

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
OPPOSITION DECISION
N° 2015724
of 6 January 2022

Opponent: **CRISTALFARMA S.r.l.**
Via S. G. Cottolengo 15
20143 Milano
Italy

Representative: **Novagraaf Belgium S.A./N.V.**
Chaussée de la Hulpe 187
1170 Watermael-Boitsfort
Belgium

Invoked trademark: **European Union trademark 4043071**
RELAXCOL

against

Defendant: **THE PROCTER & GAMBLE COMPANY Ohio corporation**
One Procter & Gamble Plaza
Cincinnati - Ohio 45202
United States of America

Representative: **Bakker & Verkuijl B.V.**
Alexander Office Prinsenkade 9 D
4811 VB Breda
Netherlands

Contested trademark: **Benelux application 1402857**
RELAXOR

I. FACTS AND PROCEEDINGS

A. Facts

1. On 26 September 2019 the defendant filed a Benelux trademark application for the word trademark RELAXOR for goods in class 5. This application was processed under number 1402857 and was published on 25 October 2019.
2. On 18 December 2019 the opponent filed an opposition against this application. The opposition is based on the European Union trademark 4043071 for the word trademark RELAXCOL, filed on 29 September 2004 and registered on 30 November 2005 for goods in class 5, 29 and 30.
3. According to the register the opponent is the actual holder of the trademark invoked.
4. The opposition is directed against all the goods of the contested application and is based on all the goods of the trademark invoked.
5. The grounds for opposition are those laid down in Article 2.14, 2 (a) Benelux Convention on Intellectual Property (hereinafter referred to as: "BCIP").
6. The language of the proceedings is English.

B. Proceedings

7. The opposition is admissible and the Benelux Office for Intellectual Property (hereinafter referred to as: "the Office") notified the parties on 20 December 2019. During the administrative phase of the proceedings both parties filed arguments, at the request of the defendant, the opponent submitted proof of use and at the joint request of the parties, the proceedings were suspended. All the documents submitted meet the requirements as stated in the BCIP and the Implementing Regulations (hereinafter referred to as: "IR"). The administrative phase of the procedure was completed on 22 October 2020.

II. ARGUMENTS OF THE PARTIES

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 relevant trademarks and of the goods or services concerned.

A. Opponent's arguments

9. The opponent notes that both trademarks are of approximately the same length. Five letters are identical and in the same order. These identical letters stand at the beginning of both trademarks where, according to a constant case law, the consumers tend to focus their attention. The resemblances are not limited to the beginning of the trademarks at stake since both have their ending syllable with the same vowel O. Therefore, the trademarks are visually highly similar, according to the opponent.
10. Phonetically, the trademarks share identical sounds in the beginning and at the end. The opponent therefore concludes that there is a high degree of similarity from the aural standpoint.
11. For an important part of the public, the opponent is of the opinion that no conceptual comparison can be made. For the rest of the relevant public, the fact that the part RELAX is weak will not allow

consumers to distinguish the trademarks since the resemblances between them do not stop at the prefix *relax*, but embrace the entirety of the trademarks.

12. According to the opponent, the goods concerned are identical or at least similar since they share the same nature, purpose, channel of trade and target the same public.

13. For the above-mentioned reasons, the opponent requests that the Office upholds the opposition, rejects the contested application, and condemns the applicant to the payment of the official fees in favour of the opponent.

14. Upon request of the defendant, the opponent has provided proof of use of the trademark invoked.

B. Defendant's arguments

15. The defendant has requested proof of use of the trademark invoked.

16. According to the defendant, the documents and materials should be in the language of the proceedings, namely English. Some documents are in Italian or in French and basically the information in these languages is not comprehensible or clear, except for the invoices. Furthermore, a good part of the documents is undated, and many pages are unclear as to its contents or purpose. The defendant submits that these materials do not sufficiently prove the commercial use of the trademark in Italy, and certainly not in France. Moreover, the defendant points out that use of the trademark must be use on the market, not just internally. Finally, use of the trademark solely in Italy and in France is not to be considered as use in the EU.

