



Benelux Office for
**Intellectual
Property**

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
OPPOSITION DECISION
N° 2016993
of 25 October 2022

Opponent: **BioSystems, S.A.**
Costa Brava 30
08030 Barcelona
Spain

Representative: **Chiever BV**
Barbara Strozzilaan 201
1083 HN Amsterdam
Netherlands

Invoked trademark 1: European Union trademark registration 17999384



Invoked trademark 2: European Union trademark registration 4424818



Invoked trademark 3: European Union trademark registration 18381828

BioSystems

human - centred biotech

against

Defendant: **FOx Biosystems NV**
Agoralaan Abis
3590 Diepenbeek
Belgium

Representative: **ARNOLD & SIEDSMA**

Meir 24 Bus 17
2000 Antwerpen
Belgium

Contested sign: **Benelux trademark application 1436359**

FOX BIOSYSTEMS

I. FACTS AND PROCEEDINGS

A. Facts

1. On 19 February 2021, the defendant filed a Benelux trademark application for the wordmark FOX BIOSYSTEMS for goods and services in the classes 1, 5, 7, 9, 10, 40, 41 and 42. This application was processed under the number 1436359 and was published on 25 March 2021.

2. On 21 May 2021, the opponent filed an opposition against the registration of the application. The opposition is based on the following earlier trademarks:

- European Union registration 17999384 of the combined word/figurative trademark



filed 13 December 2018 and registered on 16 May 2019 for goods in the classes 1, 5, 9 and 10;

- European Union registration 4424818 of the combined word/figurative trademark



filed on 3 June 2005 and registered on 12 June 2006 for goods in the classes 1, 5 and 10;

- European Union registration 18381828 of the combined word/figurative trademark

BioSystems

human - centred biotech

filed 25 January 2021 and registered on 12 June 2021 for goods in classes 1, 5, 9 and 10.

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

4. The opposition is directed against all goods and services covered by the contested application and is based on all goods covered by the trademarks 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. Proceedings

7. The opposition is admissible and was notified by the Benelux Office for Intellectual Property (hereinafter: "the Office") to the parties on 26 May 2021. The proceedings were suspended ex officio for the duration of the registration procedure of the third invoked trademark (EU 18381828). During the administrative phase of the proceedings both parties filed arguments and at the request of the defendant proof of use was submitted by the opponent. 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 2022.

II. LEGAL GROUNDS AND ARGUMENTS OF THE PARTIES

8. The opponent filed his 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 of the goods or services concerned.

A. Opponent's arguments

9. The opponent argues that the word element BioSystems in the trademarks invoked is fully comprised by the contested sign. The only minor difference is caused by the word "FOx" and the descriptive pay offs in small font, as well as a logo in the second trademark invoked. Thus, according to the opponent, from a visual point of view the contested sign is identical as it concerns the first part BIOSYSTEMS, and highly similar when considering the total impression of both the earlier trademarks and the contested sign.

10. Aurally, the dominant elements in the trademarks, namely BioSystems vs FOx BIOSYSTEMS, are identical as far as the verbal element 'BioSystems' respectively 'BIOSYSTEMS' is concerned. For this reason, the opponent states that the trademarks invoked and the contested sign should be regarded as highly similar from an aural point of view.

11. According to the opponent, the contested sign has no meaning and therefore cannot be compared from a conceptual point of view.

12. The opponent argues that it is obvious that the goods in class 1, 5, 9 and 10 are identical or highly similar and the services in classes 40, 41 and 42 overlap with the goods in class 1, 5, 9 and 10 covered by trademarks invoked. Furthermore, consumers will be likely to perceive that the goods and services of the contested sign originate from the opponent or that there is a direct commercial link between them.

13. With regard to the distinctive character of the signs, the opponent argues that verbal components of a combined word-device mark generally have a stronger impact on the consumer than the figurative component. In this case, it is apparent that the distinctive and dominant part of the earlier trademarks is the verbal element BioSystems. According to the opponent, given the short size and the small font of the letter x in the element 'FOx', the verbal element BIOSYSTEMS is also the most dominant verbal element in the contested sign. The opponent also states that the word BioSystems has no meaning in relation to the goods and services concerned from the perspective of the public in the relevant territory. Therefore, their distinctiveness must be seen as normal.

14. The opponent further argues that considering the goods and services it should be concluded that these are destined for the public at large with a normal, moderate level of attention.

15. The opponent concludes that there exists a likelihood of confusion and requests that the Office refuses the contested sign and orders the defendant to bear the costs of the proceedings.

