

OPPOSITION No B 2 225 020

Apple and Pear Australia Limited, 128 Jolimont Road, 3002 East Melbourne, Australia (opponent), represented by **NautaDutilh**, Chaussée de la Hulpe, 120, 1000 Bruxelles, Belgium (professional representative)

a g a i n s t

Pink Lady America, PO Box 1420 N. 16th Ave., 98902 Yakima, United States of America (applicant), represented by **Roberto Manno**, Geremia Di Scanno, 65, 76121 Barletta (BA), Italy (professional representative).

On 25/04/2024, the Opposition Division takes the following

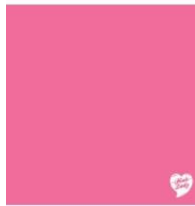
DECISION:

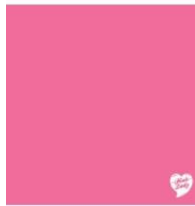
1. Opposition No B 2 225 020 is rejected in its entirety.
2. The opponent bears the costs, fixed at EUR 300.

REASONS

On 30/07/2013, the opponent filed an opposition against all the goods of European Union trade mark application No 11 701 216 'WILD PINK' (word mark). The opposition is based on the following earlier marks:

- 1) French national trade mark registration No 92 420 538 'PINK LADY' (word mark);



- 2) EUTM registration No 6 335 591  (figurative mark);

- 3) German trade mark registration No 2 903 690 'PINK LADY' (word mark);


- 4) EUTM registration No 2 266 948 'PINK LADY' (word mark);


- 5) Benelux trade mark registration (Belgium, Luxembourg, the Netherlands) No 559 177 'PINK LADY' (word mark);

- 6) EUTM registration No 2 042 679 'PINK LADY' (word mark);

- 7) UK trade mark registration No 1 582 849 'PINK LADY' (word mark);



- 8) EUTM registration No 4 186 169  (figurative mark);

9) EUTM registration No 8 613 911  (figurative mark).

The opponent invoked Article 8(1)(b) and Article 8(5) of Regulation No 207/2009 CTMR (now Article 8(1)(b) and Article 8(5) of Regulation 2017/1001, namely EUTMR) in relation to all the earlier marks invoked.

I. EARLIER UK RIGHTS

On 01/02/2020, the United Kingdom (UK) withdrew from the EU subject to a transition period until 31/12/2020. During this transition period EU law remained applicable in the UK. As from 01/01/2021, UK rights ceased *ex-lege* to be earlier rights protected 'in a Member State' for the purposes of proceedings based on relative grounds. The conditions for applying Article 8(1), (4) and (5) EUTMR, worded in the present tense, must also be fulfilled at the time of decision taking. It follows that United Kingdom trade mark registration No 1 582 849 'PINK LADY' (word mark) **no longer constitutes a valid basis of the opposition** (see Communication No 2/20 of the Executive Director of the Office of 10 September 2020 on the impact of the United Kingdom's withdrawal from the European Union on certain aspects of the practice of the Office, Section V 'Earlier rights in *inter partes* proceedings').

The opposition must therefore **be rejected** as far as it is based on this earlier mark.

II. CASE REMITTED BY THE BOARDS OF APPEAL

On 23/12/2014, the Opposition Division rendered a decision that resulted in the rejection of the opposition on the grounds of visual, aural and conceptual dissimilarity of the signs.

The main reasons were the coincidence in the non-distinctive element 'pink' (for the part of the public that will understand it), it being a second element in the contested sign, and a conceptual difference for the part of the relevant public that will understand the verbal elements in both signs. Although earlier EUTMs No 2 042 679 and No 2 266 948 were assumed to have enhanced distinctiveness, the dissimilarity of the signs led to the conclusion that there was no likelihood of confusion. Furthermore, since the similarity of signs is a prerequisite for the application of Article 8(5) EUTMR, the opposition was also rejected on this ground.

The decision was appealed, and on 10/01/2017 the Board of Appeal rendered a decision in the case (10/01/2017, R 87/2015-4, WILD PINK / PINK LADY et al.).

The Board **upheld the contested decision of 23/12/2014** and dismissed the appeal. The Board noted that the similarity of signs is a condition for application of both Article 8(1)(b) and Article 8(5) EUTMR, and first proceeded with the examination of the signs (10/01/2017, R 87/2015-4, WILD PINK / PINK LADY et al., § 12). The Board made a thorough reference to the applicant's arguments yet dismissed its arguments concerning the alleged distinctiveness of the verbal element 'PINK' (10/01/2017, R 87/2015-4, WILD PINK / PINK LADY et al., § 16-17). Regarding the similarity of the

signs, including the earlier figurative marks, the Board found that the term 'PINK' in the conflicting signs could be understood by the relevant public as a descriptive term indicating a specific quality, namely the colour of the goods (10/01/2017, R 87/2015-4, WILD PINK / PINK LADY et al., § 18). It confirmed the Opposition Division's findings of visual, aural and conceptual dissimilarity (10/01/2017, R 87/2015-4, WILD PINK / PINK LADY et al., § 19-21, 23). The Board concluded that the opposition must be rejected in its entirety, regardless of any reputation the earlier marks might enjoy, since similarity of the signs is a prerequisite of Article 8(1)(b) and Article 8(5) EUTMR (10/01/2017, R 87/2015-4, WILD PINK / PINK LADY et al., § 24). In addition, the Board found that the judgment of the Commercial Court in Brussels were irrelevant in the present case, as the signs and the parties were not identical, and the Office was not bound by decisions of national courts (10/01/2017, R 87/2015-4, WILD PINK / PINK LADY et al., § 30).

The opponent filed an action before the General Court. The General Court in its judgment (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678) annulled the contested decision of the Board of Appeal (10/01/2017, R 87/2015-4, WILD PINK / PINK LADY et al.). The main relevant findings of the General Court can be summarised as follows.

- The survey concerning the public's perception of the word 'pink' submitted by the applicant (opponent in this case) for the first time in its application to the General Court, cannot be taken into consideration in the assessment of legality of the contested decision (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 39-43).
- The word 'pink' must be regarded, as part of basic English vocabulary like the words 'blue' and 'red', regularly used in everyday life and in advertising. Therefore, the relevant public throughout the EU has had extensive and repeated exposure to that word (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 58-59).
- The word 'pink' is descriptive as it indicates a specific quality of the goods, namely their colour (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 69). The term 'pink' plays a secondary but not negligible role vis-à-vis that of the word 'lady', which is at the end of the earlier mark, and the word 'wild', which is at the beginning of the contested mark (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 73-74).
- The English-speaking public in the EU will perceive the word 'pink' in both the signs as denoting the colour 'pink'. It will understand the expression 'pink lady' as referring to the concept of a 'lady in pink' and the expression 'wild pink' as referring to a colour, namely a kind of pink to be found in the wild (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 85).
- The non-English-speaking public will also understand the meaning of the word 'lady' and the concept conveyed by the earlier marks 'PINK LADY', whereas the word 'wild' is not regarded as an English word known by the relevant public throughout the EU (07/03/2013, T-247/11, FAIRWILD / WILD, EU:T:2013:112, § 39). The non-English-speaking part of the relevant public who will not understand the verbal element 'wild', will only perceive the adjective 'pink' in the contested sign (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 86-87).

- The signs have, at least, a low degree of visual and aural similarity due to the coinciding element 'pink' (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 79, 81).
- A low degree of conceptual similarity exists due to the descriptiveness of the term 'pink' (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 88-89).
- The Boards of Appeal failed to conduct the global assessment of likelihood of confusion and incorrectly concluded that the signs were dissimilar overall (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 91).
- The Boards of Appeal erred in finding that Article 8(5) EUTMR was not applicable without carrying out an overall assessment and without assessment of the claim of reputation of the earlier marks (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 101).

On 20/03/2023, the fifth Board of Appeal issued a decision (20/03/2023, R 339/2019-5, Wild Pink / Pink Lady et al.) in which it remitted the case to the Opposition Division for further prosecution. The Board's reasoning can be summarised as follows.

- The Opposition Division was ordered to carry out a fully comprehensive and in-depth assessment of the opposition grounds invoked and taking into account the findings of the General Court (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678), which is binding upon the Opposition Division. The Opposition Division was also ordered to examine the evidence filed by the applicant and the opponents in the opposition and appeal proceeding (20/03/2023, R 339/2019-5, Wild Pink / Pink Lady et al., § 60).
- The examiner may consider whether the sign applied for 'WILD PINK' must be objected under Article 7(1) CTMR, as indicating the name of a colour that might constitute an objective characteristic, inherent to the nature of that product and intrinsic and permanent with regard to the designated products (20/03/2023, R 339/2019-5, Wild Pink / Pink Lady et al., § 59).
- For the ground of refusal to apply, a direct and specific link is necessary in the mind of the relevant public, not just an indirect association (20/03/2023, R 339/2019-5, Wild Pink / Pink Lady et al., § 72). Therefore, the crucial question is whether the term 'Wild pink' – as a colour indication – could reasonably be perceived in the context of the relevant goods as a significant characteristic, which is likely to be important in the choices of the consumers (20/03/2023, R 339/2019-5, Wild Pink / Pink Lady et al., § 72 last sentence).

