) and 'KOROVKA' (in Latin characters), five out of the seven letters coincide and are placed in the same order. As a result, the distinctiveness of the EUTM as registered is not altered as the variation in the mark is acceptable. From a global assessment of all the relevant factors, the Board therefore concludes that the use shown by the EUTM proprietor in relation to the contested goods is sufficient to maintain or create a market share on the specific market. The revocation applicant's approach of splitting up the evidence into individual items in order to find some missing information in relation to each requirement of use remains unsuccessful. Constant case-law, as that cited above, confirms that the evidence must be assessed as a whole and that there is no obligation for the EUTM proprietor to produce individual pieces of evidence each complying with all the requirements of use. The proof of use does not require at all that each item of evidence must necessarily contain information on each of the four elements to which the proof of use must refer. In the present case, the evidence considered as a whole allows for the finding of genuine use of the mark in accordance with the requirements set out by the Regulations and the relevant case-law. Consequently, the contested

decision correctly rejected the application for a declaration of revocation for all the contested goods at issue in the appeal.

[26/10/2020, R 1890/2019-1, Auratone](#)

**Proof of use – Revocation grounds – Article 58(1) EUTMR – Proper reasons for non-use – Decision confirmed**

A request for the revocation of the EUTM registration was filed on the grounds of non-use pursuant to Article 58(1) EUTMR in respect of all the goods covered by the registration. The EUTM proprietor, its defence, relied in particular on justified reasons for non-use, namely the existence of ongoing administrative and civil proceedings regarding the ownership of the trade mark 'AURATONE' in the United States of America. The Cancellation Division upheld the application for a declaration of revocation and declared the EUTM revoked in its entirety. It considered the arguments and evidence submitted by the EUTM proprietor insufficient to constitute proper reasons for non-use of the contested EUTM. The EUTM proprietor filed an appeal reasserting the claim that the proceedings in the United States stifled its ability to use the mark in the EU. Thus, it requested that the decision be set aside or, in the alternative, for the Board to use its discretion, pursuant to Article 71(1)(b) EUTMR, to suspend the appeal proceedings until the civil lawsuit before the court in the United States was decided upon.

The Board dismisses the appeal in its entirety. First, as regards the request to suspend the appeal proceedings, the Board finds that granting a suspension in the present case would only be warranted and logical if the pending lawsuit in the United States were to have influence on the EUTM proprietor's capacity to use the contested EUTM in the EU or would lead to the finding that the EUTM proprietor was not allowed to use the EUTM. It is clear from Article 132 EUTMR that the civil courts of the United States do not have jurisdiction over the validity of an EU trade mark. Second, regarding the proper reasons for non-use relied on by the EUTM proprietor, the Board confirms that those obstacles do not have a direct relationship with the mark concerned, as they have not proven to have imposed restrictions upon the EUTM proprietor to use the mark in the EU. The evidence adduced by the EUTM proprietor does not enable the Board to establish that the circumstances which take place in the United States will also have a direct effect in the EU. The Board also indicates that the EUTM proprietor's statements of having been barred from using the mark seem to be contradictory in light of the evidence adduced by the cancellation applicant showing that just one day after the application for a declaration of revocation was filed the EUTM proprietor filed another EUTM application for the word 'AURATONE'.

**B. ARTICLE 58(1)(b) EUTMR – COMMON NAME FOR A PRODUCT OR SERVICE**

[no entry]

**C. ARTICLE 58(1)(c) EUTMR – USE LIABLE TO MISLEAD THE PUBLIC**

[no entry]

**3. RELATIVE GROUNDS FOR REFUSAL (ARTICLE 8 EUTMR) / INVALIDITY (ARTICLE 60**

**EUTMR)**

[no entry]

**A. ARTICLE 8(1)(a) / 60(1)(a) EUTMR – IDENTICAL SIGNS / G&S**

[no entry]

**B. ARTICLE 8(1)(b) / 60(1)(a) EUTMR – LIKELIHOOD OF CONFUSION**

[29/01/2020, R 1073/2019-2, Vinya carles / Carlos I et al.](#)

Earlier trade mark	Contested sign
	

**Word Mark – Conceptual similarity – Likelihood of confusion – Article 8(1)(b) EUTMR – Decision confirmed – Opposition allowed**

The opposition based on Article 8(1)(b) EUTMR was rejected in its entirety, namely for goods in Class 33, specifically wines, thus allowing the international registration designating the European Union to proceed. While wines were identically contained in both lists of goods, there was no conceptual similarity between the two signs.

The Board confirms the contested decision. The comparison between the two marks and the overall impression given by them, is considered from the perception of the Spanish public. In light of the latter, the Spanish consumer would understand 'Vinya' as vineyard even though it is written in Catalan, while the term 'Carles' is the Catalan equivalent of the male first name 'CARLOS. As far as the earlier mark is concerned, the numeral 'I' following the name Carlos would be associated by Spanish consumers with the historical figure of a King of Spain, i.e. 'Carlos the First'. Even though there are common visual elements between the two marks, there are also significant differences. Conceptually the signs indicate completely different things. On the one hand, 'VINYA CARLES' points to the vineyard belonging to, or associated with, a person named 'CARLES', while the earlier mark refers to a Spanish king. Overall, despite the identity between the goods there is no risk of confusion from the perspective of the Spanish public. The clear conceptual dissimilarity between the two signs also affects the visual and phonetic perception thereof and thereby neutralises the elements that the two signs have in common. Furthermore, the Board notes that the result would have been the same in relation to other earlier rights i.e. 'CARLOS II' and 'CARLOS III' since they follow the same structure as the earlier mark analysed.

