

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
OPPOSITION DECISION
N° 2015855
of 4 June 2021

Opponent: **FrieslandCampina Nederland B.V.**
Stationsplein 4
3818 LE Amersfoort
The Netherlands

Representative: **HGF B.V.**
Gedempt Hamerkanaal 147
1021 KP Amsterdam
The Netherlands

Trademark invoked: **Benelux trademark 1007725**

VIFIT

against

Defendant: **TEMAX BH d.o.o.**
Poduzetnička zona,
Dusine 17
76270 Orašje
Bosnia and Herzegovina

Representative: **Bastion IP**
Postbus 1104
1400 BC Bussum
The Netherlands

Contested trademark: International trademark 1501102



I. FACTS AND PROCEEDINGS

A. Facts

1. On 17 October 2019 the defendant filed an international trademark application, also designating the Benelux, for the combined word/figurative mark  for goods in classes 29, 30, 31, 32 and 33. The application was processed under number 1501102 and was published in the WIPO Gazette of International Marks 2019/47 on 5 December 2019.

2. On 4 February 2020 the opponent filed an opposition against the registration in the Benelux of the international trademark application. The opposition is based on the earlier Benelux trademark registration 1007725 of the word mark VIFIT, filed on 4 January 2017 and registered on 22 March 2017 for goods in classes 5, 29, 30 and 32.

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) of the Benelux Convention on Intellectual Property (hereinafter: "BCIP").

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 5 February 2020. 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 8 September 2020.

II. ARGUMENTS

8. The opponent filed an opposition at the Office under articles 2.18 and 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 marks and the identity or similarity of the goods or services concerned.

A. Opponent's arguments

9. According to the opponent his trademark is a coined word which has intrinsically at least an average degree of distinctive character. Furthermore, both trademarks consist only of one word and have no meaning in any of the Benelux languages.

10. Both trademarks consist of an equal amount of words and characters, of which 4 out of 5 are identical and in the same position. The difference in the middle is less noticeable. The opponent argues that the figurative elements in the contested trademark are merely decorative and that the trademarks are visually highly similar. Since the differing letters V and F have an interchangeable sound in the Benelux languages and the trademarks have the same intonation and rhythm, the opponent considers the trademarks to be phonetically identical or at least highly similar. As both trademarks have no particular meaning in any of the Benelux languages, a conceptual comparison is not possible.

11. The opponent argues that the goods in question are for a large part identical and highly similar or at least similar for the remaining part. As the goods are directed at the public at large and at customers without specific professional knowledge or expertise, the opponent considers the level of attention to be average.

12. The opponent reaches the conclusion that there is a likelihood of confusion and therefore asks that the Office grants the opposition and refuses the Benelux designation of the international trademark application.

B. Defendant's arguments

13. The defendant explains that he is a small Bosnian enterprise that owns and operates a water spring. The contested trademark is meant in particular for mineral waters from its Bosnian spring.

14. The consumers for foodstuffs can be presumed to be reasonably circumspect and well-informed. The defendant argues that this is also true for consumers of mineral and aerated waters.

15. Neither mark has a meaning in one of the languages that are commonly spoken in the Benelux. Nevertheless, the defendant considers that the consumer will break down the mark VIFIT into the elements VI and FIT, as the word FIT has a clear, unambiguous and directly perceivable meaning in Dutch, English and German. The average consumer will thus perceive the trademark VIFIT as a reference to fitness and health, whereas the trademark VIVIT does not evoke such an association. Therefore, the defendant finds the trademarks conceptually different.

16. Phonetically, the defendant argues that the trademarks display a low degree of similarity, as the pronunciation of the central letters F and V have a marked impact on the overall pronunciation.

17. As far as the visual comparison is concerned, the defendant considers the trademarks similar to a low degree, since his figurative trademark displays several elements that set it apart from the trademark invoked.

18. Regarding the comparison of the goods the defendant argues that the goods in class 29 are in part of a different nature and in part identical, as far as the *'preserved, frozen, dried and cooked fruit and vegetables; jellies, jams, compotes; eggs; milk, cheese, butter, yoghurt and other milk products; oils and fats for food'* are concerned. With regard to class 30 the defendant finds all goods to be dissimilar. The goods in class 32 on the other hand are considered to be partly dissimilar and partly similar to a low degree by the defendant. He finds there is a low degree of similarity between the preserved fruits and vegetables

on the one hand and the fresh foods and vegetables on the other hand. Finally, when comparing the goods in class 32 and 33, the defendant comes to the conclusion that the goods in these classes are dissimilar.