III. ABSOLUTE GROUNDS FOR REFUSAL

The opponent made several requests for the Office to re-open absolute grounds examination of the contested mark. In particular, the opponent relied on the provisions of Article 45(3) EUTMR and Article 30(2) EUTMDR, which relate to third parties' observations, the Office's right to re-open the examination of absolute grounds on its own initiative at any time before registration (where appropriate) and the Boards of Appeal's right to remit the contested application to the Examiner competent for examining it (submissions of 18/03/2019, 03/02/2020, 28/04/2020 and in particular a separate submission of 21/10/2021, filed during the second appeal proceedings).

As the Board of Appeal correctly noted, from Article 161 in conjunction with Article 47 EUTMR, and Article 71(1) EUTMR, the Opposition Division and the Boards of Appeal do not have competence to examine absolute grounds for refusal during opposition proceedings (20/03/2023, R 339/2019-5, Wild Pink / Pink Lady et al., § 65).

The third-party observations concerning the absolute grounds for refusal in relation to the contested trade mark application No 11 701 216 'WILD PINK' (word mark), were duly forwarded to the Examiner for further analysis (acknowledged in the Communication of the Office in the file of the contested application on 04/04/2024). However, having considered all relevant factors and observations, including the findings of the General Court related to the contested sign (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678), the examination of absolute grounds for refusal under Article 7(1) EUTMR was not re-opened in relation to the contested mark.

The examination of the opposition may proceed.

IV. OTHER PRELIMINARY REMARKS

1. *Validity of the earlier marks*

The applicant raised various objections against the validity of the earlier 'PINK LADY' trade marks, including that they were filed in bad faith (Section IV of its submission of 09/12/2021), as well as objections concerning the nature of use of the earlier marks. For example, in its submission of 20/02/2024, the applicant presented arguments and evidence focusing, inter alia, on the alleged use of the earlier marks as collective marks.

According to established case-law, earlier marks, whether EUTMs or national marks, enjoy a 'presumption of validity'. The Court made it clear (24/05/2012, C-196/11 P, F1-LIVE (fig.)/F1 et al., EU:C:2012:314, § 40-41), that 'in proceedings opposing the registration of a European Union trade mark, the validity of national trade marks may not be called into question'. The Court added that 'it should be noted that the characterisation of a sign as descriptive or generic is equivalent to denying its distinctive character'.

Given that all the earlier marks listed at the beginning of this decision are valid and there are no pending invalidity or cancellation proceedings against any of them, the applicant's arguments questioning both distinctiveness and validity of the earlier 'PINK LADY' trade marks must be set aside as irrelevant.

2. *Use by third parties – valid consent from the opponent*

In its observations of 20/02/2024, the applicant presented arguments and some evidence focusing on the nature of the earlier marks and use thereof. In particular, the applicant raised questions about control over use of the earlier marks and whether use thereof by third parties was upon a valid consent of the opponent.

Given that lack of the consent of the proprietor of the earlier marks may have an impact on the validity of the evidence submitted by the opponent to support its claim of reputation / enhanced distinctive character of the earlier marks, the Opposition Division notes the following.

According to Article 18(2) EUTMR, use of the mark with the consent of the proprietor is deemed to constitute use by the proprietor. This means that the owner must have given

its consent prior to the use of the mark by the third party. Consequently, at the evidence stage it is prima facie sufficient that the opponent only submits evidence that a third party has used the mark. The Office infers from such use, combined with the opponent's ability to present evidence of it, that the opponent has given prior consent (implicit consent) (08/07/2004, T-203/02, VITAFRUIT / VITAFRUT, EU:T:2004:225, § 25; 11/05/2006, C-416/04 P, VITAFRUIT / VITAFRUT, EU:C:2006:310). The Court pointed out that it was unlikely that the proprietor of a trade mark would be in a position to submit evidence if the mark had been used against its will.

This presumption of implicit consent remains valid not only when it is not disputed by the applicant (08/07/2004, T-203/02, VITAFRUIT / VITAFRUT, EU:T:2004:225, § 26), or when the applicant merely provides generic argumentations (07/09/2022, T-521/21, ad pepper the e-advertising network (fig.), EU:T:2022:520, § 22, 28), but also in cases where the applicant expressly disputes the use of the mark by third parties (14/12/2022, T-636/21, eurol LUBRICANTS (fig.) / Eurollubricants, EU:T:2022:804, § 41). In fact, where the proprietor of a trade mark maintains that the use of its mark by a third party constitutes genuine use of that mark, it is implicit that the proprietor consented to that use, unless there is evidence to the contrary (14/12/2022, T-636/21, eurol LUBRICANTS (fig.) / Eurollubricants, EU:T:2022:804, § 44). Therefore, when the applicant disputes the consent without providing relevant and concrete documentation in support of its claim, the presumption would remain, in principle, valid.

In the present case, in the context of use of the earlier marks by third parties, the applicant requested the opponent to disclose complete versions of the 'Master licences' granted to their EU counterparts.

From the case-law, it follows that where goods are produced by the trade mark proprietor (or with its consent), but subsequently placed on the market by distributors at wholesale or retail level, this is also to be considered as use of the mark (17/02/2011, T-324/09, Friboi (fig.) / FRIBO et al., EU:T:2011:47, § 32; 16/11/2011, T-308/06, BUFFALO MILKE Automotive Polishing Products (fig.) / BÚFALO (fig.), EU:T:2011:675, § 73). This applies to the present case, at least to some extent.

Moreover, during the proceedings before the EUIPO instances, the opponent, Apple and Pear Australia Limited, provided sufficient explanation as regarding the type of relationship with the French company, Star Fruits Diffusion. Specifically, it explained that the French company was the opponent's licensee for the earlier Benelux, German and French trade marks and EUTMs No 2 042 679, No 2 266 948, No 6 335 591 and No 8 613 911, and that it even gave its consent to bring infringement actions against these EUTMs. Furthermore, the opponent explained that the French entity Pink Lady Association Europe was responsible, on behalf of Star Fruits Diffusion and its licensees, for coordinating the 'PINK LADY' marketing campaigns throughout Europe (except the UK).

Furthermore, the arguments and evidence submitted by the applicant related to the current use of the earlier marks, do not prove or raise a justifiable doubt of lack of prior consent to use the earlier marks before, on, or after the relevant date (application date of the contested sign).

Therefore, the request for the opponent to disclose the complete version of the 'Master licences' is clearly unfounded and must be rejected. Furthermore, the evidence of use of the earlier marks by third parties submitted by the opponent is considered valid evidence of use of those marks.

3. *Various types of proceedings and decisions issued by authorities outside of the EU*

Both parties participated in various types of proceedings concerning plant variety rights 'Cripps Pink' and 'Cripps Red', trade mark examination proceedings concerning both the opponent's and the applicant's marks outside of the EU, in particular in Australia, Mexico, New Zealand and the USA, and submitted various arguments and evidence related thereto. For example, in its submission of 09/12/2021, the applicant submitted, inter alia, copies of various decisions concerning registration procedures for the 'PINK LADY' trade marks, including decisions on rejection of oppositions against its 'WILD PINK' trade marks in jurisdictions outside of the European Union.

However, each case must be examined on its own individual merits and with regard to the legal basis applicable to EU trade marks.

The Office is also not bound by decisions issued in jurisdictions outside of the EU, not only because the parties or the signs might not have been the same, but also because those decisions might have been issued with regard to different provisions of law and different criteria.

Therefore, even if the cases cited by the parties relate to registration and diverse ownership of the 'PINK LADY' trade marks, they are irrelevant for the purpose of examining grounds for opposition in the present case and cannot be taken into consideration.

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

Pursuant to 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.

Actual business activities of the parties

To date, both parties have presented numerous arguments relating to their business activities, including their geographical scope (also outside of the EU), historical developments related to use of the 'PINK LADY' trade marks in the EU and outside of the EU, negotiations with third parties or even negotiations between the opponent and the applicant concerning their trade marks and persons involved in their business operations (e.g. the applicant's submission of 04/02/2020 and the latest applicant's submission of 20/02/2024).