16. At the request of the defendant, the opponent submitted proof of use.

B. Defendant's arguments

17. The defendant argues that the verbal element 'BioSystems' in the trademarks invoked should be considered descriptive in relation to all the goods and services concerned. As a whole, it will either be understood by the relevant public as 'any system of mutually interacting biological organisms' or divided into parts ('Bio' and 'Systems') referring to 'biological systems'. According to the defendant, the entire public in the Benelux will be able to understand this meaning as these words are considered basic English terms. Furthermore, the defendant states that the corresponding Dutch ('biologische systemen') and French ('systèmes biologiques') terms are closely related as well. As 'BioSystems' concerns a descriptive term, this element has a very low distinctive character and plays a minor role in the comparison between the signs concerned.

18. According to the defendant, the same applies to the descriptive elements 'Reagents & Instruments' and 'human – centred biotech' within the first and second trademarks invoked. These elements will not be perceived by the relevant public as part of the mark as the relevant public will not consider a descriptive element forming part of a mark as the distinctive and dominant element of the overall impression conveyed by that mark.

19. In addition, the defendant refers to a recent refusal decision of the European Union Intellectual Property Office (EUIPO), regarding the trademark 'BIOSYSTEMS', filed by the opponent.

20. The defendant argues that the trademarks invoked consist almost entirely of descriptive elements, whereas the contested sign starts with the dominant and distinctive element 'FOx'. This element has no meaning for the relevant public in relation to the goods and services applied for and is, hence, very distinctive. According to the defendant, the dominance of element 'FOx' is further emphasized by the red colour.

21. With regard to the comparison of the signs, the defendant argues that the signs contain many visual differences including the dominant word element 'FOx' in the contested sign, as well as the different captions and figurative elements. Therefore, the signs are visually dissimilar. Furthermore, the pronunciation of the signs differ at the beginning due to the presence of the word 'Fox' in the contested sign. For this reason, the signs are also aurally dissimilar.

22. Conceptually, the defendant argues that due to the use of the capital letter S in the trademark invoked, the relevant public will split the word Biosystems into two different parts: Bio and Systems. The word 'Bio' is a common abbreviation of 'biological', which is an adjective indicating a relation to biology or living organisms. A 'system' is a set of things working together as parts of a mechanism or an interconnecting network. The word 'Reagents' refers to substances or mixtures for use in chemical analysis or in other reactions. The word 'Instruments' refers to a tool or implement especially one for precision work. Furthermore, the defendant explains that the caption 'human centred biotech' can be interpreted as biotechnology mainly focused on the humankind. In the contested sign, the element 'Fox' refers to an animal and the word biosystems will be perceived as described above.

23. The defendant argues that the conceptual similarity of the signs relates only to descriptive elements and that the distinctive element 'FOx' clearly has a different meaning than the trademarks invoked. For this reason, trademarks and sign are conceptually dissimilar.

24. In conclusion, the defendant states that the differences between the signs are sufficient to neutralize any points of similarity. For this reason, the overall impression is different.

25. The defendant has requested proof of use of the second trademark invoked, which is subject to the use obligation. With regard to the proof of use submitted, the defendant argues that the evidence does not show that the trademark invoked has been genuinely used, because the documents i) either fall outside of the relevant period of time or are not dated at all, ii) do not show a connection with the trademark invoked or the relevant goods, iii) do not show use of the trademark in the relevant territory or iv) only show use of a tradename and not a trademark.

26. According to the defendant, a part of the goods in class 1 of the contested sign is not similar to the goods in class 1 of the trademarks invoked, because the goods of the opponent mainly concern chemical substances and reagents and therefore differ in nature and purpose with antibodies, plasmids, enzymes, enzyme stabilizers, buffers, interferon, nucleotides and polynucleotides. Also, a part of the goods in class 9 that refer to computer software and programs are not similar to the goods in class 9 of the trademarks invoked. Furthermore, the defendant states that the goods in class 7 and services in classes 40, 41 and 42 are not similar to any of the goods of the trademarks invoked.

27. The defendant states that the degree of attention of the relevant public should be considered high, because the goods concerned are highly specialized medical products addressed to professionals with expertise in the scientific and medical fields, including chemistry, diagnostics and laboratory analysis. For this reason, and taking into account that the similarity between the signs relates to the word 'BIOSYSTEMS', which is considered of very low distinctiveness, as well as the presence of the very distinctive element 'FOX' at the beginning of the contested sign, the defendant argues that there is no likelihood of confusion.

