

OPPOSITION No B 2 637 653

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a g a i n s t

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On 28/04/2017, the Opposition Division takes the following

DECISION:

1. Opposition No B 2 637 653 is partially upheld, namely for the following contested goods and services:

Class 29: Meat, fish, poultry, game and snacks made from these products; meat products; meat extracts; canned meat.

Class 30: Spices, whether or not dried; spices; seasoning mixes; salt; relishes [condiments].

Class 35: Retail trading and retailing of meat and charcuterie, poultry.

2. European Union trade mark application No 14 631 451 is rejected for all the above goods and services. It may proceed for the remaining goods and services.
3. Each party bears its own costs.

REASONS:

The opponent filed an opposition against all the goods and services of European Union trade mark application No 14 631 451. The opposition is based on French trade mark registration No 98 731 673. The opponent invoked Article 8(1)(b) EUTMR.

LIKELIHOOD OF CONFUSION – ARTICLE 8(1)(b) EUTMR

A likelihood of confusion exists if there is a risk that the public might believe that the goods or services in question, under the assumption that they bear the marks in question, come from the same undertaking or, as the case may be, from economically linked undertakings. Whether a likelihood of confusion exists depends on the appreciation in a global assessment of several factors, which are interdependent. These factors include the similarity of the signs, the similarity of the

goods and services, the distinctiveness of the earlier mark, the distinctive and dominant elements of the conflicting signs and the relevant public.

a) The goods and services

As a preliminary note, the Opposition Division informs the parties that it has relied on a correction in the English translation of the specification of goods and services of the contested European Union trade mark in Class 29.

The goods originally filed in German as '*Fleisch, Fisch, Geflügel und Wild und aus diesen Waren hergestellte Imbisszeugnisse*' have been translated as '*vlees, vis, gevogelte en wild en uit producten vervaardigde snackproducten*', which is the Dutch translation of these goods.

The Opposition Division considers that the correct translation in English of these goods is '*meat, fish, poultry, game and snacks made from these products*'.

This correction does not alter the scope of protection of the trade mark application in question, nor does it introduce any alteration in the extent of the opposition filed. Hence, the Opposition Division will hereby proceed with the analysis and comparison of goods in this case, considering the correct translation of these items as *meat, fish, poultry, game and snacks made from these products*.

The goods on which the opposition is based are the following:

Class 29: Meat, poultry, game, meat extracts, edible oils and fats.

The contested goods and services are the following:

Class 29: Meat, fish, poultry, game and snacks made from these products; meat products; meat extracts; canned meat; preserved, frozen and dried fruits and vegetables.

Class 30: Spices, whether or not dried; spices; seasoning mixes; salt; relishes [condiments]; flour and preparations made from cereals; bread, pastry and confectionery.

Class 35: Retail trading and retailing of meat and charcuterie, fish, poultry; Advertising; Commercial intermediation services; Business mediation for the trading, import and export of meat, fish, poultry and game and snack products prepared from the aforesaid goods, meat products, meat extracts, tinned meat, snack products and prepared dishes, preserved foodstuffs, preserved, frozen and dried fruits and vegetables, herbs, condiments.

As a preliminary remark, it is to be noted that according to Article 28(7) EUTMR, goods or services are not regarded as being similar or dissimilar to each other on the ground that they appear in the same or different classes under the Nice Classification.

The relevant factors relating to the comparison of the goods or services include, inter alia, the nature and purpose of the goods or services, the distribution channels, the sales outlets, the producers, the method of use and whether they are in competition with each other or complementary to each other.

Contested goods in Class 29

The goods *meat, poultry, game, meat extracts* are identically contained in both lists of goods.

The contested *meat products; canned meat* are included in the broad category of the opponent's *meat*. Therefore, they are identical.

The contested *and snacks made from meat, poultry, game* can have the same origin, nature, purpose and methods of use as the opponent's *meat*, which is the main ingredient of these contested goods. When the ingredient can be considered as being the main ingredient of the prepared dish, a similarity will exist (04/05/2011, T-129/09, *Apetito*, EU:T:2011:193, where the Court confirms the finding of similarity between a particular foodstuff and prepared meals mainly consisting of that same foodstuff). Therefore, they are similar.

The contested *fish, snacks made from fish* are similar to the opponent's *meat*, since they are all foodstuffs made of animal origin and, therefore, they are in competition with each other, share the same method of use and target the same public. Therefore, they are similar.