19. The defendant requests that the Office rejects the opposition in its entirety as the marks are only lowly similar and the goods under comparison partly dissimilar. As for the dissimilar goods, one necessary condition for the finding that a risk of confusion exists is not fulfilled. For the goods that are identical or similar, the nature of the similarity between the trademarks on the one hand and of the pertinent goods on the other is such that no likelihood may be presumed.

III. DECISION

A.1 Likelihood of confusion

20. 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.

21. Article 2.2ter (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."*

22. 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

23. 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).

24. 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).

25. The overall impression created in the memory of the relevant public by a complex mark might, in certain circumstances, be dominated by one or more components of that mark (CJEU, *Limonchello*, C-334/05 P, 12 June 2007, ECLI:EU:C:2007:333). With regard to the assessment of the dominant characteristics of one or more components of a complex trademark, account must be taken, in particular, of the intrinsic qualities of each of these components by comparing them with those of other components. In addition, account may be taken of the relative position of the various components within the arrangement of the complex mark (EGC, *Matratzen*, T-6/01, 23 October 2002, ECLI:EU:T:2002:261 and *El Charcutero Artesano*, T-242/06, 13 December 2007, ECLI:EU:T:2007:391).

26. The trademarks to be compared are the following:

Opposition based on:	Opposition directed against:
VIFIT	

Visual comparison

27. The trademark invoked is a word mark consisting of one word of five letters, namely VIFIT. The contested trademark is a combined word/figurative mark consisting of the five letter word 'Vivit' in a golden handwritten typeface replacing the dots on the i's with stars. Given that the earlier trade mark is a word marks, the fact that it is represented in capital letters, whereas the latter is not, is irrelevant for the purposes of a visual comparison of those marks (see EGC, *babilu*, T-66/11, 31 January 2013, ECLI:EU:T:2013:48).

28. Where a sign consists of both verbal and figurative elements, the former are, in principle, considered more distinctive than the latter, because the average consumer will more easily refer to the goods or services in question by quoting their name than by describing the figurative element of the trademark (EGC, *SELENIUM-ACE*, T-312/03, 14 July 2005, ECLI:EU:T:2005:289). In this case the figurative element is limited to a fanciful typeface which does not distract from the verbal element.

29. The trademarks only differ in the third letter, all other letters are identical and in the same position. Although, in short signs, small differences are more easily noticed by the public (reference is made to EGC, *COR/DOR*, T-342/05, 23 May 2007, ECLI:EU:T:2007:152), the overall visual impression of both trademarks is highly similar.

Aural comparison

30. Concerning the aural comparison, it must be pointed out that, in the strict sense, the aural reproduction of a complex sign corresponds to that of all its verbal elements, regardless of their specific

graphic features, which fall more within the scope of the analysis of the sign on a visual level (EGC, PC WORKS, T-352/02, 25 May 2005, ECLI:EU:T:2005:176 and Thai Silk, T-361/08, 21 April 2010, ECLI:EU:T:2010:152).

31. Both trademarks consist of one word of two syllables. The first syllable will be pronounced in an identical manner whereas the pronunciation of the second syllable is nearly identical as the aural difference between the consonant sounds F and V is only minor in this position in the trademarks. These two sounds take the same mouth position, the former being unvoiced and the latter voiced.

32. The trademarks are aurally highly similar.

Conceptual comparison

33. Both trademarks have no clear meaning for the Benelux public. Even if the public would break down the trademarks in VI and FIT on the one hand and VI and VIT on the other, as alleged by the defendant, this in itself is not enough to alter that conclusion. Moreover it is not sufficient to neutralize the high level of visual and aural similarity.

Conclusion

34. The earlier trademark and the contested trademark are visually and aurally highly similar. As both trademarks lack a clear meaning, a conceptual comparison is not possible.

Comparison of the goods

35. 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).

36. With the comparison of the goods of the earlier mark invoked and the goods against which the opposition is filed, the goods are only considered on the basis of what is expressed in the register or the goods for which genuine use has been proven on the one hand and the goods as indicated in the trademark application on the other hand.