In this context, the examination of the likelihood of confusion carried out by the Office is a prospective examination. In contrast to trade mark infringement situations – where the courts deal with specific circumstances in which the particular facts and the specific nature of use of the trade mark are crucial – the deliberations of the Office on likelihood of confusion are carried out in a more abstract manner. The Office must take the usual circumstances in which the goods covered by the marks are marketed as its benchmark, that is, those circumstances that are expected for the category of goods covered by the marks. The particular circumstances in which the goods covered by the marks are

actually marketed, use of the marks by third parties or the past and current business activity model of any of the parties, as a matter of principle, have no impact on the assessment of the likelihood of confusion because they may vary in time depending on the wishes of the proprietors of the trade marks (15/03/2007, C-171/06 P, Q QUANTIM (fig.) / Quantieme (fig.), EU:C:2007:171, § 59; 22/03/2012, C-354/11 P, G (fig.) / G (fig.) et al., EU:C:2012:167, § 73; 21/06/2012, T-276/09, Yakut / Yakult (fig.), EU:T:2012:313, § 58).

The opposition is based on more than one earlier trade mark. The Opposition Division finds it appropriate to first examine the opposition in relation to the opponent's EUTM registrations No 2 266 948 and No 2 042 679 for the word marks 'PINK LADY'. This is because these marks have no additional elements (e.g. figurative elements or colours) and in conjunction cover the same goods as those covered by the remaining earlier marks.

a) The goods

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

- 1) EUTM registration No 2 266 948 (earlier mark 1)

Class 29: *Preserved, dried and cooked **fruits**; including apples.*

Class 30: *Confectionery including apple cakes and applies pies; cereal and oat based products including health bars; breads; and pastries such as apple strudel.*

- 2) EUTM registration No 2 042 679 (earlier mark 2)

Class 31: *Agricultural, horticultural products including fruit, grains, plants and trees, especially apples and apple trees.*

The contested goods, after limitation of the list of goods in Class 30 submitted by the applicant on 16/08/2013, partial refusal of protection for some of the goods in Classes 29 and 30 by opposition decision (23/05/2014, B 2 238 247), which has become final, and the limitation of the list of goods in Class 31 accepted by the Board of Appeal on 30/05/2022, are the following:

Class 29: *Preserved, frozen, dried and cooked vegetables.*

Class 30: *Fruit flavourings, other than essences.*

Class 31: *Fruit, fresh, namely apples belonging to the species 'Malus domestica Borkh'.*

The limitation of the list of goods in Class 31 to apples belonging to the species 'Malus domestica Borkh' means that the contested sign is intended solely for marking apples that are cultivated. In other words, the contested mark is not intended to cover any 'wild' apples. This is because the Latin name 'Malus domestica' simply indicates apples, namely domesticated tree and fruit of the rose family (Rosaceae), one of the most widely cultivated tree fruits (information extracted from *Britannica Encyclopaedia Online* on 25/03/2024 at <https://www.britannica.com/plant/apple-fruit-and-tree>). The specific epithet 'Borkh' refers to the German botanist Moriz Balthasar Borkhausen who first published the name in 1803. This scientific name is widely used in the botanical

community to classify and identify the domestic apple tree (information extracted from *Science Direct* on 25/03/2024 at <https://www.sciencedirect.com/topics/agricultural-and-biological-sciences/malus>).

An interpretation of the wording of the list of goods is required to determine the scope of protection of these goods.

The terms 'including' and 'especially', used in the opponent's list of goods in Classes 30 and 31, indicate that the specific goods are only examples of items included in the category and that protection is not restricted to them. In other words, it introduces a non-exhaustive list of examples (09/04/2003, T-224/01, NU-TRIDE / TUFFTRIDE, EU:T:2003:107).

However, the term 'namely', used in the applicant's list of goods to show the relationship of individual goods and services to a broader category, is exclusive and restricts the scope of protection only to the goods specifically listed.

According to Article 33(7) EUTMR, goods or services are not regarded as being similar to or dissimilar from 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 or complementary.

Contested goods in Class 29

The contested *preserved, frozen, dried and cooked vegetables* are similar to a low degree to the opponent's *preserved, dried and cooked **fruits**, including apples* of earlier mark 1 because they usually coincide in distribution channels, relevant public and producer.

Contested goods in Class 30

The contested *fruit flavourings, other than essences* are dissimilar to any of the goods in Class 29 (*preserved, dried and cooked fruits*) and in Class 30 (*confectionary, bread and pastries*) covered by earlier mark 1 and to any of the goods in Class 31 covered by earlier mark 2 (*agricultural, horticultural products including fruit, grains, plants and trees, especially apples and apple trees*).

In particular, flavourings, other than essential oils, are dissimilar to the goods in Class 30. These goods have different commercial origins, they serve specific purposes and, in principle, target companies operating in the food and beverage industry (manufacturers of foods and beverages), and consequently a specialised and different relevant public. In addition, the contested goods are not distributed through the same distribution channel as the earlier goods. They are also neither complementary (indispensable) nor in competition.

The same reasoning applies to the earlier goods in Classes 29 and 31. The sole fact that the goods may be sold in the same outlets as the contested goods is insufficient to render them similar.

Contested goods in Class 31

The contested *fruit, fresh, namely apples belonging to the species ‘Malus domestica Borkh’* are included in the broad category of the opponent’s *agricultural, horticultural products including fruit, grains, plants and trees, especially apples and apple trees* of earlier mark 2. Therefore, they are identical.

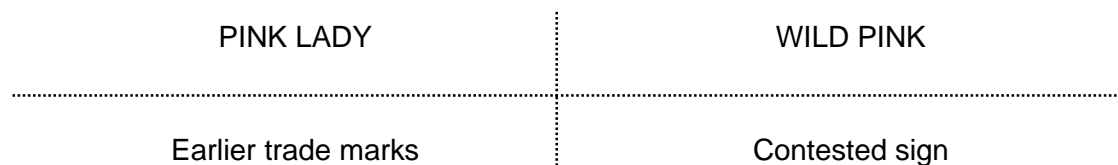
b) Relevant public – degree of attention

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 found to be identical and similar to a low degree target the general public.

The degree of attention is low as confirmed by the General Court (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 51).

c) The signs



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).

Moreover, when assessing the similarity of the signs, an analysis of whether the coinciding components are descriptive, allusive or otherwise weak is carried out to assess the extent to which these coinciding components have a lesser or greater capacity to indicate commercial origin. It may be more difficult to establish that the public may be confused about origin due to similarities that pertain solely to non-distinctive elements.

The General Court has established that ‘WILD’ is not part of the basic English vocabulary understood by the relevant public throughout the EU (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 86). Therefore, for at least part of the relevant public (e.g. Bulgarian-, Polish-, and Spanish-speaking public) ‘WILD’ is meaningless and distinctive in relation to the relevant goods.

The Opposition Division accepts the opponent’s arguments (and evidence) that the verbal element ‘WILD’ will be understood not only by the English-speaking public (such as in Ireland, Malta and the Scandinavian countries where English is commonly known),

but also by a part of the non-English-speaking, namely the Danish-, Dutch-, German- and Swedish-speaking public in Benelux, Denmark, Germany, Austria and Sweden. This is due to the word 'WILD' existing as such in those territories (in Danish, Dutch: Belgium, the Netherlands, and in German: Austria, Germany), or having close equivalents (e.g. *VILD* in Swedish and *wëlleg* in Luxembourgish). The General Court has held that the word 'wild' means 'wild' in English and German (07/03/2013, T-247/11, FAIRWILD / WILD, EU:T:2013:112). Therefore, in Belgium, Denmark, Germany, Ireland, Luxembourg, Malta, the Netherlands, Austria and Sweden, the term 'WILD' will be understood to have the same meaning in relation to the goods at issue, that is as fruits and vegetables grown in the wild (opponent's submission of 03/02/2020).

For the part of the public that understands the verbal element 'WILD', it indicates 'animals or plants that live or grow in natural surroundings and are not looked after by people' or someone/something unconventional 'crazy' (information extracted from *Collins English Dictionary* on 28/03/2024 at <https://www.collinsdictionary.com/dictionary/english/wild>). Therefore, for this part of the public the word 'WILD' is descriptive in relation to the contested goods in Class 29 as it will indicate that the goods are made from such 'uncultivated' goods. It is distinctive to a normal degree for the contested goods in Class 31 (as limited), as they are obviously not grown in the wild, whereas the other message conveyed by this word ('crazy') has no descriptive meaning for those goods (as also argued by the applicant in its submission of 27/05/2020, page 2).

The General Court has also established that the coinciding verbal element 'PINK' is a basic English word and that it will be understood by average consumers of the general public throughout the EU (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 58-59). In relation to the relevant goods, the verbal element 'PINK' indicates a specific quality thereof, namely their colour, and thus it is descriptive of the goods for the whole of the specification (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 69-70). Although the opponent challenges the finding of descriptive character of 'PINK' for other types of goods than *fruits* (opponent's submission of 18/03/2019, page 16, point 55), it has not submitted any congruent line of arguments and/or evidence that would prove otherwise (as will be further examined below).

