

**BENELUX OFFICE FOR INTELLECTUAL PROPERTY**  
**CANCELLATION DECISION**  
**N° 3000002**  
**of 3 September 2019**

**Claimant:** **Rigo Trading S.A.**  
Route de Trèves 6 EBBC, Building E  
2633 Senningerberg  
Luxembourg

*against*

**Defendant:** **SC CROCO SRL**  
Str. Slanicului 12 , Onesti  
601110 Judetul Bacau  
Romania

**Representative:** **NLO Shieldmark B.V.**  
New Babylon City Offices  
Anna van Buerenplein 21 A  
2595 DA The Hague  
The Netherlands

**Contested trademark: Benelux registration 866034**



## **I. FACTS AND PROCEEDINGS**

### **A. Facts**

1. On 1 June 2018 the claimant filed an application for a declaration of invalidity with the Benelux Office for Intellectual Property (hereinafter: "the Office") in accordance with Article 2.30bis (1)(a), invoking the absolute grounds stated under Article 2.2bis (1)(b), (c) and (g) of the Benelux Convention on Intellectual Property (hereinafter: "BCIP")<sup>1</sup>, namely that the contested trademark is devoid of any distinctive character, is descriptive and is of such a nature to deceive the public.

2. The cancellation application is directed against Benelux trademark registration 866034, which was filed by the defendant on 22 June 2009 and was registered on 10 September 2009 for goods and services in classes 30 and 35, and which consists of the following semi-figurative mark:



3. The cancellation application is directed against all goods and services of the contested trademark.

4. The language of the proceedings is English.

### **B. Course of the proceedings**

5. The cancellation request is admissible and was notified by the Office to the parties on 28 June 2018. During the administrative phase of the proceedings both parties filed arguments. The course of the proceedings meets the requirements as stated in the BCIP and the Implementing Regulations (hereinafter: "IR"). The administrative phase was completed on 11 January 2019.

## **II. ARGUMENTS**

### **A. Claimant's arguments**

6. The claimant, in essence, claims that the contested trademark is registered contrary to Article 2.2bis (1)(b) and (c) BCIP because it is not capable of distinguishing the goods for which it is registered. He is of the opinion that the contested trademark consists exclusively of a sign which is to be considered descriptive for the goods in class 30 for which it is registered.

7. According to the claimant, the contested trademark "consists only of one readily identifiable French word, namely CROCO in a graphical representation". Claimant refers to the Larousse dictionary which confirms that the word is commonly used in French as an abbreviation for CROCODILE. Claimant is therefore of the opinion that the word CROCO immediately informs consumers without further reflection that the goods applied for are in the shape of crocodiles or decorated with crocodiles. The sign thus

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<sup>1</sup> This decision shall always refer to the laws and regulations applicable on the date of the decision, except in the case of provisions which have undergone a material change during the proceedings and which are relevant to the decision.

conveys obvious and direct information regarding the kind and appearance of the goods. According to the claimant, the defendant intended this from the beginning, whereby claimant points to an image from the homepage of the defendant showing a packaging of cookies on which a stylized (cartoonlike) crocodile is depicted. The claimant finds that the contested sign is not merely allusive, as its descriptive meaning will be immediately perceived by the French-speaking public.

8. According to the claimant the relevant public is made up of average consumers, who are reasonably well informed and reasonably observant and circumspect, since the goods are goods of mass consumption. The level of attention of the relevant public will be average in respect of the goods in question. The claimant also states that the relevant public in the Benelux will understand the word in its descriptive meaning, whereas French is an official language in Belgium and Luxembourg and the basic understanding of the French language by the general public in The Netherlands is also a well-known fact.

9. As regards to the stylized presentation of the contested trademark, the claimant finds it to be not particularly striking and not of such nature that it would require a mental effort from the relevant consumer to understand the meaning of the verbal element CROCO. A graphic style, even if it has some specific feature, may be regarded as a distinctive element only if it is capable of conveying an immediate and lasting impression enabling the relevant public to distinguish the goods by their commercial origin. According to the claimant, the typeface used does not endow the sign with a specific feature that would make it distinctive and therefore the defendant is not entitled to monopolize CROCO for the relevant products in Class 30.

10. In conclusion, the claimant finds the whole sign descriptive for the goods for which it has been filed and devoid of any distinctive character. Therefore, he requests that the contested registration be declared invalid.

## **B. Defendant's arguments**

11. The defendant starts by pointing out that the cancellation was initially launched against all goods and services of the contested registration. In his argumentation, the claimant however only covers the possible descriptiveness and lack of distinctiveness with regard to the goods in Class 30. Furthermore, the defendant finds that the request for revocation was also based on the provision set out in Article 2.2bis (1) (g) BCIP ('misleading') (see paragraph 1). According to the defendant the claimant fails to provide arguments or proof to substantiate his claim in this respect.

