



Benelux Office for  
**Intellectual  
Property**

**BENELUX OFFICE FOR INTELLECTUAL PROPERTY**  
**OPPOSITION DECISION**  
**N° 2016503**  
**of 31 October 2021**

**Opponent:** **nutra-pharm swiss gmbh**  
Hofstraße 114  
CH-8400 Zurich  
Switzerland

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

**Invoked right:** **International trademark registration 1138946**  
  
EQUIVE  
  
*against*

**Defendant:** **SCIGEN PTE. LTD.**  
Beach Road 150 32-05/08 Gateway West  
189720 Singapore  
Singapore

**Representative:** **Baker & McKenzie Amsterdam N.V.**  
PO-box 2720  
1000 CS Amsterdam  
Netherlands

**Contested trademark: International application 1553459**

**evive**

**I. FACTS AND PROCEEDINGS****A. Facts**

1. On 8 July 2020 the defendant filed an international trademark application designating the Benelux, for the semi-figurative mark  for goods in classes 5, 10 and 42. This application was processed under the number 1553459 and was published in the Gazette 2020/39 on the 8 October 2020.

2. On 17 November 2020 the opponent filed an opposition against the registration of the application. The opposition is based on the international trademark registration 1138946 designating the European Union of the wordmark "EQUIVE", filed and registered on 28 February 2012 for goods in classes 5, 29, 30 and 32 and with a priority date of 30 August 2011. As a result of an opposition decision taken on the 30 November 2016 the invoked trademark was not registered in the European Union for goods in class 3.

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

4. The opposition is directed against all of the goods covered by the contested application and is based on all of the goods covered by 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" or "BOIP") to the parties on 18 November 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 31 May 2021.

**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 trademark and sign and the identity or similarity of the goods or services concerned.

**A. Opponent's arguments**

9. The opponent starts his arguments with the comparison of the trademarks in question. Visually thus, he notes that the trademarks are composed by 5 and 6 letters respectively of which 4 are present in both. Furthermore, the opponent notes that both trademarks start with the same letter and have the same ending "ive". Also, from the letters in which they differ, "qu" and "v", the letters "u" and "v" are visually very similar according to the opponent, causing the trademarks as a whole to be highly similar visually.

10. Phonetically the opponent argues that both trademarks are composed of 3 syllables of which 2 are identically present in both trademarks. The trademarks also share the same intonation and rhythm, differing

only in one sound, which leads the opponent to conclude that they show an important level of phonetic similarity.

11. The opponent notes that since both trademarks do not have a meaning, a conceptual comparison is not possible.

12. Addressing the comparison of the goods and services, the opponent notes first that both trademarks contain "Pharmaceutical preparations" in class 5. Otherwise, the opponent finds the "nutraceuticals" to be a broader category of the other goods covered by the opponent in class 5 related to dietary supplements, and the goods "nutraceuticals for dietary supplements" which are highly similar to the dietetic foodstuffs covered by the opponent in classes 29 and 30 and similar to other goods covered in these classes. The opponent notes that all these goods could be produced by the same undertaking and via the same distribution channels and should thus be considered similar.

13. Concerning the goods covered in class 10 of the contested trademark, insofar as they relate to the medical field, the opponent argues that these are similar to the goods covered in class 5 and the "dietetic foodstuffs" in classes 29 and 30 of the invoked trademark in that all these goods coincide in their end users and distribution channels and could generally be produced by the same undertaking. Also, concerning the services covered in class 42 by the contacted trademark, the opponent, referring to caselaw, considers these similar to the "medicines, pharmaceutical preparations, sanitary preparations for medical purposes" in class 5 of the earlier trademark.

14. As a result of the above, the opponent considers that there exists a likelihood of confusion for the consumer. He asks the Office to grant the opposition, not to register the contested trademark and to order that the costs be borne by the defendant.