17. The defendant establishes that the trademarks have the descriptive word "relax" in common. Indeed, when considering the goods of interest, the public (also in Benelux) will inevitably think that they have a relaxing characteristic or property. Therefore, according to the defendant, the assessment of likelihood of confusion will focus on the impact of the non-coinciding components on the overall impression of the trademarks.

18. The defendant submits that the differences between the trademarks outweigh the similarities due to the common, descriptive element *relax*. Considering the visual, aural and conceptual differences, he concludes that the trademarks under comparison are not similar.

19. The defendant finds that the goods concerned have the same nature, namely pharmaceutical products or food supplements for medical use. Nevertheless, attention should be paid of the goods at stake which differ in their function and destination. Whereas the goods of the trademark invoked are meant specifically for digestion problems, such as abdominal tension and flatulence, the contested products have a different goal and therapeutic effect, namely relaxation of body and mind.

20. The defendant observes that the relevant public's degree of attention is high, since the products concerned are all meant to improve a human's state of health.

21. The defendant concludes that no risk of confusion exists between the trademarks at hand and that the opposition should therefore be rejected.

III. DECISION

A.1 Proof of use

22. In application of the provisions of articles 2.16bis (1) and 2.23bis (1) of the BCIP and rule 1.25 of the UR, the trademark relied upon must have been in genuine use during a period of five years preceding the date of filing of the younger trademark.

23. The contested trademark was filed for Benelux on 26 September 2019. Thus, the period to be considered - the relevant period - is from 26 September 2014 to 26 September 2019.

24. In accordance with the decision of the Court of Justice of the European Union (hereinafter referred to as "CJUE") of 11 March 2003 (CJUE, Ansul, C-40/01, ECLI:EU:C:2003:145) there is genuine use of a trademark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered. This is done in order to create or preserve an outlet for those goods or services. Genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark. In that regard, the condition relating to genuine use of the trademark requires that the mark, as protected in the relevant territory, be used publicly and outwardly (see also General Court of the European Union (hereinafter referred to as "EGC"), Silk Cocoon, T-174/01, 12 March 2003, ECLI:EU:T:2003:68; EGC, Vitafruit, T-203/02, 8 July 2004, ECLI:EU:T:2004:225; EGC, Charlott, T-169/06, 8 November 2007, ECLI:EU:T:2007:337).

25. The EGC held that use of the earlier mark need not always be quantitatively significant for it to be deemed genuine (EGC, Hipoviton, T-334/01, 8 July 2004, ECLI:EU:T:2004:223; EGC, Sonia-Sonia Rykiel, T-131/06, 30 April 2008, ECLI:EU:T:2008:135). The purpose of the notion of genuine use is not to assess commercial success or to review the economic strategy of an undertaking, nor is it intended to restrict trademark protection to the cases where large-scale commercial use has been made of the mark (EGC, Vitafruit, already referred to above).

26. In addition the EGC held that genuine use of a trademark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trademark in the market concerned (see EGC, Hiwatt, T-39/01, 12 December 2002, ECLI:EU:T:2002:316; EGC, Vitakraft, T-356/02, 6 October 2004, ECLI:EU:T:2004:292 and EGC, SoniaSonia Rykiel, already referred to above).