37. The goods to be compared are the following:

Opposition based on:	Opposition directed against:
CI 5 Dietary and nutritional supplements; protein supplements.	
CI 29 Dairy products; milk; milk products; milk powder; dairy based beverages; milk shakes; flavoured milk powder for making beverages; whey, whey powder; curd; milk proteins; cheese; fermented milk; fermented milk products; kefir; yoghurt; cream; dairy products	CI 29 Meat, fish, poultry and game; meat extracts; preserved frozen, dried and cooked fruits and vegetables; jellies, jams compotes; eggs; milk, cheese, butter, yoghurt and other milk products; oils and fats for food.

for dietetic purposes (not for medical use); nutritional bars included in this class; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs; edible oils and fats; prepared coconut; prepared nuts; edible seeds.	
CI 30 Coffee, tea, cocoa and drinks based thereon; rice, cereals, corn, oats and foodstuffs based thereon; muesli; drinks in powder form containing cocoa, coffee or tea; candy bars; cereal and muesli bars; nutritional bars included in this class; sesame seeds; chocolate; chocolate coated foodstuffs; chocolate based foodstuffs; pastry; confectionery; desserts, namely mousses, blancmanges, pudding, frozen yoghurt, ice cream; powder for making ice cream.	CI 30 Coffee, tea, cocoa and artificial coffee; rice, pasta and noodles; tapioca and sago; flour and preparations made from cereals; bread, pastries and confectionery; chocolate, ice cream, sorbets and other edible ices; sugar, honey, treacle; yeast, baking-powder; salt, seasonings, spices, preserved herbs; vinegar, sauces and other condiments; ice (frozen water).
	CI 31 Raw and unprocessed agricultural, agricultural, aquacultural, horticultural and forestry products; raw and unprocessed grains and seeds; fresh fruits and vegetables, fresh herbs; natural plants and flowers; bulbs, seedlings and seeds for planting; live animals; foodstuffs and beverages for animals; malt.
CI 32 Powders and other preparations for making beverages; sports drinks; sports beverages; isotonic beverages; energy drinks; whey beverages; smoothies.	CI 32 Beers; non-alcoholic beverages; mineral and aerated waters; fruit beverages and fruit juices; syrups and other non-alcoholic preparations for making beverages.
	CI 33 Alcoholic beverages, except beers; alcoholic preparations for making beverages.

Class 29

38. The goods *preserved, frozen, dried and cooked fruits and vegetables; jellies, jams compotes; eggs; milk, yoghurt and other milk products* are present in class 29 of both trademarks and are thus identical. *Cheese and butter* of the contested trademark belong to the broader category *dairy products* of the trademark invoked and are therefore identical. As a matter of fact, where the goods covered by the earlier mark include the goods covered by the trade mark application, those goods are considered to be identical (see, to that effect, EGC, Fifties, T-104/01, 23 October 2002, ECLI:EU:T:2002:262 and Arthur et Felicie, T-346/04, 24 November 2005, ECLI:EU:T:2005:420). The *oils and fats for food* of the contested trademark are identical or at least highly similar to the *edible oils and fats* of the trademark invoked, as both are oils and fats which are destined to be used in food or eaten. This is also undisputed between the parties.

39. The Benelux Court of Justice (judgment Alliance, C 2018/5, 31 October 2019) considered that as regards the egg products of the earlier mark and the meat products of the contested mark, they have the same nature (foodstuff) and the same origin (animal). They are both intended for human consumption and are addressed to the same consumers, being the general public of average attention in the case of everyday consumer goods. Both products are also an important dietary source of protein and vitamin B12. The

products can compete with each other, as one serves as a meal replacement for the other. The fact that a vegetarian does not eat meat but eggs does not make the products dissimilar. They may have the same manufacturers (farms) and use the same distribution channels and share the same outlets (supermarkets, grocery shops, independent butchers). It follows that there is a low degree of similarity of the goods. Although the manufacturers might differ for some, the same applies to the fish, poultry and game of the contested trademark, as they do share nature, origin and distribution channels.

40. Meat extract is highly concentrated meat stock, usually made from beef. It is used to add meat flavour in cooking, and to make broth for soups and other liquid-based foods¹. The goods *meat extracts* of the contested trademark are dissimilar to the goods of the earlier trademark: they have no point of contact with any of the opponent's goods, given the differences in their manufacturers, distribution channels, purpose and the lack of any complementarity or competition between them.

Class 30

41. The goods *coffee, tea, cocoa* appear *expressis verbis* in both classifications and are therefore identical. The *artificial coffee* is highly similar to the coffee of the trademark invoked, as these goods coincide in their methods of use, distribution channels, manufacturers and consumers. Furthermore, they are in competition.

42. The contested goods *rice; pastries and confectionery; chocolate, ice cream* are contained identically in both lists of goods.