[03/03/2020, R 1115/2019-4, Bucocalma/ Mucocalm](#)

Earlier trade mark	Contested sign
<b>MUCOCALM</b>	<b>BUCOCALMA</b>

**Word Mark – Conceptual similarity – Likelihood of confusion – Article 8(1)(b) EUTMR – Decision confirmed – Opposition allowed**

The opposition based on article 8(1)(b) EUTMR was upheld in its entirety, namely for goods in Class 5, specifically pharmaceuticals, hence rejecting the applicant’s trade mark application. With the exception of their first letter, the contested sign identically reproduced the earlier sign, resulting in a likelihood of confusion between the two marks.

The Board confirms the contested decision. The comparison between the two marks and the overall impression given by them, is considered from the perception of the Dutch-speaking public. Visually, the marks are similar to an average degree since, since the contested sign reproduces seven of the eight letters the earlier mark is composed of. The different starting letters and the additional last letter “A” are not sufficient to outweigh the visual similarity. Phonetically, the similar length and the identical pronunciation of “UCOCALM”, result in an average degree of similarity. The Board notes, that the difference in the starting and ending letter cannot change their aural similarities. Conceptually, neither of the signs have a clear meaning. The Dutch public will only perceive the sequence “CALM(A)” in both word marks as something to “reduce pain” while “BUCO” or “MUCO” will be perceived only by the professional public in the medical field as something relating to mouth cavity. As such, the conceptual similarity between the marks is neutral. In light of the above, the Board confirms that based on the similar overall impression produced by the two signs and bearing in mind the normal inherent distinctiveness of the earlier mark, there is likelihood of confusion.

[30/03/2020, R 81/2019-4, Tekbond / TECHNOBOND \(fig.\)](#)

Earlier trade mark	Contested sign
	<b>TEKBOND</b>

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

The opposition based on Article 8(1)(b) EUTMR was upheld in its entirety, namely for goods in Classes 1, 16 and 17, thus, rejecting the application for the contested sign. Due to the visual and aural similarities, as well as the goods at hand, such as ‘plastic substances’, a likelihood of confusion between the two marks was established.

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

[12/05/2020, R 2210/2019-5, XI FENG \(fig.\) / DEVICE OF THREE CHINESE CHARACTERS \(fig.\)](#)

Earlier trade mark	Contested sign
	

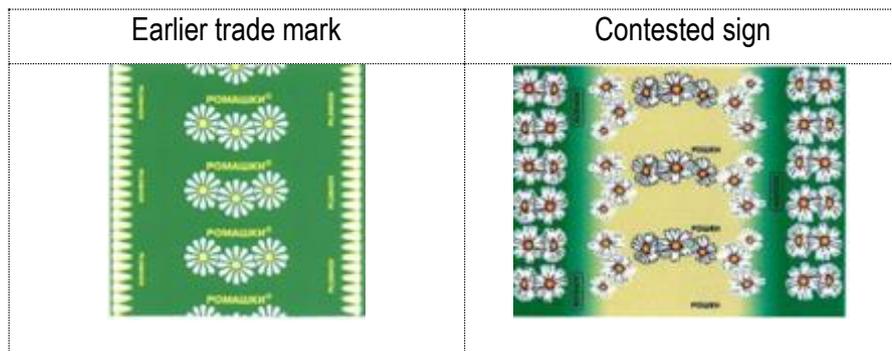
**Figurative Mark – Dominant Element – Article 8(1)(b) EUTMR – Decision annulled – EUTM cancelled**

The application for a declaration of invalidity, based on Article 60(1)(a) EUTMR, was rejected, namely for goods in Class 33 (alcoholic beverages etc.), because no likelihood of confusion was found between the two marks.

The Board notes that the contested goods must be considered identical to the earlier goods, as both lists contain similar goods such as 'alcoholic beverages'. As far as the signs are concerned, they are both figurative. The Chinese elements in both marks possess a lower than average level of distinctive character, since the relevant public will not be able to verbalise them. Hence, the Board focuses on the circular element, comprising a highly stylised phoenix, depicted in both signs. Visually, the marks are considered similar to an average degree as the circular element differs only in colour, while the first two Chinese characters of the contested sign are also present in the earlier mark. A phonetic comparison cannot be carried out since the earlier mark does not contain any word elements. The Board also notes that considering the many visual similarities, the two marks should be considered similar at least to an averagedegree. As such, due to the fact that the circular figurative element of the earlier mark is clearly

depicted in the contested sign, only differing in colour, the Board cannot exclude the possibility of the relevant public perceiving the two marks as originating from the same undertaking. As a result, the decision is annulled and the EUTM is cancelled.

