DECISION
of the Fourth Board of Appeal
of 10 November 2025

In case R 2187/2023-4

Bharat Biotech International Limited
Genome Valley, Turkapally, Shameerpet
500078 Hyderabad
India — Applicant / Appellant

represented by Durán - Corretjer, S.L.P., Còrsega, 329 (Pº de Gracia/Diagonal), 08037 Barcelona, Spain

v

Sanofi Pasteur
14, Espace Henry Vallée
69007 Lyon
France — Opponent / Defendant

represented by Casalonga Alicante, S.L., Plaza de los Luceros, 17 8º Oficinas, 03004 Alicante, Spain

APPEAL relating to Opposition Proceedings No B 3 142 878 (European Union trade mark application No 18 417 771)

THE FOURTH BOARD OF APPEAL

composed of N. Korjus (Chairperson), C. Govers (Rapporteur) and A. Kralik (Member)

Acting Registrar: K. Zajfert

gives the following

Decision

Summary of the facts

1 By an application filed on 5 March 2021, Bharat Biotech International Limited ('the applicant') sought to register the word mark

BCOVAXIN

('the contested sign') as a European Union trade mark ('EUTM') for the following goods:

Class 5: *Vaccines for human use.*

2 The application was published on 12 March 2021.

3 On 17 March 2021, Sanofi Pasteur Europe, predecessor in title of Sanofi Pasteur following total transfer registered on15 April 2025 ('the opponent'), filed an opposition against the registration of the published trade mark application for all the above goods ('the contested goods').

4 The grounds of opposition were those laid down in Article 8(1)(b) EUTMR.

5 The opposition was based on the EUTM No 8 176 158 for the word mark

COVAXIS

('the earlier mark'), filed on 24 March 2009, registered on 2 September 2009 and renewed until 24 March 2029 for the following goods:

Class 5: *Vaccines*.

6 On 28 July 2021, the applicant requested that the opponent submit proof that the earlier mark was put to genuine use in the European Union.

7 On 9 November 2021, within the time limit, the opponent submitted Annexes 1.1-1.5 as evidence of use.

8 On 12 April 2022, after expiry of the time limit, the opponent submitted additional evidence, namely New Annexes 1 to 5.

9 On 17 November 2022, the Office requested that the opponent submit a translation of part of the evidence (in particular, New Annexes 4 and 5) because these documents were not in the language of the proceedings. The opponent submitted a translation of the evidence of use within the time limit.

10 By decision of 18 September 2023 ('the contested decision'), the Opposition Division upheld the opposition for all the contested goods and rejected the contested sign. It ordered the applicant to bear the costs and gave, in particular, the following reasons for its decision:

Proof of use

- The opponent was required to prove that the earlier mark on which the opposition is based was put to genuine use in the European Union from 5 March 2016 to 4 March 2021, inclusive, in relation to the relevant goods: *vaccines* in Class 5.

- It is considered that the opponent submitted relevant indications or evidence within the time limit initially set by the Office and, therefore, the later evidence submitted on 12 April 2022 can be considered to be supplementary. The fact that the applicant disputed the initial evidence submitted by the opponent justifies the submission of additional evidence in reply to the objection. Therefore, it is decided to take into account the additional evidence.

- The applicant argues that the opponent did not submit translations of some of the evidence of use, in particular the invoices submitted as Annex 1.1 and New Annex 2, and that therefore this evidence cannot demonstrate whether the use was made for the relevant goods or for any other pharmaceutical product.

- However, as far as the invoices are concerned, in view of their self-explanatory character and the fact that the relevant parts of the documents were translated by the opponent (e.g. 'einzelpreis: unitary price', 'betrag: amount' or 'fertigspritze: pre-filled syringes'), it would be excessive to request a translation of the documents provided, which are easy to understand. Contrary to the applicant's claims, the goods to which the invoices refer can be clearly and sufficiently defined and identified by the remaining items of evidence, since the product description, product codes and dosage unit coincide. Therefore, there is no need to request a translation of the invoices submitted by the opponent.

- The applicant states that some of the evidence is undated (in particular, the marketing materials or the samples of the product packaging), or date from outside the relevant period (some of the invoices), and that some other documents (in particular the internal sales report) are not acceptable means of evidence because they come from the sphere of the owner. The applicant's arguments are based on an individual assessment of each item of evidence regarding all the relevant factors. However, when assessing genuine use, the evidence must be considered in its entirety. Even if some relevant factors are lacking in some items of evidence, the combination of all the relevant factors in all the items of evidence may still indicate genuine use.

Place and time of use

- The place and the time of use are satisfactorily proved, mainly because most of the documents, in particular the invoices and marketing materials, refer to the relevant period and sales to customers in the EU, in particular, in Germany. This can be inferred from the language of these documents (German), the currency mentioned (EUR) and the addresses located in that country.

- Even if the samples of the packaging are undated, images of products/product packaging may serve to show how the mark was used in relation to the relevant goods and to provide information regarding the type of goods the proprietor manufactures/markets, and therefore cannot be ignored in the evidence's overall evaluation.

– Regarding the duration of use, the items dated outside the relevant period (i.e. two invoices from the end of 2021) serve to strengthen the evidence submitted for the relevant period, by showing continuous use of the earlier mark.

Extent of use

– The number of units sold, and revenue shown in the sales report submitted as Annex 1.5 (and New Annex 3) for 2015-2021, although not significantly high, are not negligible (in particular for 2019 to 2021) considering that the goods concerned are not everyday consumer goods.

– The fact that this document was probably generated by the opponent and not by a third party does not mean that this information does not have any probative value at all. Although it is true that statements and information in relation to the sales figures coming from the sphere of the owner of the earlier mark are generally given less weight than independent evidence, because the perception of the party involved in the dispute may be more or less affected by personal interests in the matter, the final outcome depends on the overall assessment of the evidence in the particular case.

– The rest of the documents submitted, particularly the invoices, provide sufficient information concerning the commercial volume, the territorial scope, the duration, and the frequency of use. It is clear from these documents that, during the whole relevant period, the opponent was selling goods under its mark to clients located in different cities around Germany.

– It must also be noted that these are a selection of invoices. Indeed, the numbering of the invoices provided by the opponent is not consecutive, which demonstrates that other invoices were issued in between them. Consequently, it can be inferred that the submitted invoices are examples that indicate a larger volume of sales and support other sales information provided by the opponent.

– For the sake of completeness, the fact that the invoices were issued by Sanofi-Aventis Deutschland GmbH (rather than by the opponent itself, Sanofi Pasteur Europe) does not affect their probative value, nor materially affect the present assessment of genuine use. In this regard, use by companies economically related to the trade mark proprietor, such as members of the same group of companies (affiliates, subsidiaries, etc.) is similarly to be considered as authorised use. Therefore, it can be presumed that the evidence submitted by the opponent is an implicit indication that use of their mark was made with their consent and is thus deemed to constitute use by the opponent.

– Taking into account all these factors, the opponent has provided sufficient indications concerning the extent of use of the earlier mark.

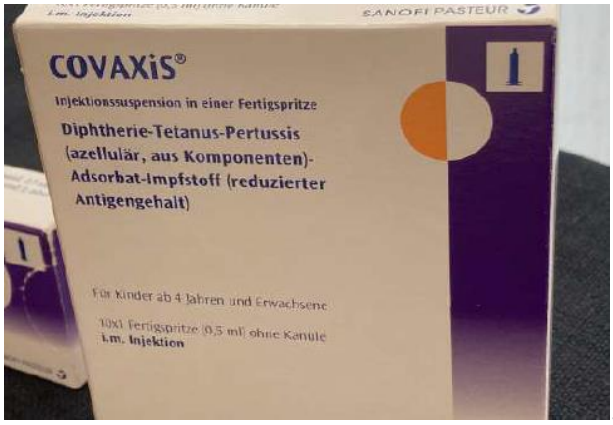
Nature of use

– The excerpt from the MRI Product Index and the marketing materials clearly identify ‘COVAXIS’ as a vaccine against tetanus, diphtheria and pertussis. These documents also establish the doses and quantities in which the product is marketed. The invoices submitted clearly show sales of goods under the mark ‘COVAXIS’. The fact that these goods correspond to the pharmaceutical product described above can be inferred from their description in the invoices:

Position	PZN	Menge/ME	Chargenbez.	Materialbezeichnung Verfalldatum	Einzelpreis
1	12590107			Covaxis ISU i d Fertigspritze 10St	

.