43. *Preparations made from cereals* fall under the broader category of *foodstuffs based on cereals, corn, oats*. They are therefore considered to be identical. As regards bread; pasta and noodles there is a similarity, or, at the very least, a low degree of similarity, between those goods and the *foodstuffs based on cereals, corn, oats* of the earlier mark. The goods in question are prepared from cereals and the end users and distribution channels coincide with those of the preparations made from cereals (see, to that effect, EGC, Castello, T-549/14, 4 October 2016, ECLI:EU:T:2016:594).

44. There is also some similarity between those goods and the *flour* covered by the contested trademark. The latter may be used by the average consumer himself in order to manufacture the former. In addition, both — in contrast to, for example, the goods covered by the mark applied for in Class 31 — are processed foodstuffs. Lastly, since these goods are interchangeable, they are in competition (see also EGC, Castello, already cited).

45. The *sorbets and other edible ices* of the contested trademark are specific types of ice cream and are therefore also considered to be identical.

46. The contested *seasonings; spices and preserved herbs* are similar to a low degree to the opponent's edible oils and fats in Class 29 as they can coincide in their essential purpose and target consumers. The contested *salt and vinegar* are similar to a low degree to the opponent's edible oils and fats in Class 29 as the goods under comparison can be used as for seasoning and also, by manufacturers, for preserving purposes. Therefore, they can coincide in their essential purpose, distribution channels and relevant public. As regards the *sauces and other condiments*, the EGC held that there is a low degree of similarity between

¹ https://en.wikipedia.org/wiki/Meat_extract

the goods in question and the preserved and cooked vegetables. The latter may be used in making sauces, or even themselves constitute sauces, even though that is not always the case. In addition, in some cases, preserved and cooked vegetables are themselves condiments (see EGC, Castello, already cited).

47. The contested *honey, treacle* in Class 30 are similar to the opponent's jellies, jams, compotes in Class 29. They are all interchangeable and usually used in the same way, namely spread on a base such as toasts, pancakes, bread and cakes or used for the same purpose as a cooking ingredient.

48. The contested *ice* refers to frozen water used for cooling drinks or for food preservation and, as such, it must be found to be dissimilar to the opponent's goods in Class 29 and 30. The fact that these goods may be available to the public in supermarkets from the same fridges is not a sufficiently close link as these goods differ in their purpose, nature, commercial origin and method of use, and also due to the absence of complementarity or competition.

49. The remaining contested goods, namely *tapioca; sago; sugar; yeast, baking-powder* must all be considered to be dissimilar to the opponent's goods. These goods usually originate from different manufacturers and are sold at different outlets or different sections thereof, and they are neither complementary nor in competition. The mere fact that some of the opponent's goods may also contain or prepared by using some of these contested goods is not a sufficiently close link, in particular since ingredients used for the preparation of foodstuffs are a subcategory of raw materials and treated in the same way as raw materials in general. Consequently, the mere fact that one ingredient is needed for the preparation of a foodstuff will generally not be sufficient in itself to show that the goods are similar, even though they all fall under the general category of foodstuffs (EGC, Naty's, T-72/10, 26 October 2011, EU:T:2011:635).

Class 31

50. There is a high degree of similarity between the *fresh fruits and vegetables* of the contested trademark and the preserved, frozen, dried and cooked fruits and vegetables of the earlier mark. It should be noted that the fresh fruits and vegetables in question have the same origin, with the fresh fruit then being preserved by different means, such as freezing, cooking or canning. Moreover, the products in question may be regarded as substitutable, since, although it is now possible to buy fruit and vegetables even out of season, it is not unusual to substitute canned products for fresh products, in particular in the preparation of ready-made meals. The importance of the phenomenon of vertical integration in the agro-food sector in the European Union should also be highlighted. Thus, the relevant public is used to seeing a farmer also producing canned products from the fruit and vegetables he grows (see EGC, HUNAGRO, T-423/08, 24 March 2010, ECLI:EU:T:2010:116).

51. The contested fresh herbs, as is the case for the preserved herbs, are similar to a low degree to the opponent's edible oils and fats in Class 29 as they can coincide in their essential purpose and target consumers.

