

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
OPPOSITION DECISION
N° 2016512
of 1 September 2022

Opponent: **SIC invent AG (Société anonyme (SA))**
Birmannsgasse 3
4055 Basel
Switzerland

Representative: **WIPLAW SPRL**
Avenue Louise 231
1050 Bruxelles
Belgium

Invoked right: **International trademark registration 1088934**



against

Defendant: **MEDICAL CARE, naamloze vennootschap**
Berkenlaan 6
2610 Wilrijk
Belgium

Representative: **GEVERS**
Holidaystraat 5
1831 Diegem
Belgium

Contested trademark: Benelux application 1423571

SC IMPLANT

I. FACTS AND PROCEEDINGS

A. Facts

1. On 25 August 2020 the defendant filed a Benelux trademark application for the wordmark "SC IMPLANT" for goods in class 10. This application was processed under number 1423571 and was published on 21 September 2020.

2. On 20 November 2020 the opponent filed an opposition against the registration of the application.

The opposition is based on the international registration 1088934 of the semi figurative mark designating the European Union, filed on 31 May 2011 and, after limitation, registered for goods in class 5 and 10.



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 the goods "*Pharmaceutical, veterinary and sanitary products, plasters, materials for dressings, material for dental fillings and dental impressions*" in class 5 and all of the goods covered in class 10 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 25 November 2020. During the administrative phase of the proceedings both parties filed arguments and the opponent filed documents to prove use of his trademark. 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 29 September 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 goods and considers these to be either identical or, at least, similar.

10. As regards the comparison of the signs, the opponent notes that the verbal element "SIC" constitutes the dominant element of the invoked trademark. For the contested trademark, the opponent

argues that the word element "IMPLANT" is descriptive for the products covered, thus the dominant element of that trademark would be the verbal element "SC".

11. Visually the opponent notes that the trademarks differ only in the letter "I" present in the invoked trademark. As a result, the opponent considers the trademarks to be strongly similar.

12. Phonetically, the opponent notes that while the contested trademark's lack of a vowel would probably cause the consumer to pronounce the letters individually, the invoked trademark could also be pronounced that way. As a result, the opponent concludes that the trademarks are phonetically similar.

13. Conceptually, since the dominant elements of both trademarks do not, according to the opponent, have a clear meaning, a conceptual comparison is thus not possible.

14. The opponent submits evidence to show that the invoked trademark has acquired enhanced distinctiveness among the relevant public.

15. As a result, the opponent considers that there exists a likelihood of confusion for the consumer and asks the Office not to register the contested trademark.

16. Following the request by the defendant, the opponent submitted proof of use.

B. Defendant's arguments

17. In the first place the defendant asks the opponent to provide proof of use for his trademark.

18. In that regard the defendant considers that the proof submitted by the opponent is not adequate to prove genuine use of the invoked trademark in that use of the invoked trademark in the elements submitted deviates consistently from the registered trademark in a dominant and distinctive element, which is that the invoked trademark is always used in a distinctive and dominant red color. In addition, the defendant notes that some of the invoices submitted by the opponent fall outside the relevant period and one of the annexes is submitted in another language than the language of the proceedings. As a result, the defendant argues that these materials can not be taken into account for the present assessment.

19. However, in the event that the Office would be of the opinion that there is genuine use of the invoked trademark, the defendant argues that there is no likelihood of confusion.

20. In that sense, the defendant notes that, while the goods covered by the trademarks are indeed similar, these goods are nonetheless directed at a professional public in the medical sector which has a high degree of attention.

21. Assessing the overall similarity of the signs, the defendant notes that while the verbal element "IMPLANT" is rather descriptive, it should nonetheless be taken into account for the comparison as, in particular due to its relative size in the contested trademark, it remains a dominant element of the trademark and will therefore impact the overall impression of the consumer.

22. As regards the invoked trademark, the defendant notes that both the verbal element "SIC" and the circle around it are dominant and distinctive elements, while the "®" symbol constitutes a descriptive element which does not have to be taken into account. Furthermore, the defendant argues that the invoked trademark is a short trademark which means that any differences will more easily be perceived, in particular due to the previously argued higher degree of attention of the relevant public.