[30/09/2020, R 1109/2020-1, ПОШЕН \(fig.\) / ПОМАШКИ \(fig.\)](#)



**Figurative Mark – Article 8(1)(b) EUTMR – Likelihood of Confusion – Decision Confirmed – Opposition Allowed**

The applicant designated the European Union in its international registration ('IR') for the figurative mark above for goods in Class 30. The opponent filed an opposition against this designation on the grounds of Article 8(1)(b) EUTMR basing the opposition on an earlier international registration for the figurative mark above designating a number of European Union Member States in respect of goods in Class 30. The Opposition Division allowed the opposition and rejected the IR designating the European Union in its entirety.

The IR holder appealed this decision. The Second Board upheld the appeal, rejected the opposition and annulled the contested decision, considering that the level of attention of the relevant consumer was low, the goods were identical and that the similar elements of the signs were non-distinctive. The motif of daisies or flowers in the signs was weak, while the camomile motif and the verbal element might denote the flavour of the confectionary. The Board held that even given the visual similarity between the signs there was no risk of confusion.

This decision was appealed and overturned in a judgment by the General Court (13/05/2020, T-63/19, ПОШЕН (fig.) / ПОМАШКИ (fig.), EU:T:2020:195). The Court stated that the low level of attention of the relevant public, the identity between the goods and the fact that the marks, considered as whole, presented similar motifs, suggested the possibility of consumers wrongly believing that the goods originated from the same undertaking, or constituted variations of the same sign. The General Court concluded that the Second Board of Appeal wrongly found that there was no likelihood of confusion between the marks in conflict on the part of the relevant public. The case was reallocated to the First Board for further prosecution.

The First Board indicates in its decision that the signs have a similar structure and that there are visual, aural and conceptual resemblances between them, that the contested goods are identical and that the

level of attention of the consumer of the goods at stake is lower than average. In both signs, the consumer's perception is attracted by the flowers and by the overall structure of the figurative motif that is the dominant element. The word components in the centre of the signs are small; they will not be overlooked, but they are of secondary importance.

The Board states that despite the inherently weak nature of the figurative motifs represented in the signs, it remains likely that a consumer having a lower than average degree of attention could be induced to believe that the goods concerned, bearing the signs, originate from the same undertaking. The contested sign may also bring the risk of an incorrect association with the earlier mark. In accordance with the similarities between the patterns, the word written in Cyrillic letters, the flower motifs and green rectangles combined with the fact that the consumer has a lower than average level of attention, the Board finds that a likelihood of confusion is possible. Such finding is reinforced by the possibility that the contested sign is perceived as a mere variation of the earlier mark. Consequently, the Board confirms the decision and dismisses the appeal.

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

Earlier rights	Contested sign
<p data-bbox="375 1167 766 1200"><b>TORO denominación de origen</b></p> 	

**Likelihood of confusion – Reputation – Proof of use – 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.

[27/10/2020, R 1036/2019-1, SAGER ELECTRONICS / Hager services et al.](#)

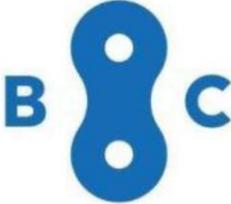
Earlier trade mark	Contested sign
<b>Hager services</b>	<b>SAGER ELECTRONICS</b>

**Likelihood of confusion – Similarity of the goods and services – Similarity of the signs – Enhanced distinctiveness – Phonetic dissimilarity – Decision annulled**

The applicant designated the European Union in its international registration (‘IR’) for the word mark ‘SAGER ELECTRONICS’ in respect of goods and services in Classes 9, 35 and 42. The opponent filed an opposition. The grounds of the opposition were those laid down in Article 8(1)(b) and Article 8(5) EUTMR. The Opposition Division refused the IR in respect of all the goods and services on the basis of a likelihood of confusion with the earlier EUTM for the word mark ‘Hager services’, as the signs at stake were found similar visually and aurally, and the goods and services concerned were found in part identical and in part similar to a different degree.

The Board finds that the average consumer in this case is reasonably attentive and the level of attention with respect to the goods and services is higher than normal. As regards the signs at stake, the Board confirms, as already established in its earlier decision (15/06/2020, R 867/2019-1, Sager / Hager services et al.), that neither the word element ‘Sager’ nor ‘Hager’ have their own meaning that will be perceived by consumers. It is to be expected that the word element ‘Hager’ in combination with the word element ‘services’ in the earlier mark will be perceived as a surname. Likewise, the word element ‘Sager’ in the contested mark will be seen as a surname. The Board indicates that the fact that both marks refer to surnames does not make them conceptually similar. Visually and aurally, the letters ‘H’ and ‘S’ are quite far apart with additional different word elements ‘services’ or ‘electronics’, even if they possess a low degree of distinctive character. According to well-established case-law the first letter is particularly important in the case of normally structured surnames or in the case of trade marks which resemble such surnames. Therefore, having regard to the fact that the goods and services concerned are targeted at specialists with an increased level of attention, the differences between the signs are sufficient to conclude that there is no likelihood of confusion. Consequently, the opposition is rejected on the basis of Article 8(1)(b) EUTMR and the case is remitted back to the Opposition Division to examine the grounds of Article 8(5) EUTMR invoked by the opponent.