28. The defendant requests that the Office rejects the opposition, registers the contested sign, and decides that the opponent should bear the costs.

III. DECISION

A. Likelihood of confusion

29. 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.

30. 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 of confusion on the part of the public; the likelihood of confusion includes the likelihood of association with the earlier trademark.*"¹

31. 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.²

¹ Art. 2.2ter (1)(b) BCIP 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.

² CJEU 11 June 2020, C-115/19 P, ECLI:EU:C:2020:469, point 54 (China Construction Bank).

32. 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.³



Comparison of the signs

33. 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.⁴

34. 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.⁵ 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.⁶

35. 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.

36. The signs to be compared are the following:

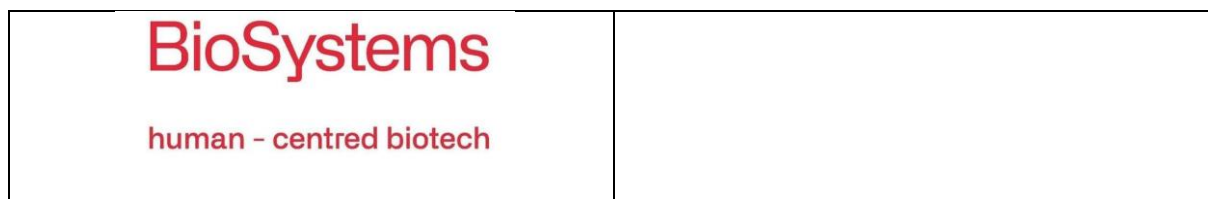
Opposition based on:	Opposition directed against:
 	<p style="text-align: center;">FOx BIOSYSTEMS</p>

³ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 57 (Equivalenza) and the case-law mentioned there.

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

⁵ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 71 and the case-law mentioned there (Equivalenza).

⁶ 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).



37. The trademarks invoked are combined word/figurative marks. The first trademark invoked contains the word element 'BioSystems' depicted in red letters. To the left there is an abstract figurative element of a grey sphere in which two white interlocked circles and a smaller white sphere are depicted. The second trademark invoked consists of the word element 'BioSystems', depicted in large white letters which are placed in a red rectangle, and the caption 'REAGENTS & INSTRUMENTS', depicted in smaller white letters which are placed in a black rectangle. The third trademark invoked consists of the word element 'BioSystems' depicted in red letters of which the descender of the letter 'y' ends at a 90-degree angle, and the caption 'human - centred biotech', depicted in smaller red letters.

38. The contested sign is a purely verbal mark that contains the words 'FOx' and 'BIOSYSTEMS' of which all the letters are capitals except for the letter 'x'.

Conceptual comparison

39. The relevant public is used to breaking down a verbal sign into word elements which suggest a specific meaning or which resemble words known to it, as confirmed by settled case-law.⁷ Therefore, the Office finds that it is likely that the public will split the words BioSystems and BIOSYSTEMS into two different parts: Bio and Systems. The word 'Bio' is a common abbreviation of 'biological', which is an adjective indicating a relation to biology or living organisms.⁸ A system is a set of ideas or theories working together or pieces of equipment that are connected or work together.⁹ These words are likely to be understood by the public in the Benelux either because they are commonly used English words, and also due to the similarity with the equivalents of the words 'bio' and 'systems' in Dutch and French. The combination will be perceived as an abbreviation of 'biological systems'. Taking into consideration that the relevant goods relate to chemical and biological preparations, as well as scientific and medical apparatus and instruments, this element is descriptive for these goods and therefore the distinctive character of this element is low.

40. The captions 'REAGENTS & INSTRUMENTS' and 'human - centred biotech' in the trademarks invoked also refer to either the nature, quality or intended purpose of the goods and services concerned.

41. 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.¹⁰ As a result, the Office is of the opinion that the relevant public will perceive the element "FOx", which will be understood by the public as the name of a wild animal and is distinctive for the goods and services concerned, as the dominant element of the contested sign. The trademarks invoked do not contain any conceptual reference to a fox.

42. The trademarks invoked as well as the contested sign contain the conceptually identical word 'biosystems' which is descriptive and is therefore of less importance. In addition, the additional word

⁷ General Court (EU) 13 February 2007, T-256/04, ECLI:EU:T:2007:46, point 57 (Respicur) and General Court (EU) 3 October 2019, T-500/18, ECLI:EU:T:2019:721, point 29 and the case-law mentioned there (GINMG).