However, there is no relevant similarity between the contested *preserved, frozen and dried fruits and vegetables* and all the opponent's goods. Although these sets of goods in Class 29 belong to the food industry, they differ in nature and purpose. They do not normally have the same commercial origin and producers and are displayed in different sections of supermarkets. Furthermore, these goods are neither in competition nor complementary. Thus, they are dissimilar.

Contested goods in Class 30

The contested *spices, whether or not dried; spices; seasoning mixes; relishes [condiments]* are similar to the opponent's *meat extracts* in Class 29, as they may have the same purpose (flavouring in cooking) and they can coincide in producers, end users and distribution channels. Furthermore, they are goods in competition.

The contested *salt* is similar to a low degree to the opponent's *meat extracts* in Class 29. They may be used in combination and can coincide in purpose, distribution channels and relevant public.

When it comes to the remaining contested goods in this class, namely *flour and preparations made from cereals; bread, pastry and confectionery*, these goods are dissimilar to the opponent's goods in Class 29. Although the contested goods are food products, their purpose and method of use are different from those of the opponent's goods. They are neither complementary nor in competition, and they do not have the same distribution channels. Where they do, they are found in different areas of sales outlets. They do not necessarily target the same consumers, and are not likely to come from the same kinds of undertakings.

Contested services in Class 35

Retail services concerning the sale of particular goods are similar to a low degree to those particular goods. Although the nature, purpose and method of use of these goods and services are not the same, they have some similarities, as they are

complementary and the services are generally offered in the same places where the goods are offered for sale. Furthermore, they target the same public.

Therefore, the contested *retail trading and retailing of meat and charcuterie, poultry* are similar to a low degree to the opponent's *meat and poultry*.

However, this is not the case for the contested *retail trading and retailing of fish*, since the goods retailed are not identical to any of the opponent's goods and, therefore, not complementary. Furthermore, the contested services and the opponent's goods differ in nature, since services are intangible whereas goods are tangible. They serve different needs, retail services consisting in bringing together, and offering for sale, a wide variety of different products, thus allowing consumers to conveniently satisfy different shopping needs at one stop, whereas the opponent's goods are intended to feed. Furthermore, goods and services have different methods of use and are neither in competition nor complementary. Therefore, they are dissimilar.

The contested *advertising; commercial intermediation services; business mediation for the trading, import and export of meat, fish, poultry and game and snack products prepared from the aforesaid goods, meat products, meat extracts, tinned meat, snack products and prepared dishes, preserved foodstuffs, preserved, frozen and dried fruits and vegetables, herbs, condiments* are services consisting of providing assistance to companies in the sale of their goods and services, in managing their business and in the performance of business operations. They are professional support services which do not have a sufficient link with the opponent's foodstuffs. Goods and services are already different by nature, but these neither have the same purpose nor method of use. They are not complementary, they are provided by very different types of companies (e.g. food producers versus advertising agencies), they use different distribution channels and they do not target the same public (on the one hand, the general public looking for foodstuffs and, on the other, business owners and operators). As regards the import-export services in particular, it has to be recalled that they do not relate to the actual retail or wholesale of the goods, but are considered to relate to business administration. The fact that the subject matter of the import/export services and the goods in question could be the same is not a relevant factor for finding a similarity. Therefore, all these contested services are dissimilar to the opponent's goods.

b) Relevant public — degree of attention

The average consumer of the category of products concerned is deemed to be reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's degree of attention is likely to vary according to the category of goods or services in question.

In the present case, the goods and services found to be identical and similar to various degrees are directed at the public at large. The degree of attention is average.

c) The signs



Earlier trade mark



Contested sign

The relevant territory is France.

The global appreciation of the visual, aural or conceptual similarity of the marks in question must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23).

Both marks are rather complex figurative marks. The earlier mark shows a black oval label in which a smaller white oval is included. Several figurative and verbal elements are placed in the sign, namely a black star in the centre, the verbal elements 'ZAHRA' 'PRODUIT' 'HALAL' just to the left of the star, Arabic signs and/or undefined elements just to the right of the star, as well as the verbal elements 'RIF' and 'ANOUAL' which are displayed vertically at both ends of the sign. All the verbal elements are written in an almost standard typeface.

The contested sign shows an orange oval label against which a comic-book style depiction of a chef holding a book is set in the upper portion. In the centre of the label is the term 'Zehra' between two stars, which are of blue colour and inserted into a waveform ribbon. The lower part of the label is occupied by the verbal elements 'HALAL FOOD' and an Arabic sign. The colours used in the sign are yellow, blue, green, white, black and red. The typeface is almost standard.