23. Visually, the defendant considers the trademarks dissimilar due to, on the one hand the invoked trademark being encircled and consisting of one short 3 letter word "SIC" while, on the other hand, the contested trademark is a purely verbal trademark, consisting of two words "SC IMPLANT". As a result, the defendant considers that, the invoked trademark being a short sign and the level of attention of the relevant public being higher, the visual impression of the trademarks will be different.

24. Phonetically, the defendant argues that the invoked trademark would be pronounced "SIK" while the contested trademark would be spelled "S" "C" in addition to the verbal element "IMPLANT". As a result, the defendant argues that the trademarks are phonetically dissimilar.

25. Conceptually, the defendant argues that despite the presence of the verbal element "IMPLANT" in the contested application, the elements "SIC" and "SC" have no specific meaning making a conceptual comparison impossible.

26. Concerning the evidence submitted by the opponent regarding an enhanced distinctive character of the invoked trademark, the defendant considers that, since the majority of the evidence consists in internal documentation, it is thus of no evidential or decisive value and the distinctiveness of the earlier mark has to be considered normal.

27. In that regard and considering the arguments above, the defendant finds that the proof of use submitted is insufficient to prove a genuine use of the invoked trademark. Nonetheless, should the Office decide that use was sufficiently proven, the defendant still finds that there exists no risk of confusion for consumers confronted with these trademarks due to the trademarks being dissimilar and the higher level of attention of the relevant public. Thus, the defendant asks the Office to register the contested trademark.

III. DECISION

A.1 Proof of use

28. In accordance with Article 2.16bis BCIP, the opponent, at the request of the defendant, shall furnish proof that the trademark invoked has been put to genuine use as provided for in Article 2.23bis BCIP or that proper reasons for non-use existed. The evidence must show genuine use in a period of five years prior to the filing or priority date of the trademark against which the opposition is lodged.

29. The filing date of the contested trademark is 25 August 2020. Therefore, the opponent was required to show use of the invoked trademark during the period from 25 August 2015 to 25 August 2020 ('the relevant period'). Given the fact that the trademark invoked was registered more than five years prior to the filing date of the contested trademark, the defendant's request that proof of use is submitted is legitimate.

In general

30. In accordance with the case-law of the European Court of Justice ("CJEU") there is genuine use of a trademark if the mark, 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, is used in order to create or preserve an outlet for those goods or services, not including token use for the sole purpose of preserving the rights conferred by the mark.¹ When assessing whether use of the trade mark is genuine, regard must be had for all the facts

¹ CJEU 3 July 2019, C-668/17, ECLI:EU:C:2019:557, point 38 (Viridis), and CJEU 11 March 2003, C-40/01, ECLI:EU:C:2003:145, point 43 (Ansul).

and circumstances relevant to establishing whether the commercial use of the mark is real, particularly the practices regarded as warranted in the relevant economic sector as a means of maintaining or creating market shares for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark.² 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.³

31. The General Court held that use of the earlier mark need not always be quantitatively significant for it to be deemed genuine.⁴ In interpreting the concept of genuine use, account should be taken of the fact that the *ratio legis* of the requirement that the mark must have been put to genuine use is not to assess commercial success or to review the economic strategy of an undertaking, nor is it to restrict trade mark protection to the case where large-scale commercial use has been made of the marks.⁵

32. Genuine use of a trademark cannot be proven by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trademark on the market concerned.⁶

33. The trademark invoked is a trademark of the European union. Whilst it is reasonable to expect that an EU trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be put to use in a larger area than the territory of a single Member State in order for that use to be capable of being deemed to be ‘genuine use’, it is not necessary that the mark should be used in an extensive geographic area for the use to be deemed genuine, since such a qualification will depend on the characteristics of the product or service concerned on the corresponding market.⁷ It should be demonstrated that the trademark is used for the purpose of maintaining or creating market share within the EU, taking into account all relevant facts and circumstances such as 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.⁸

34. 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

35. The opponent submitted the following exhibits to demonstrate the genuine use of the invoked trademark in the European Union:

1. Several pictures of product packaging showing the invoked trademark, including a label showing the date 7/3/2017.
2. A product catalogue showing the invoked trademark and dating from 2017.