Similarly, the English word 'LADY' present in the earlier marks is understood by the relevant public throughout the entire EU. Given that 'LADY' has no descriptive or otherwise allusive meaning in relation to any of the relevant goods, it is distinctive (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 86).

For the entire public, the earlier marks 'PINK LADY', as a whole, convey a concept of a 'lady in pink' or lady otherwise characterised by the colour pink. This meaning of 'PINK LADY' is not descriptive or otherwise allusive or weak in relation to any of the relevant goods. Therefore, the earlier marks are distinctive for the relevant goods.

The public that does not understand the word 'WILD' will only perceive the concept of the adjective 'pink' in the contested sign (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 87). Consequently, for this part of the relevant public the contested sign 'WILD PINK', as a whole, has no clear meaning in relation to the contested goods in Classes 29 and 31.

The General Court established that for the public that will understand the word 'WILD', the contested sign 'WILD PINK', as a whole, relates to a colour, namely 'a kind of pink to be found in the wild' (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 85).

The signs do not have any dominant elements. However, the Court stated that:

while it is true that the term 'PINK' plays a secondary role vis-à-vis that of the word 'LADY', which is at the end of the earlier mark, and the word 'wild', which is at the beginning of the mark applied for, the words 'lady' and 'wild' cannot, in any event, be regarded as likely to dominate, by themselves, the relevant public's recollection of those marks.

Therefore, despite its position and descriptive character, 'PINK' cannot be totally disregarded in the comparison of the marks (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 73-74).

To support its arguments concerning similarity between the signs, the opponent presented a list of numerous previous Office decisions as well as judgments of the General Court and Court of Justice of the EU relating to cases in which the signs coincided in the same verbal element indicating a colour (e.g. blue, red or black) or coincided in the same verbal elements in reversed order (e.g. 'MARINA', TACK'COTO', 'PIRUS', 'ROYAL', 'GURU', 'MOUNTAIN' or 'SCOUT'). However, even if those cases were to some extent relevant, the distinctiveness and role in the signs of their similar elements was different or there was a conceptual similarity between the signs. In addition, in some cases, different goods and services were compared. In any case, in the present case, the Opposition Division is bound by the findings regarding the similarity of the signs and the role of their elements provided by the General Court in the judgment in the case (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 73-74) directly relating to the signs in conflict.

Reference is made to the principle that consumers generally tend to focus on the beginning of a sign when they encounter a trade mark. This is because the public reads from left to right, which makes the part placed at the left of the sign (the initial part) the one that first catches the attention of the reader.

Visually and aurally, both signs have two verbal elements of four letters each. They coincide in the non-distinctive verbal element 'PINK' (and its sound). However, they differ visually and aurally in the distinctive second verbal element 'LADY' in the earlier marks and in the verbal element 'WILD' at the beginning of the contested sign, which is where the consumers pay more attention. Moreover, the different elements in the signs are relatively short and comprise four letters, as does the coinciding verbal element 'PINK' (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 78).

It is reiterated that the coinciding element 'PINK' is in a different (second position) in the contested sign, which impacts on the visual and aural perception.

Therefore, visually and aurally, a low degree of similarity is established, complying with the directions given by the General Court (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 79-80).

Conceptually, reference is made to the previous assertions concerning the semantic content conveyed by the marks. The relevant public will understand 'PINK LADY' as an expression. Regardless of whether 'WILD' is understood or not, both signs will be associated with the concept of the colour pink conveyed by the coinciding verbal element 'PINK'. Since the coinciding element is non-distinctive, its impact on the conceptual comparison of the signs is very limited. Therefore, there is only a low degree of conceptual similarity between the signs (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 88).

For the part of the public for which 'WILD' has a meaning, conceptually the signs would be even further apart, since they refer to the semantic expression of a lady in pink and of the crazy pink / pink found in the wild, respectively.

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 marks

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

As explained above, the earlier marks 'PINK LADY', as a whole, convey a concept of a 'lady in pink' or lady otherwise characterised by the colour pink. This meaning of 'PINK LADY' is not descriptive or otherwise allusive or weak in relation to any of the relevant goods. Therefore, the earlier marks are distinctive for the relevant goods.

According to the opponent, the earlier trade marks have a reputation as a result of their long standing and intensive use, and enjoy a high degree of recognition among the relevant public in the European Union in connection with some of the goods for which they are registered, namely:

1) EUTM registration No 2 266 948 (earlier mark 1)

Class 29: *Preserved, dried and cooked fruits; including apples.*

Class 30: *Confectionery including apple cakes and applies pies; cereal and oat based products including health bars; breads; and pastries such as apple strudel.*

2) EUTM registration No 2 042 679 (earlier mark 2)

Class 31: *Agricultural, horticultural products including fruit, grains, plants and trees, especially apples and apple trees.*

This claim must be properly considered given that the distinctiveness of the earlier trade mark must be taken into account in the assessment of likelihood of confusion. Indeed, the more distinctive the earlier mark, the greater will be the likelihood of confusion, and therefore marks with a highly distinctive character because of the recognition they possess on the market, enjoy broader protection than marks with a less distinctive character (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 18).

Both the reputation and the enhanced distinctiveness of the earlier trade marks should exist at the time of filing of the contested EUTM application (or any priority date). In principle, it is sufficient that the opponent show that its marks had acquired enhanced distinctiveness on that date. Enhanced distinctiveness should also exist at the time when the opposition decision is taken. However, in principle, this will be assumed unless the applicant claims and proves any subsequent loss of enhanced distinctiveness. This has not been claimed in the present case.

In the present case, the contested trade mark was filed on **29/03/2013**. Therefore, the opponent was required to prove that the trade marks on which the opposition is based had a reputation (and thus enjoyed a high degree of recognition among the relevant

public) and enjoyed a high degree of distinctiveness as a result of long-standing and intensive use prior to that date.

The opposition was filed 10 years ago and most of the evidence submitted by the opponent to prove its claims comes from before the filing date of the contested mark. The Opposition Division will assess the evidence with the assumption that the reputation, if proven, subsists until the present moment, since this is the most advantageous scenario for the opponent and does not alter the outcome.

The opponent submitted evidence to support its claims. As it requested that certain commercial data contained in the evidence and its submissions be kept confidential vis-à-vis third parties due to special interest under Article 114(4) EUTMR, the Opposition Division will describe the evidence only in the most general terms without divulging any such data.

The Board of Appeal confirmed that the additional evidence (submitted by the opponent for the first time before the Board) served merely to supplement its arguments and evidence filed during the proceedings before the first instance, and therefore that it was admissible (20/03/2023, R 339/2019-5, Wild Pink / Pink Lady et al., § 59).

The Opposition Division thoroughly reviewed the entire evidence provided by the opponent. In its submission of 03/02/2020, the opponent specified that the earlier marks 'PINK LADY' enjoy 'an exceptionally high reputation and recognition' in particular in the Benelux (Belgium, the Netherlands, Luxembourg) and Denmark. Given that the evidence is most complete and demonstrates significant levels of recognition within the Benelux (Belgium, the Netherlands), Denmark and Germany, the following analysis will focus on the submissions pertaining to these countries, which does not alter the outcome.

The evidence consists, inter alia, of the following relevant documents.

I. Certificates from independent auditors of KPMG in Nimes (France). Certificates of 22/01/2013 and of 31/01/2013 relating to the following.

- a) Sales volumes in the EU excluding the UK. Certificate shows total sales volume (in tonnes) in the EU excluding the UK between 2005 and 2012. It shows that the total sales volume each year exceeded 100 000 tonnes of 'PINK LADY' fruits and reached nearly 900 000 tonnes in total over the referenced period (e.g. Exhibit 3.1 of the opponent's submission of 30/12/2013).
- b) Budget for TV advertising of 'PINK LADY'. Certificate shows TV budget for 'PINK LADY' in Benelux (Belgium, the Netherlands) and Germany for 2009-2010 and 2010-2011, respectively. This data is cited in the opponent's submission and, in general, shows substantial TV budgets for the seasons 2009/2010 and 2010/2011 (Exhibit 3.3 of the opponent's submission of 30/12/2013).