– As shown in the product sample submitted by the opponent, the ‘COVAXIS’ mark was also affixed to the box in which the goods at issue are sold, along with the mentioned dosage and number of syringes:

– 

.

– Therefore, the representation of the sign in question on, inter alia, the invoices and product packaging, constitutes direct evidence that the mark was used publicly and outwardly and with a view to ensuring an outlet for the goods that it represents. Moreover, the evidence does show use of the mark as it has been registered.

– Taking into account the evidence in its entirety, although the evidence submitted by the opponent is not particularly exhaustive, it does reach the minimum level necessary to establish genuine use of the earlier mark during the relevant period in the relevant territory in relation to the relevant goods: *vaccines* in Class 5.

Likelihood of confusion

– The contested *vaccines for human use* are included in the earlier mark’s broader category of *vaccines*. Therefore, they are identical.

– The goods found to be identical target the public at large and professionals in the medical sector, such as doctors and pharmacists. Indeed, even if vaccines are normally administrated by medical professionals, they can also be sold under medical prescription to individual patients by pharmacies and not only to healthcare professionals (30/06/2015, R 1154/2014-2, CINQAPAR, § 23-24). It is apparent from the case-law that, insofar as pharmaceutical preparations, whether or not issued on prescription, are concerned, the relevant public’s degree of attention is relatively high. Medical professionals have a high degree of attentiveness when prescribing medicines. Non-professionals also have a higher degree of attention, regardless of whether the pharmaceuticals are sold without prescription, as these goods affect their state of health.

– The relevant territory is the European Union.

- Bearing in mind the relevant goods, it cannot be excluded that part of the relevant public (e.g. those who understand English) may perceive the elements ‘VAXIS’ and ‘VAXIN’ in the earlier mark and the contested sign respectively (or simply ‘VAX’), as alluding to the term ‘vaccine’, and, therefore, they are considered weak in relation to the goods at issue.

- However, for the majority of the public in the relevant territory, both signs are meaningless single-word marks that will be perceived as a whole and have, therefore, a normal degree of distinctiveness.

- Despite the presence of a weak element for part of the English-speaking part of the public, the earlier mark as a whole has no meaning for any of the goods in question from the perspective of the public in the relevant territory, as stated above. Therefore, and taking into account that the opponent did not explicitly claim that its mark is particularly distinctive by virtue of intensive use or reputation, the distinctiveness of the earlier mark must be seen as normal.

- Visually and aurally, the signs coincide in all their letters and their pronunciation, with the exception of their last letters ‘S’ / ‘N’ and the first letter ‘B’ in the contested sign, which has no counterpart in the earlier mark. Despite the difference in their first and last letters, the signs coincide in the same structure, with the earlier mark almost entirely reproduced in the contested sign.

- Therefore, the marks are visually and aurally similar to an average degree.

- Conceptually, the signs are similar for the part of the public who will perceive the components ‘VAXIS / VAXIN’ within the signs and associate them with the concept of a ‘vaccine’. However, since this coinciding component is weak, its impact on the conceptual comparison of the signs is very limited. For the remaining part of the public in the relevant territory, neither of the signs has a meaning. Therefore, since a conceptual comparison is not possible, the conceptual aspect does not influence the assessment of the similarity of the signs.

- The applicant argues that there are several registrations including the letters ‘OVAXI’ in the EU or national registries, which allegedly coexist with the earlier mark. However, in the absence of convincing arguments and evidence, this applicant’s argument must be rejected as unfounded.

- The slight differences between the signs are not sufficient to reduce the likelihood of confusion, even for the part of the public who displays a higher degree of attention.

- Considering all the above, there is a likelihood of confusion on the part of the public.

11 On 30 October 2023, the applicant filed an appeal against the contested decision, requesting that the decision be entirely set aside. The corresponding statement of grounds of the appeal was received on the same day, along with Annexes 1-2.

12 In its response received on 19 December 2023, the opponent requested that the appeal be dismissed.

13 On 19 January 2024, the applicant requested that the Board authorise it to supplement the statement of grounds with a reply pursuant to Article 26(1) EUTMDR. On 23 January 2024, this request was granted.

14 On 13 February 2024, the applicant filed an application for revocation based on Article 58(1)(a) EUTMR against the earlier mark for all the designated goods. This proceeding was attributed the reference C 64 302.

15 On 22 February 2024, the applicant filed its reply.

16 On 23 February 2024, the applicant requested the suspension of the appeal proceedings until a final decision is issued in the revocation proceedings C 64 302.

17 On 14 March 2024, the opponent filed a rejoinder.

18 On 8 April 2024, the Registry of the Boards of Appeal ('the Registry') informed the parties that the appeal proceedings were suspended until there is a final decision in the revocation proceedings C 64 302.

19 By decision of 21 March 2025, the Cancellation Division partially upheld the application for revocation and revoked the earlier mark as from 13 February 2024 for some of the contested goods, namely:

Class 5: *Vaccines except those for human use*.

The earlier mark remained registered for all the remaining goods, namely:

Class 5: *Vaccines for human use*.

20 On 21 June 2025, this decision became final, and the present appeal proceedings were automatically resumed.

Submissions and arguments of the parties

21 The arguments raised in the applicant's statement of grounds may be summarised as follows:

Lack of proof of genuine use of the earlier mark

– Proof of the earlier mark was not established so the opposition should be rejected on this basis.

– Proof of use must be examined according to the characteristics of the goods or services in question, namely the pharmaceutical sector. In the pharmaceutical sector, it is very common for companies to market and promote the same pharmaceutical product under different names. This is the case, for example, with generic and trade names of medicines, which may have radically different names but refer to the same products. Furthermore, in order to avoid potential confusion, pharmaceutical companies must obtain approval from national and regional agencies for each proposed trade mark to sell their pharmaceutical products.

- Therefore, pharmaceutical companies must obtain the necessary authorisations to market a given pharmaceutical product under a given name, and it is common for the same pharmaceutical products to be marketed under different names; for example, Ibuprofen is also marketed under names such as Advil or Motrin; Ferinject is authorised and marketed in the EU under names such as Injectafer (in Luxembourg) and Iroprem (in Slovenia); Amoxicilline Centrient is sold in the Netherlands, however in Spain it is marketed under Amoxicilina Almus and in France under Amoxicilline Almus (see Annex 1).

- The opponent's vaccine was authorised for marketing under the earlier mark only in Germany and Austria, and in other EU countries the opposing party claimed authorisation under different names. This shows that the opponent intended to use the earlier mark only at a national level in Germany (and Austria) – see Annex 2.

- Regarding the place of use, the documents submitted by the opponent as proof of use of all refer to use exclusively in Germany. The (few) invoices and links to the opponent's website submitted as Annex 1 were all in German, the same occurred with the links to German pharmacies allegedly selling the earlier goods, and the marketing material and photographs of the packaging were all in German.

- Given the limited level of sales apparent from the invoices and the fact that all the documents referred to a single country (Germany), it is clear that that use was not sufficient to be regarded as genuine use in the European Union.