The verbal elements 'ZAHRA', 'RIF', 'ANOUAL' (for the earlier right) and 'ZEHRA' (for the contested sign) are meaningless for the relevant public and therefore distinctive.

By contrast, the verbal elements 'PRODUIT HALAL' ('halal product' in English) of the earlier sign and 'HALAL FOOD' of the contested sign will be understood as '*food/product in accordance with Islamic law*' by the public in the relevant territory. Indeed, the elements 'PRODUIT' and 'HALAL' are French words and 'FOOD' is a very basic English word known by the French public, notably because of the widespread use of the expression 'fast food'.

Bearing in mind that the relevant goods and services are foodstuffs and retail of foodstuffs, it is considered that these expressions are descriptive and therefore non-distinctive for all the goods and services found to be identical or similar, as all of these could be prepared or provided in accordance with Islamic food laws.

Both marks contain Arabic signs, which might be associated with Arabic origin of the goods and services, as well as stars, which might be perceived as an indication of quality. Therefore, all these elements have a relatively weak impact and degree of distinctiveness.

Likewise, since the relevant goods and services are foodstuffs or related to such goods, the depiction of a chef in the contested sign is not particularly strong. Indeed, the public may understand that the goods and services are intended for or prepared/provided by chefs.

The undefined round elements which are depicted on the right and left sides of the star in the earlier mark are likely to be disregarded by the relevant public and will not be taken into consideration.

Moreover, the oval labels in both signs and the ribbon in the contested sign have a degree of distinctiveness which is lower than average, since these elements have a decorative nature.

Visually, the distinctive term of the earlier mark 'ZAHRA' and the most distinctive element of the contested sign 'ZEHRA' coincide in four out of their five letters, namely in their first letter and in their last three letters.

Moreover, both signs contain stars, Arabic signs, an oval label and the coinciding term 'HALAL'. Even if these elements are rather weak or non-distinctive (for the latter) and although the figurative elements are represented differently in their details, these numerous coincidences are not negligible. The overall depiction of these elements introduces further visual coincidences between the marks

It has also to be recalled that when signs consist of both verbal and figurative components, in principle, the verbal component of the sign usually has a stronger impact on the consumer than the figurative component. This is because the public does not tend to analyse signs and will more easily refer to the signs in question by their verbal element than by describing their figurative elements (14/07/2005, T-312/03, Selenium-Ace, EU:T:2005:289, § 37). Therefore, in the present case the public will focus on the distinctive verbal elements of the signs, namely 'ZAHRA RIF ANOUAL' for the earlier mark and 'ZEHRA' for the contested sign.

The signs differ in the second letter of the abovementioned terms 'ZAHRA' and 'ZEHRA', namely 'A' for the earlier mark and 'E' for the contested sign. They differ also in the additional words 'RIF' and 'ANOUAL' of the earlier mark. However, since these terms are placed vertically and in opposite directions at both ends of the signs, it is highly likely that the public will refer to the sign rather by its central and more horizontal term 'ZAHRA', knowing that the remaining verbal elements 'PRODUIT HALAL' are non-distinctive.

Other differences lie in the organisation and colours of the elements, as well as in elements with no or little impact, namely the non-distinctive terms 'PRODUIT' and 'FOOD' and the rather weak depiction of a chef in the contested sign.

Therefore, the signs are visually similar at least to a low degree.

Aurally, for the same reasons mentioned above, the relevant public will pronounce the earlier mark first (or even only) by its distinctive term 'ZAHRA'.

Likewise, the public will refer aurally to the contested sign by its distinctive term 'ZEHRA', since it is depicted in the centre in a larger typeface and since the additional verbal elements 'HALAL FOOD' are non-distinctive.

Therefore, the vast majority of the most impactful elements of the signs coincide from an aural perspective. They both have two syllables, the first starting with the same striking sound of the letter 'Z' and the second syllable being identical (/RA/). The pronunciation differs in the sound of the vowel in the first syllable, namely /A/ for the earlier mark and /E/ for the contested sign.

The signs coincide also in the sound of the word 'HALAL', which is, however, non-distinctive.

The additional differences between the signs lie in the sound of the words 'PRODUIT' and 'FOOD', which are however non-distinctive, and in the verbal elements 'RIF ANOUAL' of the earlier sign, which have nevertheless a subsidiary status due to their position, as explained above.

Therefore, the signs are aurally similar to an average degree.