27. The trademark invoked is a trademark of the European union, hence the obligation to use the trademark is administered by article 18 of Regulation (EU) No 2017/1001 of the European Parliament and of the Council of 14 June 2017. This article, entitled "Use of an EU mark", stipulates: *"If, within a period of five years following registration, the proprietor has not put the EU trade mark to genuine use in the Union in connection with the goods or services in respect of which it is registered, or if such use has been suspended during an uninterrupted period of five years, the EU trade mark shall be subject to the sanctions provided for in this Regulation, unless there are proper reasons for non-use."*

28. In its decision of 19 December 2012 (case C-149/11, Onel, ECLI:EU:C:2012:816), the ECJ explained this. The ECJ considers regarding the concept "in the Community" that there is a difference between the territorial extent of the protection conferred on national trademarks and the extent of the protection conferred on EU trademarks. From a territorial point of view, an EU trademark enjoys a more extensive scope of protection than a national trademark. As a consequence, it may reasonably be expected that an EU trademark can be used in a larger area, except for the (exceptional) case where the market for the goods and services at issue has been territorially restricted. Abstraction should be made here of the

boundaries of the territory of the Member States. The ECJ concludes: "*A Community trade mark is put to 'genuine use' within the meaning of Article 15(1) of Regulation No 207/2009 when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the Community for the goods or services covered by it. It is for the referring court to assess whether the conditions are met in the main proceedings, taking account of all the relevant facts and circumstances, including the characteristics of the market concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity.*"

29. The threshold for genuine use of an EU trademark is therefore in principle higher than that for genuine use of a national (or Benelux) trademark. It should be demonstrated that the trademark is used for the purpose of maintaining or creating market share within the EU and taking into account all relevant facts and circumstances.

30. Following rule 1.41 io. 1.25 IR the proof of use should contain evidence of the place, duration, extent and manner of use of the trademark invoked for the goods on which the opposition is based.

Analysis of the proof of use

31. The opponent submitted the following exhibits to demonstrate genuine use of the trademark invoked:

- 1) Affidavit executed by the legal representative of the opponent;
- 2) Invoices issued by Eurodep to Mediolanum;
- 3) Invoices issued by the opponent on companies in France and Italy;
- 4) Photos of the products;
- 5) Advertisements.

32. The affidavit (number 1 above) shows the figures of sale of the goods RELAXCOL and the variants RELAXCOL JUNIOR and RELAXCOL PLUS in Italy (from 2014 to 2019) directly by the opponent as well as the figures of sale of the RELAXCOL goods in France, through the French distributor of the opponent for the years 2016, 2017, 2018 and 2019. It should be recalled that the fact that this statement has not been drawn up by an independent party, but by the opponent himself, does not necessarily mean that it is ruled out as evidence. The outcome depends on the overall assessment of the evidence in each particular case. In general, further material is necessary to establish evidence of use, since such statements have to be considered to have less probative value than evidence originating from independent sources (see EGC, Salvita, T-303/03, 7 June 2005, ECLI:EU:T:2005:200).

33. The figures for Italy are in the order of EUR 1,3 to 1,6 million, just for the trademark invoked. The figures for the variants cited by the opponent are somewhat lower. For France, the figures are between EUR 44,000 and EUR 195,000.

34. The invoices (number 2) are issued by Eurodep, a company which specializes in wholesaling and logistics for pharmaceutical goods on the French distributor of the opponent. The opponent explains that, the purchaser being a distributor, this company will then resale these goods to pharmacists. The invoices fall within the relevant period and mention the trademark invoked in vast quantities, but not the products it stands for.

35. The invoices issued by the opponent (number 3) are addressed to various companies in Italy and again to opponent's distributor in France. The invoices fall within the relevant period and mention (inter alia) the trademark invoked in large quantities, but not the products that this trademark stands for.

36. The photos of the products (number 4) show packaging for pharmaceutical products, bearing the opponent's tradename and the trademark invoked or its variants already mentioned. They also show the following texts: *Integratore alimentare* (food supplement) and *Prodotto incluso nel registro degli integratori del Ministro della Salute* (Product included in the register of supplements of the Ministry of Health).

37. It is true that a part of the Advertisements (number 5) is in Italian and that not all the texts are equally easy and understandable to read, especially not the more scientific-looking ones. On the other hand, the texts are accompanied by various pictures clearly indicating that the products concerned are pharmaceutical products.