II. Market surveys concerning recognition of 'PINK LADY' marks

A set of market surveys' reports entitled 'Assessment of reputation of the apples trade marks', conducted in 2013 (before the filing date of the contested sign) by the independent research company IPSOS in Belgium, Denmark, the Netherlands and Germany, accompanied by an overview of results of the previous IPSOS market surveys conducted between 2001 and 2010 in Benelux and Germany, and tables with more detailed comparable data (Exhibits 4.1, 4.2, 4.3, 4.5, 4.7 and 4.8

of the opponent's submission of 30/12/2013). The market surveys were conducted among the general public in the specified EU countries, using a nationally representative sample of at least 1 000 respondents. The reports include comprehensive information and data about their objectives, methodology, relevant sociodemographic information, questions asked, and detailed analysis of their results. Consequently, they meet the criteria for providing credible results regarding the level of recognition of the earlier marks in the relevant territories. The market surveys' reports include tables displaying comparable data, which demonstrate a significant increase in all levels of 'PINK LADY' brand awareness measured between 2010 and 2013. The market surveys' results indicate that in 2013 the earlier 'PINK LADY' trade marks were known by a significant part of the relevant public in the above-indicated countries. In particular, the market surveys show considerable levels of top-of-the-mind awareness in Belgium and Denmark (i.e. 'PINK LADY' was the first apple name that came to mind amongst the respondents) as well as substantial spontaneous awareness levels in Belgium, Denmark and the Netherlands and considerable spontaneous awareness levels in Germany (i.e. 'PINK LADY' was one of the apples names cited most frequently).

The evidence also includes an affidavit of 23/12/2013 of IPSOS confirming the validity of the market surveys' results conducted between 2010 and 2013 and general information concerning IPSOS (Exhibits 4.9 and 4.10 of the opponent's submission of 30/12/2013).

III. Independent market analysis.

The documents include, inter alia, the following.

- a) Article entitled 'Significant rise in sales of Pink Lady' from issue No 26 of 2009 of the online magazine 'www.fruittoday.com'. It includes information on the global sales volume of 'PINK LADY' apples in Europe, which increased significantly in 2008. In particular, it mentions performance in Germany (the principal market) and in Denmark, which noticed an impressive growth compared to 2008. It presents 'PINK LADY' as a premium apple brand (Exhibit 5.5 of the opponent's submission of 30/12/2013).
- b) Article entitled 'Naturally exhilarating Pink Lady®' published in the specialised magazine '*Fruchthandel Leading Brands 2013*' (Exhibit 5.8 of the opponent's submission of 30/12/2013). It presents the earlier marks as 'Pink Lady® apples as No 1 branded apple in Europe'. It includes data concerning exceptional sales growth in the season 2012/2013. It describes 'powerful European promotional campaigns' on TV channels each year in November and February, which reached in total more than 200 million viewers, extension of web-based customer activities with a loyalty club and more social network, websites activities and in-store promotions. Finally, it mentions that Pink Lady® apple growers must meet demanding quality and sustainability standards to use the brand sticker on their apples. It presents pictures of apples with a figurative 'PINK LADY' trade mark:



IV. Advertising and promotional activities

Set of numerous documents comprising the following.

- a) Press and media coverage concerning the 'PINK LADY' trade marks in Benelux (Belgium and the Netherlands) and Germany, mainly between 2002 and 2010 (Exhibits 6.1, 6.2 and 8.1 of the opponent's submission of 30/12/2013).

The evidence includes, inter alia, the following.

- Belgium – pictures and/or information leaflets about promotional campaigns between 2002 and 2010, which included a trip to Paris in the season 2002/2003, promotional leaflets spread in Carrefour stores in the season 2004/2005, Valentine's Day promotions in the seasons 2003/2004 and 2006/2007 (with a prize being a trip to Las Vegas), promotional campaign on one of the main TV channels alongside a known sitcom series and outdoor campaigns in the season 2005/2006, partnership and sales challenges with known supermarket chains in Belgium in the seasons 2007/2008 and 2008/2009. Furthermore, the evidence includes information on various promotional spots in the leading radio stations in Belgium with approximately 50 % of the targeted public covered in the season 2008/2009 as well as lists of various known lifestyle magazines where the adverts of 'PINK LADY' were published in 2009. It lists several TV channels for a TV campaign in 2009 and the overall impact on millions of viewers.
- The Netherlands – cooking recipes in the apple packs sold, Valentine's Day promotion in well known stores in the season 2006/2007 and in the season 2009/2010, TV adverts on one of the main TV channels in the seasons 2005/2006 and 2008/2009 with an estimated impact on millions of viewers.
- Germany – tasting promotions in various leading German food stores and supermarkets in the seasons 2000/2001, 2002/2003, and 2007/2008, Valentine's Day animations in the season 2004/2005 and Valentine's Day partnership in the season 2006/2007, press adverts in various magazines with their overall impact on millions of readers as well as TV adverts on various leading TV channels with an estimated impact on more than 50 million viewers.

The evidence shows use of various figurative marks:



- b) Sample invoices for advertising and promotional services, namely 38 **invoices** for advertising services issued by the companies in Belgium, the Netherlands and Luxembourg between 2006 and 2010 (Exhibits 7.1 to 7.38 of the opponent's submission of 30/12/2013), 44 invoices issued by different German and international marketing companies between 2006 and 2010 (Exhibits 9.1 to 9.44 of the opponent's submission of 30/12/2013). Most of

the invoices show significant amounts of expenditure for the advertising services rendered.

V. Extracts from the opponent's website and newsletter

The evidence includes, inter alia, the following.

a) Printouts (undated) from various opponent's websites:

- www.pinkladyeurope.com (EU international home page);
- www.apple-pinklady.com in various language versions, inter alia, in Dutch, English and German (Exhibits 14.1, 14.3, 14.4, 14.6 and 14.10 of the opponent's submission of 30/12/2013, an updated version of 15/04/2015 attached to the opponent's submission of 20/04/2015).

The evidence shows the use of the word mark 'PINK LADY' as well as the



figurative marks

- b) Printouts from the opponent's website related to the history of the 'Pink Lady®' brand (Exhibit 4 of the opponent's submission of 07/10/2014).
- c) Declaration from an independent marketing agency 'Hive' regarding the number of visits to the 'PINK LADY' website and members in the club in July 2011 and March 2013 (Exhibit 14.2 of the opponent's submission of 30/12/2013).
- d) Newsletter from International Pink Lady Alliance of 2009 (Exhibit 14 of the opponent's submission of 07/10/2014). It informs, inter alia, that in 2009 over 170 million European consumers were reached by the communication campaign organised for Valentine's Day, and lists countries with the best sales performance.

VI. Evidence concerning the opponent's PINKIDS trade marks:

- a) extract concerning the EUTM registration No 9 914 565 'PINKIDS' (word mark);
- b) declaration of the Mediafel agency confirming the launch of the 'PINKIDS' brand in January 2012;
- c) printout from the 'PINK LADY' website relating to 'PINKIDS'.

(Exhibits 20.1 to 20.3 of the opponent's submission of 18/03/2019).

Assessment of the evidence

Both enhanced distinctiveness and reputation require recognition of the mark by a significant part of the relevant public. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including whether or not it contains an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in

promoting the mark; the proportion of the relevant section of the public that, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 22).

Furthermore, the evidence must be clear, convincing and ultimately reveal facts necessary to safely conclude that the mark is known by a significant part of the public (06/11/2014, R 437/2014-1, SALSA / SALSA (fig.) *et al.*).

Enhanced distinctiveness of an individual mark means that the relevant public recognises the mark as having an enhanced ability or a high capacity to identify the goods or services for which it is registered as coming from a particular undertaking. Mere knowledge or recognition of the mark by the relevant public as, for instance, a certification mark, is not sufficient. The enhanced recognition of a mark must be related to its essential function, which is, in the case of individual marks, that of indicating commercial origin. Enhanced distinctiveness of the mark is the result of its use in accordance with its essential function (07/06/2018, T-807/16, N & NF TRADING / NF ENVIRONNEMENT (fig.) *et al.*, EU:T:2018:337).

While the nature, factors, evidence and assessment of enhanced distinctiveness are the same as for reputation, a finding of reputation requires that a certain threshold of recognition be met whereas the threshold for finding of enhanced distinctiveness may be lower.

The opponent provided reliable evidence concerning the level of recognition of the 'PINK LADY' trade marks in relation to apples in Belgium, Denmark, the Netherlands and Germany. Notably, the market survey reports present detailed quantitative data demonstrating considerable top-of-the-mind and substantial spontaneous recognition of the earlier 'PINK LADY' trade marks in 2013 in all the above countries. In addition, a third party article of 2009 refers to 'PINK LADY' as 'No 1 apple brand in Europe'.

Furthermore, the opponent submitted certificates issued by independent auditors concerning substantial total sales volumes of 'PINK LADY' apples prior to the filing date of the contested trade mark. Data concerning total sales volumes is also confirmed in an article published on 'www.fruittoday.com' in 2009.

Moreover, the evidence demonstrates that the opponent undertook serious and continuous advertising and promotional efforts for many years prior to the filing date of the contested mark. The evidence refers to numerous promotional actions undertaken in each of the above-referenced countries between **2000 and 2010**, including in-store promotional actions, advertisements in recognised newspapers, magazines, repetitive TV and radio campaigns, and various promotions on the internet. Notably, the evidence also includes a **set of invoices** demonstrating significant investments made by the opponent, particularly for 2006 to 2010, and confirming that various marketing and advertising agencies rendered services to the opponent or companies related thereto.