² CJEU 31 January 2019, C-194/17, ECLI:EU:C:2019:80, point 83 (Pandalis), and CJEU 11 March 2003, C-40/01, ECLI:EU:C:2003:145, point 43 (Ansul).

³ General Court (EU) 4 April 2019, T-910/16 and T-911/16, ECLI:EU:T:2019:221, point 29 and the case-law mentioned there (Testa Rossa).

⁴ General Court (EU) 8 July 2004, T-334/01, ECLI:EU:T:2004:223, point 36 (Hipoviton), and General Court (EU) 30 April 2008, T-131/06, ECLI:EU:T:2008:135, point 41 (Sonia Sonia Rykiel).

⁵ General Court (EU) 4 April 2019, T-910/16 and T-911/16, ECLI:EU:T:2019:221, point 28 and the case-law mentioned there (Testa Rossa).

⁶ General Court (EU) 8 July 2020, T-686/19, ECLI:EU:T:2020:320, point 35 (GNC LIVE WELL).

⁷ General Court (EU) 1 June 2022, T-316/21, ECLI:EU:T:2022:310, point 73 (Superior Manufacturing) and CJEU 19 December 2012, C-149/11, ECLI:EU:C:2012:816, points 50 and 54 (ONEL).

⁸ CJEU 19 December 2012, C-149/11, ECLI:EU:C:2012:816, point 58 (ONEL).

3. Photographs showing a brochure or pamphlet, containing the invoked trademark and dated from 2019.
4. Extract of product information material showing the invoked trademark and dating from 2018
5. Marketing material showing company and product information, containing the invoked trademark and dating from 2019.
6. Screenshots of the company website dating from March 2021, showing the location of various company seats and distributors throughout the world and Europe more specifically.
7. An order form in German, showing the invoked trademark and dating from July 2020.
8. An overview showing turnover figures of the opponent's company in different EU countries over the period dating from 2015 until 2021.
9. 12 invoices addressed to locations in the Netherlands, Germany and Luxembourg showing the invoked trademark and covering over 1100 product units containing the indication "SIC" sold over a period ranging from January 2011 until February 2021. Except for an invoice dating from the 16 June 2020 where the total invoiced amount is legible, all other invoices have had the total amounts and unit prices blurred.
10. Copies of certificates dating from 2018, 2019 and 2020 issued by a third party, concerning quality management systems, product design compliance with EU requirements for medical devices and product quality assurance for among others dental implants all showing the invoked trademark.
11. Instructions showing the invoked trademark regarding the use of products named "SIC Prosthetic Components".
12. A complaint form dated December 2019, in German, showing the invoked trademark.

36. As mentioned above, regarding the geographical scope of use, an EU trademark is put to genuine use when it is used in accordance with its essential function and with a view to maintaining or creating market share in the EU for the goods concerned.

37. The invoices provided (exhibit 9) read in conjunction with the turnover figures (exhibit 8), show, despite the lower probative value of the latter, being provided by the opponent himself, that the opponent is active with the invoked trademark in several Member States, especially, as shown by the invoices, in the Netherlands, Germany and Luxembourg. As pointed out by the defendant, not all the invoices are dated within the relevant period (paragraph 18). However, it should be noted here that the possibility that some of the proof of use (exhibit 6 and parts of exhibit 9) falls outside of the relevant period, does not necessarily mean that these exhibits cannot be taken into consideration. They can still serve to support other proof that was submitted or can contribute to a better analysis of the scope of the use of the right invoked in the relevant period.⁹ The screenshots submitted under exhibit 6 provide further evidence as to the geographical scope of the activities of the opponent. All in all, the documents provided cover the entirety of the relevant period.

38. While the invoiced amounts are mostly blurred, the product units covered by the invoices are sufficiently substantial that they exceed the threshold for mere token use within the European Union. Indeed, the purpose of the notion of genuine use is not to assess commercial success or to review the economic strategy of an undertaking. The assessment is made in order to establish if the registered trademark has been put to use to fulfil its essential function as a badge of origin in a way that exceeds mere token use, i.e. use for the sole purpose of preserving the rights conferred by the mark.

⁹ General Court (EU) 1 June 2022, T-316/21, ECLI:EU:T:2022:310, point 35 (Superior Manufacturing) en CJEU 27 January 2004, C-259/02, ECLI:EU:C:2004:50, point 33 (La Mer Technology).