- It is submitted as Annex 2 an extract from the Spanish packaging leaflet of the Spanish Agency for Medicine and Health Products, dated 2023, for the earlier mark. This expressly states that the opponent's vaccine was authorised for marketing under the name 'Covaxis' only in Germany and Austria, while for other countries it was authorised under different names, that is to say 'Triaxis' and 'Adacel'. This document constitutes complementary evidence supplementing previous argumentation and submitted in order to challenge the findings of the Opposition Division. Moreover, the document is relevant for the outcome.

- This document proves that the opponent never had any intention of marketing its vaccines under the mark 'COVAXIS' outside Germany (and Austria), since its vaccines were authorised under different names/trade marks in all other EU Member States.

- The fact that the opponent never received (or even requested) authorisation to market its vaccines under the mark 'COVAXIS' in other EU countries is conclusive evidence that it had no intention of using its earlier mark in the EU, but rather used it to prevent competitors from freely using similar trade marks, while continuing to sell its 'COVAXIS' vaccines exclusively on the German national market.

- The evidence is also insufficient in particular with regard to the extent of use. The opponent has, at most, made 'token' use of the earlier mark, for the sole purpose of preserving the rights conferred by the mark, as is clear from the negligible number of sales reported on the invoices.

- The seven invoices submitted by the opponent, which show sales of only 26 units in total during the five-year period of reference, are not sufficient to prove genuine use

of the earlier mark, especially since they all relate to sales made in a single country (Germany) and, therefore, there was no extensive or regular use of that trade mark in the EU, which could compensate for the very low commercial volume.

– In addition, the marketing material and photographs of the packaging did not display a date, and the opponent did not demonstrate that they had been distributed publicly and externally to the relevant consumers.

– As regards the other arguments, reference is made to the observations submitted in the first instance in the opposition proceedings, and it is requested that they are taken into account in this appeal.

Incorrect assessment of the likelihood of confusion

– The fact that the goods at issue are identical is irrelevant, since, taking into account the global assessment of all the relevant factors, there is no likelihood of confusion and/or association on the market.

– Given the highly specialised nature of vaccines, both consumers and medical professionals will pay a high degree of attention when prescribing and/or purchasing these products on the market, which makes it unlikely that they will confuse the signs at issue and will notice the differences between the signs at issue.

– Both the beginning and the end of the signs, which are the parts to which the public pays most attention, are visually and phonetically different, as found in the contested decision.

– Furthermore, the signs are structurally different, since the earlier mark is three syllables, whereas the contested sign is four. The signs will also be pronounced very differently, the earlier mark will be pronounced /CO/-/VAX/-/CIS/, and the contested sign will be pronounced /BE/-/CO/-/VAX/-/CIN/.

– The signs also differ in the stressed syllables, which alters the rhythm and intonation of the signs, thereby increasing the likelihood that consumers will clearly distinguish between them.

– Furthermore, the earlier mark is not included in the contested sign as an independent and distinctive element, but merely coincides with it in its central part and will not be recognised as such by the relevant public.

– Reference is made to the decision of the French National Institute of Industrial Property (INPI) No OPP 06-3308/MAS, which rejected the opposition against the trade mark application ‘IVAX’ on the basis of the French earlier mark ‘PANVIVAX’ on the grounds that there was no similarity between the signs, although the goods were identical (see Annex 2 of the observations of 18 January 2022).

– Conceptually, the Opposition Division correctly held that, since the term ‘VAX’ is an abbreviation of ‘vaccine’ and, especially since the COVID-19 pandemic, average consumers have become more familiar with it and, at least the English-speaking part

of the EU public, will associate that term with an obvious descriptive character in relation to goods in Class 5.

– Therefore, the fact that the signs coincide in the ‘COVAXI-’ part, which attracts less attention because it is in the centre and has a direct meaning identifying the goods in question (vaccines), is of limited importance and has a minimal impact on the similarity of the signs. Consequently, the other differences between the signs are such as to outweigh their similarities and produce a different overall impression on the relevant public.

– This is further demonstrated by the fact that the sequence ‘-OVAXI’ is widely used in trade marks designating goods in Class 5; there are in fact several EUTMs already registered that coincide in the sequence ‘-OVAXI’ for goods in Class 5:

  - EUTM No 18 524 489, ‘BIOVAXIN’.
  - EUTM No 3 605 698, ‘BIOVAXID’.
  - Greek trade mark registration No D162374, ‘MOVAXIN’
  - UK trade mark registration No 11 878 345, ‘INNOVAXIS’.
  - Czech trade mark registration No R. 318339, ‘NOVAXIL PLUS’.
  - Czech trade mark registration No 301 576, ‘NEFRO VAXIN’.
  - Slovak trade mark registration No 223 995, ‘NEFRO VAXIN’.
  - Danish trade mark registration No VA 2020 01 470, ‘COVAXIX’.

– Therefore, the mere coincidence in the sequence ‘-OVAXI’ is not sufficient to consider that the signs at issue are confusingly similar, especially when it comes to such specialised goods as *vaccines*, to which consumers and professionals in the medical sector pay a higher-than-average degree of attention.

– In the light of the above, the signs are visually, aurally and conceptually dissimilar.

– Reference is made to the decision 28/06/2023, R 2281/2022-4, DIARKO (fig.) / ARKO (fig.) et al., in which the signs coincided in the central part but differed at the beginning and end, and the Board confirmed that the signs were not confusingly similar, even though they were for identical goods.

– The same conclusion was reached by the Board of Appeal in its decision of 10/05/2023, R 1244/2022-1, AGIOMIX / Igenomix (fig.) et al., in which it held that the signs were only similar to a low degree and that this was not sufficient to conclude that there was a likelihood of confusion.

– The applicant submitted the following documents:

  - Annex 1: extracts and medical leaflets of pharmaceutical products sold under different names

- Annex 2: an extract from the Spanish packaging leaflet of the opponent's 'COVAXIS' vaccine (dated March 2023) of the Spanish Agency for Medicine and Health Products, from 2023.

22 The arguments raised in the opponent's response may be summarised as follows:

Lack of proof of genuine use of the earlier mark

– The new documents submitted by the applicant in support of its argument that the opponent's vaccine was authorised for marketing under the earlier mark only in Germany and Austria (for other EU countries it claimed authorisation under different names) should not be taken into consideration as it was submitted for the first time before the Board of Appeal, even though it was available to the applicant during the opposition proceedings. Reference is made to the Court's decision of 13/09/2023, T-549/22, PROLACTAL / Proláctea (fig.) et al, EU:T:2023:538, where the coexistence of the marks had been argued before the Opposition Division, but the evidence was only submitted to the Board of Appeal.

– If the abovementioned document was taken into account, it should not change the outcome of the case since Germany and Austria constitute a substantial part of the European Union.

– The General Court has consistently held that the use of an EUTM in a single Member State (e.g. Germany, Spain or the United Kingdom) or even in a single city of a Member State of the European Union is sufficient to satisfy the criterion of territorial scope (07/11/2019, T-380/18, INTAS / INDAS (fig) et al., EU:T:2019:782, § 81 and the case-law cited).

– The applicant's arguments are based on an individual assessment of certain items of evidence in relation to all the relevant factors, whereas, for the purposes of assessing genuine use, the Office must consider the evidence as a whole.

– The applicant only refers to some of the invoices but not to the evidence provided. This was referred to in the evidence submitted in the first instance. The Opposition Division correctly concluded, the evidence provided was sufficient to prove genuine use of the earlier mark during the relevant period in the relevant territory in relation to the goods in Class 5, vaccines.

Incorrect assessment of the likelihood of confusion

– In addition to the identity of the goods, the signs are visually very similar in that 'COVAXIS' and 'BCOVAXIN' are of similar length, with seven and eight letters respectively, and the contested sign reproduces six letters in the same order, '*COVAXI*'.