Lastly, the evidence illustrates use of the word mark 'PINK LADY' as well as various figurative marks, which essentially consist of stylised depictions of the term 'PINK LADY', and do not alter the distinctive character of the earlier marks.

Having examined the material listed above, the Opposition Division concludes that the evidence, taken in its entirety, is sufficient to prove that prior to the filing date of the contested sign (29/03/2013), the earlier trade marks 'PINK LADY' were subject to long lasting use and continuous advertising, as a result of which they acquired reputation for apples among a significant part of the relevant public in the EU, at least in Benelux,

Denmark and Germany. Given that the remaining part of the evidence relating to other countries in the EU, for example in Ireland, Spain, France and Italy, comprises also of the relevant market surveys conducted in the same relevant periods as well as on similar evidence relating to the sales volumes for apples and advertising activities (including invoices), the existence of reputation of the same degree is assumed for the remaining countries in the EU as this is the best-case scenario for the opponent.

However, the evidence on file does not allow to compare the data relating to the earlier marks against other leading brands on the market and whether the apple market in the EU is highly segmented or not. Therefore, the Opposition Division cannot, without making any assumptions, establish whether the reputation of the earlier marks is indeed exceptionally high (as the opponent claims). Given these limitations of the evidence, it is concluded that **the degree of reputation is considerable**.

Furthermore, apart from *apples* (which are classified in Class 31), there is no evidence of use, advertisement, or recognition for any other types of goods. Therefore, no reputation or enhanced distinctiveness has been proven for the earlier EUTM registration No 2 266 948.

In summary, concerning all the above, it is concluded that the evidence on the file allows the Opposition Division to confirm that prior to the filing of the contested mark the earlier EUTM trade mark registration No 2 042 679 'PINK LADY' (as a whole) had acquired a considerable reputation in relation to *apples* in Class 31 in the EU.

In view of the above, and regarding the opponent's arguments focusing on the coincidence in the verbal element 'PINK', the Opposition Division considers it necessary to assess whether the submitted evidence would allow the opponent to claim an enhanced distinctive character acquired through use and/or reputation of the verbal element 'PINK' alone.

Assessment of evidence as regards the verbal element 'PINK' as such

Enhanced distinctiveness of an individual mark means that the relevant public recognises the mark as having an enhanced ability or a high capacity to identify the goods or services for which it is registered as coming from a particular undertaking. The enhanced recognition of a mark must be **related to its essential function**, which is, in the case of individual marks, that of indicating commercial origin.

On the other hand, the Court of Justice of the EU established that **consumers are not in the habit of making assumptions about the origin of goods based on their colour** or the colour of their packaging. A colour is not normally inherently capable of distinguishing the goods of a particular undertaking (06/05/2003, C-104/01, Libertel, EU:C:2003:244, § 65). Consequently, **single colours are not distinctive for any goods and services except under exceptional circumstances**. Such exceptional circumstances require an interested party to demonstrate that the mark is unusual or striking in relation to specific goods or services. These cases are very rare, for example as would be the case of the colour black for milk.

Furthermore, **even if a mark, as a whole, may have acquired enhanced distinctiveness or reputation, there may be descriptive elements that will have less than normal or no distinctiveness**. For example, the enhanced distinctiveness of the mark 'Coca Cola' as a whole does not alter the fact that the element 'Cola' retains its entirely descriptive character for certain products. Similarly, in the present case, while

the reputation has been established for the earlier marks 'PINK LADY' as a whole, it does not alter the descriptive character of the verbal element 'PINK' as such.

From the case-law it follows that in order to prove that a sign has acquired distinctive character through use, it is necessary to submit direct evidence, such as that provided by surveys or market studies as well as by statements from professional bodies or statements from the specialised public (09/09/2020, T-187/19, Colour Purple - 2587C (col), EU:T:2020:405, § 94 and the case-law cited therein, 06/03/2024, T-652/22, Orange (colour), EU:T:2024:152, § 100, 102).

Similarly, as in the case of a claim of enhanced distinctiveness, **reputation proven for a complex sign refers to that sign as such and not a particular element alone**. As an example, the reputation acquired by a figurative mark may, but will not automatically, benefit a word mark with which it is subsequently used. To establish the reputation of a trade mark on the basis of evidence relating to the use and well-known nature of a different trade mark, the former must be included in the latter and play therein 'a predominant or even significant role' (21/05/2015, T-55/13, F1H20 / F1 et al., EU:T:2015:309, § 47). When the earlier mark has been used as part of another mark, it is incumbent on the opponent to prove that the earlier mark has independently acquired a reputation (12/02/2015, T-505/12, B (fig.) / DEVICE OF EXTENDED WINGS WITH A GEOMETRIC DESIGN IN THE MIDDLE (fig.), EU:T:2015:95, § 121).

Regarding the above, in the present case the coinciding verbal element 'PINK' plays a secondary role vis-à-vis that of the word 'LADY', which is at the end of the earlier marks. Therefore, although the General Court has found that 'PINK' cannot be disregarded (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 74), it definitely cannot be considered as having 'a predominant or significant role' therein.

More importantly, the entire evidence submitted by the opponent, including the market surveys, relates to the earlier marks 'PINK LADY' as such. There is **no document that would directly relate to use, advertising, or recognition of the verbal element 'PINK' alone as an indication of commercial origin of the goods**.

For the sake of completeness, it is noted that the evidence relating to the registration and launch in 2012 of the opponent's EUTM No 9 914 565 'PINKIDS' (word mark) and



EUTM No 12 521 316, was submitted in the context of the opponent's arguments concerning the clear distinction it makes between the plant variety denomination 'Cripps Pink' and its trade marks 'PINK LADY'. Moreover, considering the form in which these marks are used on the market, namely, as in the figurative mark with the letter 'K' in contrasting colour to the preceding letters, the word 'PINK' cannot be considered as having an independent distinctive role in the above signs. The consumers are likely to dissect the additional marks into the components 'PIN' and 'KIDS', the latter being a basic English word understood throughout the entire EU (05/07/2012, T-466/09, Mc. Baby (fig.) / Mc Kids (fig.) et al., EU:T:2012:346, § 40). In any case, the evidence concerning the 'PINKIDS' trade marks is very limited and comprises only relevant extracts from the eSearch database pertaining to the above marks, a couple of printouts from the opponent's website related to the brand 'PINKIDS' as intended for kids, and confirmation from a marketing agency attesting that the 'PINKIDS' brand was launched on the market only in 2012. There is no other evidence concerning use (e.g. invoices) or recognition of those signs.

Furthermore, the additional evidence submitted by the opponent during the proceedings before the General Court (15/10/2018, T-164/17, WILD PINK / PINK LADY et al.,

EU:T:2018:678), namely the 'Market survey on the Understanding of the Word "Pink" in Three Large EU Countries', conducted in 2017, was disregarded by the General Court as submitted for the first time before the Court, and was not re-submitted before the EUIPO instances. Therefore, it does not form part of the file in the present case.

It follows that the evidence of use and reputation of the earlier marks 'PINK LADY' (as such) are insufficient to prove any enhanced distinctiveness or, even less so, reputation of the verbal element 'PINK' alone. Without any specific, direct and convincing evidence relating to the use and recognition of the verbal element 'PINK' (alone) as an indication of origin of goods from the opponent, **the opponent has failed to prove that the verbal element 'PINK' has independently acquired distinctive character or reputation.**

e) Global assessment, other arguments and conclusion

The appreciation of likelihood of confusion on the part of the public depends on numerous elements and, in particular, on the recognition of the earlier mark on the market, the association that can be made with the registered mark, and the degree of similarity between the marks, and between the goods or services identified. It must be appreciated globally, taking into account all factors relevant to the circumstances of the case (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 18; 11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22).

Evaluating likelihood of confusion also 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 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).

Moreover, account is 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 (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26).

In the present case, the goods are partly identical, partly similar to a low degree and partly dissimilar. They target the general public displaying a low degree of attention.

The signs are visually, aurally and conceptually similar to a low degree. The coinciding verbal element 'PINK' is non-distinctive for the relevant goods. Furthermore, it is placed in the second position in the contested sign where consumers pay less attention. On the other hand, the signs have different distinctive verbal elements 'LADY' and 'WILD' respectively. Due to the position of the element 'WILD' in the contested sign, the signs have different beginnings. In addition, the earlier marks (as a whole) convey a clear concept, namely that of a 'lady in pink' or lady otherwise characterised by this colour. For the part of the relevant public that understands 'WILD', the contested sign also has a distanced semantic meaning on the whole, which further separates the conflicting signs conceptually.