39. Furthermore, the marketing and advertisement evidence provided (exhibits 1, 2, 3, 4, 5 and 11), shows that the invoked trademark is also used outwardly and publicly. Read in conjunction with the other documents provided in relation to the products such as the order form, the certifications obtained by the company and the complaint form (exhibits 7, 10 and 12), these further underline the use of the trademark, in particular as regards dental and surgical apparatus related to dental operations.

40. The defendant argues that the elements submitted do not show use of the invoked trademark due to the fact that the representation of the trademark in these documents deviates consistently in a dominant and distinctive form from the registered trademark, namely in that it is being shown in a red colour (paragraph 18). In that regard the Office notes that the figurative element changes the distinctive character of a trademark if the figurative element is dominant in the overall impression of the trademark. In principle, the use of a trademark in a form differing in elements without altering the distinctive character of the registered trademark is also considered to be use.¹⁰ In the present case, the Office considers that the representation of the invoked trademark in a red colour on some of the evidence submitted does not alter the distinctive character of the trademark and thus constitutes a representation of the invoked trademark for the purposes of assessing proof of use.

41. With regard to the complaint form submitted in German (annex 12), which was not translated, it should be borne in mind, first of all, that documents in support of arguments or to demonstrate use of a mark may be submitted in their original language. Such documents will be taken into consideration only if the Office considers them to be sufficiently intelligible in the light of the reason for their submission (Rule 1.20 IR). The Office understands that the document provided constitutes some form of complaint form to be filled out by customers in relation to the products provided. The Office is of the opinion that the nature of the document in this case is sufficiently comprehensible.

42. It should be noted that the evidence submitted relates mainly to dental implants. While some of the evidence provided also includes other products, the evidence submitted with regards to these is insufficient in order to establish genuine use. Therefore, genuine use of the trademark invoked, for the purpose of this opposition, will only be established for the former.

43. Thus, after careful analysis of the proof of use provided, the Office concludes that the evidence submitted, shows genuine use for the following goods mentioned in class 10 of the invoked trademark namely "*Dental apparatus and instruments, namely implants*". For this reason, the Office will continue with the assessment of the likelihood of confusion considering solely these goods for which the opponent has proven genuine use of his invoked trademark.

A.2 Likelihood of confusion

44. 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.

45. Article 2.2ter (1) BCIP stipulates insofar as relevant 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*

¹⁰ CJEU 18 July 2013, C-252/12, ECLI:EU:C:2013:497, point 31 (Specsavers) and CJEU 13 September 2007, C-123/06, ECLI:EU:C:2007:514, point 86 (Bainbridge).

of confusion on the part of the public; the likelihood of confusion includes the likelihood of association with the earlier trademark.”¹¹

46. A likelihood of confusion within the meaning of this provision exists if the public may believe that the goods or services designated by that trademark and those covered by the trademark applied for come from the same undertaking or, where appropriate, from undertakings which are economically linked.¹²

47. According to settled case-law of the CJEU, the existence of a likelihood of confusion in the mind of the public must be assessed globally, considering all the relevant circumstances of the individual case, including the degree of similarity between the signs at issue and the goods or services concerned, the degree of recognition of the earlier trademark and the degree of distinctiveness – inherent or acquired through use – of the earlier trademark.¹³

Comparison of the trademarks

48. To assess the degree of similarity between the conflicting signs, their visual, phonetic, and conceptual similarity should be determined. The comparison must be based on the overall impression given by those signs. In the assessment, the perception of the signs by the average consumer plays a decisive role. The average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details.¹⁴

49. Although the comparison must be based on the overall impression made by those signs on the relevant public, account must nevertheless be taken of the intrinsic qualities of the signs at issue.¹⁵ The overall impression created in the mind of the relevant public by a complex trademark may, in certain circumstances, be dominated by one or more of its components. Regarding the assessment whether this is the case, account must be taken, in particular, of the intrinsic qualities of each of those components by comparing them with those of other components. In addition and accessorially, account may be taken of the relative position of the various components within the arrangement of the complex mark.¹⁶

50. The assessment of the similarity between the signs, regarding the visual, aural and conceptual similarity of the signs, must be based on the overall impression created by them, taking into account, inter alia, their distinctive and dominant components.