52. The contested *raw and unprocessed agricultural, aquacultural, horticultural and forestry products; raw and unprocessed grains and seeds* are similar to a low degree to the earlier *preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; prepared coconut; prepared nuts; edible seeds* in Class 29. The former are fresh ingredients such as fruits, vegetables, berries and nuts, which are necessary for the elaboration of the latter; thus, the goods are complementary and on that account also

similar. They can be in competition with each other since the final consumer can choose between fresh (raw) or processed products. Moreover, despite the difference in their producers, they can be found in the same sales outlets. Moreover, as far as the *malts, raw and unprocessed grains and seeds* are concerned, these goods have a link with the opponent's *foodstuffs based on cereals* and *cereal and muesli bars* in Class 30, which cover goods that may contain semi- or unprocessed grains and seeds. All these goods may have the same nutritional purpose and they may target the same public. In addition, their commercial origin is often the same, as they can be found in the same specialised nature and health shops. Therefore, they are similar to a low degree.

53. There is a low degree of similarity between the *foodstuffs and beverages for animals* and the goods in Class 5 of the earlier mark. The latter are goods which are meant to augment or supplement the nutritional value of the normal diet of a human being or animal. The goods of the contested mark are mainly meant to serve an animal's nutritional needs. There is some complementarity between the earlier goods in Class 5 and the contested goods in Class 31 which results from the fact that the earlier goods can be used in combination with the contested goods. Even though the earlier goods in Class 5 serve a medical purpose, veterinary preparations, especially as part of preventive treatment for diseases such as vitamins, hormones and the like, are frequently integrated in foodstuffs and fodder for animals in Class 31, or administered with animal fodder. Furthermore, their method of use, namely oral administration, can be the same. In terms of the nature of the goods, the relevant products are given in solid or liquid form. The end-users of the goods in question may coincide. The relevant goods are aimed at professionals, for example in the field of animal farming or individual animal owners. Furthermore, these goods are likely to be sold through the same specialised distribution channels such as wholesale distributors or pet shops. Veterinarians, shops specialising in products for animals and supermarkets all usually sell all kinds of pet products such as foodstuffs, vitamins or mineral supplements.

54. The remaining goods in Class 31, namely *natural plants and flowers; bulbs, seedlings and seeds for planting; live animals* must all be considered to be dissimilar to the opponent's goods. They are different in nature and destination. The distribution channels also differ and the goods in question are neither complimentary nor in competition.

Class 32

55. The *syrops and other non-alcoholic preparations for making beverages* of the contested trademark are identical or at least highly similar to *powders and other preparations for making beverages* of the earlier mark. Both are meant to prepare beverages, either from a liquid or a solid form.

56. *Non-alcoholic beverages* contain a large number of beverages, including these covered in Class 32 by the earlier mark. They are therefore considered to be identical. According to settled case-law, goods should be regarded as identical where the goods designated by the earlier trade mark are included in a more general category covered by the contested trade mark (see EGC, METABIOMAX, T-281/13, 11 June 2014, ECLI:EU:T:2014:440). The identity is undisputed between the parties.

57. *Fruit beverages and fruit juices* are to be considered highly similar to the *smoothies* of the earlier mark. A smoothie is a smooth, thick drink consisting of fresh fruit, sometimes mixed with milk, yoghurt or ice cream. These goods have basically the same nature, they are in competition, they are found at the

same place in the supermarket and they may be produced by the same undertaking. Similarity is undisputed between the parties.

58. So far as concerns the *mineral and aerated waters* of the contested trademark and the *smoothies* covered by the earlier mark, while these goods do not have, strictly spoken, the same nature as smoothies, they do have the same purpose and they are furthermore in competition. Moreover, the aforementioned *mineral and aerated waters; fruit beverages and fruit juices; non-alcoholic beverages* and also *beers* are all beverages that serve the same purpose as the opponent's *energy drinks; sport drinks and isotonic beverages*, namely to quench thirst. The goods are in competition (with respect to 'beers' - at least insofar as they are alcohol free) and most of them can originate from the same producers. Also, they may be found in the same points of sale, such as restaurants, bars or side-by-side in supermarkets. Therefore, the goods in conflict must be seen as being similar to an average degree.

Class 33

59. First, as regards the nature, end-users and method of use of the alcoholic beverages covered by the mark applied for and the beverages covered by the earlier mark in Class 32, it must be observed that the very nature of those goods differs in terms of the presence or absence of alcohol.

60. In that respect, the average consumer is used to and aware of the distinction between alcoholic and non-alcoholic drinks, which is, moreover, necessary, since some consumers do not wish to – or cannot – consume alcohol. Accordingly, the average consumer will make that distinction when comparing the alcoholic beverages covered by the mark applied for and the non-alcoholic beverages covered by the earlier mark (see, to that effect, EGC, MEZZOPANE, T-175/06, 18 June 2008, ECLI:EU:T:2008:212).