Indeed, it has been acknowledged that the earlier mark 'PINK LADY' No 2 042 679, as a whole, enjoys a considerable reputation in relation to apples, however this does not alter the descriptive character of the coinciding verbal element 'PINK'. It needs to be underlined that the opponent did not submit any direct evidence demonstrating independent use and recognition of the verbal element 'PINK' alone as an indicator of commercial origin (as explained above).

The opponent contends that the 'low degree of attention' is a factor that contributes to likelihood of confusion. While this assertion is true, it does not alter or counterbalance the descriptive character of the coinciding verbal element 'PINK'.

According to the Common Practice 5 (CP5 – https://www.tmdn.org/network/documents/10181/193073/en_common_communication.pdf), when marks share an element with **no distinctiveness**, the assessment will focus on the impact of the non-coinciding components on the overall impression of the marks. The assessment will take into account the similarities/differences and distinctiveness of the non-coinciding components.

A coincidence only in non-distinctive components does not lead to a likelihood of confusion. However, when marks also contain other figurative and/or verbal elements that are similar, there will be a likelihood of confusion if the overall impression of the marks is highly similar or identical. These conditions are not met in the present case because the differentiating elements 'LADY' and 'WILD' are not similar, the coinciding element has a different position in the signs, and the overall impression produced by the signs is clearly not highly similar, in particular due to 'PINK LADY' being a conceptual unit.

As already explained above, in the present case, the signs have different distinctive elements, which are not similar to each other, and the overall similarity between the signs is low. Furthermore, the earlier marks convey a specific concept.

For the sake of completeness, it is noted that even if the coinciding verbal element 'PINK' was considered to have a weak distinctive character (which is not the case here), the same rules as above would apply. Therefore, the outcome would be the same.

To support its arguments regarding the existence of the likelihood of confusion, the opponent refers to various previous decisions of the Office, Boards of Appeal and judgments of the EU courts. These cases either involve the same prior marks as those invoked as the basis of the opposition in the present case or feature signs that coincided in the verbal element 'WILD':

16. **Judgments and decisions re. the successful enforcement of PINK LADY**
- 16.1 a. Brussels Commercial Court, 14 December 2012, *PINK LADY* v *PINK BLUSH*, final judgment (Dutch version)
- 16.1 b. Brussels Commercial Court, 14 December 2012, *PINK LADY* v *PINK BLUSH*, final judgment (English translation)
- 16.2 a. Brussels Commercial Court, 28 June 2012, *PINK LADY* v *ENGLISH PINK*, final judgment (Dutch version)
- 16.2 b. Brussels Commercial Court, 28 June 2012, *PINK LADY* v *ENGLISH PINK*, final judgment (English translation)
- 16.3 EUIPO Opp. Div., 25 January 2011, B1635823, *PINK LADY* v *LADY IN ROSE*
- 16.4 a. General Court, 25 March 2015, T-378/13, EU:T:2015:186, *APAL and Star Fruits* v *OHIM – Carolus* (*PINK LADY* v *ENGLISH PINK*), confirmed by CJEU, 21 July 2016, C-226/15P, EU:C:2016:582
- 16.4 b. EUTM application for ENGLISH PINK withdrawn

18. EUIPO decisions

- 18.1 EUIPO BoA, 26 June 2018, R/5/2018-A, *GOLDBERRY*
- 18.2 EUIPO BoA, 1 March 2013, R 67/2012-2
- 18.3 EUIPO Opp. Div., 13 April 2012, B1829525, *BERTOLINI WILD*
- 18.4 EUIPO decisions of 23 November 2017 and 5 February 2018 rejecting *WILD FRUITS* (cl. 31)
- 18.5 EUIPO decision of 15 May 2006 rejecting *FRESH & WILD* (cl. 31)
- 18.6 EUIPO Opp. Div., 28 January 2009, B1183599

However, the Office is not bound by its previous decisions. This practice has been fully supported by the General Court, which stated that, according to settled case-law, the legality of decisions is to be assessed purely with reference to the EUTMR, and not to the Office's practice in earlier decisions (30/06/2004, T-281/02, *Mehr für Ihr Geld*, EU:T:2004:198).

While the Office does have a duty to exercise its powers in accordance with the general principles of European Union law, such as the principle of equal treatment and the principle of sound administration, the way in which these principles are applied must be consistent with respect to legality. **It must also be emphasised that each case must be examined on its own individual merits.** The outcome of any particular case will depend on specific criteria applicable to the facts of that particular case, including, for example, the parties' assertions, arguments and submissions. A party in proceedings before the Office may not rely on, or use to its own advantage, a possible unlawful act committed for the benefit of some third party in order to secure an identical decision.

Moreover, the decisions of Boards of Appeal as well as the judgments of the EU courts are binding only in a specific case in which they were issued, as they are based on specific facts and circumstances of that case. While these decisions can be cited in other cases to support a party's arguments, they are not legally binding precedents and may be used as supplementary evidence rather than as mandatory authority. Furthermore, most of the cited cases predate the judgment of the General Court (15/10/2018, T-164/17, *WILD PINK / PINK LADY et al.*, EU:T:2018:678), which is binding in the present case.

Even if some of the previous decisions and judgments were issued in cases based on the same earlier marks as in the ones invoked in the present case, or signs sharing the verbal element 'WILD', the outcome in the present case may not be the same. This is not only because the relevant date is different, but also because the cited cases had other relevant factual circumstances, for example the coinciding verbal elements 'PINK' constituted the first element in both signs, the signs considered as a whole conveyed a similar concept (e.g. 25/01/2011, B 1 635 823, *Lady in rose v PINK LADY*), or the coinciding verbal element 'WILD' played a secondary role in the contested sign (e.g. 13/04/2012, B 1 829 525, *Bertolini Wild v BERTOLLI*), in which the signs coincided in the identical distinctive verbal element 'Bertolini'. In addition, in relation to the opposition decision (23/05/2014, B 2 238 247) rejecting the contested sign 'WILD PINK' application for some of the goods in Classes 29 and 30 (cited by the opponent), the Opposition Division notes that the likelihood of confusion in that case was found due to a coincidence in the verbal element 'WILD' (the earlier mark 'WILD CRISP'), which constituted the first verbal element in both signs and was found distinctive for the relevant goods (at least for the non-English-speaking part of the relevant public). Therefore, the opponent's arguments as to the descriptive character of the word 'WILD' does not hold true for the entire public in the EU.

For the sake of completeness, the Opposition Division considers it advisable to also comment on the decisions concerning the conflict between the earlier marks 'PINK LADY' and the EUTM application 'ENGLISH PINK'. The opposition was rejected due to dissimilarity of the signs and the reputation/enhanced distinctiveness of the earlier marks was not proven, whereas the judgments of the General Court and Court of Justice (cited above) mainly focused on the issue of res-judicata and whether the judgments of the Commercial Court in Brussels annulling the Benelux 'ENGLISH PINK' trade mark (also cited above) were binding on the Board of Appeal. The actions brought by the opponent before the General Court and the Court of Justice were dismissed. The Courts underlined different legal basis and aspects examined in infringement proceedings and opposition cases before the EUIPO as well as different aims of those proceedings. The fact that the contested EUTM application for 'ENGLISH PINK' was eventually withdrawn does not confirm the existence of likelihood of confusion with the earlier marks 'PINK LADY' within the meaning of Article 8(1)(b) EUTMR.

Furthermore, the opponent submitted evidence relating to its actions undertaken by it against other EUTM applications that encompassed the verbal element 'PINK' and were intended, inter alia, for *fresh fruits* in Class 31:

- 17. Additional successful enforcement of PINK LADY
- 17.1 Result of action against WASHINGTON PINK
- 17.2 Result of action against ABSOLUTELY PINK
- 17.3 Result of action against PINK STAR
- 17.4 Result of action against PRETTY IN PINK
- 17.5 Result of action against iPINK
- 17.6
 - a. Result of action against PINK SENSATION apples sold by REWE (Germany)
 - b. English translation of Exhibit 17.6 a
 - c. Result of action against PINK SENSATION (exclusion of apples and pears)
- 17.7 Result of action against PINK INTUITION
- 17.8 Result of action against PINK SHOWER
- 17.9 Result of action against PINKTASTIC
- 17.10 Result of action against PINK PARADISE
- 17.11 Result of action against PINK EVE

Although some of the EUTM applications listed above were withdrawn or limited following receipt of cease & desist letters sent by the opponent, citing a potential conflict with its earlier 'PINK LADY' marks, it is plausible that the decisions of the proprietors of those applications were influenced by various other factors, such as their commercial and business strategies. Therefore, it cannot be inferred conclusively that they withdrew or modified their applications solely due to concerns regarding the risk of confusion with the earlier marks. Hence, the cases listed above lack relevance for assessing the likelihood of confusion in the present case.