⁸ <https://www.oxfordlearnersdictionaries.com/definition/english/biological>

⁹ <https://www.oxfordlearnersdictionaries.com/definition/english/system>

¹⁰ General Court (EU) 3 July 2003, T-129/01, ECLI:EU:T:2003:184, point 53 (Budmen).

element 'FOX' at the beginning of the contested sign causes a notable difference with the trademarks invoked. Therefore, the Office finds that the signs are conceptually similar to a low degree.

Visual comparison

43. 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.¹¹ In this case, the figurative elements mostly concern decoration and simple stylization, except for the image in the first trademark invoked which will not go unnoticed to the average customer, due to its position and size.

44. The visual similarity between the trademarks invoked and the contested sign concerns the identical word 'biosystems'. However, the distinctive character of this element is low. Furthermore, the contested sign starts with the distinctive word 'FOX', which is a striking visual difference between the signs. According to established caselaw, the consumer normally attaches more importance to the first part of a sign.¹² Trademarks and sign also differ with regard to the captions, although the Office finds that the public will generally not pay much attention to this.

45. Taking into account all these factors, the Office finds that the signs are visually similar to a low degree.

Phonetic comparison

46. 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.¹³

47. The pronunciation of the signs coincides in the verbal element 'BIOSYSTEMS', present identically in both signs. Irrespective of the descriptive nature, the Office finds that the captions present in the trademarks invoked will not be pronounced by the consumer due to the position, size and length, and also because the average consumer will tend to abbreviate the sign.

48. The pronunciation differs in the sound of the first verbal element, 'FOX', of the contested sign, which has no counterpart in the trademarks invoked.

49. Taking into account that the signs are aurally different in the beginning and that the aural similarity lies within a descriptive element, the Office finds that the signs are aurally similar to a low degree.

Conclusion

50. The trademarks invoked and the contested sign are conceptually, visually and aurally similar to a low degree.

¹¹ General Court (EU) 9 November 2016, T-290/15, ECLI:EU:T:2016:651, point 36 and the case-law mentioned there (Smarter Travel).

¹² General Court EU 17 March 2004, T-183/02 en T-184/02, ECLI:EU:T:2004:79, point 81 (Mundicor).

¹³ General Court (EU) 21 April 2010, T-361/08, ECLI:EU:T:2010:152, point 58 (Thai Silk).

51. Since there is a low degree of similarity between the signs, an overall assessment of the likelihood of confusion in the light of the other relevant factors must be carried out.¹⁴

Comparison of the goods and services

52. 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.¹⁵

53. 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.¹⁶

54. In comparing the goods and services, the goods and services shall be considered in the terms set out in the register and not the actual or intended use.¹⁷

55. The goods to be compared are the following:

Opposition based on:	Opposition directed against:
(EU 4424818) Cl 1 Chemicals used in industry, science and photography, as well as in agriculture, horticulture and forestry; unprocessed artificial resins, unprocessed plastics; manures; fire extinguishing compositions; tempering and soldering preparations; chemical substances for preserving foodstuffs; tanning substances; adhesives used in industry; chemical reagents (other than for medical or veterinary purposes); chemical substances for analyses in laboratories (not for medical or veterinary purposes); bases (chemical preparations); diagnostic preparations (not for medical or veterinary purposes).	Cl 1 Chemical products, biochemical products and biological preparations; Antibodies, plasmids, enzymes, enzyme stabilizers, buffers, interferon, nucleotides and polynucleotides for use on reagent control strips or on reagent control fibres for medical, biological, bacteriological, food, agricultural and chemical research; Antibodies, plasmids, enzymes, enzyme stabilizers, buffers, interferon, nucleotides and polynucleotides for scientific use including forensics, for medical research use or for scientific research services in biology, bacteriology, chemistry and medicine.
(EU 17999384 and EU 18381828) Cl 1 Chemicals used in industry, science and photography, as well as in agriculture, horticulture and forestry; Synthetic resins, unprocessed; Unprocessed plastics; Compositions for extinguishing and preventing fires; Tempering preparations; Soldering preparations; Substances for tanning animal	

¹⁴ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 60 and the case-law mentioned there (Equivalenza).

¹⁵ CJEU 29 September 1998, C-39/97, ECLI:EU:C:1998:442, point 23 (Canon).

¹⁶ General Court (EU) 24 September 2008, T-116/06, ECLI:EU:T:2008:399, point 52 (O STORE).

¹⁷ General Court (EU) 16 June 2010, T-487/08, ECLI:EU:T:2010:237, point 71 (Kremezin).