51. The trademarks to be compared are the following:

¹¹ Art. 2.2ter (1)(b) BTIP implements art. 5 (1)(b) 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. A similar provision can be found in art. 8 (1)(b) Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trademark.


¹² CJEU 11 June 2020, C-115/19 P, ECLI:EU:C:2020:469, point 54 (China Construction Bank).

¹³ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 57 (Equivalenza) and the case-law mentioned there.

¹⁴ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 58 and the case-law mentioned there (Equivalenza).

¹⁵ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 71 and the case-law mentioned there (Equivalenza).

¹⁶ General Court (EU) 23 October 2002, T-6/01, ECLI:EU:T:2002:261, points 34 en 35 (Matratzen) en 13 December 2007, T-242/06, ECLI:EU:T:2007:391, point 47 (El Charcutero Artesano).

Opposition based on:	Opposition directed against:
	SC IMPLANT

Conceptual comparison

52. The invoked trademark does not have a clear meaning known to the public, which was also argued by the parties.

53. While the word "IMPLANT" of the contested trademark has a meaning, it's meaning is descriptive for the products covered by the trademark. 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.¹⁷ As a result, the Office is of the opinion that the relevant public will perceive the element "SC", which does not have a meaning, as the dominant element of the contested trademark.

54. Both trademarks do not have a conceptual meaning for the Benelux consumer, making a conceptual comparison of the trademarks irrelevant.

Visual comparison

55. The invoked trademark consists of the word element "SIC" composed of 3 letters with a figurative element of a circle interrupted in the top left corner by the sign ® surrounding the former. The contested trademark consists of the word elements "SC IMPLANT" composed of 2 and 7 letters respectively.

56. 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.¹⁸ The figurative elements of the invoked trademark in this case would probably not go unnoticed to the average customer. Nonetheless, the Office is of the opinion that the relevant public will perceive the verbal element "SIC" as the dominant element of the invoked trademark due to its central position and size. The sign ® of the invoked trademark will not be perceived as a dominant element but merely an indication that the sign constitutes a registered trademark.

57. The Office notes that the signs in question are short, making the differences between them more apparent to the consumer. Furthermore, the invoked trademark contains a figurative element whereas the contested trademark is solely composed of verbal elements. Nonetheless, the dominant elements of the trademarks concerned, namely the verbal elements "SIC" and "SC" coincide in their initial and final letter. According to established caselaw, the consumer normally attaches more importance to the first part of a

¹⁷ General Court (EU) 3 July 2003, T-129/01, ECLI:EU:T:2003:184, point 53 (Budmen).

¹⁸ General Court (EU) 9 November 2016, T-290/15, ECLI:EU:T:2016:651, point 36 and the case-law mentioned there (Smarter Travel).

sign.¹⁹ In addition, the dominant elements of the concerned trademarks solely differ in the letter "I" present in the invoked trademark. Due to its placement and the relatively limited space this letter occupies in the invoked trademark, its omission in the contested trademark does not create an impression sufficiently different to counteract the visual similarities existing between both trademarks.

58. The trademarks are visually similar to a certain degree.

Aural comparison

59. 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.²⁰ Also, the previously held non distinctive element of the ® sign (paragraph 56) in the invoked trademark would not be pronounced by the consumer, and is therefore not considered in the aural comparison of the trademarks.

60. The invoked trademark consists of a single word element, composed of 3 letters which the consumer may pronounce in 1 syllable [SIC]. Considering that the invoked trademark is composed of only 3 letters and does not have a conceptual meaning, part of the relevant public may perceive the trademark as an acronym and thus pronounce the individual letters of which it is composed.

61. Considering that the verbal element "IMPLANT" is, as previously held, (paragraph 53) descriptive for the goods covered, it will probably not be pronounced by the consumer.²¹ The dominant element of the contested trademark, the verbal element "SC" will most likely, due to how short it is and its lack of a vowel, be perceived by the relevant public as an acronym and thus have its individual letters spelled out and pronounced separately by the consumer.

62. The dominant elements of the trademarks concerned coincide in their first and last letter. For part of the consumers which will pronounce the trademarks as acronyms, the trademarks will thus coincide in the first and last syllable. For the part of the consumers which will pronounce the invoked trademark as a word composed of one syllable, the trademarks will have only a low level of similarity due to the fact that they both start with an S sound.