[28/10/2020, R 662/2020-2, B C \(fig.\) / bc \(fig.\) et al.](#)

Earlier trade mark	Contested sign
	

**Figurative mark – Likelihood of Confusion – Article 8(1)(b) EUTMR – Dissimilarity of signs – Decision confirmed – Opposition rejected**

The applicant sought to register the contested sign, after a limitation, for goods in Classes 3, 4, 7, 8, 9, 11, 12, 19, 25 and 28. The opponent filed an opposition based on Article 8(1)(b) EUTMR invoking several earlier registrations for the trade mark above in respect of goods and services in Classes 8, 9, 12, 18, 21, 25, 28, 35 and 37. The opposition was directed against all the goods applied for. A part of the goods and services concerned were specified as relating to bicycles. The Opposition Division rejected the opposition in its entirety on the grounds that the signs at issue were dissimilar, thus a necessary condition of Article 8(1)(b) EUTMR was not fulfilled.

The Board confirms the decision and dismisses the appeal. The Board finds that there are goods that are identical in Classes 8, 9 and 12 and focuses on these goods in order to assess if there is a likelihood of confusion between the sign applied for and the earlier marks.

As regards the signs, the Board holds that the relevant consumer may not see the signs at stake as visually similar. In the contested sign the letters 'B' and 'C' are clearly recognisable in combination with a figurative element that alludes to a tool or a bicycle chain joint, whereas it is unlikely that the targeted public would identify a particular combination of letters within the dark hexagon, in the earlier marks. Even if the consumer were to interpret the earlier marks as containing letters, these would not necessarily be perceived as a 'b' and 'c'. Further, the Board finds that aurally the signs are not comparable or there is a degree of similarity assuming that the letters 'b' and 'c' are perceived in the earlier marks and pronounced accordingly. Conceptually, the Board holds that the relevant public may associate the figurative elements of the signs with bicycles and therefore the signs have a certain similarity. Nevertheless, the Board points out that according to the case-law the mere correspondence of a concept is not sufficient to establish a relevant degree of similarity between two signs (14/11/2019, T-149/19, DEVICE OF A HUMAN FIGURE CENTERED OVER A BLUE ESCUTCHEON (fig.) / DEVICE OF A HUMAN FIGURE WITH A SEMICIRCLE (fig.), EU:T:2019:789, § 47). The Board concludes that, as the signs are not similar overall, there is no likelihood of confusion even for the goods that have been found to be identical.

[28/10/2020, R 329/2020-1, BANU / BANUS](#)

Earlier trade mark	Contested sign
<b>BANU</b>	<b>BANUS</b>

**Word mark – Likelihood of confusion – Article 8(1)(b) EUTMR – Similarity of goods – Partly upheld**

The applicant sought to register the word mark 'BANUS' for, inter alia, goods and services in Classes 30, 32, 33 and 43, mainly dealing with coffee, tea, beer, other non-alcoholic drinks, fruit beverages, fruit juices, syrups and other preparations for making beverages, alcoholic beverages and services for providing food and drink, bar services, restaurants and hotel and catering services. An opposition was filed on the grounds of Article 8(1)(b) EUTMR based on an earlier EUTM registration for the word mark above in respect of 'waters [beverages]' in Class 32. The Opposition Division partially refused the trade mark applied for on the grounds that there was a likelihood of confusion for all the goods and services applied for in Classes 32 and 43, except 'hotel services'.

The Board dismisses the appeal and confirms the contested decision, insofar as 'coffee; cocoa, and artificial coffee' in Class 30, 'alcoholic beverages (except beer)' in Class 33 and 'hotel services' in Class 43 are concerned, finding that these goods and services are not similar to 'waters [beverages]' in Class 32 for which the earlier mark is registered. Although the signs are visually and aurally highly similar, there is no likelihood of confusion in view of dissimilarity between the goods and services above.

However, the Board holds that the appeal is well-reasoned in respect of 'tea' in Class 30. The Board finds that tea is a basic ingredient for very popular ready-made water-based beverages (e.g. pre-canned ready-made ice-tea). Due to the well-known health and beneficial properties of tea, green tea in particular is commonly used as an essence or flavouring in infused or flavoured mineral waters, which are nowadays offered as healthier and purpose-focused alternatives to plain mineral waters, aiming not only to quench thirst, but also to improve relaxation and concentration. When seeing, e.g. infused/flavoured 'water [beverages]' covered by the opponent's mark, on the one hand, and the applicant's 'tea', which includes, for instance, iced tea, consumers may perfectly assume that the goods may have a common commercial origin. Accordingly, there is a low degree of similarity between these goods.

Thus, in view of the high degree of similarity between the signs the Board finds that there is a likelihood of confusion in respect of 'tea' in Class 30.

