

**BENELUX OFFICE FOR INTELLECTUAL PROPERTY  
OPPOSITION DECISION  
N° 2014441  
of 29 January 2020**

**Opponent:** **Kelvion PHE GmbH**  
Karl-Schiller-Straße 1-3  
31157 Sarstedt  
Germany

**Representative:** **Algemeen Octrooi- en Merkenbureau**  
Professor Dr. Dorgelolaan 30  
5613 AM Eindhoven  
Netherlands

**Invoked right:** **International trademark registration 1320417**  
  
K°Flex  
  
*against*

**Defendant:** **Euro-Apex B.V.**  
Westeinde 10  
2275 AD Voorburg  
Netherlands

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

**Contested trademark: Benelux application 1377137**

V-FLEX

## **I. FACTS AND PROCEEDINGS**

### **A. Facts**

1. On 20 June 2018 the defendant filed an application for a trademark in the Benelux for the wordmark V-FLEX for goods in classes 7 and 11. This application was processed under number 1377137 and was published on 17 July 2018.

2. On 17 September 2018 the opponent filed an opposition against the registration of the application. The opposition is based on international registration 1320417, with designation of the European Union, of the wordmark K<sup>o</sup>Flex, filed and registered on 29 September 2016 for goods in class 11.

3. According to the register the opponent is the actual holder of the trademark invoked.

4. The opposition is directed against all goods of the contested application and is based on all goods of the trademark invoked.

5. The grounds for opposition are those laid down in article 2.14, 2 (a) of the Benelux Convention on Intellectual Property (hereinafter: "BCIP").<sup>1</sup>

6. The language of the proceedings is English.

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

7. The opposition is admissible and was notified by the Benelux Office for Intellectual Property (hereinafter: "the Office") to the parties on 4 October 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"). In addition the proceedings were suspended at the request of the parties. The administrative phase was completed on 21 August 2019.

## **II. ARGUMENTS**

8. The opponent filed an opposition at the Office under article 2.14, 2 (a) BCIP, in accordance with the provisions of article 2.2ter, 1 (b) BCIP: the likelihood of confusion based on the identity or similarity of the trademarks and of the goods or services concerned.

### **A. Opponent's arguments**

9. The opponent argues that the goods mentioned in class 11 are the same. With regard to the goods of class 7, the opponent states that these are highly similar.

10. With regard to the visual comparison of the trademarks, the opponent argues that both signs consist of two identifiable elements: one single letter followed by the word FLEX. According to the opponent, the word FLEX is the most dominant element in both trademarks. The only difference is one

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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.

single letter at the beginning. The opponent states that this difference is insufficient to counterbalance the degree of similarity of the signs. For this reason, the trademarks are visually highly similar.

11. The opponent argues that in both trademarks the syllables and their particular sequence and stress are identical. Furthermore, the element FLEX will be pronounced identically. According to the opponent, the phonetic difference at the beginning of the trademarks concerns one single letter, which is incapable of phonetically offsetting the identical pronunciation of FLEX. Therefore, the trademarks are aurally similar to a high degree.

12. Conceptually, the opponent states that the single letters K and V have no particular meaning and therefore there is no specific concept that can be extracted from them. According to the opponent, the word FLEX, *inter alia*, refers to an abbreviation for flexible. In view of the nature of the products concerned, any concept is related to the attribute of being flexible, as in being able to change according to the situation, perhaps referring to the ability to be used for different situations. The opponent further argues that in view of the identical products of both trademarks, the relevant public will perceive both signs as conceptually similar. The opponent concludes that the trademarks are similar to a high degree.

13. The opponent states that the relevant public is the heavy manufacturing industry in the Benelux. This specialist public will pay more attention to the origin of the products. However, this does not mean, according to the opponent, that such a specialist public will always have a high degree of attention. The opponent argues that in such a particular field, with very specific products, the existence of two trademarks that only differ by one single letter could go unnoticed. Or the public could believe that it concerns another line of products from the same manufacturer.

14. Furthermore, the opponent argues that the trademark invoked cannot be considered as devoid of distinctive character in the comparison of the signs, but must be deemed to be endowed with some (low/minimal) degree of distinctiveness.