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

15. The defendant starts his arguments with an introduction of the applicant's company and notes the lack of information available about the opponent's company and activity. He notes that the limited information available about the opponent indicates that he is active in a completely different market from the defendant and that thus there is no competition between their goods and services and no likelihood of confusion.

16. Concerning the comparison of the trademarks, the defendant notes that both trademarks are dissimilar due to the striking, evident and significant differences between the trademarks which offset the similarities. Indeed, the opponent notes that the letter "Q", due to being so uncommon in the dutch language will immediately catch the eye of the consumer. In response to the opponent's argument, the defendant notes that the similarity between the letters "u" and "v" is irrelevant as the letter "u" merely follows the letter "q" as an usual accessory to it.

17. In the same vein, the defendant notes that phonetically the differences in pronunciation between the letters "q" and "v" lead to distinct intonations and render the trademarks as a whole dissimilar.

18. Conceptually, the defendant agrees with the reasoning of the opponent in that both trademarks do not have a meaning and therefore a conceptual comparison is irrelevant.

19. As regards the comparison of the goods and services, the defendant notes that the goods covered by the earlier right in class 29, 30 and 32 are dissimilar to the goods covered by the contested trademark. Furthermore, the goods covered in class 5 by the invoked right need to be read in conjunction with the

other goods covered by the trademark and thus, relating to the area of healthcare and dietetic foods, specifically excluding medical purpose goods and are thus dissimilar to the goods covered by the contested trademark.

20. The defendant notes that the goods covered by the contested right are not complementary to the opponent's goods, nor are they in competition or addressed at the same public. Thus, they cannot be considered similar.

21. Finally, as regards the services in class 42 covered by the contested trademark, the defendant notes that the argument that the opponent's goods may be used for these services is not sufficient to render these goods similar to the services. The defendant notes that such medical care service providers seldom also manufacture products themselves. Thus, these services are dissimilar to the opponent's goods according to the defendant.

22. In that regard and considering the arguments above, the defendant finds that there exists no risk of confusion for consumers between the trademarks. Thus, he asks the Office to register the contested trademark and to order that the costs be borne by the opponent.

### **III. DECISION**

#### **A 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 trademarks**


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 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).

29. The trademarks to be compared are the following:

Opposition based on:	Opposition directed against:
EQUIVE	

#### *Visual comparison*

30. The invoked trademark consists of the word element "EQUIVE" composed of 6 letters. The contested trademark is composed of the word element "evive" composed of 5 letters. While the invoked trademark contains the letter sequence "qu" which is somewhat uncommon, both trademarks share the same initial letter and the sequence "ive" at the end. Thus, considering that within these word elements of 5 and 6 letters respectively, 4 share the same placement in both trademarks, the overall visual impression of the trademarks is similar.

31. The trademarks are visually similar.

#### *Aural comparison*

32. Both trademarks consist of a single word element, composed of 3 syllables [e] [vi] [ve] and [e] [qui] [ve] respectively. It follows that the trademarks only differ in their middle syllable, yet are identical in their other syllables, their rhythm and cadence.

33. Thus, the Office considers the trademarks to be aurally similar.

#### *Conceptual comparison*

34. According to Rule 1.21(e) of the IR, compliance with the adversarial principle referred to in Article 2.16(1) CBPI implies, inter alia, that the examination of the opposition is limited to the arguments, facts and evidence put forward by the parties. The parties agree that the trademarks in question do not have a meaning (par 18 and 11) and therefore a conceptual comparison is irrelevant.

*Conclusion*

35. The trademarks in question are similar both visually and phonetically while a conceptual comparison is irrelevant.

**Comparison of the goods and services**

36. 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 (CJEU, Canon, already cited).

37. Contrary to what was argued by the defendant (paragraph 15), with the comparison of the goods of the trademark invoked and the goods and services against which the opposition is filed, the goods and services are considered only on the basis of what is expressed in the register.