[18/11/2020, R 2988/2019-2, DecJet / DECOjet](#)

Earlier trade mark	Contested sign
<b>DECOjet</b>	<b>DecJet</b>

**Likelihood of confusion – Article 8(1)(b) EUTMR – Dissimilarity of the goods and services – Decision partially annulled**

The IR holder sought to register the figurative mark above for goods and services in Classes 7 and 42. The opponent filed an opposition on the grounds of Article 8(1)(b) EUTMR in respect of all the goods and services covered by the contested mark, basing the opposition on an earlier EUTM registration for the word mark ‘DECOjet’ in respect of goods in Classes 9 and 11. The Opposition Division partially upheld the opposition, namely for all the contested goods in Class 7 and refused it as regards the services in Class 42. The IR holder filed an appeal against the contested decision requesting that the decision be partially set aside.

The Board finds that all of the conflicting goods are directed at highly specialised consumers in the pharmaceutical and food production industries, such as scientists, engineers, researchers and laboratory technicians whose level of attention will be significantly higher than average. The opponent’s mark covers devices, such as apparatus and installations for so-called ‘clean rooms’ used in production plants. The ‘clean rooms’, produced and installed by the opponent, are closed spaces designed to allow control over environmental contaminants which may compromise the work being carried out in the clean room. These are often required in the manufacture of electronic hardware, biology, medicine and food, or in any context where the environment may need to be free from bacteria, viruses, fungal spores or other potential pathogens. The contested goods, on the other hand, are various types of powder processing machines and insulators for use in the production processes of the chemical and pharmaceutical industries. The purpose of clean room devices is to maintain a sterile environment, thus allowing it to function as a clean room. The purpose of the powder processing machines is to process powder. In the Board’s opinion, the nature and intended purpose of the respective goods is clearly not the same. The goods are also not produced by the same companies, nor are they complementary. The opponent’s clean room devices are not, as such, necessary or of relevance for the functioning of the contested powder processing machines. The Board concludes that there is no similarity between the goods concerned and thus there can be no likelihood of confusion, regardless of the degree of similarity between the conflicting signs. Consequently, the opposition is rejected in its entirety.

[19/11/2020, R 2281/2019-5, M MODERNO \(fig.\) / VEKA \(fig.\) et al.](#)



**Likelihood of Confusion – Article 8(1)(b) EUTMR – Visual dissimilarity – Phonetic dissimilarity – Decision Confirmed**

The applicant sought to register the figurative mark above for goods in Classes 6 and 19. An opposition was filed on the grounds of Article 8(1)(b), Article 8(4) and 8(5) EUTMR based on several earlier rights, inter alia, EUTM registration for the figurative mark above in respect of goods and services in Classes 1, 17, 19 and 37. The Opposition Division rejected the opposition on the grounds that none of the earlier marks and rights were similar to the contested sign.

The Board dismisses the appeal. As a preliminary point, the Board rejects the opponent's argument that the verbal elements of the contested sign are non-distinctive and descriptive. The Board indicates in this regard that in the context of opposition proceedings, Article 7(1)(b) and (c) EUTMR cannot be applied. As regards the grounds under Article 8(1)(b) EUTMR the Board refers to settled case-law according to which, where a trade mark is composed of verbal and figurative elements, the former are, in principle, more distinctive than the latter, since the average consumer will readily refer to the goods in question by quoting the name of the trade mark rather than describing its figurative element. In the present case, the word 'VEKA' is the distinctive and dominant element in the earlier mark, whereas in the contested sign, although the verbal element 'MODERNO' has a weak distinctive character, this element together with the figurative element and the letter 'M' are co-dominant. The Board finds that, as the verbal elements of the conflicting marks are clearly different, the mere appearance of a basic graphic element such as a rhombus, which is moreover stylised differently in each case, cannot lead to a visual similarity. Nor there is any phonetic similarity between the signs or semantic meaning in common. The public will not recall or remember the few negligible commonalities of the figurative elements (rhombuses) which are moreover fully counteracted by the different verbal elements. Consequently, the Board concludes that, since the signs are dissimilar overall, one of the conditions for the application of Article 8(1)(b) EUTMR is not satisfied, without need to compare the goods or to examine the enhanced distinctiveness or reputation of the earlier marks as claimed by the opponent. For the same reasons regarding the overall dissimilarity between the conflicting marks, the grounds of Article 8(5) and Article 8(4) EUTMR are also inapplicable.

### **C. ARTICLE 8(3) / 60(1)(b) EUTMR – TM FILED BY AGENT OR REPRESENTATIVE**

[no entry]

### **D. ARTICLE 8(4) / 60(1)(c) EUTMR – NON REGISTERED MARKS / OTHER SIGNS**

[11/08/2020, R 2514/2018-1, Fitadium / Fitadium et al.](#)

#### **Non-registered mark – Domain names – Article 8(4) EUTMR – Decision partially 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 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.