38. Moreover, more than half of the promotional material is in French, which is an official language in the Benelux. It is true that the procedural language is English, but in that context it should be noted that documents serving to prove the use of a trademark do not have to be in the language of the procedure but may be submitted in their original language, provided that they are sufficiently comprehensible, in the light of the reason for their submission (rule 1.20 IR).

39. The photos of the products and the advertisements therefore provide sufficient insight into what kind of products are involved. This also makes it clear for which products the trademark invoked was sold on the invoices. The defendant points out that use of the trademark must be use on the market, not just internally and that use of the trademark solely in Italy and in France is not to be considered as use in the EU. It may be that the invoices for France should be considered internal use (by the opponent's distributor), but in any event, in combination with the promotional material, it is clear that the goods are marketed or about to be marketed and for which preparations by the undertaking to secure customers are under way, particularly in the form of advertising campaigns. The Office also points out that France and Italy are among the larger countries of the EU and together, with a population of over 67 million and almost 60 million respectively, they make up a significant part of the EU.

Conclusion

40. The Office concludes that the evidence of use, taken together, sufficiently demonstrates that the trademark invoked has been put to genuine use in the EU and during the relevant period for part of the goods on which the opposition is based, namely *pharmaceutical preparations, sanitary preparations for medical purposes and dietetic substances adapted for medical use*. Therefore the trademark invoked shall, for the purpose of this opposition examination be deemed to be registered in respect of these goods only.

A.2 Likelihood of confusion

41. 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.

42. Article 2.2ter, para. 1 BCIP stipulates that "*A trademark shall, in case an opposition is filed, not be registered (...) where 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.”

43. According to case law of the Court of Justice of the European Union (hereinafter: the “CJEU”) concerning the interpretation of Directive (EU) 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 trademarks

44. The wording of Article 5, 1 (b) of the Directive (compare 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).

45. 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).

46. The trademarks to be compared are the following:

Opposition based on:	Opposition directed against:
RELAXCOL	RELAXOR

Visual comparison

47. Both trademarks are pure verbal trademarks, the trademark invoked consisting of the word RELAXCOL and the contested trademark consisting of the word RELAXOR. Both trademarks are thus of approximately the same length: eight and seven letters respectively.

48. Five letters are identical and in the same order. These identical letters stand at the beginning of both trademarks and that is the part the consumer usually pays the most attention to (EGC, MUNDICOR, T183/02 and T-184/02, 17 March 2004, ECLI:EU:T:2004:79). Moreover, the trademarks also contain the identical letter O at the end.

49. The trademarks are visually similar.

Aural comparison

50. The five identical letters at the beginning of the trademarks are pronounced identically and in two syllables. In addition, the last syllable of the trademarks contains the identical vowel O.

51. The trademarks are phonetically highly similar.

Conceptual comparison

52. Both parties recognise the word "relax" in the trademarks, which they consider to have only a weak distinctive character. However, the Office points out that the average consumer normally perceives a trademark as a whole and does not proceed to analyse its various details (Lloyd, already cited). Nevertheless, the fact remains that, when perceiving a verbal trademark, the consumer will often break it down into elements which, for him, suggest a concrete meaning or which resemble words known to him (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 and Galvalloy, T-189/05, 14 February 2008, ECLI:EU:T:2008:39).

53. In the present case, however, the Office sees no reason to divide the trademarks into elements having a meaning, since the end of the marks COL and OR has no meaning, nor do the trademarks as a whole. Therefore, for part of the relevant public, a conceptual comparison between the trademarks is not possible, while another part of the public will see in it a reference to relaxation.

Conclusion

54. The trademarks are visually similar, aurally highly similar and conceptually, for part of the public they refer to relaxation.