38. The goods and services to be compared are the following:

<b>Opposition based on:</b>	<b>Opposition directed against:</b>
Cl 5 Medicines; pharmaceutical preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use; dietetic foods and dietetic beverages adapted for medical purposes; dietary supplements adapted for medical purposes; dietary supplements, mainly consisting of vitamins, trace elements, minerals and amino acids; vitamin preparations; food supplements for non-medical purposes, mainly consisting of proteins, fats also with the addition of fatty acids; food supplements for non-medical purposes, mainly consisting of carbohydrates; dietary supplement drinks, not for medical purposes.	Cl 5 Pharmaceuticals, medical and veterinary preparations; tablets [pharmaceuticals]; pharmaceutical preparations for health care; nutraceutical preparations for therapeutic or medical purposes; nutraceuticals for use as a dietary supplements.
	Cl 10 Surgical, medical, dental and veterinary apparatus and instruments; apparatus for medical use; medical therapy instruments.
Cl 29 Dietetic foodstuffs for non-medical purposes, mainly consisting of proteins, fats also with the addition of fatty acids; food replacements and dietetic foods for non-medical purposes, all included in this class; soups in liquid and powder form enriched with nutrients; soups and soup preparations, all included in this class; meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes;	

eggs; milk and milk products; edible oils and fats.	
CI 30 Dietetic foodstuffs for non-medical purposes, mainly consisting of carbohydrates; food replacements and dietetic foods for non-medical purposes, all included in this class; ready-to-eat snack bars on the basis of cereals and grain, also enriched with nutrients, all included in this class; coffee, tea, cocoa and artificial coffee; rice; tapioca and sago; flour and preparations made from cereals; bread, pastry and confectionery; ices; sugar, honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); spices; ice.	
CI 32 Mineral and aerated waters and other non-alcoholic beverages, including carbonated drinks (refreshing beverages); fruit beverages and fruit juices; syrups and other preparations for making beverages.	
	CI 42 Research and development services relating to medicines; medical laboratory services; medical research; providing medical and scientific research information in the field of pharmaceuticals and clinical trials; design of medical apparatus; biotechnology research; research relating to pharmaceuticals.

#### Class 5

39. The goods "*Pharmaceuticals, medical and veterinary preparations; tablets [pharmaceuticals]; pharmaceutical preparations for health care;*" of the contested trademark are identical to the "*pharmaceutical preparations;*" of the trademark invoked in as far as they describe the same products or present a subclass of the latter. Indeed, according to established case law, if the goods and services of the earlier trademark also contain goods and services that are mentioned in the application for the contested sign, these goods and services are considered identical (see EGC, Fifties, T-104/01, 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 ).

40. The "*nutraceutical preparations for therapeutic or medical purposes; nutraceuticals for use as a dietary supplements.*" fall within the broader category of "*dietary supplements adapted for medical purpose*" and are thus also to be considered identical.

41. The office concludes that the goods covered by both trademarks in class 5 are identical.

#### Class 10

42. The goods "*Surgical, medical, dental and veterinary apparatus and instruments; apparatus for medical use; medical therapy instruments.*" of the contested trademark are similar to a certain degree to the "*pharmaceutical preparations*" of the invoked trademark. The former being generally used for the diagnosis, treatment or improvement of the condition of persons or animals, they coincide in relevant public

and distribution channels with the latter and can be complementary (for example, some medical instruments can be used for the administration of pharmaceuticals).

43. Thus, the goods covered by the contested trademark in class 10 are similar to a certain degree to the goods in class 5 of the trademark invoked.

#### *Class 42*

44. In general, products and services are of a different nature, due to the fungible nature of the former and the non-fungible nature of the latter. Furthermore, they do not have the same use. However, products and services can be complementary: after all, some services cannot be rendered without using some products.

45. In this context, it should be recalled that complementarity only exists where the products and/or services are so closely related to each other that one is indispensable or important for the use of the other so that consumers may believe that the same undertaking is responsible for those products (see to that effect EGC, O STORE, T-116/06, 24 September 2008, ECLI:EU:T:2008:399).