– The signs only differ in their last letters, 'S' v 'N', and in the contested sign's first letter 'B', which are insufficient to outweigh the similarities between them.

– Phonetically, the signs are very similar since the contested sign reproduces almost in its entirety the earlier mark.

- The signs differ only in the pronunciation of the first letter of the contested sign, ‘B’, and the last two letters (‘N’ as opposed to ‘S’), while they coincide in the same structure and the same sequence of identical vowels in the same position (O-A-I).

- Therefore, the signs in question will be pronounced in a very similar manner.

- Consequently, the rhythm and intonation of the two signs are very similar, which will undoubtedly be perceived by the consumer, who will be very easily led to confuse the marks in question.

- Conceptually, as the signs will be perceived as fanciful terms, they are not comparable at a conceptual level.

- In this regard, the term ‘VAX’ will not be understood by the vast majority of EU consumers as ‘vaccine’. In addition,, it will not be understood in all European Union countries.

- Furthermore, since the term ‘VAX’ is included in the more complex terms ‘COVAXIN’ and ‘BCOVAXIN’, it will not necessarily be understood even by English-speaking consumers who understand its meaning. Therefore, the signs should be perceived as fanciful terms and are not comparable on an intellectual basis.

- Furthermore, the public is less likely to notice such minor differences when they encounter relatively long signs, which are identical in all other letters, despite the limited distinctiveness of ‘VAXIS’/‘VAXIN’ for at least part of the relevant public in relation to the goods in question.

- Indeed, even if the coinciding conceptual content of the signs is weak for part of the relevant public (English-speaking), it nevertheless establishes a certain semantic similarity between the signs, especially since none of the signs conveys any other semantic content that could potentially help consumers to distinguish them. None of the signs conveys a clear and unambiguous meaning as a whole.

- As regards the existence of several earlier registered EUTMs that coincide in the sequence ‘-OVAXI’ for goods in Class 5, it must be noted that the formal coexistence in national or European Union registries of certain trade marks is not, in itself, particularly relevant. It must also be shown that they coexist on the market, which could indeed indicate that consumers are accustomed to seeing the trade marks without confusing them.

- It should also be noted that the Office is, in principle, limited in its examination to the signs at issue.

23 The arguments raised in the applicant’s reply may be summarised as follows:

- Although the opponent claims that Annex 2, submitted by the applicant in the appeal proceedings, should not be taken into consideration as it constitutes new evidence, which was not submitted during the opposition proceedings, the opponent does not deny, refute or question in any way the truth or authenticity of the information contained in that packaging leaflet of Annex 2. Therefore, it must be considered accurate and truthful.

- Annex 2 is merely supplementary. It confirms and supports the applicant's previous arguments that the proof of use submitted by the opponent was insufficient to demonstrate genuine use in the EU as it shows that the opponent never applied for authorisation to sell its vaccines under the 'COVAXIS' mark in the EU, but only in Germany and Austria.

- Therefore, Annex 2 does not introduce any new line of reasoning that was not previously submitted to the Opposition Division and must be accepted by the Board of Appeal since it is likely to be relevant for the outcome of the case.

- Furthermore, the document in Annex 2 is directly linked to the marketing authorisation, which the opponent itself submitted during the opposition proceedings as proof of use, and which shows that it is authorised to sell its vaccines only in Germany. Even the opponent admitted that the proof of use it submitted only referred to use in Germany.

- The case-law according to which use in a single Member State may be considered sufficient to satisfy the criterion of territorial scope of application, is not applicable to the present case as it is not analogous. In the present case, account must be taken of the specific circumstances of the pharmaceutical sector, the need for undertakings to obtain authorisation from the competent health authorities of the Member States in order to market pharmaceutical products under a specific name, and the fact that the opposing party has clearly always used, and intended to use, its earlier mark 'COVAXIS' at national level, whereas in the other EU countries the vaccine was authorised under different names, namely 'Triaxis' and 'Adacel'.

- The opponent does not contest that the degree of attention of (average and professionals) consumers when acquiring the goods in question is higher than average.

- 'VAX' is a term commonly used to designate the goods in question (*vaccines*). It is therefore clearly descriptive and devoid of distinctive character for the goods in question. The coincidence in 'VAX' is therefore irrelevant and must be disregarded.

- The signs therefore coincide in only three of their letters. Furthermore, they differ at the beginning, which is the part to which consumers pay the most attention, and that difference, contrary to the opponent's claim, introduces numerous dissonances between the conflicting signs, which differ in the number of syllables (three as opposed to four), in the stressed syllable (/CO/-/**VAX**/-/CIS/ - /**BE**/-/CO/-/VAX/-/**CIN**/) and alters the rhythm and intonation of the opposing signs. Given the high degree of attention that consumers will pay when purchasing those goods, there is no doubt that they will perceive the differences between the signs and their different commercial origins. There is therefore no likelihood of confusion.

24 The arguments raised in the opponent's rejoinder may be summarised as follows:

- Even if it were taken into consideration and regarded as merely supplementing the previous evidence, Annex 2 would not alter the outcome of the case. Germany and Austria constitute a substantial part of the European Union. The arguments relating to the fact that use in one Member State is insufficient should be rejected and are applicable even if the goods in question are pharmaceutical products.

– In the light of the evidence submitted by the opponent during the opposition proceedings, which is referred to again in this submission, it must be concluded that genuine use of the earlier mark has been sufficiently proved on the relevant market.

– The opponent maintains that the signs are highly similar that in addition to the identity between the products creates a high risk of confusion on the part of the relevant public, medical professionals and average consumers even if the degree of attention is higher than average.

– As regards the similarity of the signs, the Opposition Division's decision should be confirmed as the signs are visually and phonetically similar to an above-average degree.

Reasons

25 All references made in this decision to the EUTMR should be seen as references to Regulation (EU) 2017/1001 on the European Union trade mark (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended, unless specifically stated otherwise.

26 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

Scope of appeal

27 Following the partial revocation of the earlier mark, which became final, as detailed above in paragraph 19, the earlier mark's goods to be taken into account in the present appeal are the following:

Class 5: Vaccines for human use.

Admissibility of the evidence submitted for the first time before the Board

28 The applicant submitted together with the statement of grounds documents for the first time, namely Annexes 1 and 2 as listed above in paragraph 21.

29 Pursuant to Article 95(2) EUTMR, the Office may disregard facts or evidence which are not submitted in due time by the parties concerned. Pursuant to Article 27(4) EUTMDR, the Board of Appeal may accept facts or evidence submitted for the first time before it only where those facts or evidence are, on the face of it, likely to be relevant for the outcome of the case, and they have not been produced in due time for valid reasons, in particular where they are merely supplementing relevant facts and evidence which had already been submitted in due time, or are filed to contest findings made or examined by the first instance of its own motion in the decision subject to appeal.

30 Those same principles are reiterated in Article 54(1) Rules of Procedure of the Boards of Appeal, according to which such facts or evidence may also not be disregarded if they were not available before or at the time the contested decision was taken or are justified by any other valid reason.

31 In the present case, as pointed out by the applicant, the evidence aims to challenge the Opposition Division's findings regarding the assessment of the genuine use of the earlier

mark. Therefore, although the document may have been available before to the applicant as raised by the opponent, its submission for the first time before the Board is justified. Furthermore, it may be prima facie relevant for the outcome of the case.

32 Consequently, the Board decides to take these documents into account.

33 In that regard, the judgment 13/09/2023, T-549/22, PROLACTAL / Proláctea (fig.) et al., EU:T:2023:538, referred to by the opponent is not comparable to the present case, as it concerned the submission of evidence for the first time before the Board in support of a claim on the alleged coexistence of the marks, which had not been substantiated before the first instance. In the present case, the evidence is submitted with respect to the assessment of genuine use of the earlier mark, and the relevant claim regarding the coexistence of the marks was substantiated before the first instance.