63. Thus, the Office considers the trademarks to be aurally similar at most to a certain degree.

Conclusion

64. The trademarks in question are visually and aurally similar to a certain degree and a conceptual comparison is irrelevant.

Comparison of the goods

65. In assessing the similarity of the goods and services concerned, account must be taken of all the relevant factors which characterise the relationship between them. 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.²²

¹⁹ General Court EU 17 March 2004, T-183/02 en T-184/02, ECLI:EU:T:2004:79, point 81 (Mundicor).

²⁰ General Court (EU) 21 April 2010, T-361/08, ECLI:EU:T:2010:152, point 58 (Thai Silk).

²¹ General Court (EU) 3 July 2013, T-206/12, ECLI:EU:T:2013:342, point 43 (LIBERTE).

²² CJEU 29 September 1998, C-39/97, ECLI:EU:C:1998:442, point 23 (Canon).

66. In comparing the goods and services, the goods and services shall be considered in the terms set out in the register in as far as genuine proof of use was provided, and not the actual or intended use.²³

67. The goods to be compared are the following:

Opposition based on:	Opposition directed against:
CI10 Dental apparatus and instruments, namely implants.	CI 10 Dental implants.

68. The goods "*Dental implants*" of the contested trademark are identical to the goods "*Dental apparatus and instruments, namely implants*" of the invoked trademark.

Conclusion

69. The goods covered by the trademark concerned are identical.

A.3 Global assessment

70. The global assessment must be made by reference to the average consumer, who is reasonably well-informed and reasonably observant and circumspect about the goods or services in question. However, account must be taken of the fact that the average consumer only rarely has the opportunity to make a direct comparison between the different trademarks but relies on the imperfect impression left upon him. It must also be borne in mind that the average consumer's level of attention may vary depending on the type of goods or services at issue.²⁴ In the present case, the goods in question concern dental implants, which are generally purchased by business customers with specific knowledge and expertise in the dental sector. Considering also the possible impact of the relevant goods on the health of the consumers or patients as well as the average price of these products, the Office considers the degree of attention of the relevant public to be high.

71. The greater the degree of distinctiveness of the earlier trademark, the greater the likelihood of confusion. Trademarks with a highly distinctive character, either by their nature or because of their reputation on the market, enjoy greater protection than trademarks with a weak distinctive character.²⁵ In the present case the invoked trademark has to be considered as having normal distinctiveness for the goods concerned as it does not describe the characteristics of the goods in question. Insofar as the opponent invokes enhanced distinctiveness, the Office finds that it is not necessary to discuss this argument, because it has no influence to the outcome of these proceedings.

72. The global assessment of the likelihood of confusion presupposes a certain coherence between the factors to be considered and, in particular, between the similarity of the conflicting signs and the goods or

²³ General Court (EU) 16 June 2010, T-487/08, ECLI:EU:T:2010:237, point 71 (Kremezin).

²⁴ CJEU 22 Juni 1999, C-342/97, ECLI:EU:C:1999:323, point 26 (Lloyd Schuhfabrik Meyer).

²⁵ CJEU 29 September 1998, C-39/97, ECLI:EU:C:1998:442, point 18 (Canon).

services to which they relate. Thus, a low degree of similarity between the goods or services in question may be offset by a high degree of similarity between the signs, and vice versa.²⁶

73. Based on the abovementioned circumstances, despite the higher level of attention of the relevant public, the Office finds that due to both the trademarks being similar to a certain degree, both visually and aurally, while a conceptual comparison is irrelevant, and since both trademarks cover identical goods, the relevant public might believe that said goods would come from the same undertaking or from economically-linked undertakings.

C. Conclusion

74. Based on the foregoing the Office is of the opinion that there exists a likelihood of confusion between both trademarks.

IV. DECISION

75. The opposition with number 2016512 is justified.

76. The Benelux application with number 1423571 will not be registered.

77. 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, 1 September 2022

François Châtellier
(*rapporteur*)

Pieter Veeze

Eline Schiebroek

Administrative officer: Rémy Kohlsaat

²⁶ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 59 and the case-law mentioned there. (Equivalenza)