15. The opponent concludes that in light of the above, there exists a risk of confusion. Therefore, the opponent requests that the Office rejects the contested trademark and orders the defendant to pay the costs.

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

16. The defendant argues that the identical part of the trademarks is the word FLEX. This word is descriptive, because it is an abbreviation of the word 'flexible' in the English language, as well as the Dutch language. This has been confirmed in multiple cases ruled by both the Benelux Office and the EU Office. The defendant therefore states that the comparison has to be based on the distinctive elements of both signs, which are K° in the trademark invoked and V- in the contested trademark.

17. According to the defendant the element K° is visually different from V-. Furthermore, the '°' element is unusual and stands out. The defendant argues that the relevant public might perceive it as being a symbol for degrees, which is different to the '-' element in V-FLEX. Therefore, the signs are not visually similar.

18. The defendant argues that the pronunciation of the letters K and V is different. Furthermore, the trademark invoked could be pronounced as "K – degrees – FLEX" or "K – degrees Kelvin – FLEX". With regard to the contested sign, the defendant argues that the '-' will probably not be pronounced. The defendant concludes that the trademarks are aurally different.

19. With regard to the conceptual comparison, the defendant agrees with the opponent that the element V has no particular meaning. However, according to the defendant, the relevant public will recognise the letter K, accompanied by the '°' element, as degrees Kelvin. In combination with the word FLEX, the trademark invoked will be perceived as a designation for flexible products in relation to degrees or heat. For this reason, the defendant concludes that the trademark invoked has a meaning and is therefore not conceptually similar to the contested sign.

20. The defendant further states that the goods share similarity, although some of the goods refer to a different public and method of use.

21. With regard to the relevant public, the defendant argues that the goods, which refer to heat exchangers, are only compared and purchased by professionals in a specific industry. The public will have a high level of attention and will invest time in studying the goods concerned, as well as the companies that offer them. If a consumer purchases a heat exchanger, this consumer will also have a high degree of attention, because these products are expensive and technically complex.

22. In light of the foregoing, the defendant concludes that there is no likelihood of confusion and requests that the Office rejects the opposition, registers the contested trademark and decides that the opponent should bear the costs.

### **III. DECISION**

#### **A.1 Likelihood of confusion**

23. In accordance with article 2.14 BCIP, the holder of a prior trademark may submit a written opposition to the Office, within a period of two months to be calculated from the publication date of the application, against a trademark which in the order of priority, ranks after its own in accordance with Article 2.2ter BCIP.

24. Article 2.2ter, para. 1 BCIP stipulates that, "*A trademark shall, in case an opposition is filed, not be registered (...) where: b. because of its identity with, or similarity to, the earlier trademark and the identity or similarity of the goods or services covered by the trademarks, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association with the earlier trademark.*"

25. According to case law of the Court of Justice of the European Union (hereinafter: the "CJEU") concerning the interpretation of Directive 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks (hereinafter: "Directive"), the likelihood of confusion of the public, which is defined as the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, must be appreciated globally taking into account all factors relevant to the circumstances of the case (CJEU, Canon, C-39/97, 29 September 1998, ECLI:EU:C:1998:442; Lloyd Schuhfabrik Meyer, C-342/97, 22 June 1999, ECLI:EU:C:1999:323; CJBen, Brouwerij Haacht/Grandes Sources belges, A 98/3, 2 October 2000; Marca Mode/Adidas, A 98/5, 7 June 2002; Supreme Court of the Netherlands, Flügel-bottle, C02/133HR, 14 November 2003, ECLI:NL:HR:2003:AK4818; Court of Appeal Brussels, N-20060227-1, 27 February 2006).

**Comparison of the signs and the goods**

26. The wording of Article 5, 1 (b) of the Directive (cf. article 2.2ter, 1 (b) BCIP) according to which “there exists a likelihood of confusion on the part of the public including the likelihood of association with the earlier trademark” shows that the perception of marks in the mind of the average consumer of the type of goods or services in question plays a decisive role in the global assessment of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (CJEU, Sabel, C-251/95, 11 November 1997, ECLI:EU:C:1997:528).

27. Global assessment of the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components (CJEU, Sabel and Lloyd, already cited).