Proof of use

34 According to Article 47(2) and (3) EUTMR, the applicant of a European Union trade mark application may request proof that the earlier mark on which an opposition is based has been put to genuine use during the five-year period preceding the date of filing of the application, provided that the earlier mark has, at that date, been registered for more than five years. If the earlier mark has been used in relation to only part of the goods or services for which it is registered it shall, for the purposes of the examination of the opposition, be deemed to be registered in respect only of that part of the goods or services.

35 In the absence of proof of use, the opposition shall be rejected, pursuant to Article 47(2), second sentence, EUTMR and Article 10(2) EUTMDR.

36 According to the case-law, there is 'genuine use' of a trade mark where the mark is used 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, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark (11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 43; 19/12/2012, C-149/11, Onel / Omel, EU:C:2012:816, § 29; 14/04/2016, T-20/15, Piccolomini, EU:T:2016:218, § 42). In addition, the condition relating to genuine use of the trade mark requires that the mark, as protected in the relevant territory, is used publicly and outwardly (11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 37; 18/01/2011, T-382/08, Vogue, EU:T:2011:9, § 27; 05/02/2020, T-44/19, TC Touring Club (fig.) / TOURING CLUB ITALIANO et al., EU:T:2020:31, § 52).

37 When interpreting genuine use, the ratio for the requirement that the contested 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 intended to restrict trade mark protection to the cases of large-scale commercial use (26/09/2013, C-609/11 P, Centrotherm, EU:C:2013:1449, § 72; 29/11/2018, C-340/17 P, ALCOLOCK, EU:C:2018:965, § 90; 13/10/2021, T-1/20, INSTINCT, EU:T:2021:695, § 33).

38 When assessing whether use of the trade mark is genuine, regard must be taken to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create market share for the relevant goods or services, the nature of those goods or services, the characteristics of the market and the scale and

frequency of use of the mark (11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 38, 39; 19/12/2012, C-149/11, Onel / Omel, EU:C:2012:816, § 29).

39 In order to examine, in a particular case, whether a trade mark has been put to genuine use, an overall assessment must be carried out which takes into account all the relevant factors of the particular case. That assessment implies that a certain interdependence between the factors be taken into account. Thus, a low volume of goods marketed under the trade mark may be compensated for by a high intensity or a certain consistency over time of the use of that trade mark or vice versa. In addition, the turnover and the volume of sales of goods marketed under the earlier mark cannot be assessed in absolute terms but must be looked at in relation to other relevant factors, such as the volume of business, production or marketing capacity or the degree of diversification of the undertaking using the mark and the characteristics of the products or services on the relevant market. As a result, use of the mark at issue need not always be quantitatively significant in order to be deemed genuine. Even minimal use can therefore be sufficient to be deemed genuine, provided that it is viewed as warranted in the economic sector concerned in order to maintain or create a market share for the goods or services protected by the mark (08/07/2004, T-203/02, Vitafruit, EU:T:2004:225, § 42; 02/02/2016, T-171/13, MOTOBI B PESARO, EU:T:2016:54, § 72).

40 Genuine use of a trade mark cannot be proved by means of probabilities or suppositions but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (13/06/2019, T-398/18, DERMAEPIL SUGAR EPIL SYSTEM (fig.) / dermépil Perron Rigot (fig.), EU:T:2019:415, § 56; 23/09/2020, T-677/19, Syrena, EU:T:2020:424, § 44).

41 Pursuant to Article 10(4) EUTMDR, the evidence shall be limited to the submission of supporting documents and items such as packages, labels, price lists, catalogues, invoices, photographs, newspaper advertisements and statements in writing as referred to in Article 97(1)(f) EUTMR.

42 The Board will assess whether the evidence submitted demonstrates genuine use of the earlier mark ‘COVAXIS’ in the European Union, in relation to the goods covered by the mark, namely *vaccines for human use* in Class 5 following its partial revocation (see paragraph 19 above).

43 As detailed above in paragraph 10, the Opposition Division exercised its discretion and decided to take into account the evidence submitted by the opponent after the time limit as it was supplementary to the evidence already provided during the time limit, and with the aim to reply to the applicant’s criticism. This is not criticised by the applicant before the Board.

44 Moreover, since the opponent requested part of the evidence submitted before the Opposition Division to be kept confidential, it will be described in general terms, without disclosing any potentially sensitive commercial information.

45 Therefore, the evidence to be taken into account in the opposition proceedings can be summarised as follows:

- Annex 1.1: several invoices dated between 2018 and 2021 (four per year) addressed to clients located in different cities of Germany (i.e. Leipzig, Kiel, Rostock or

Frankfurt) by the opponent's German subsidiary Sanofi-Aventis Deutschland GmbH referring to the sale of, inter alia, vaccines in pre-filled syringes displaying the mark 'COVAXIS'. The product codes and description in the invoices match the images and product information provided in other Annexes (in particular, Annexes 1.2 and 1.3). The invoices are issued in German and in Euro (€) and include the total number of units sold, the price per unit and the total turnover.

Impfstoff	Handelsform	PZN	Anzahl Packung/en
COVAXIS® Injektions-suspension	1 Fertigspritze (0,5 ml) mit 2 separaten Kanülen. N1	12590099	
	10×1 Fertigspritze (0,5 ml) ohne Kanüle.	12590107	

– Annex 1.2: marketing and promotional materials (including mailing advertisements sent to addresses in Germany, product catalogues and posters) for 2017-2021 showing the products (vaccines against tetanus, diphtheria and pertussis) under the 'COVAXIS' mark. The materials are issued by the opponent or its subsidiaries in English and German and show all the specifications of the product – including the product code – and its packaging.

– Annex 1.3: undated samples of product packaging in Germany showing the earlier mark in the following form: COVAXiS® in relation to vaccines (Injektionssuspension in einer Fertigspritze):

– Annex 1.4: an extract from Compumark Serion Pharma In-Use database for 'COVAXIS' in Germany, showing the launch date of the product (01/03/2002) and indicating that the vaccine is still marketed in 2021.

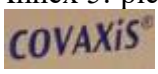
– Annex 1.5: an internal chart showing the sales volume of the product (in number of doses) and its annual turnover (in Euro) in Germany for 2015-2021.

– New Annex 1: an extract from the Wayback Machine for the opponent's website 'www.mein.sanofi.de/produkte/COVAXIS', from 25 February2021 to 14 May 2021.

– New Annex 2: additional invoices dated 2018 (three invoices), 2019 (one invoice), 2020 (two invoices) and 2021 (two invoices), addressed in different cities in Germany.

– New Annex 3: a declaration issued by the president of Sanofi Pasteur Europe, dated 28 February 2022 providing the sum of sales and sum of volume (doses) for 'COVAXIS' products in Germany for2015-2021.

– New Annex 4: additional marketing materials (in German) showing the sign in the following form  . These materials are dated November 2017 and October 2017, respectively.

– New Annex 5: pictures of 'COVAXIS' packaging, showing the sign in the following form:  .

46 According to Article 10(3) EUTMDR, the evidence of use must indicate the place, time, extent and nature of use of the earlier mark for the goods and services for which it is registered and on which the opposition is based.

47 An overall assessment of all the items of evidence must be made, taking account of all the relevant factors in the particular case, which entails a degree of interdependence of the factors presented (18/01/2011, T-382/08, Vogue, EU:T:2011:9, § 30; 05/03/2019, T-263/18, MEBLO (fig.), EU:T:2019:134, § 38). In particular, Article 10(3) EUTMDR does not state that each item of evidence must necessarily give information about all four elements to which proof of genuine use must relate, namely the place, time, extent and nature of use. An accumulation of evidence may allow the necessary facts to be established, even though each of those items of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (17/04/2008, C-108/07 P, Ferro, EU:C:2008:234, § 36; 16/11/2011, T-308/06, Buffalo Milke, EU:T:2011:675, § 61; 05/03/2019, T-263/18, MEBLO (fig.), EU:T:2019:134, § 84).

