

BENELUX OFFICE FOR INTELLECTUAL PROPERTY
OPPOSITION DECISION
N° 2017218
of 6 September 2022

Opponent: **Financière Batteur SAS**
Avenue du Général de Gaulle
14200 HEROUVILLE SAINT-CLAIR
France

Representative: **Dennemeyer & Associates SA**
rue des Bruyères 55
1274 Howald
Luxembourg

Invoked trademark: **International trademark registration 1344723**

BLUE DOSE

against

Defendant: **The Seaweed Company BV**
Lange Haven
3111 CK Schiedam
Netherlands

Joost J.H. Wouters
Lange Haven
3111 CK Schiedam
Netherlands

Representative: -

Contested sign: **Benelux application 1442073**

Blue Health

I. FACTS AND PROCEEDINGS

A. Facts

1. On 4 May 2021 the defendant filed a Benelux application for the wordmark Blue Health for goods in classes 5 and 31. This application was processed under the number 1442073 and was published on 10 June 2021.
2. On 2 August 2021 the opponent filed an opposition against the registration of the application. The opposition is based on the International trademark registration 1344723 designating the European Union of the wordmark "BLUE DOSE", filed and registered on 1 December 2016 for goods in class 5 and with a priority date of 22 July 2016.
3. According to the register the opponent is the actual holder of the trademark invoked.
4. The opposition is directed against all the goods covered by the contested application and is based on all 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 3 August 2021. 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 24 January 2022.

II. LEGAL GROUNDS AND ARGUMENTS OF THE PARTIES

8. The opponent filed an opposition at the Office under article 2.14, 2 (a) BCIP, in accordance with the provisions of article 2.2ter, 1 (b) BCIP: the likelihood of confusion based on the identity or similarity of trademark and sign and of the goods or services concerned.

A. Opponent's arguments

9. The opponent starts by defining the relevant public. This concerns the public in the Benelux and as the goods in question are directed at the public at large and at specialized customers with specific professional knowledge or expertise, the degree of attention may vary from average to high, depending on the specialized nature of the goods, the effect on consumers' health, the frequency of purchase and their price.
10. In relation to the comparison of the goods and services, the opponent notes that all the contested goods in class 5 are food and dietary supplements. They are identical to the opponent's respective "food supplements for medical use" either because they are identically contained in both lists (including synonyms) or because the opponent's goods include or overlap the contested goods.

11. The contested goods "seaweed for human or animal consumption" are algae- based foodstuff. These contested goods, commonly used in the preparation of a meal, are considered to have beneficial properties for one's health. Therefore, these goods are similar to the earlier goods "food supplements", in the sense that they have the same purpose, they may be in competition or be complementary and are provided by the same undertakings.

12. Furthermore, the contested goods are also considered as similar to the "spirulina-based food supplements" covered by the earlier registration. Both goods are composed of "algae". Indeed, "spirulina" is a type of algae and "seaweed" is the generic name for various types of underwater algae. Therefore, the goods are similar in nature, and they are targeted at the same public. Moreover, they can be produced by the same companies and sold through the same business channels. Therefore, they are highly similar.

13. In relation to the comparison of the signs, the opponent finds as follows. Visually, the signs in comparison share the exact same structure and are composed of two verbal elements with almost the same number of letters. The marks are similar to the extent that they coincide in their initial, identical and distinctive term BLUE. The signs only differ in the second element DOSE for the earlier registration and HEALTH for the contested sign, however its impact on the relevant public will be limited because it is less distinctive and occupies a secondary position within the contested sign. The same reasoning applies to the aural comparison. Hence, the signs are similar on an aural level as well.

14. The signs at hand are also conceptually similar, as the relevant public will certainly understand the term "BLUE" as an indication of the color blue, and they will also perceive the word "dose" and "health" as related to pharmaceuticals, health and well-being. Therefore, the signs at issue are conceptually similar not only due to their initial part "BLUE" but also due to the similar concepts conveyed in their final parts, with the consequence that they have the same overall conceptual structure.