Comparison of the goods

55. In assessing the similarity of the goods and services concerned, all the relevant factors relating to these goods or services themselves should be taken into account. These factors include, inter alia, their nature, their end-users and their method of use and whether they are in competition with each other or are complementary (Canon, already cited).

56. With the comparison of the goods against which the opposition is filed and those on which the opposition is based, the goods are considered as indicated in the trademark application or what is expressed in the register, insofar as the normal use has been demonstrated for this purpose.

57. Genuine use of the trademark invoked has been proved for only some of the goods relied on. The goods to be compared are thus the following:

Opposition based on:	Opposition directed against:
Class 5 Pharmaceutical preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use.	Class 5 Pharmaceutical and sanitary preparations for medical use; food supplements for medical use for health care.

58. The goods *pharmaceutical preparations* are mentioned *expressis verbis* in both lists and are thus identical.

59. The goods *sanitary preparations for medical use* of the contested trademark are identical to the goods *sanitary preparations for medical purposes* of the trademark invoked, only the wording being slightly different.

60. The goods *food supplements for medical use for health care* of the contested trademark belong to the category *dietetic substances adapted for medical use* of the trademark invoked and are therefore identical to them. Indeed, according to established case law, if the goods of the earlier trademark also contain goods that are mentioned in the application for the contested trademark, these goods are considered identical (see EGC, Fifties, T104/01, 23 October 2002, ECLI:EU:T:2002:262; Arthur et Félicie, T-346/04, 24 November 2005, ECLI:EU:T:2005:420 and Prazol, T-95/07, 21 October 2008, ECLI:EU:T:2008:455).

Conclusion

61. The goods of the contested trademark are identical to the goods on which the opposition is based and for which normal use has been proved.

A.2 Global assessment

62. 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 trademarks are important factors.

63. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect (case Lloyd, already cited). It should also be considered that the average consumer's level of attention is likely to vary in accordance with the category of goods or services in question. As the goods concerned are pharmaceutical and medical goods, the average level of attention of the public concerned may be deemed higher than normal.

64. The global assessment of the likelihood of confusion assumes that there is a certain degree of interdependence between the factors that have 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).

65. It should also be taken into consideration that the average consumer usually perceives a mark as a whole and does not proceed to an analysis of its various details (Sabel and Lloyd, already cited). Furthermore, it is of importance that the average consumer only rarely has the chance to make a direct comparison between the different trademarks and must place their trust in the imperfect picture of those that they have kept in their mind.

66. 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). According to the defendant, the common element of the trademarks, *relax*, is descriptive (see point 18). However, the Office points out that the trademark invoked is RELAXCOL in its entirety and as such is distinctive.

67. Nonetheless, it is important to note that in the context of assessing a likelihood of confusion, following established European case law, the distinctiveness of a trademark is only one element among

others involved in this assessment. Thus, even in the presence of an earlier trademark of low distinctiveness, there may be a likelihood of confusion, in particular, because of the similarity of the trademarks and the goods or services referred to (see ECJ, Pages Jaunes, T-134/06, 13 December 2007, ECLI:EU:T:2007:387).

68. The trademarks are visually similar, aurally highly similar and conceptually similar for part of the public concerned. The goods concerned are identical. Based on the aforesaid, the Office concludes that the relevant public, notwithstanding an increased level of attention, might believe that the goods in question come from the same undertaking or from economically linked undertakings.

B. Other factors

69. In opposition proceedings, there is no order to pay the costs incurred by the other party. Only an order to pay costs, fixed at the fixed amount of the opposition fee, is provided for if the opposition is upheld (or rejected) in its entirety.

C. Conclusion

70. Based on the foregoing the Office concludes that there exists a likelihood of confusion.

IV. CONSEQUENCE

71. The opposition with number 2015724 is justified.

72. Benelux application with number 1402857 will not be registered.

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

The Hague, 6 January 2022



Willy Neys
rapporteur

Eline Schiebroek

Saskia Smits

Administrative officer:

Raphaëlle Gérard