12. The defendant is of the opinion that the trademark CROCO (device) is not descriptive for the goods and services for which it is registered. The word element CROCO does not have any relationship to the goods and services registered for, not to mention a direct or specific relationship. It is in no way able to designate the kind, quality, quantity, intended purpose, value, geographical origin or time of production of the goods or performance of the services, according to the defendant.

13. Defendant does not agree with the claimant, where he states that the "the word CROCO immediately informs consumers without further reflection that the goods applied for are in the shape of crocodiles or decorated with crocodiles". The defendant thereby points to the image provided by the claimant showing a packaging of cookies on which a stylized (cartoonlike) crocodile is depicted (see paragraph 7). The defendant is of the opinion that the "characteristics of the goods and/or services" do

not relate to the possible graphical ornamentation of the goods or the product packaging. According to the defendant the goods do not bear and are not in the shape of a crocodile.

14. Furthermore the defendant states that the request for revocation and invalidation is aimed at the trademark as registered and that the actual use, namely the product packaging or graphical ornamentation, is not relevant in this proceeding. Since the word element CROCO can convey a conceptual meaning (crocodile) which has no relation to the goods and services involved, the contested trademark is absolutely not descriptive and does not lack distinctive character.

15. According to the defendant there is no conceptual resemblance between the trademark CROCO (device) and the conceptual meaning of the trademark, which is a reptile. The relevant public will definitely not be able to find any relation between the trademark and the goods and services for which it is registered. Since the trademark CROCO (device) is neither descriptive of nor allusive to the relevant goods and services, it possesses a normal degree of inherent distinctiveness, according to the defendant.

16. The reference of the claimant to the level of attention (see paragraph 8) is not relevant according to the defendant since the level of attention relates to likelihood of confusion and not to possible descriptiveness or non-distinctiveness of the trademark.

17. The defendant asks the Office to reject the request for revocation and invalidation of the contested trademark for the Classes 30 and 35 and to uphold the registration.

### **III. GROUNDS FOR THE DECISION**

#### **A.1 Legal framework**

18. Pursuant to Article 2.30bis (1)(a) BCIP an application for cancellation may be filed with the Office based on the grounds set out in Article 2.2bis (1) BCIP.

19. It follows from the case-law that the relevant date for the purposes of examining, in the context of an application for a declaration of invalidity based on Article 2.30bis (1)(a) BCIP, the compliance of a trademark with Article 2.2bis (1) of the BCIP is that of the date of filing of the application for registration (see by analogy CJEU, *Flugbörse*, 23 April 2010, C-332/09 P, ECLI:EU:C:2010:225). The Supreme Court of the Netherlands ruled that in the absence of transitional provisions, the assessment of the distinctive character of a registered trademark should take account of the factual situation at the time of application, but apply the law applicable at the time of assessment (Supreme Court of the Netherlands, *BACH FLOWER REMEDIES*, 20 January 2012, ECLI:NL:HR:2012:BU7244).

#### **A.2 Scope of the claim**

20. The cancellation request is also based on the provision set out in Article 2.2bis (1) (g) BCIP ('misleading') (see paragraph 1). The claimant however did not provide any arguments supporting his claim based on this ground. Furthermore the claimant did not substantiate the cancellation insofar as it was directed against the services in Class 35 (see paragraph 3) for which the contested trademark is registered. Consequently the Office will not examine these elements of the initial claim.

### A.3 Regarding the ground set out in Article 2.2bis (1)(c) - Descriptive trademarks

21. According to Article 2.2bis (1)(c) BCIP, trademarks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or time of production of the goods or performance of the service, or other characteristics of the goods or services shall not be registered or, if registered, shall be liable to be declared invalid.

22. According to settled case-law, the prohibition of registration of descriptive signs or indications (cf. Article 2.11 (1)(c) BCIP) pursues an aim that is in the public interest, which requires that such signs and indications may be freely used by all. The provision accordingly prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trademarks (see CJEU, *DOUBLEMINT*, 23 October 2003, C-191/01 P, ECLI:EU:C:2003:579; *CHIEMSEE*, 4 May 1999, C-108/97 and C-190/97, ECLI:EU:C:1999:230 and *LINDE AND OTHERS* (three-dimensional shape of product mark), 8 April 2003, C-53/01 to C-55/01, ECLI:EU:C:2003:206).

23. For a trademark to be refused registration under Article 2.2bis (1)(c) BCIP, it is not necessary that the signs and indications composing the mark that are referred to in that article actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in relation to which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that provision itself indicates, that such signs and indications may be used for such purposes. A sign must therefore be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services concerned (CJEU, *Doublemint*, already mentioned).

24. The descriptive character of a sign must be assessed, firstly, by reference to the goods and services concerned and, secondly, in relation to the perception of that sign by the relevant public, which is composed of consumers of those goods and services (see CJEU, judgment *POSTKANTOOR*, 12 February 2004, C-363/99, ECLI:EU:C:2004:86) who are reasonably well-informed and reasonably observant and circumspect.