15. In relation to the distinctiveness of the trademark invoked, the opponent argues that it should be considered as having a normal to high distinctive character in relation with the food supplements in class 5. Indeed, even if BLUE and DOSE are understood by the relevant public, taking as a whole, they have no meaning and no connection in relation with the designated goods. The fact that blue is a 'generic color' does not necessarily imply that it is non-distinctive in relation to any product. The opponent also refers to a decision of the Boards of Appeal of the EUIPO, in which is stated that the word 'BLUE' has no descriptive or otherwise weak character in relation to the goods at issue, as in principle the color is not a relevant characteristic of pharmaceuticals/medicines.

16. There is a high risk of association between the signs at hand, in that sense that they both consist of two words, with in first position the dominant and distinctive word BLUE and in second position a word less distinctive referring to the same idea and concept. The average customer will automatically, and wrongly, believe that the goods are commercialized by the owner of the earlier registration. This even for the relevant public with a high level of attention, as the public only rarely has the chance to make a direct comparison between the different marks but must place his or her trust in the imperfect picture of them that he or she has kept in his or her mind.

17. 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 and not to register the contested trademark.

B. Defendant's arguments

18. The defendant starts his arguments with an introduction of his company. Defendant is an impact-driven company that cultivates different seaweed species all over the globe and develops seaweed-based

products for the health & wellbeing of soils, plants, animals and humans. The market development takes place under two concepts: 1) Blue Farming (using the strength of the sea to accelerate the transition to sustainable farming) and 2) Blue Health (seaweed-based products to strengthen human health & wellbeing and support the transition to a more sustainable plant-based diet).

19. The defendant notes to be willing to limit its application to only the following goods in class 5: "health food supplements made principally of seaweed," in the hope the opponent will withdraw the opposition. The defendant does however state the following in relation to the goods in class 31: To contest the goods in Class 31 (seaweed for human or animal consumption), the opponent uses a 'sophism', arguing that both spirulina and seaweed are algae, and therefore similar in nature. Although both main ingredients are part of the family of algae, spirulina is a one-celled organism, also referred to as micro-algae, where seaweed is a multi-celled organism, referred to as macro-algae. From a perspective of phycology and bio-active ingredients as much of a relevant similarity as the fact that both spirulina and seaweed start with the letter 's'. Apart from that, 'consumption' refers to the activity of fulfilling one's nutritional needs through eating food. Supplements on the other hand serve a different need. Clearly, the goods as described in Class 31 (seaweed for human or animal consumption) are therefore dissimilar to opponent's goods in Class 5, including 'spirulina-based supplements'.

20. Regarding the comparison of the signs, the defendant argues that the signs at hand are clearly distinct from a visual perspective. Although the parts 'BLUE' and 'Blue' are the same, the elements 'DOSE' and 'Health' have nothing in common and marks must be compared as a whole. From an aural perspective, although the parts 'BLUE' and 'Blue' sound similar, the pronunciation of the respective two signs as a whole has no similarity.

21. The word "Blue" in BLUE DOSE refers to the color of the product which can be offered or taken in a dose. "Blue" in Blue Health refers to the sea, the origin of the ingredients which contribute to the consumer's health and wellbeing. This in line with a concept such as "Blue Economy" (economic activities in marine environments). Therefore, also from a conceptual perspective there are no similarities between the two signs which as a whole convey very different concepts.

22. Regarding the distinctive and dominant elements, the defendant states that the word "blue" is either descriptive (in BLUE DOSE) or allusive (in Blue Health), and therefore not distinctive and dominant as suggested by the opponent. In the case of Blue Health, the word Blue is an association to the sea, the origin of the seaweed. In the case of BLUE DOSE, the word Blue is a weak distinctive or even purely descriptive element, since it refers to the natural colour of the ingredient (spirulina) of the products in question, as supported as well by the following information on the opponent's website: "*A noble element of spirulina, this intense natural blue phytonutrient gives its emerald-green colour to spirulina*" as well as "*BLUE DOSE is sugar-free, without artificial colouring, naturally blue.*"

23. Apart from the fact that "Blue" is not the most distinctive and dominant element of the signs, it is the combination of the words that needs to be taken into consideration. From this perspective BLUE DOSE and Blue Health have two distinctive meanings, namely: BLUE DOSE: 'a blue measured quantity of a therapeutic agent to be taken at one time' (this mark as whole being very weak, if not descriptive) and Blue Health: 'the blue condition of being well or free from disease' (this mark as whole, in the absence of a clear and direct meaning being distinctive).