<p>skins and hides; Adhesives used in industry; Putties and other paste fillers; Compost, manures, fertilizers; Biological preparations for use in industry and science; Chemical substances for preserving foodstuffs; Chemical reagents, other than for medical or veterinary purposes; Chemical substances for analyses in laboratories, other than for medical or veterinary purposes; Bases [chemical preparations]; Diagnostic preparations, other than for medical or veterinary purposes.</p>	
<p>(EU 4424818) CI 5 Pharmaceutical, veterinary and sanitary preparations; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides; chemical reagents for medical or veterinary purposes; chemical preparations for medical or veterinary purposes; reagents for clinical analyses.</p> <p>(EU 17999384 and EU 18381828) CI 5 Pharmaceuticals; Veterinary preparations and substances; Sanitary preparations for medical purposes; Dietetic substances adapted for medical use; Baby food; Plasters, materials for dressings; Teeth filling material; Dental etching materials; Disinfectants; Preparations for destroying vermin; Herbicides; Fungicides; Chemical reagents for medical or veterinary purposes; Chemical preparations for medical purposes; Chemical preparations for veterinary purposes; Reagents for analytical purposes [for veterinary purposes]; Reagents for analytical purposes [for medical purposes].</p>	<p>CI 5 Diagnostic preparations for medical purpose; Diagnostic preparations for clinical laboratory use, medical laboratory use, and medical research use; Diagnostic preparations; Preparations of microbial extracts, assays, genes, proteins and enzymes for clinical or medical laboratory use; Biological and biochemical reagents for clinical diagnostic use; Diagnostic medical reagents for medical use in diagnosing inflammatory, infectious, central nervous system, cardiovascular, neurological, endocrine, autoimmune and genetic diseases and cancer, comprised of reagents, processing chemicals, slides, patches, and solid matrix materials; Medical diagnostic test kits for detecting pathogens in the environment.</p>
	<p>CI 7 Robots for preparing biological and biochemical reagents; Robots for preparing biological and biochemical reagents for research and commercial use; Robots for preparing diagnostic reagents for scientific use including forensics; Robots for preparing diagnostic test kits for scientific use; Agitators, mixers or mixing machines for mixing biological and biochemical reagents; Rinsing machines for biological and biochemical reagents.</p>

<p>(EU 17999384 and EU 18381828) CI 9 Testing apparatus not for medical purposes; Scientific apparatus and instruments; Microscopes.</p>	<p>CI 9 Diagnostic apparatus for food analysis, biological research and scientific research in a bacteriology, chemistry, agriculture, food and medicine laboratory; probes for scientific research purpose bacteriology, chemistry, agriculture, food and medicine laboratory; Instruments for testing, processing or detecting biological samples; computer software for use in analysing and managing biological data; Computer programs for use in spectral analysis; computer programs for use in controlling affinity capture optical biosensors; Computer programs for use in analysis chromatograms; Computer programs for use in protein analysis and spectral processing; Computer programs for use in analysing, managing and visualising nucleic acid and amino acid sequences; laboratory equipment, namely apparatus for screening samples, detecting the presence of analytes in samples and identifying sample types, together with measuring patterns and equipment for making molecular arrays and parts therefor.</p>
<p>(EU 4424818) CI 10 Surgical, medical, dental and veterinary apparatus and instruments, artificial limbs, eyes and teeth; orthopedic articles; suture materials; analysis devices, diagnostic apparatus for medical purposes; testing apparatus for medical purposes.</p> <p>(EU 17999384 and EU 18381828) Veterinary apparatus and instruments; Surgical apparatus and instruments; Dental apparatus and instruments; Medical apparatus and instruments; Artificial limbs; Artificial teeth; Artificial eyes; Orthopedic articles; Suture materials; Devices for analysis; Diagnostic apparatus for medical purposes; Analysers for medical use.</p>	<p>CI 10 Medical apparatus and instruments; Electrochemical sensors and scales for preparation and measurement of biological analyte concentrations in fluids for medical purposes; Electrochemical or optical sensors and scales for medical analysis and diagnosis of biological analyte concentrations in fluids; Electrochemical or optical sensors and scales for preparation and measurement of analytes in biological samples for medical purposes; Apparatus for use in medical and veterinary analysis; testing apparatus for medical and veterinary purposes; blood testing apparatus and diagnostic apparatus for medical and veterinary purposes; test kits and accessories for medical and veterinary diagnoses, comprising diagnostic compositions for microbiological, endocrinological and immunological tests for medical and veterinary or clinical use.</p>
	<p>CI 40 Material treatment services relating to apparatus, machines and instruments used in medical and veterinary analysis or used in testing of preparations for medical, food, agricultural and veterinary diagnostic purposes.</p>
	<p>CI 41 Education, providing of training; providing courses, training and instruction in the use of biological and biochemical preparations for analyses or</p>