28. The signs and goods to be compared are the following:

<b>Opposition based on:</b>	<b>Opposition directed against:</b>
K°Flex	V-FLEX
	Cl 7 Heat exchangers being parts of machines and their accessories and spare parts, namely plates, tubes, inlets, outlets, casings, fittings, pipings.
Cl 11 Heat exchangers.	Cl 11 Heat exchangers not being parts of machines; apparatus for heating and cooling; parts and accessories for heat exchangers, namely, plates, tubes, inlets, outlets, casings, fittings, pipings.

*Conceptual comparison*

29. Both trademarks, seen as a whole, have no meaning. Although the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (Sabel and Lloyd, already cited), the fact remains that, when perceiving a verbal sign, he or she will break it down into elements which, for him or her, suggest a concrete meaning or which resemble words known to him or her (EGC, Respicur, T-256/04, 13 February 2007, ECLI:EU:T:2007:46; Aturion, T-146/06, 13 February 2008, ECLI:EU:T:2008:33; Galvalloy, T-189/05, 14 February 2008, ECLI:EU:T:2008:39 and Ecoblue, T-281/07, 12 November 2008, ECLI:EU:T:2008:489). For this reason, the Office finds that the public will recognise the second part of the trademarks, which consists of the word FLEX, because it is clearly separated from the first part, by a symbol, being “°” and “-” respectively.

30. The word FLEX is a common abbreviation for ‘flexible’ in the English, as well as the Dutch and French languages. The Office finds that the relevant public in the Benelux will perceive this word as an indication of the quality or ability of the goods concerned, in the sense that these goods are either shaped in a flexible form or possess a high degree of adaptability or are multifunctional in applicability. Therefore, the word FLEX describes characteristics of the goods concerned. Generally, the public will not consider a descriptive element forming part of a complex mark as the distinctive and dominant element of the overall impression conveyed by that mark (EGC, Budmen, T-129/01, 3 July 2003, ECLI:EU:T:2003:184).

31. The symbol ° could be understood as the typographical symbol for degrees. However, the Office finds it less likely that the public will perceive the element K in combination with the degree symbol as 'degrees kelvin', as the defendant suggests (see paragraph 19). In contrast to the degree Fahrenheit and degree Celsius, the kelvin is not referred to or written as a degree.<sup>2</sup> In addition, due to the fact that the symbol is not placed before the letter K, but after, it is doubtful that the public would think that it refers to 'degrees kelvin'. Therefore, the Office finds that the letter K, in the trademark invoked, does not have any clear meaning.

32. In light of the above, the Office concludes that the trademarks are conceptually similar to the extent that they both refer to the identical indication FLEX.

#### *Visual comparison*

33. Both signs are purely verbal trademarks. The trademark invoked is composed of the letter K, the symbol ° and one word of four letters, Flex. The contested trademark is composed of the letter V, a hyphen and one word of four letters, FLEX, depicted in capital letters.

34. The fact that the contested trademark is represented in capital letters, whereas the trademark invoked is represented in capital and lower-case letters, is irrelevant for the purposes of a visual comparison of these marks (see BOIP, opposition decision HY-BOND RESIGLASS, 2000572, 8 April 2008 and EGC, babilu, T-66/11, 31 January 2013, ECLI:EU:T:2013:48).

35. Both signs contain the word FLEX at the end. However, the first and dominant part of the signs, consisting of the elements K° and V-, is different. Normally, the consumer attaches more importance to the first part of words (EGC, MUNDICOR, T-183/02 en T-184/02, 17 March 2004, ECLI:EU:T:2004:79).

36. In light of the above, the Office concludes that the trademarks are visually similar to a certain extent, because both contain the word FLEX, in the same position.

#### *Aural comparison*

37. Both trademarks will be pronounced in two syllables, of which the first syllable is a single letter and the second is the word "flex". Aurally, the pronunciation of the signs coincides in the sound of the identical word "flex". The pronunciation differs in the sound of the first letters which have no counterparts in the trademark of the other party, namely "K" and "V".

38. With complex signs, the Office points out that, when referring to a trademark, the average consumer will not pronounce a caption or legend (EGC, Green by Missako, T-162/08, 11 November 2009, ECLI:EU:T:2009:432) and a trademark comprising a number of terms will generally be abbreviated in order to make it easier to pronounce (EGC, BROTHERS by CAMPER, T-43/05, 30 November 2006, ECLI:EU:T:2006:370). For this reason the Office considers that the public, when it aurally refers to the trademark invoked, will not pronounce the symbol ° as "degrees".