### **E. ARTICLE 8(5) / 60(1)(a) EUTMR – MARKS WITH A REPUTATION**

[no entry]

## F. ARTICLE 8(6) / 60(1)(d) EUTMR – GEOGRAPHICAL INDICATIONS

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

Earlier protected sign	Contested sign
<b>CHAMPAGNE</b>	<b>Champagnola</b>

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

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

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

## G. ARTICLE 60(2)(a) EUTMR – RIGHT TO A NAME

[no entry]

## H. ARTICLE 60(2)(b) EUTMR – RIGHT OF PERSONAL PORTRAYAL

[no entry]

## I. ARTICLE 60(2)(c) EUTMR – COPYRIGHT

[no entry]

## J. ARTICLE 60(2)(d) EUTMR – INDUSTRIAL PROPERTY RIGHT

[no entry]

## 4. PROOF OF USE AND ASSESSMENT OF EVIDENCE

[23/11/2020, R 634/2020-5, kradle care planning assistant \(fig.\) / Gradle](#)

Earlier trade mark	Contested sign
Gradle	 <span style="font-size: 24pt; font-weight: bold;">kradle</span> care planning assistant

### Proof of use – Article 33(5) EUTMR – Decision confirmed

The applicant sought to register the figurative mark above for goods in Class 9. An opposition was filed on the grounds of Article 8(1)(b) EUTMR. The opposition was based on an EUTM, filed on 5 May 2009 and registered on 7 October 2009, for the word mark ‘Gradle’ insofar as it was registered for goods in Class 9 comprising the entire class heading in Class 9 of the edition of the Nice Classification in force at the time of filing. The applicant requested proof of use of the earlier mark for all the goods in Class 9. The Opposition Division rejected the opposition finding an absence of the earlier mark’s use for the goods on which opposition was based. It found, essentially, that the evidence adduced by the opponent showed use of the earlier mark in respect of software which did not fall within any of the categories for which the earlier mark was registered.

The Board confirms the contested decision and dismisses the appeal. The Board indicates that in accordance with Article 33(5) EUTMR the goods covered by the earlier EUTM in Class 9 can only be interpreted as including goods covered by the literal meaning of the indications in the heading of the relevant class and cannot be interpreted as comprising a claim to goods that cannot be so understood. The opponent did not exercise its right conferred by Article 33(8) EUTMR to declare, up until 24 September 2016, that its intention on the filing date of the EUTM had been to seek protection in respect of goods beyond those covered by the literal meaning of the heading of the class concerned. The Board finds that the evidence produced by the opponent relates exclusively to a specific type of software, instructional material and support services related to that software. The literal meaning of the goods in Class 9 does not cover software. Thus, there is clearly no evidence of use of the earlier mark in respect of the goods in Class 9 for which it is registered and on which the opposition is based.

**5. OTHER ISSUES**

[11/03/2020, R 1364/2019-2, Ism ATEX INERIS EX Installation Service Maintenance \(fig.\)](#)



**Certification mark – Decision confirmed – Application rejected**

The Board confirms that refusal of the EU certification mark since the deficiencies of the regulations governing use of the mark have not been remedied. The information to be mentioned in the regulations of use required by Article 17 EUTMIR is compulsory.

Unlike the Examiner, the Board finds that the representation of the mark in colour and in black and white in the Annex of the regulation of use, indicating how the mark should be used in commerce, is not contrary to Article 17(c) EUTMIR. However, the Board confirms that the conditions required by Article 17(d), (e), (f), (g) EUTMIR are not fulfilled. In particular, as to the characteristics of the services to be certified, the fact that the applicant certifies that the services offered in Class 37 are done by persons trained and certified by the applicant itself does not guarantee the objective quality of the services. As to the evaluation, training and audit services applied for, the certification mark is contrary to Article 83(2) EUTMR.

[26/05/2020, R 156/2020-2, Plus screen / PLUSSCREEN \(fig.\) et al.](#)

Earlier trade marks	Contested sign
	Plus Screen

**Descriptive – Non-distinctive – Article 31(2) EUTMR – Case suspended**

The applicant sought to register the word mark 'Plus Screen' for 'smartphones; display for smartphones; cellular phones, wearable smartphones' in Class 9. The Opposition Division rejected the opposition in its entirety.

The Boards of Appeal, in opposition proceedings, do not have the competence to examine absolute grounds for refusal. However, pursuant to Article 45(3) EUTMR, in conjunction with Article 30(2) EUTMDR, they may, by means of a reasoned interim decision, suspend the appeal proceedings and remit the contested application to the examiner competent for examining that application with a recommendation to reopen the examination, where it considers that an absolute ground for refusal should apply to some or all of the goods or services listed in the trade mark application.

In the present case, the Board indicates that it is appropriate to recommend a reopening of the examination of absolute grounds for refusal of the trade mark applied for. The mark applied for consists of the word 'Plus' followed by the word 'screen'. 'Plus' as an adjective means 'additional, extra; more than what is normally required or expected' or 'of a superior quality or class; excellent of its kind, elite' as also confirmed in various judgments of the General Court and decisions of the Boards that defined 'PLUS' as 'additional, extra, of superior quality, excellent of its kind'. The word 'PLUS' constitutes a laudatory statement and indicates that the goods are of a particularly good quality or have additional useful characteristics. It is a sign which, as a pure indication of quality, is both descriptive and also devoid of any distinctive character. A 'screen' is a flat vertical surface on which pictures or words are shown. It refers to any contrivance for 'affording an upright surface for display'. The goods covered by the mark applied for, that is 'smartphones; cellular phones, wearable smartphones' have a screen. In addition, a 'display for smartphones' is a screen. The sign 'Plus screen', as a whole, will be understood according to the natural meaning of its component parts, as referring to a screen which is of particularly good quality or has additional useful characteristics. For the English-speaking public, there is nothing unusual about the structure of the mark applied for. The combination of words simply indicates that the applicant's smartphones, etc., have a 'better screen'. No analysis or mental leap is required to ascertain the possible meaning of the expression, taken as a whole. Consequently, it seems that the mark applied for may fall within the scope of the grounds for refusal set out in Article 7(1)(b) and (c) EUTMR in relation to all of the goods for which registration is sought.

