

**Notification to the applicant/holder of a decision**

Alicante, 20/01/2021

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*Your reference:*

*Opposition number:* **B 003104331**

*Contested trade mark number:* **018128531**

*Name of the applicant/holder:* **UAB "NAUJI VERSLO PROJEKTAI"**

Please see the attached decision which ends the abovementioned opposition proceedings. It was taken on **20/01/2021**.



**Felix ORTUÑO LOPEZ**

Enclosures (excluding the cover letter): 6 pages.

**Please note that the decisions of the Opposition Division will not be signed by the responsible officials, but will only indicate their full name and carry a printed seal of the Office according to Article 94(2) EUTMR.**

## OPPOSITION No B 3 104 331

**Fruca, S.A.**, Ctra. San Javier nº21, 30570 Beniaján (Murcia), Spain (opponent), represented by **Marina Lorenzo Luna**, Avda. General Primo De Rivera, 9 - Entlo. C, 30008 Murcia, Spain (professional representative)

a g a i n s t

**UAB 'Nauji Verslo Projektai'**, Undinės g. 12, 44104 Kaunas, Lithuania (applicant), represented by **Edita Ivanauskienė**, Law Firm of Edita Ivanauskiene A., Goštauto str. 8-228, 01108 Vilnius, Lithuania (professional representative).


On 20/01/2021, the Opposition Division takes the following


### DECISION:

1. Opposition No B 3 104 331 is rejected in its entirety.
2. The opponent bears the costs, fixed at EUR 300.

### REASONS

The opponent filed an opposition against some of the goods and services of European

Union trade mark application No 18 128 531 for the figurative mark , namely against all the services in Class 35. The opposition is based on European Union trade

mark registration No 17 959 474 for the figurative mark . The opponent invoked Article 8(1)(a) and (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 services

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

Class 35: *Import and export; retailing, wholesaling and sale via global computer networks of agricultural, horticultural and forestry products, fresh fruits*

*and vegetables, preserved, frozen, dried and cooked fruits and vegetables, jellies, jams, compotes.*

The contested services are the following:

Class 35: *Wholesale services in relation to non-alcoholic beverages; wholesale services in relation to cocoa; wholesale services in relation to coffee; wholesale services in relation to baked goods; wholesale services in relation to confectionery; wholesale services in relation to ice creams; wholesale services in relation to foodstuffs; wholesale services in relation to frozen yogurts; wholesale services relating to candy; wholesale services in relation to dairy products; wholesale services in relation to chocolate; retail services in relation to teas; retail services relating to delicatessen products; retail services in relation to desserts; retail services in relation to non-alcoholic beverages; retail services in relation to cocoa; retail services in relation to coffee; retail services relating to bakery products; retail services in relation to baked goods; retail services in relation to confectionery; retail services in relation to ice creams; retail services relating to food; retail services in relation to foodstuffs; retail services via global computer networks related to foodstuffs; retail services in relation to dairy products; retail services relating to candy; retail services in relation to frozen yogurts; retail services relating to fruit; retail services connected with the sale of subscription boxes containing chocolates; retail services connected with the sale of subscription boxes containing food.*

Some of the contested services are identical or similar to services on which the opposition is based. For instance, the opponent's *retailing ... via global computer networks of fresh fruits* is identical to the contested *retail services relating to fruit* and similar to the contested *retail services in relation to dairy products* inasmuch as the goods at issue (fruits v dairy products) are often retailed together in the same outlets and target the same public. For reasons of procedural economy, the Opposition Division will not undertake a full comparison of the services listed above. The examination of the opposition will proceed as if all the contested services were identical to those of the earlier mark which, for the opponent, is the best light in which the opposition can be examined.

#### **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.

The services assumed to be identical target the public at large and business customers with specific professional knowledge or expertise. The public's degree of attentiveness may vary from average to high, depending on the price, or terms and conditions of the services purchased. For instance, in relation to wholesale services, the attention may be higher for large quantities bought in bulk by professionals.

## c) The signs



Earlier trade mark



Contested sign

The relevant territory is the European Union.

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).

The verbal element 'MOND' of the earlier mark has a meaning in different languages, for instance 'moon' in German, 'mouth' in Dutch and the third person of the verb 'to speak/tell' in Hungarian. Likewise, the verbal elements of the contested sign are meaningful in French, namely 'Mon Amie' means 'my friend' and 'boulangerie' means 'bakery'. However, these verbal elements will be perceived as fanciful meaningless words by other parts of the relevant public, such as the Polish-speaking public.

For the purpose of this comparison, the Opposition Division finds it appropriate to assess the signs from the perspective of the public for which the verbal elements do not convey any particular meaning, as that would introduce differences from the conceptual point of view setting the signs apart (see final remarks in section e). This is the most advantageous scenario for the opponent.

In light of the above, the verbal elements 'MOND' (of the earlier mark), 'Mon Ami' and 'boulangerie' (of the contested sign) will be perceived as fanciful meaningless words for the relevant public being assessed. Therefore, they have an average degree of distinctive character.

The typeface of both signs is rather standard and does not detract the public from immediately perceiving the verbal elements of the signs, to which consumers will attribute more importance. It is deemed that the particular arrangement of colours (white, yellow and red) in the earlier mark has a low degree of distinctiveness while the contested sign's stylisation (basic italic font) lacks distinctive character. The backgrounds (black rectangle v beige oval) are of a purely decorative nature. Finally, the figurative devices in the contested sign (i.e. a man putting some bread into the oven and the two ears of wheat), will, bearing in mind the relevant services (retail of foodstuff, bakery products, beverages etc.), be seen as a reference to the product types offered or even the establishment in which they are sold. Therefore, their distinctive character is very low.