46. The goods covered by the invoked trademark, namely "*pharmaceutical preparations*", are the subject matter of the services "*Research and development services relating to medicines; medical laboratory services; medical research; providing medical and scientific research information in the field of pharmaceuticals and clinical trials; design of medical apparatus; biotechnology research; research relating to pharmaceuticals*" covered by the defendant. Pharmaceutical companies not only bring medicines onto the market but are also involved in research and development activities. It is thus not excluded that these services are also provided to third parties. Those goods and services are therefore so closely linked that the public may think that the same undertaking is responsible for providing research services and for the manufacture of these goods (see also CJEU, T-165/17, 14 June 2018, EMCURE, ECLI:EU:T:2018:346). For that reason, the Office considers that those services are similar to a certain degree to the goods of the trademark invoked.

#### *Conclusion*

47. The goods and services covered by the contested trademark are in part identical and in part similar to a certain degree to the goods covered by the trademark invoked.

### **A.3 Global assessment**

48. 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.

49. 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. In the present case, the goods and services in question concern pharmaceutical and medical products and services for which there is generally an increased level of attention, regardless of whether they are prescription drugs or not. For example, professional users (doctors and pharmacists), have a high level of attention when prescribing, preparing and/or dispensing these but non-professional (end) users will also have an increased level of attention when purchasing these products, as they affect their health (see, inter alia, EGC, *Tolposan*



judgment, T-331/09, 15 December 2010, ECLI:EU:T:2010:520 and *Zydus*, T-288/08, 15 March 2012, ECLI:EU:T:2012:124). Therefore, the Office is assuming an increased level of attention.

50. 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 they cover. A lesser degree of similarity between the relevant goods can be offset by a greater degree of similarity between the trademarks, and vice versa (*Canon and Lloyd*, already cited).

51. 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 the present case, the trademark invoked has a normal distinctiveness, as it is not descriptive of the goods concerned.

52. Account must also be taken of the circumstance that normally, the average consumer perceives a mark as a whole and does not proceed to analyse 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 marks but must place his trust in the imperfect picture of them that he has kept in his mind.

53. Based on the abovementioned circumstances, despite the higher level of attention, the Office finds that due to the similarities between the trademarks both visually and aurally, the relevant public might believe that the in part identical, in part similar to some degree goods and services would come from the same undertaking or from economically-linked undertakings.

## **B. Other factors**

54. In an opposition procedure there is no question of the other party being ordered to bear the costs incurred (see paragraphs 14 and 22). Only a referral of the costs set at the established opposition fee in case the opposition is totally rejected (or justified) is provided for.

55. The defendant argues that the contested sign will not be used for the same goods for which the trademarks invoked are used and is not aimed at the same audience (paragraph 15). The Office points out that the opposition procedure leaves no room for considerations concerning the actual or future use of the signs concerned or any other signs. The comparison of the signs is solely based on the trademark and sign as registered (see to that effect: CJEU, *Quantum*, C-171/06, 15 March 2007, ECLI:EU:C:2007:171; *O2 Holdings Limited*, C-533/06, 12 June 2008, ECLI:EU:C:2008:339 and *EGC, Ferromix e.a.*, T-305/06-T-307/06, 15 October 2008, ECLI:EU:T:2008:444).

## **C. Conclusion**

56. Based on the foregoing the Office is of the opinion that there exists a likelihood of confusion.

## **IV. DECISION**

57. The opposition with number 2016503 is justified.

58. The International application with number 1553459 will not be registered in the Benelux.

59. 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. This decision constitutes an enforceable order pursuant to article 2.16, 5 BCIP.



The Hague, 31 October 2021

*François Châtellier*  
(rapporteur)

*Pieter Veeze*

*Eline Schiebroek*

Administrative officer: Raphaëlle Gerard