	diagnosis; providing courses, training and instruction in the use of instruments for testing, processing or detecting biological samples.
	CI 42 Industrial analysis and research services in the fields of biology, bacteriology, chemistry and medicine; Scientific research and scientific research services in biology, bacteriology, chemistry, agriculture, food and medicine, such as biological research services, materials testing services and quality control services for biomarker discovery, biomarker validation and development and testing of preparations and apparatus for medical, food, agricultural and veterinary diagnostic purposes; research and development services relating to industry; research and development services relating to biochemistry and biotechnology; research and development services relating to products and tools to be used in biotechnical research or in biochemical research; laboratory research services in the field of molecular biology, namely nucleic acid synthesis and analysis, gene identification, gene cloning, gene expression, gene mapping, electrophoresis, protein purification and analysis, and protein interaction detection; research and development services for others in the fields of diagnostic chemicals, forensics, compounds and devices, measuring apparatus for use in product research and development, separation and purification processes, environmental testing processes and industrial quality control processes; chemical screening analysis and diagnostic, forensic and genetic medical testing services for others; analysis services for feed, food, agriculture, horticulture and forestry; analysis services for pharmacy; chemical analysis services related to the medical treatment of humans or animals.

56. In the present case at least part of the goods for which the contested sign has been applied in the classes 1, 5, 9 and 10 are identical or similar to goods of the trademarks invoked, which has also not been disputed by the defendant (see paragraph 26).

57. For reasons of procedural economy, the Office will not undertake a full comparison of the goods and services listed above, but will proceed with the global assessment.

Global assessment

58. 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.¹⁸ In the present case, the Office agrees with the defendant (see paragraph 27) that the goods and services are directed to a specialised public with specific professional knowledge or expertise in the scientific and medical fields, including chemistry and diagnostics. Taking into account the fact that these goods and services are, for the most part, intended for laboratory use and may be quite complex and advanced, the public's degree of attention is considered higher than average.

59. The higher 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.¹⁹ In this case, the Office finds that the distinctive character of the second and third trademarks invoked is low, due to the reasons mentioned above (see paragraphs 39 and 40). The first trademark invoked has a normal distinctiveness, due to the presence of the abstract figurative element. The opponent has not claimed any acquired distinctiveness for the trademarks invoked.

60. 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 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.²⁰

61. In this case, the signs are visually, aurally and conceptually similar to a low degree. The similarities between the trademarks invoked and the contested sign only lie within a descriptive element. The Office considers that a weak distinctive character does not, by definition, mean that there is no likelihood of confusion.²¹ However, the Office also takes into account that the first part of the contested sign 'FOx' is a distinctive term, which is not present in the invoked trademarks. This notable difference combined with the higher level of attention of the specialist public for the goods and services concerned is sufficient to conclude that the relevant public would not assume that the identical or similar goods and services bearing the disputed sign originate from the same or from economically-linked undertakings.

62. Therefore, in the light of the foregoing, the Office considers that there will be no likelihood of confusion even if the goods and services are identical.

B. Conclusion

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

64. Since there is no risk of confusion, it is not necessary to examine the proof of use regarding the second trademark invoked.

IV. CONSEQUENCE

65. The opposition with number 2016993 will be rejected.

¹⁸ CJEU 22 Juni 1999, C-342/97, ECLI:EU:C:1999:323, point 26 (Lloyd Schuhfabrik Meyer).

¹⁹ CJEU 29 September 1998, C-39/97, ECLI:EU:C:1998:442, point 18 (Canon).

²⁰ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 59 and the case-law mentioned there. (Equivalenza)

²¹ CJEU 15 January 2010, C-579/08, ECLI:EU:T:2008:444, point 68 (Ferromix).

66. The Benelux application with number 1436359 will be registered for all the goods and services for which it has been applied.

67. The opponent shall pay the defendant 1,045 euros in accordance with article 2.16, 5 BCIP in conjunction with rule 1.28, 3 IR, as the opposition is not justified. This decision constitutes an enforceable order pursuant to article 2.16, 5 BCIP.

The Hague, 25 October 2022



Eline Schiebroek
(rapporteur)

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