The contested sign has no element that could be considered clearly more dominant than other elements. However, as the opponent points out, the verbal element 'boulangerie' and the ears of wheat are secondary due to their size and position.

Finally, although it is true that consumers generally tend to focus on the first element of a sign when encountering a trade mark, it must be stressed, as the opponent claims, that this argument cannot hold in all cases and does not cast any doubt on the principle that

the assessment of the similarity of marks must take account of the overall impression created by them.

**Visually**, the signs coincide in the sequence of letters 'MON'/'Mon'. However, they differ in the remaining (fourth) letter of the earlier mark 'D' and the verbal element 'Ami' of the contested sign. Furthermore, they differ in the secondary verbal element 'boulangerie' as well as in their respective figurative elements (stylistic, letter case, background etc.) which, despite their limited distinctiveness, are overall notably very different. Finally, the signs have quite distinct structure. The earlier mark is composed of only one word whereas the contested sign contains the two-word verbal element 'Mon Ami' accompanied by the additional elements (i.e. figurative devices and 'boulangerie').

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

**Aurally**, the pronunciation of the signs coincides in the sound of the letters 'MON'. However, the pronunciation differs in the sound of the fourth letter of the earlier mark 'D', and in the sound of the additional words 'Ami' and 'boulangerie' of the contested sign. The latter has a limited impact given the secondary role that it plays. Furthermore, the signs also differ in their length, number of syllables, rhythm and intonation.

Therefore, the signs are aurally similar to a below average degree.

**Conceptually**, although the public in the relevant territory will perceive the meanings (even if with only a low degree of distinctiveness) of the figurative elements of the contested sign as explained above, the other sign has no meaning in that territory. Since one of the signs will not be associated with any meaning, the signs are not conceptually similar.

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 services in question from the perspective of the public in the relevant territory. Therefore, the distinctiveness of the earlier mark must be seen as normal.

#### **e) Global assessment, other arguments and conclusion**

The services are assumed to be identical. They are directed at the public at large and at professionals, whose degree of attention varies from average to high.

The signs are visually similar to only a very low degree, aurally similar to a below average degree and not conceptually similar.

In particular, the signs are only similar to the extent that they both contain the string of letters 'MON'. However, they differ significantly in many elements and aspects that will not be overlooked, namely in the fourth letter of the earlier mark 'D', the additional verbal elements 'Ami' and 'boulangerie' as well as their respective figurative elements. The signs have a different number of verbal elements and lengths (i.e. rather short sign v composite mark) and, therefore, rhythms and intonations. All these additional elements diminish the relevance of the coinciding letters, which are likely to be overlooked by consumers when considering the contested sign as a whole.

An assessment of similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another (in this case 'MOND' v 'Mon'). On the contrary, the comparison must be made by examining each of the marks in question as a whole.

The opponent has argued strongly in favour of the importance of the aural similarity between the signs, stating that it is the predominant aspect. Although the category of goods and services involved may increase the importance of one of the different aspects of similarity between signs because of how goods and services are purchased, there are no reasons to consider that the aural aspect can play a greater role in the global assessment in relation to the services in question (essentially retail and wholesale of foodstuff and beverages). These services can be advertised orally, for instance on radio or when referred to by other consumers, but they frequently become known through other means, such as catalogues, the internet or on the signs of the establishments themselves. This makes the visual aspect of equal or even greater importance. Consequently, the opponent's argument must be set aside.

In view of these considerations, and in spite of the fact that the services in question have been assumed to be identical, it must be held that the degree of similarity between the opposing trade marks is insufficient to conclude that the relevant public under analysis, such as the Polish-speaking part of the public, may believe that those services come from the same undertaking or, as the case may be, from economically linked undertakings.

This absence of a likelihood of confusion equally applies to the part of the public for which the verbal elements, in particular 'MOND' and 'Mon Amie' have a meaning. This is because, as a result of the different meanings of those elements, that part of the public will perceive the signs to be even less similar, as already mentioned above. For instance, the German- and Dutch-speaking public will perceive the meaning of 'moon' and 'mouth', respectively, in the earlier mark, whereas those speaking French will perceive the expression 'my friend' in the contested sign. This sets the signs apart and makes the risk of confusion even less likely.

Considering all the above, there is no likelihood of confusion on the part of the public. Therefore, the opposition must be rejected.

For the sake of completeness, it must be mentioned that the opposition must also fail insofar as based on grounds under Article 8(1)(a) EUTMR because the signs are obviously not identical.

## **COSTS**

According to Article 109(1) EUTMR, the losing party in opposition proceedings must bear the fees and costs incurred by the other party.

Since the opponent is the losing party, it must bear the costs incurred by the applicant in the course of these proceedings.

According to Article 109(7) EUTMR and Article 18(1)(c)(i) EUTMIR, the costs to be paid to the applicant are the costs of representation, which are to be fixed on the basis of the maximum rate set therein.



### **The Opposition Division**

Julia  
GARCÍA MURILLO

Félix  
ORTUÑO LÓPEZ

María Clara  
IBÁÑEZ FIORILLO

According to Article 67 EUTMR, any party adversely affected by this decision has a right to appeal against this decision. According to Article 68 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 for appeal must be filed within four months of the same date. The notice of appeal will be deemed to have been filed only when the appeal fee of EUR 720 has been paid.