48 The Board is required by the courts to consider the submitted evidence in its totality in assessing its value in sum regarding the narrative it provides in relation to the use of a sign. In other words, each item of evidence is not to be analysed separately, but rather together – in order to determine the most likely and coherent meaning that it presents regarding the activities of the relevant undertaking. It is noted from 12/12/2002, T-39/01, Hiwatt, EU:T:2002:316, § 47, '… that genuine use of a trade mark cannot be proved by means of probabilities or suppositions but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned'.

Assessment of the evidence

49 As a preliminary remark, as already stated in the contested decision, the applicant individually challenges the items of evidence submitted, pointing out that some are undated (such as the pictures of products' packaging), while the assessment must be done on the evidence as a whole. Therefore, the applicant's arguments in that respect reiterated before the Board must be rejected.

50 Furthermore, the Board notes that the declaration submitted as New Annex 3 is admissible as mean of proof of use pursuant to Article 10(4) EUTMDR and as listed in Article 97(1)(f) EUTMR.

51 In order to assess the probative value of the document, it is necessary to check the plausibility and truthfulness of the information that it contains. In that regard, account must be taken of, inter alia, the origin of the document, the circumstances of its preparation, the person to whom it was addressed, and whether it seems from the content to be sensible and reliable (07/06/2005, T-303/03, Salvita, EU:T:2005:200, § 42; 15/12/2005, T-262/04, Briquet à Pierre, EU:T:2005:463, § 78; 18/11/2015, T-813/14, Cases for Portable computers, EU:T:2015:868, § 26).

52 In the present case, the declaration is signed by the president of the opponent, and its content is corroborated, inter alia, by the sample of invoices, pictures of packaging and advertising materials displaying the sign 'COVAXIN'. Therefore, the declaration submitted as New Annex 3 must be considered as relevant and a probative item of evidence.

53 Finally, the opponent included hyperlinks in its submissions for proof of use before the Opposition Division. However, the provision of links to online content or website addresses is not a valid form of evidence in inter partes proceedings. In accordance with Article 95(1) EUTMR, in proceedings relating to relative grounds for refusal of registration, the Office is restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought. It is not for the Office's decision taking bodies to search websites for the relevant data (04/10/2018, T-820/17, Alfrisa (fig.) / Frinsa F (fig.), EU:T:2018:647, § 61-63). Websites are easily updated, and most do not provide any archive of previously displayed material or display records that enable members of the public to establish precisely when any particular content was published. The authenticity and integrity of the information cited using only a hyperlink to a website cannot, therefore, be verified. The extract from the WaybackMachine submitted by the opponent (New Annex 1) is not sufficient in that respect since it does not show the content, which was available during the relevant period, only that the opponent's website was accessible in 2021.

54 Therefore, the hyperlinks provided by the opponent will not be taken into account by the Board.

(i) Time of use

55 Most of the evidence is dated within the relevant period, namely from 5 March 2016 to 4 March 2021. In particular, the invoices submitted in Annex 1.1 and New Annex 2 are dated regularly from 2018 to 2021, and the sales figures provided in New Annex 3 cover, inter alia, the relevant period. Moreover, contrary to the applicant's claims, the marketing materials provided are also dated within the relevant period (see Annex 1.2 and New Annex 4).

56 Regarding the evidence dated outside this period, as pointed out by the opponent before the Board, it is relevant to the extent that it confirms use of the sign in the months before or after this period (06/06/2015, T-660/11, POLYTETRAFLON / TEFLON, EU:T:2015:387, § 54 and the case-law cited; 10/11/2021, T-353/20, ACM 1899 AC MILAN (fig.) / Milan et al., EU:T:2021:773, § 36). This is the case for example of invoices referring to sales made shortly after the end of the relevant period in September 2021 (Annex 1.1).

57 Therefore, the Board confirms that the evidence contains sufficient indication concerning the time of use.

(ii) Place of use

58 Since the earlier mark is an EUTM, the evidence must show that it has been genuinely used in the European Union (see Article 18(1) EUTMR and Article 58(1)(a) EUTMR).

59 It is not disputed that the evidence mostly refers to use of the sign in Germany. This can be inferred in particular from the invoices' addresses located in several cities in Germany (Annex 1.1 and New Annex 2), or the language in these invoices and on the products' packaging or the marketing materials (inter alia Annexes 1.2 and 2.3). Furthermore, the signed declaration concerns sales in Germany (New Annex 3).

60 Germany represents a substantial part of the territory of the European Union. Therefore, contrary to the applicant's arguments, use in one Member State, as Germany, is sufficient to be considered as use of the mark in the European Union (07/11/2019, T-380/18, INTAS / INDAS (fig.) et al., EU:T:2019:782, § 81 and the case-law cited).

61 The applicant further argues that the opponent was only authorised to market its vaccine under the name 'COVAXIN' in Germany, while it was distributed under different names in other countries. It states that the opponent never had any intention of using the sign 'COVAXIN' in the whole EU and that it uses this trade mark registration to illegitimately and voluntarily block out competitors.

62 However, the Board notes that the document submitted by the applicant before it as Annex 2 only confirms use of the opponent's sign 'COVAXIN' in Germany, which is sufficient. Furthermore, it is recalled that any argument raised by the applicant regarding the alleged unfair competition behaviour of the opponent cannot be examined since, pursuant to Article 46 EUTMR, an opposition can be filed only on the basis of the grounds of Article 8 EUTMR, which does not comprise the grounds for bad faith. Therefore, the applicant's arguments are irrelevant and must be rejected.

(iii) Extent of use

63 Concerning the extent of use made of the earlier mark, account must be taken, in particular, of the commercial volume of all the acts of use on the one hand, and the duration of the period in which those acts of use occurred, and the frequency of those acts, on the other (08/07/2004, T-334/01, Hipoviton, EU:T:2004:223, § 35). However, the use of the earlier mark need not always be quantitatively significant for it to be deemed genuine (08/07/2004, T-334/01, Hipoviton, EU:T:2004:223, § 36).

64 Although the concept of genuine use excludes all minimal and insufficient use as the basis for a finding that a mark is being put to real and effective use on a given market, nevertheless the requirement of genuine use does not seek to assess commercial success or to review the economic strategy of an undertaking, nor is it intended to restrict trade mark protection to the case where large-scale commercial use has been made of the marks (15/09/2011, T-427/09, CENTROTHERM, EU:T:2011:480, § 26 and case-law cited).

65 In the present case, as stated in the contested decision, the invoices submitted by the opponent are not numerous but are regularly dated between 2018 and 2021, that is, most of the relevant period.

66 Moreover, it can be inferred from the invoices' numbers that they are only an illustrative sample of the invoices sent during this period, which corroborates the figures provided in the president's signed declaration (New Annex 3). The number of sales and of doses sold during the relevant period in Germany indicated in this declaration must be considered as significative.

67 Therefore, contrary to the applicant's arguments, the opponent sufficiently proved the extent of use of the earlier mark, which is not merely token use.

(iv) Nature of use

68 In the context of Article 10(3) EUTMDR, the expression 'nature of use' includes evidence of use of the sign in accordance with its function, of use of the mark as registered, or of a variation thereof according to Article 18(1), second subparagraph, point (a) EUTMR, and of its use for the goods and services for which it is registered. As a trade mark has, inter alia, the function of operating as a link between the goods and services and the person responsible for their marketing, the proof of use must establish a clear link between the use of the mark and the relevant goods and services.