39. As also considered with regard to the visual comparison, the public gives more attention to the beginning of a sign, which in this case is different.

40. Therefore, the Office concludes that the trademarks are aurally similar to a certain extent, because in both signs the second syllable "FLEX" will be pronounced identically.

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<sup>2</sup> [https://en.wikipedia.org/wiki/Degree\\_symbol](https://en.wikipedia.org/wiki/Degree_symbol); <https://en.wikipedia.org/wiki/Kelvin>

### Conclusion

41. The trademarks are conceptually, visually and aurally similar to a certain extent.

### A.2 Global assessment

42. When assessing the likelihood of confusion, in particular the level of attention of the relevant public, the similarity of the goods and services in question and the similarity of the signs are important factors.

43. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect (case Lloyd, already cited). It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question. The present case concerns specialist goods that are not intended for the general public, but for professionals. The goods are used in complex systems, which are usually an important part of a machine. Due to the technical complexity of these goods, the Office is of the opinion, contrary to the opponent (see paragraph 13), that the level of attention of the relevant public is high.

44. The global assessment of the likelihood of confusion assumes that there is a certain degree of interdependence between the factors to be taken into account, particularly between the level of similarity of the signs and of the goods or services which they cover. A lesser degree of similarity between the relevant goods or services can be offset by a greater degree of similarity between the trademarks, and vice versa (Canon and Lloyd, already cited).

45. The more distinctive the earlier trademark, the greater the likelihood of confusion. Marks with a highly distinctive character, either *per se* or because of the reputation they possess on the market, enjoy broader protection than marks with a less distinctive character (Canon, Sabel and Lloyd, already cited). In this context, the Office finds that, with respect to the goods concerned, the meaning of the word FLEX is descriptive (see paragraph 30). For this reason, the distinctive character of the trademark invoked stems from the first part K°, rather than from the word FLEX.

46. The Office points out that, according to European case law, a weak distinctive character does not, by definition, mean that there is no likelihood of confusion. Although the distinctive character of the marks must be taken into account with the assessment of the likelihood of confusion, it is only one of a number of elements concerning that assessment (CJEU, Ferromix, C-579/08, 15 January 2010, ECLI:EU:C:2010:18). The global assessment of the likelihood of confusion also assumes that there is a certain degree of interdependence between the factors to be taken into account, particularly between the level of similarity of the signs and of the goods or services which they cover. A lesser degree of similarity between the relevant goods or services can be offset by a greater degree of similarity between the trademarks, and vice versa (Canon and Lloyd, already cited).

47. However, in the present case this is not the case. The conceptual, visual and aural similarity between the signs only lies within a descriptive element. The public will not consider a descriptive element forming part of a complex mark as the distinctive and dominant element of the overall impression conveyed by that mark (Budmen, already cited). For this reason, the Office finds that the public will give its attention to the notable differences at the beginning of the signs, namely the elements K° and V-. It is also of importance that for the goods concerned, the level of attention of the public is

high. Therefore, the mere fact that both signs start with one single letter, followed by a very descriptive, identical word, does not lead to any confusing similarity in this case.

48. Based on the abovementioned circumstances, the Office finds that in this case the differences outweigh the similarities and that even for those goods that are identical, the Office concludes that no risk of confusion exists. Therefore a comparison of the goods is not necessary (ECG, YOKANA, T-103/06, 13 April 2010, ECLI:EU:T:2010:137).

#### **B. Conclusion**

49. Based on the foregoing the Office concludes that there is no likelihood of confusion.

#### **IV. CONSEQUENCE**

50. The opposition with number 2014441 is rejected.

51. Benelux application with number 1377137 will be registered.

52. The opponent shall pay the defendant 1,045 euros in accordance with article 2.16, 5 BCIP in conjunction with rule 1.28, 3 IR, as the opposition is rejected in its entirety. This decision constitutes an enforceable order pursuant to article 2.16, 5 BCIP.

The Hague, 29 January 2020

Eline Schiebroek  
(*rapporteur*)

Diter Wuytens

Willy Neys



Administrative officer: Gerda Veltman