25. The invalidity claim is directed against all goods and services of the contested trademark. The goods and services for which the disputed sign is registered are the following:

- Cl 30 Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flours and preparations made from cereals, bread, pastry and confectionery, edible ices; honey, treacles, yeast, baking-powder; salt, mustard; vinegar, sauces [condiments]; spices; ice [frozen water], with the exception of chocolate products.
- Cl 35 Advertising; business management; business administration; office functions, all services related to the goods mentioned in Class 30.<sup>2</sup>

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<sup>2</sup> The original language of the list of goods and services is French. For reasons of clarity the Office has provided a non-official translation. The original list reads as follows:

*Cl 30 Café, thé, cacao, sucre, riz, tapioca, sagou, succédanés du café; farines et préparations faites de céréales, pain, pâtisserie et confiserie, glaces comestibles; miel, sirop de mélasse; levure, poudre pour faire lever; sel, moutarde; vinaigre, sauces (condiments); épices; glace à rafraîchir, à l'exception des produits de chocolat.*

*Cl 35 Publicité; gestion des affaires commerciales; administration commerciale; travaux de bureau, tous ces services en relation avec les produits de la classes 30.*

26. As already mentioned the claimant only provided arguments for his claim against the goods in Class 30 (see paragraph 20).

27. The contested trademark consists of the word "Croco" in a specific typeface. As the claimant has pointed out, the word "croco" is the French abbreviation of "crocodile", which refers to the well-known large predatory semiaquatic reptile as well as to goods made of crocodile leather.<sup>3</sup> In Dutch the word "croco" is commonly used to define goods made of crocodile leather or goods with a "croco" print. The Office is therefore of the opinion that a substantial part of the public in the Benelux will understand the meaning of the word "croco" as referring to "crocodile".

28. The goods for which the contested trademark is registered and against which the claimant has formulated his arguments (see paragraph 26 and 20) are foodstuffs in Class 30, namely coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flours and preparations made from cereals, bread, pastry and confectionery, edible ices; honey, treacles, yeast, baking-powder; salt, mustard; vinegar, sauces [condiments]; spices; ice [frozen water], with the exception of chocolate products.

29. The Office is of the opinion that the "characteristics" referred to in Article 2.2bis (1)(c) BCIP indeed may refer to the shape of goods. However they do not include ornamentations on the packaging of the goods. Although these decorations may in particular cases be considered to be descriptive or non-distinctive by themselves, they are as a general rule not the object of the description by a word element. For a word to be descriptive for the shape of certain goods, the specific market for the relevant goods needs to be taken into account from a perspective of economic reality.

30. Although the claimant states that the word CROCO "immediately informs consumers without further reflection that the goods applied for are in the shape of crocodiles" he fails to substantiate this statement for the goods against which the cancellation is directed. The claimant solely points to an image from the homepage of the defendant showing a packaging of cookies on which a stylized (cartoonlike) crocodile is depicted (see paragraph 7). As already mentioned, the Office does not regard such an ornamentation to fall under the definition of a characteristic as covered by Article 2.2bis (1)(c) BCIP (see paragraph 31).

31. The claimant thus did not provide the Office with any evidence whatsoever showing that the goods, against which the cancellation action is directed, are in economic reality offered in different shapes, including those of a crocodile, and described as such by means of words. Lack of sufficient substantiation cannot be overcome by expecting the Office to perform a research of market reality at the date of filing for all the relevant goods and/or services of its own accord. After all, it is up to the claimant to call the validity of the contested trademark into question and to sufficiently substantiate this claim (see to that effect GC, judgment Castel, 13 September 2013, T-320/10, ECLI:EU:T:2013:424).

## C. Conclusion

32. Based on the foregoing the Office is of the opinion that the claimant failed to sufficiently substantiate his claim for cancellation. Therefore the cancellation shall be rejected.

<sup>3</sup> <https://www.larousse.fr/dictionnaires/francais/croco/20603?q=croco#20488> in conjunction with <https://www.lexico.com/en/definition/crocodile> – 'a large predatory semiaquatic reptile with long jaws, long tail, short legs, and a horny textured skin'. In French and English: crocodile; in Dutch, Luxembourgish and German: krokodil (orig. Greek: krokodelos and Latin: crocodilus).

**IV. DECISION**

33. The cancellation application with number 3000002 is not justified.

34. Benelux registration 866034 will be upheld for all the goods and services for which it is registered.

35. The claimant shall pay the defendant 1,420 euros in accordance with Article 2.30ter (5) BCIP in conjunction with rule 1.44 (2) IR, as the cancellation application is rejected in its entirety. This decision constitutes an enforceable order pursuant to Article 2.30ter, 5 BCIP.

The Hague, 3 September 2019

Tomas Westenbroek  
(*rapporteur*)

Pieter Veeze

Diter Wuytens

Administrative officer: Diter Wuytens