69 It is not disputed by the parties that the evidence shows use of the sign 'COVAXIN' as a word and as figurative signs, especially in the packaging and marketing materials dated during the relevant period, as detailed above in paragraph 45.

70 In that respect, although, as the applicant pointed out, the opponent did not provide proof of distribution of the packaging or materials to the public, it can be inferred from the nature itself of these elements that they were indeed distributed to the public.

71 It follows that the evidence shows that the sign 'COVAXIN' was used publicly and outwardly, with the view of indicating the commercial origin of the goods. Therefore, it constitutes use of the sign as a trade mark.

72 Moreover, the Board confirms that the additional features, mainly the colours, in the figurative sign as used on part of the evidence is decorative or negligible (such as the symbol '®'), so they do not alter the earlier mark's distinctive character. Therefore, evidence shows genuine use of the trade mark within the meaning of Article 18(1)(a) EUTMR.

73 Finally, in view of the evidence as detailed in paragraph 45, it is clear that the sign has been used in relation to the relevant goods, namely *vaccines for human use*. This is furthermore confirmed by the applicant's Annex 2 submitted before the Board showing that vaccines were circulated, inter alia, in Germany under the name 'COVAXIN'.

74 Therefore, genuine use of the earlier mark has been demonstrated for the goods as registered.

Article 8(1)(b) EUTMR

75 Under Article 8(1)(b) EUTMR, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for will not be registered if, because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected. The likelihood of confusion includes the likelihood of association with the earlier trade mark.

76 According to settled case-law, the likelihood of confusion is to be understood as being the risk that the public might believe that the goods or services covered by the earlier mark and those covered by the mark applied for come from the same undertaking or, as the case may be, from economically linked undertakings. The existence of such a risk must be assessed globally, taking into account all factors relevant to the particular case (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 17, 18; 05/03/2020, C-766/18 P, BBQLOUMI (fig.) / HALLOUMI, EU:C:2020:170, § 63, 67; 11/06/2020, C-115/19 P, CCB (fig.) / CB (fig.) et al., EU:C:2020:469, § 54).

77 Those factors include, inter alia, the degree of similarity between the signs at issue and the goods or services in question and also the strength of the earlier mark's reputation and its degree of distinctive character, whether inherent or acquired through use (24/03/2011, C-552/09 P, TiMiKinderjoghurt, EU:C:2011:177, § 64; 04/03/2020, C-328/18 P, BLACK LABEL BY EQUIVALENZA (fig.) / LABELL (fig.) et al., EU:C:2020:156, § 57; 11/06/2020, C-115/19 P, CCB (fig.) / CB (fig.) et al., EU:C:2020:469, § 55).

Relevant public and territory

78 In the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of goods or services concerned, who is reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26; 13/02/2007, T-256/04, Respicur, EU:T:2007:46, § 42).

79 The Board agrees with the Opposition Division's findings that the goods at issue, namely *vaccines for human use*, target the public at large and professionals from the medical sectors, such as doctors and pharmacists (30/06/2015, R 1154/2014-2, CINQAPAR / CINQAIR et al., § 23-24; 30/11/2022, R 1110/2022-4, COVAXIN / COVAXIS, § 32-35).

80 Regarding the level of attention, it is settled case-law that professionals display a high level of attention with respect to pharmaceutical preparations, including *vaccines for human use*. As regards general end-consumers, their level of attention will be higher than average, since medicines, whether or not issued on prescription, affect a consumer's state of health (30/11/2022, R 1110/2022-4, COVAXIN / COVAXIS, § 36, and case-law cited).

81 Since the earlier mark is an EUTM, the relevant territory for the assessment of the likelihood of confusion is the territory of the European Union as a whole.

Comparison of the goods

82 Goods and services are identical when they appear with the same wording in both lists of goods and services or when they are included in a more general category designated by the other mark (13/09/2018, T-94/17, Tigha, EU:T:2018:539, § 46; 05/02/2020, T-44/19, TC Touring Club, EU:T:2020:31, § 91).

83 The contested sign and the earlier mark cover identical goods, namely *vaccines for human use*.

Comparison of the signs

84 The global assessment of the likelihood of confusion must, so far as concerns the visual, phonetic or conceptual similarity of the signs at issue, be based on the overall impression given by those signs, bearing in mind, in particular, their distinctive and dominant elements. The perception of the signs by the average consumer of the goods or services in question plays a decisive role in the global assessment of that likelihood of confusion. The average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 25; 08/05/2014, C-591/12 P, Bimbo Doughnuts, EU:C:2014:305, § 21; 22/10/2015, C-20/14, BGW / BGW, EU:C:2015:714, § 35).

85 Two marks are similar when, from the point of view of the relevant public, they are at least partially identical as regards one or more relevant aspects, namely the visual, aural and conceptual aspects (23/10/2002, T-6/01, Matratzen + Matratzenmarkt Concord (fig.), EU:T:2002:261, § 30; 15/12/2010, T-331/09, Tolposan, EU:T:2010:520, § 43; 17/03/2021, T-186/20, The time / Timehouse, EU:T:2021:147, § 21).

86 For the purpose of assessing the distinctive character of an element of a mark, an assessment must be made of the greater or lesser capacity of that element to identify the goods for which the mark was registered as coming from a particular undertaking, and thus to distinguish those goods from those of other undertakings. In making that assessment, it is necessary to take into account, in particular, the inherent characteristics of that element and to ask whether it is at all descriptive of the goods for which the mark has been registered (03/09/2010, T-472/08, 61 a nossa alegria, EU:T:2010:347, § 47 and case-law cited).

87 The signs to be compared are the following:

COVAXIS	**BCOVAXIN**
Earlier mark	*Contested sign*

88 The earlier mark is a word mark comprising the seven-letter term ‘COVAXIS’.

89 The contested sign is also a word mark, comprising the eight-letter term ‘BCOVAXIN’.

90 In the case of word marks, it is the word as such that is protected and not its written form (07/10/2010, T-244/09, acsensa (fig.) / accenture (fig.) et al., EU:T:2010:430, § 28 and the case-law cited). Furthermore, those marks do not have dominant elements.

91 Even though the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details, they will nevertheless, when perceiving a verbal sign, break it down into elements that suggest a concrete meaning or that resemble known words (10/02/2015, T-85/14, DINKOOL, EU:T:2015:82, § 46 and the case-law cited). In this respect, it is possible for the relevant consumer to split up a word mark even if only one of the elements making up that mark is familiar to them (22/05/2012, T-585/10, Penteo, EU:T:2012:251, § 72 and the case-law cited.

92 In the present case, although the signs are both made of a single denomination, the Board agrees with the Opposition Division's findings that, at least, part of the relevant public will identify the element 'VAXIN' in the contested sign as a reference to the English term 'vaccine'. The Board finds that this meaning will be perceived by, at least, the English-speaking part of the average consumers as well as the relevant professional public across the EU who is likely to be familiar with the English term 'vaccine' (06/03/2015, T-513/13, SafeSet, EU:T:2015:140, § 32). To some extent, this may also apply to the element 'VAXIS' of the earlier mark. But in this case, this link will be less evident. (30/11/2022, R 1110/2022-4, COVAXIN / COVAXIS, § 47). Overall, the two elements 'VAXIN' and 'VAXIS' of both signs are weak for the goods at issue for this part of the public.

93 Nevertheless, the verbal elements 'BCOVAXIN' and 'COVAXIS', considered in their entirety, are meaningless. Therefore, despite the presence of a weak element for, at least, the English-speaking part of the public, the verbal elements 'VAXIN' and 'VAXIS' and the denominations 'BCOVAXIN' and 'COVAXIS' are distinctive to an average degree, as stated in the contested decision.