The appeal proceedings are suspended and the case is remitted to the examiner for further consideration regarding the registrability of the contested EUTM application.

[12/06/2020, R 2674/2019-5, Arctic Wines / Artic \(fig.\) et al.](#)

Earlier trade marks	Contested sign
	<p><b>Arctic Wines</b></p>

**Figurative mark – Deceptive element – Descriptive element – Non-distinctive – Article 31(2) EUTMR – Case suspended**

The applicant sought to register the word mark 'Arctic Wines' for beverages in Classes 32 and 33. The Opposition Division partially upheld the opposition on the grounds that there was a likelihood of confusion, on the basis of the earlier rights, namely for beer in Class 32 and alcoholic beverages and cider in Class 33.

The Boards of Appeal, in opposition proceedings, do not have the competence to examine absolute grounds for refusal. However, pursuant to Article 45(3) EUTMR, in conjunction with Article 30(2) EUTMDR, they may, by means of a reasoned interim decision, suspend the appeal proceedings and remit the contested application to the examiner competent for examining that application with a recommendation to reopen the examination, where it considers that an absolute ground for refusal should apply to some or all of the goods or services listed in the trade mark application.

In the present case, the Board has serious doubts about the registrability of the contested word mark for all the goods that have been applied for. It is a well-known fact that there is no wine production in the Arctic area, however it is not excluded, as the scientific community has pointed out, that with climate change rapidly heating and bringing warm air to this region in the future there could be vineyards planted and producing wine in the Arctic regions. Therefore in relation to the goods in Class 33, 'Alcoholic beverages (except beer); Preparations for making alcoholic beverages', the mark could be considered descriptive of a geographical origin, and therefore could be prevented from being registered on the basis of Article 7(1)(c) EUTMR.

Moreover, the word 'wines' for goods such as those in Class 32, 'Soft drinks; Preparations for making beverages; Beer and brewery products; Waters; Alcohol free wine'; or 'cider' in Class 33, could be considered misleading as it gives a wrong message about the type and nature of the product. The Board is of the opinion that the sign applied for could also be barred from registration on the basis of Article 7(1)(g) EUTMR.

The appeal proceedings are suspended and the case is remitted to the examiner for further consideration regarding the registrability of the contested EUTM application.

[15/09/2020, R 777/2020-1, Infor plm accelerate / accelerate \(fig.\)](#)

Earlier trade mark	Contested sign
<p><b>INFOR PLM ACCELERATE</b></p>	<p><b>accelerate</b> </p>

**Word mark – Opposition – Restitutio in integrum – Article 8(1)(b) EUTMR – Article 68 EUTMR – Article 104 EUTMR – Restitutio in integrum rejected – Appeal inadmissible – Application rejected**

The applicant sought to register the word mark claiming the priority of a US trade mark application for goods and services in Classes 7 and 9. The opponent filed an opposition against the registration of the

published trade mark application for all the goods and services. The grounds of opposition were those laid down in Article 8(1)(b) EUTMR. The Opposition Division refused the trade mark applied for, for all the contested goods and services, on the grounds that there was a likelihood of confusion.

The applicant filed an appeal against the contested decision, requesting that the decision be entirely set aside. The Registry of the Boards of Appeal notified the applicant that no statement of grounds had been filed before the deadline for filing a written statement pursuant to Article 68 EUTMR which could lead to the inadmissibility of the appeal. The applicant requested *restitutio in integrum* arguing that (i) there were operational difficulties arising from measures taken by public authorities against the pandemic (the applicant is a company based in New York City) (ii) the request was submitted within two months from the removal of the cause of non-compliance within the time limits of Article 104 EUTMR.

In accordance with Article 104 EUTMR, one of the conditions for a successful request for *restitutio in integrum* is that the time limit was missed contrary to all due care required by the circumstances. The applicant argues that operational difficulties arising from measures taken by public authorities against the pandemic, or due to instances of sickness of the party or its representative could constitute exceptional circumstances in the sense required to exercise the right to *restitutio in integrum*. The EU representative argues that the applicant is a company based in New York City and that is renowned that New York City was, at that time, the US epicentre for the coronavirus pandemic. According to the EU representative, the applicant used to send instruction to its US representative which then forwarded them to the EU representative. The Board notes that the applicant has not justified any unforeseeable measures taken by the authorities that would have made the filing of its statement of grounds impossible, nor has it been alleged that any of the reference people were sick – it is not enough to invoke general organisational difficulties or a silent corresponding US representative to justify *restitutio in integrum*.