61. Specifically regarding the contested *alcoholic beverages, except beers* in Class 33 and the earlier *energy drinks* in Class 32, the General Court held that, despite the fact that 'a very large number of alcoholic and non-alcoholic drinks are generally mixed, consumed, or indeed marketed together' (see EGC, FLÜGEL, T-150/17, 4 October 2018, ECLI:EU:T:2018:641, § 80) these are dissimilar.

62. In fact, it cannot be considered that an alcoholic drink and an energy drink are similar merely because they can be mixed, consumed or marketed together, given that the nature, intended purpose and use of those goods differ, based on the presence of, or absence of alcohol in their composition (see EGC, MEZZOPANE, already cited). Furthermore, it must be held that the undertakings which market alcoholic drinks premixed with a non-alcoholic ingredient do not sell that ingredient separately and under the same or similar mark as the premixed alcoholic drink at issue (see, to that effect, EGC, TEQUILA MATADOR HECHO EN MEXICO, T-584/10, 3 October 2012, EU:T:2012:518).

63. The goods in class 33 are therefore dissimilar.

Conclusion

64. The goods in classes 29 and 30 are in part identical, in part similar (to a low degree) and in part dissimilar. The goods in class 31 are partly highly similar, partly similar to a low degree and partly dissimilar. The goods in class 32 are either identical, highly similar or similar to an average degree. The goods in class 33 are dissimilar.

A.2 Global assessment

65. 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.

66. 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 goods concerned are targeted at the public in general. For these goods the average level of attention of the public concerned may be deemed normal.

67. 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 trademarks 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).

68. 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). The distinctive character of the earlier trademark may be deemed at least normal as it is not descriptive for the relevant goods.

69. In view of the aforementioned circumstances, and in particular the interdependence of the highly similar trademarks, the Office is of the opinion that the relevant public – with a normal level of attention – might believe that the goods of the contested trademark, even those with a low degree of similarity, originate from the same undertaking or from economically-linked undertakings.

B. Other factors

70. Insofar as the applicant wishes to claim that his activity differs from the opponent by arguing that he is a small Bosnian enterprise that owns and operates a water spring and that the contested trademark is meant in particular for mineral waters from its Bosnian spring (see para 13), it must be noted that this is irrelevant. In order to assess the similarity of the goods or services at issue, the group of goods or services protected by the marks at issue must be taken into account, and not the goods or services actually marketed under those marks (see, to that effect, EGC, KREMEZIN, T-487/08, 16 June 2010, ECLI:EU:T:2010:237 and KICO, T-249/10, 17 January 2012, ECLI:EU:T:2012:7).

C. Conclusion

71. Based on the foregoing the Office is of the opinion that there is a likelihood of confusion for the goods which are considered to be identical or similar.

IV. DECISION

72. The opposition with number 2015855 is partly justified.

73. The international application with number 1501102 will not be registered in the Benelux for the following goods:

- CI 29: Meat, fish, poultry and game; preserved frozen, dried and cooked fruits and vegetables; jellies, jams compotes; eggs; milk, cheese, butter, yoghurt and other milk products; oils and fats for food.
- CI 30: Coffee, tea, cocoa and artificial coffee; rice, pasta and noodles; flour and preparations made from cereals; bread, pastries and confectionery; chocolate, ice cream, sorbets and other edible ices; honey, treacle; salt, seasonings, spices, preserved herbs; vinegar, sauces and other condiments.
- CI 31: Raw and unprocessed agricultural, agricultural, aquacultural, horticultural and forestry products; raw and unprocessed grains and seeds; fresh fruits and vegetables, fresh herbs; foodstuffs and beverages for animals; malt.
- CI 32 (*all goods*)

74. The international application with number 1501102 will be registered in the Benelux for the following goods which are considered to be dissimilar:

- CI 29: Meat extracts.
- CI 30: Tapioca and sago; sugar; yeast, baking-powder; ice (frozen water).
- CI 31: Natural plants and flowers; bulbs, seedlings and seeds for planting; live animals.
- CI 33 (*all goods*)

75. Neither of the parties shall pay the costs in accordance with article 2.16(5) BCIP in conjunction with rule 1.28(3) IR, as the opposition is partly justified.

The Hague, 4 June 2021

Diter Wuytens

Pieter Veeze

Willy Neys

(*rapporteur*)



Administrative officer: Gerda Veltman