94 As regards the remaining part of the average consumers, they will only perceive the signs, as a whole, as meaningless denominations. Therefore, the elements 'VAXIN' and 'VAXIS' and the denominations 'BCOVAXIN' and 'COVAXIS' considered as a whole are distinctive to an average degree for this part of the public.

95 Visually, the signs coincide in the same sequence of letters '-COVAXI-', that is six out of eight letters composing the contested sign. They differ by the additional first letter 'B' in the contested sign, and by the replacement of the earlier mark's final letter 'S' by 'N' in the contested sign.

96 Although the signs do not have the same number of letters, as the applicant pointed out, the difference of length by one letter is likely to go unnoticed by the consumers.

97 Furthermore, as regards the principle according to which consumers generally pay greater attention to the beginning of a mark than to its end, as invoked by the applicant, it should be pointed out that the validity of that argument cannot be assessed independently of the facts of the present case, and in particular the specific characteristics of the signs at issue (13/04/2011, T-228/09, U.S. POLO ASSN. / POLO-POLO, EU:T:2011:170, § 37). In particular, the presence, in each of the marks at issue, of several letters in the same order may be of some importance in the assessment of the visual similarities between those mark (18/05/2018, T-67/17, tèespresso / TPRESSO et al., EU:T:2018:284, § 67). This is

particularly noticeable in the presence case where the contested sign reproduces six identical letters of the earlier mark out of eight composing the sign.

98 Therefore, the differences between the signs, although they contribute to the overall impression of the signs, cannot be sufficient to outweigh the similarities.

99 Moreover, even if the elements 'VAXIN' on the contested sign and 'VAXIS' of the earlier mark are weak for the part of the relevant public who will perceive the reference to 'vaccines', the visual coincidence between the signs is not limited to these elements but encompasses the sequence of six letters '-COVAXI-'. Therefore, the weak distinctive character of the elements 'VAXIN' and 'VAXIS' is also not sufficient to neutralise the similarities between the signs arising from the reproduction of the same sequence of six letters, even for the part of the relevant public who will perceive the reference to 'vaccines' in the signs.

100 Consequently, the Board confirms that the signs are visually similar to an average degree.

101 Aurally, the pronunciation of the signs coincides to the extent that the syllables co/va/ are identically present in both signs, and the final syllables /xin/ in the contested sign and /xis/ in the earlier mark are highly similar (30/11/2022, R 1110/2022-4, COVAXIN/COVAXIS, § 52).

102 The signs differ in the sound of the letter 'B' placed at the beginning of the contested sign. However, as detailed above, the fact that the differing element is placed at the beginning of the contested sign is not sufficient to exclude any similarity between the signs.

103 Furthermore, the fact that the signs contain a different number of syllables is secondary since the contested sign reproduces the sounds co/va/xi-/ of the earlier mark.

104 Consequently, the Board confirms that the signs are aurally similar to an average degree.

105 Conceptually, as stated above in paragraphs 92 and 93, part of the relevant public will perceive the same reference to the English term 'vaccine' in both signs. Considering that the coinciding concept is weak with respect to the goods at issue, the signs are only conceptually similar to a low degree.

106 For the remaining part of the public who will not associate the signs with any meaning (see paragraph 94 above), a conceptual comparison is not possible.

Overall assessment of the likelihood of confusion

107 The global assessment of the likelihood of confusion implies some interdependence between the relevant factors, in particular between the similarity of the trade marks and that of the goods or services covered. Accordingly, a low degree of similarity between those goods or services may be offset by a high degree of similarity between the trade marks, and vice versa (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17; 18/12/2008, C-16/06 P, Mobilix, EU:C:2008:739, § 46; 05/03/2020, C-766/18 P, BBQLOUMI (fig.)/HALLOUMI, EU:C:2020:170, § 69).

108 It is also settled case-law that the more distinctive the earlier mark, the greater will be the likelihood of confusion, and therefore marks with a highly distinctive character, either per

se or because of the recognition they possess on the market, enjoy broader protection than those with a less distinctive character (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 24; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 18; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 20).

109 In the present case, the opponent did not explicitly claim that the earlier mark would enjoy enhanced distinctiveness. Consequently, the assessment of the distinctiveness of the earlier mark will rest on its distinctiveness per se. Considered as a whole, the earlier mark must be considered as having an average degree of inherent distinctiveness, despite the presence of the element 'VAXIS', which is weak for part of the relevant public who will perceive the reference to the English term 'vaccine'.

110 The goods at issue are identical and they target average consumers and professionals from the medical sector. The relevant public will display a high(er) level of attention considering the potential impact of the goods to the consumer's state of health.

111 Nevertheless, the Board recalls that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place their trust in the imperfect picture of them that they have kept in mind (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26). Even those consumers with a high degree of attention will still be subject to the imperfect recollection of trade marks (21/11/2013, T-443/12, ancotel, EU:T:2013:605, § 54).

112 The signs coincide in the same sequence of letters '-COVAXI-', that is, six out of eight letters in the contested sign. Therefore, the signs are considered visually and aurally similar to an average degree. Conceptually, there is a low degree of similarity for the part of the relevant public who will perceive the reference to the English word 'vaccine' in the signs, which is weak in relation to the goods at issue. For the other part of the public, the signs are meaningless, so the conceptual aspect does not play a role in the overall assessment.

113 In view of the above, taking into account all the relevant factors, in particular the average degree of visual and aural similarity of the signs and the identity of the goods, there is a risk that the relevant public might believe that the goods covered by the earlier mark and the goods covered by the contested sign are provided by the same undertaking, or, as the case may be, from economically linked undertakings. Therefore, in the global assessment, a likelihood of confusion cannot be excluded.

114 The high(er) level of attention of the relevant public cannot alter these findings, especially considering that, as recalled above, even consumers with a high degree of attention must rely on the imperfect recollection of trade marks (21/11/2013, T-443/12, ancotel, EU:T:2013:605, § 54), and taking into account that the goods are identical and that the identical sequence of letters between the signs constitute six out of eight letters in the contested sign.

115 Finally, the applicant reiterates before the Board that the coincidence in the letters 'OVAXI' would not retain consumers' attention and that this is illustrated by the fact that there exists other trade mark registrations containing the sequence of letters 'OVAXI'. However, apart from the fact that the existence of eight trade mark registrations in the EU cannot be considered as sufficient to show a dilution of this element, as already stated in the contested decision, formal coexistence in the registry is not per se particularly relevant in the absence of any evidence with respect to an actual coexistence on the market

(24/11/2005, T-135/04, Online Bus, EU:T:2005:419, § 68; 08/03/2013, T-498/10, David Mayer, EU:T:2013:117, § 77; 02/12/2014, T-75/13, Momarid, EU:T:2014:1017, § 85). Therefore, this argument must also be rejected.

Conclusion

116 The Opposition Division correctly upheld the opposition in its entirety.

117 Consequently, the appeal must be dismissed.

Costs

118 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the applicant, as the losing party, must bear the opponent's costs of the appeal proceedings.

119 As to the appeal proceedings, these consist of the opponent's costs of professional representation of EUR 550.

120 As to the opposition proceedings, the Opposition Division ordered the applicant to bear the opponent's costs, fixed at EUR 620. This decision remains unaffected. The total for both proceedings is therefore EUR 1 170.

Order

On those grounds,

THE BOARD

hereby:

1. **Dismisses the appeal.**

2. **Orders the applicant to bear the opponent's costs in the appeal proceedings, which are fixed at EUR 550. The total amount to be paid by the applicant in the opposition and appeal proceedings is EUR 1 170.**

Signed	Signed	Signed
N. Korjus	C. Govers	A. Kralik

Acting Registrar:

Signed

p.o. R. Vidal Romero