Conceptually, reference is made to the previous assertions concerning the semantic content conveyed by the marks. Although the signs as a whole do not have any meaning for the public in the relevant territory, the non-distinctive elements 'PRODUIT HALAL' of the earlier mark and 'HALAL FOOD' of the contested sign convey an almost identical concept, since 'produit' will be understood as 'foodstuff' in relation to the relevant goods.

Moreover, both marks contain figurative elements which evoke the concept of stars and to that extent they are conceptually similar.

The concept of a chef is only present in the contested sign, but it is rather weak.

The additional verbal elements, namely 'ZAHRA RIF ANOUAL' for the earlier mark and 'ZEHRA' for the contested sign, will not have any meaning for the French public.

Therefore, considering the conceptual coincidences between the marks in only weak or non-distinctive elements, the signs are conceptually similar to a low degree.

As the signs have been found similar in at least one aspect of the comparison, the examination of likelihood of confusion will proceed.

d) Distinctiveness of the earlier mark

The distinctiveness of the earlier mark is one of the factors to be taken into account in the global assessment of likelihood of confusion.

The opponent did not explicitly claim that its mark is particularly distinctive by virtue of intensive use or reputation.

Consequently, the assessment of the distinctiveness of the earlier mark will rest on its distinctiveness per se. In the present case, the earlier trade mark as a whole has no meaning for any of the goods in question from the perspective of the public in the relevant territory. Therefore, the distinctiveness of the earlier mark must be seen as normal, despite the presence of some non-distinctive and weak elements in the mark as stated above in section c) of this decision.

e) Global assessment, other arguments and conclusion

A likelihood of confusion (including a likelihood of association) exists if there is a risk that the public might believe that the goods or services in question, under the assumption that they bear the marks in question, come from the same undertaking or, as the case may be, from economically linked undertakings.

According to the case law of the Court of Justice, in determining the existence of likelihood of confusion, trade marks have to be compared by making an overall assessment of the visual, aural and conceptual similarities between the marks. The comparison 'must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components' (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22 et seq.).

Moreover, the Court has set out the essential principle that evaluating likelihood of confusion implies some interdependence between the relevant factors and, in particular, a similarity between the marks and between the goods or services. Therefore, a lesser degree of similarity between the goods and services may be offset by a greater degree of similarity between the marks and vice versa (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17).

In the present case, the goods and services are partly identical, partly similar to various degrees and partly dissimilar.

The signs are aurally similar to an average degree as well as visually and conceptually similar to a low degree, since they almost coincide in an essential and distinctive element, namely 'ZAHRA' for the earlier mark and 'ZEHRA' for the contested sign.

The signs share also accessory elements such as Arabic signs, stylised stars, an oval label and the non-distinctive term 'HALAL'.

The differences are mainly confined to non-distinctive, negligible, weak or less impacting elements as well as colours and structural considerations.

Based on all the foregoing, the additional elements are not sufficient to clearly differentiate the marks. Taken together with the identity and similarity of part of the goods and services as well as the average degree of attention, it is likely that the French consumers will believe that the conflicting goods and services come from the same undertaking or economically linked undertakings.

Account should also be taken of the fact that average consumers rarely have the chance to make a direct comparison between different marks, but must trust in their imperfect recollection of them.

Considering all the above, the Opposition Division finds that there is a likelihood of confusion, including a likelihood of association, on the part of the French public and therefore the opposition is partly well-founded on the basis of the opponent's French trade mark registration No 98 731 673.

It follows from the above that the contested trade mark must be rejected for the goods and services found to be identical or similar to varying degrees to those of the earlier trade mark.

The rest of the contested goods and services are dissimilar. As similarity of goods and services is a necessary condition for the application of Article 8(1) EUTMR, the opposition based on this article and directed at these services cannot be successful.

COSTS

According to Article 85(1) EUTMR, the losing party in opposition proceedings must bear the fees and costs incurred by the other party. According to Article 85(2) EUTMR, where each party succeeds on some heads and fails on others, or if reasons of equity so dictate, the Opposition Division will decide a different apportionment of costs.

Since the opposition is successful only for part of the contested goods and services, both parties have succeeded on some heads and failed on others. Consequently, each party has to bear its own costs.



The Opposition Division

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According to Article 59 EUTMR, any party adversely affected by this decision has a right to appeal against this decision. According to Article 60 EUTMR, notice of appeal must be filed in writing at the Office within two months of the date of notification of this decision. It must be filed in the language of the proceedings in which the decision subject to appeal was taken. Furthermore, a written statement of the grounds of appeal must be filed within four months of the same date. The notice of appeal will be deemed to be filed only when the appeal fee of EUR 720 has been paid.