24. Considering the foregoing, the defendant finds that no risk of confusion for consumers exists between the trademarks. Thus, he asks the Office to register the contested trademark.

III. DECISION

A Likelihood of confusion

25. 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.

26. 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

27. 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

Comparison of the signs

28. 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.³

29. Although the comparison must be based on the overall impression that the signs leave in the memory of the relevant public, it must nevertheless be made in the light of the intrinsic qualities of the conflicting signs.⁴ It is not necessary to disregard descriptive elements in order to determine the degree of similarity. The fact that an element is descriptive is not sufficient for it to be ignored in the comparison between the earlier trademark and the contested sign. A descriptive element can be dominant in the overall appearance of a trademark. In general, however, the public will not regard a descriptive element as the distinctive and dominant element in the overall impression created by that sign or trademark.⁵

30. In summary, as regards the visual, phonetic and conceptual similarity of the signs, the assessment of the similarity of the signs must be based on the overall impression given by the signs, taking into account, in particular, their distinctive and dominant components.

31. The signs to be compared are the following:

¹ 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.

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

³ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 58 and the case-law mentioned there (Equivalenza).

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

⁵ Benelux Court of Justice 15 June 2022, C 2021/8, A2, point 25 and the case-law mentioned there.

Opposition based on:	Opposition directed against:
BLUE DOSE	Blue Health

Visual comparison

32. Both the trademark invoked, and the contested sign are wordmarks. For this reason, it should be noted that for the visual comparison of these signs, it is in principle irrelevant that the trademark relied upon is presented in capital letters and the disputed sign in uppercase and lowercase letters.⁶

33. The beginning of the signs ("BLUE") is identical, which is of particular importance given the fact that the consumer usually attaches more importance to the first part of a sign.⁷ The second parts of the signs – "dose" versus "health" – are both of a descriptive nature in relation to the goods at hand, as these goods relate to health, for which a certain "dose" needs to be taken in order to maintain one's health. Generally speaking, the public will not consider a descriptive element of a combined mark to be the distinctive and dominant element of the overall impression created by that mark.⁸

34. In light of the aforementioned, the signs at hand are identical in relation to the more distinctive and dominant element "BLUE", whereas they differ in relation to those elements not of a distinctive and dominant nature. Therefore, the Office finds the signs at hand to be visually similar.

Aural comparison

35. Both the trademark invoked, and the contested sign consist of two words (both words consisting of one syllable) with the first word being identical. This is of particular importance given the fact that the consumer usually attaches more importance to the first part of a sign.⁹ In relation to the second part of the signs involved, these are – as discussed in point 32 – of a descriptive nature, therewith not being distinctive or dominant elements.

36. In light of the aforementioned, the signs at hand are identical in relation to the more distinctive and dominant element "BLUE", whereas they differ in relation to those elements not of a distinctive and dominant nature. Therefore, the Office finds the signs at hand to be aurally similar.

Conceptual comparison

37. The trademark invoked will be found to mean "a dosage of a blue nature" or "a dose of blue", whereas the contested sign will be found to mean "health of a blue nature" or "health by blue means". Both signs will therefore be perceived to relate to a concept relating to goods relating to one's health, being of a blue nature.

⁶ ECG 31 January 2013, T-66/11, ECLI:EU:T:2013:48, point 57 (Babilu).

⁷ EGC 17 March 2004, T-183/02 and T-184/02, ECLI:EU:T:2004:79, point 81 (Mundicor).

⁸ EGC 3 July 2003, T-129/01, ECLI:EU:T:2003:184 (Budmen).

⁹ EGC 17 March 2004, T-183/02 and T-184/02, ECLI:EU:T:2004:79, point 81 (Mundicor).

38. In light of the aforementioned, both signs share the concept of being related to one's health, of a blue nature, therewith being conceptually similar to a certain degree.

Conclusion

39. The trademarks in question are visually and aurally similar, and conceptually similar to a certain degree.

Comparison of the goods

40. 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.¹⁰

41. In comparing the goods, the goods shall be considered in the terms set out in the register, and not the actual or intended use.¹¹ Although the defendant has noted to be willing to limit the application to only the goods in class 5, said willingness is not seen by the Office as an unconditional request to limit the goods of the contested sign, as the defendant only seems to suggest said limitation in the hope that the opponent would withdraw the opposition, which has however not been the case. Therefore, the Office will take all goods for which the contested sign has been filed into consideration.