## IV. DESIGNS

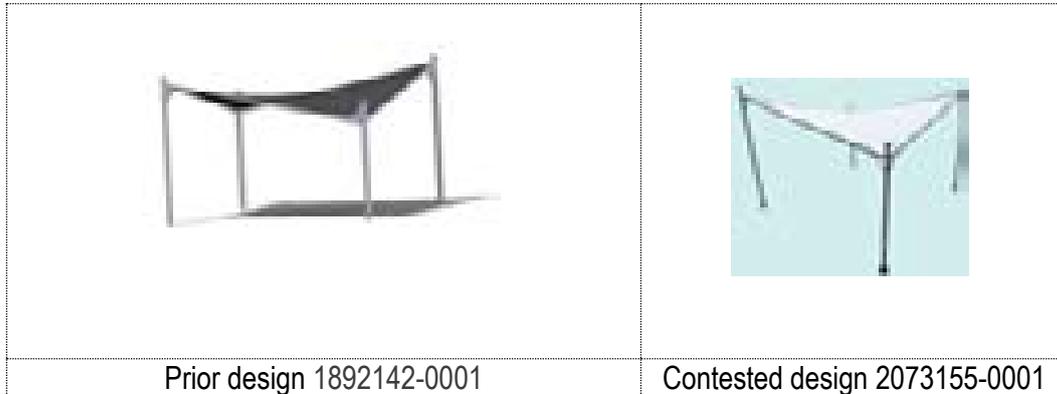
### A. ARTICLES 3(a) AND 9 CDR – REGISTRATION PROCEEDINGS

[no entry]

### B. ARTICLE 25(1)(b) CDR – INVALIDITY PROCEEDINGS

[20/01/2020, R 19/2018-3, Tents](#)

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



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

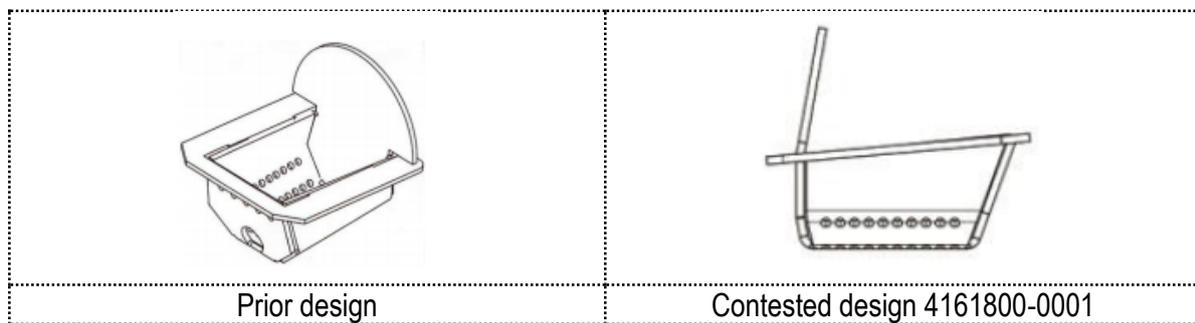
The Board confirms that the differences between the conflicting designs will be perceived as minor variations of one and the same design. The prior design destroys the individual character of the contested RCD.

According to Article 6(1)(b) CDR a registered Community design is to be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the date of filing the application for registration or, if a priority is claimed, the date of priority. In the present case, the publication of RCD No 1 892 142-0001 in the Official Bulletin on 17 August 2011 constitutes an event of disclosure within the meaning of Article 7(1) CDR. With regard to sun sail pavilions, the designer's freedom is not limited. The informed user of sun sail pavilions is neither the manufacturer nor a seller of such pavilions, but the person who uses them. Without being a designer or a technical expert, the informed user knows the various designs for sun sail pavilions as a result of the product range available on the market, possesses a certain degree of knowledge with regard to the features which they normally include, and, as a result of his or her interest, shows a relatively high degree of attention when using them. The individual character of a design results from a different overall impression from the viewpoint of the informed user with reference to the prior design taking into account the differences which are sufficiently pronounced to produce a different overall impression and discarding the differences which do not affect the overall impression. The informed user is aware that a great variety of designs for such pavilions exist, in terms of the shape and colour of the awning, the construction to support the awning and the way the awning is fixed to that construction. He or she will therefore notice that the conflicting designs not only coincide in the shape of the awning but also in the construction of the supporting frame made from four vertical bars of different heights and four horizontal bars. Both designs produce the impression of a single sail supported by a frame that only differs in minor details: the contrast between the colour of the awning and the colour of the poles, which is more pronounced in the contested RCD (white awning/black poles) than in the prior design (awning and poles of more or less the same colour), the way in which the awning is fixed to that frame, namely by means of black spheres and loops in the contested RCD that leave a small gap between awning and the frame as opposed to the tightly fixed awning in the prior design, and the black hemispheres on top of the poles of the contested RCD. However, while the informed user will not overlook these differences, these will

be perceived as a minor variation of one and the same design and cannot suffice to produce a different overall impression.

### C. OTHER ISSUES

[11/03/2020, R 437/2019-3, Heating boilers\(part of - \)](#)



#### Complementary evidence – Conflict of design with prior design – Overall impression

The evidence produced on appeal was taken into consideration. The international registration designating the EU is a prior design in the sense of Article 25(1)(d)(iii)CDR. The conflicting designs are identical in all aspects and thus produce the same overall impression.