42. The goods to be compared are the following:

Opposition based on:	Opposition directed against:
Cl 5 Food supplements for medical use, food supplements for non-medical use; spirulina-based food supplements.	Cl 5 Health food supplements made principally of seaweed.
	Cl 31 Seaweed for human or animal consumption.

The goods in class 5

43. The contested goods in class 5 are health food supplements, which are a species of the broader "food supplements for non-medical use" for which the trademark invoked is registered and therefore the goods covered by both trademarks in class 5 are identical.

¹⁰ CJEU 29 September 1998, C-39/97, ECLI:EU:C:1998:442, point 23 (Canon).

¹¹ General Court (EU) 16 June 2010, T-487/08, ECLI:EU:T:2010:237, point 71 (Kremezin).

The goods in class 31

44. The contested goods "seaweed for human or animal consumption" in class 31 will in almost all cases be used by the relevant public to become and/or remain healthy and/or for their pet to become and/or remain healthy. These goods therefore serve (at least partly) the same purpose as the "food supplements for non-medical use" from the trademark invoked (improving one's health or that of their pet), while they also can be distributed and sold via the same outlets (speciality shops aimed at health and wellbeing) and are usually aimed at the same public (those consumers actively pertaining a healthy lifestyle). In light of the foregoing, the Office concludes that the goods in class 31 of the contested sign are similar to a certain extent to the "food supplements for non-medical use" of the trademark invoked.

Conclusion

45. The goods of the contested sign in class 5 are identical to the goods covered by the trademark invoked, whereas the goods in class 31 of the contested sign are similar to a certain extent to the goods in class 5 of the trademark invoked.

A.3 Global assessment

46. 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.¹² In the present case, the goods and services in question concern medical products 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.¹³ Therefore, the Office is assuming an increased level of attention.

47. The more distinctive the earlier trademark, the greater the likelihood of confusion. Trademarks 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.¹⁴ The defendant claims that the trademark invoked is descriptive since it refers to the natural color of the ingredient (spirulina) of the products in question. The Office however finds that the general public in the Benelux will not, without further examination, be aware of the fact that spirulina is in fact blue and even if that were to be the case, the color does not describe any relevant characteristic(s) of the goods at hand; the color is not any reason to purchase the goods at hand, that are purchased with the aim to improve and/or maintain one's health. Therefore, the Office finds that the trademark invoked does not describe a quality or characteristic of the goods involved and is therefore of a normal distinctive character. And even if the invoked trademark would be of a lesser distinctive character, it may still be held that there is a likelihood of confusion on account, in particular, of a similarity between the signs and between the goods.¹⁵

¹² CJEU 22 June 1999, C-342/97, ECLI:EU:C:1999:323, point 26 (Lloyd Schuhfabrik Meyer).

¹³ EGC 15 December 2010,, T-331/09, ECLI:EU:T:2010:520 (Tolposan) and EGC 15 Mrch 2012, T-288/08, ECLI:EU:T:2012:124 (Zydus).

¹⁴ CJEU 29 September 1998, C-39/97, ECLI:EU:C:1998:442, point 18 (Canon).

¹⁵ CJEU 8 November 2016, C-43/15, ECLI:EU:C:2016:837, point 63 (Kompressor).

48. The global assessment of the likelihood of confusion presupposes a certain coherence between the factors to be taken into account 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.¹⁶

49. 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, as well as conceptually, the relevant public might believe that the goods, those in class 5 being identical and those in class 31 being similar to a certain extent, would come from the same undertaking or from economically linked undertakings.

B. Conclusion

50. Based on the foregoing the Office is of the opinion that a likelihood of confusion exists in relation to the goods in class 5 as well as in relation to the goods in class 31 of the contested sign.

IV. DECISION

51. The opposition with number 2017218 is upheld.

52. Benelux application with number 1442073 will not be registered for any of the goods for which it has been filed.

53. 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, 6 September 2022

Camille Janssen
(*rapporteur*)

Pieter Veeze

Willy Neys

Administrative officer: Vincent Munier

¹⁶ CJEU 4 March 2020, C-328/18 P, ECLI:EU:C:2020:156, point 59 and the case-law mentioned there (Equivalenza)..