Consequently, despite the reputation of the earlier marks 'PINK LADY', the coincidence in the non-distinctive verbal element 'PINK' and the low degree of overall similarity it causes are insufficient to lead the consumers, even if displaying a low degree of attention, to perceive that even identical goods bearing the contested sign originate from the same or economically linked undertakings. Likelihood of confusion is even less likely in relation to the goods found to be similar to a low degree.

Considering all the above, even taking into consideration the principles of interdependence and imperfect recollection of signs, the Opposition Division finds that there is no likelihood of confusion on the part of the public under analysis. Therefore, the

opposition must be rejected in relation to the goods found identical and similar to a low degree.

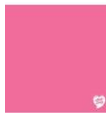
The rest of the contested goods, namely *fruit flavourings, other than essences* in Class 30, are dissimilar.

As the identity or 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 goods must also be rejected.

The opponent has also based its opposition on the following earlier trade marks:

- 1) French trade mark registration No 92 420 538 'PINK LADY' (word mark):

Class 31: *Apples, fruit trees and fresh fruit.*

- 2) EUTM registration No 6 335 591  (figurative mark):


Class 31: *Agricultural and horticultural products; fruit, grains, plants and trees; apples and apple trees.*

- 3) German trade mark registration No 2 903 690 'PINK LADY' (word mark):

Class 31: *Fresh fruits and vegetables; fodder; malt; agricultural, horticultural and forestry products and grains; live animals; seeds; live plants and natural flowers.*

- 4) Benelux trade mark registration No 559 177 'PINK LADY' (word mark):

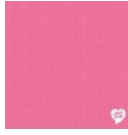
Class 31: *Agricultural, horticultural and silvicultural products and grains, not included in other classes; live animals; fresh fruits and vegetables; grains, live plants and flowers; foodstuff for animals, malt.*

- 5) EUTM registration No 4 186 169  (figurative mark):

Class 29: *Preserved, dried, cooked and crystallised fruits; preparations made from preserved, dried, cooked and crystallised fruits; jams; compotes; fruit jellies; fruit salads; fruit yoghurts; fruit chips.*

Class 30: *Preparations made from cereals; cakes; biscuits; confectionery; ices, sorbets and ice-creams; sugar confectionery.*

Class 31: *Fresh fruit; apples; fruit trees; apple trees.*

6) EUTM registration No 8 613 911  (figurative mark):

Class 29: *Preserved, dried, cooked and crystallised fruits, preparations made from preserved, dried, cooked and crystallised fruits, jams, compotes, fruit jellies, fruit salads, fruit yoghurts, fruit chips.*

Class 30: *Preparations made from cereals, cakes, biscuits, confectionery, ices, sorbets and ice creams, sugar confectionery.*

Some of the additional marks are identical and cover identical goods to those of the earlier marks that have already been compared. The additional figurative earlier trade marks are less similar to the contested sign due to the presence of additional figurative elements and colours therein, which are not present in the contested trade mark. Therefore, the outcome cannot be different with respect to goods for which the opposition has already been rejected as well as in relation to the goods that have been found identical and similar to a low degree.

The additional goods covered by the Benelux and German earlier marks in Class 31, namely *live animals, foodstuffs for animals* and *malt*, are clearly dissimilar to the contested goods found to be dissimilar, that is *fruit flavourings, other than essences* in Class 30. These goods have clearly different natures, purposes, methods of use, relevant public, distribution channels and manufacturers. The earlier *live animals, foodstuffs for animals* and *malt* also clearly have nothing in common with the remaining contested goods, namely *preserved, frozen, dried and cooked vegetables* in Class 29 and *fruit, fresh, namely apples belonging to the species 'Malus domestica Borkh'* in Class 31.

Consequently, it follows that the outcome cannot be different with respect to goods for which the opposition has already been rejected; as well as the goods found to be identical or similar to a low degree to those covered by the earlier word marks compared above. This outcome applies equally to the public that will and will not understand the verbal element 'WILD' in the contested sign (for reasons explained above). No likelihood of confusion exists with respect to all the additional earlier marks and in respect to all the goods covered by them.

Considering all the above, the opposition must be rejected under Article 8(1)(b) EUTMR, and the Opposition Division will proceed to examine the opposition under Article 8(5) EUTMR.

REPUTATION – ARTICLE 8(5) EUTMR

In relation to Article 8(5) EUTMR, the opponent invoked all the earlier trade marks listed at the beginning of this decision.

For reasons of procedural economy, the Opposition Division will first examine the opposition in relation to earlier EUTM trade mark registration 'PINK LADY' No 2 042 679 (word mark).

According to Article 8(5) EUTMR, upon opposition by the proprietor of a registered earlier trade mark within the meaning of Article 8(2) EUTMR, the contested trade mark will not be registered where it is identical with, or similar to, an earlier trade mark, irrespective of

whether the goods or services for which it is applied are identical with, similar to or not similar to those for which the earlier trade mark is registered, where, in the case of an earlier European Union trade mark, the trade mark has a reputation in the Union or, in the case of an earlier national trade mark, the trade mark has a reputation in the Member State concerned and where the use without due cause of the contested trade mark would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.

Therefore, the grounds for refusal of Article 8(5) EUTMR are only applicable when the following conditions are met.

- The signs must be either identical or similar.
- The opponent's trade mark must have a reputation. The reputation must also be prior to the filing of the contested trade mark; it must exist in the territory concerned and for the goods and/or services on which the opposition is based.
- Risk of injury: use of the contested trade mark would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark.

The abovementioned requirements are cumulative and, therefore, the absence of any one of them will lead to the rejection of the opposition under Article 8(5) EUTMR (16/12/2010, T-357/08, BOTOCYL / BOTOX, EU:T:2010:529, § 41; 16/12/2010, T-345/08, BOTOLIST, EU:T:2010:529, § 41). However, the fulfilment of all the abovementioned conditions may not be sufficient. The opposition may still fail if the applicant establishes due cause for the use of the contested trade mark.

In the present case, the applicant did not claim to have due cause for using the contested mark. Therefore, in the absence of any indications to the contrary, it must be assumed that no due cause exists.

a) Reputation of the earlier trade mark

The evidence submitted by the opponent to prove the reputation of the earlier trade mark has already been examined above under the grounds of Article 8(1)(b) EUTMR.

Reference is made to those findings, which are equally valid for Article 8(5) EUTMR.

b) The signs

The signs have already been compared above under the grounds of Article 8(1)(b) EUTMR. Reference is made to those findings, which are equally valid for Article 8(5) EUTMR.

c) The 'link' between the signs

The earlier mark has an average degree of distinctiveness.

As seen above, the earlier mark No 2 042 679 'PINK LADY' (word mark) enjoys a considerable reputation for *apples* in Class 31 in the EU. The reputation of the earlier mark exists at least in Benelux, Denmark and Germany. However, based on similar types of evidence filed for other countries in the EU, a considerable level of reputation is

assumed to exist in the remaining countries in the EU (which is the best-case scenario in which the case may be examined for the opponent).

The signs are overall similar to a low degree due to the coincidence in the non-distinctive verbal element 'PINK'.

The contested goods are the following:

Class 29: *Preserved, frozen, dried and cooked vegetables.*

Class 30: *Fruit flavourings, other than essences.*

Class 31: *Fruit, fresh, namely apples belonging to the species 'Malus domestica Borkh'.*

In order to establish the existence of a risk of injury, it is necessary to demonstrate that, given all the relevant factors, the relevant public will establish a link (or association) between the signs. The necessity of such a 'link' between the conflicting marks in consumers' minds is not explicitly mentioned in Article 8(5) EUTMR but has been confirmed by several judgments (23/10/2003, C-408/01, Adidas, EU:C:2003:582, § 29, 31; 27/11/2008, C-252/07, Intel, EU:C:2008:655, § 66). It is not an additional requirement but merely reflects the need to determine whether the association that the public might establish between the signs is such that either detriment or unfair advantage is likely to occur after all of the factors that are relevant to the particular case have been assessed.

Possible relevant factors for the examination of a 'link' include (27/11/2008, C-252/07, Intel, EU:C:2008:655, § 42):

- the degree of similarity between the signs;
- the nature of the goods and services, including the degree of similarity or dissimilarity between those goods or services, and the relevant public;
- the strength of the earlier mark's reputation;
- the degree of the earlier mark's distinctive character, whether inherent or acquired through use;
- the existence of likelihood of confusion on the part of the public.

This list is not exhaustive and other criteria may be relevant depending on the particular circumstances. Moreover, the existence of a 'link' may be established on the basis of only some of these criteria.

Distinctiveness of the coinciding element 'PINK'

Under Article 8(5) EUTMR, market reality and consumer behaviour, which are proven or derived from general knowledge, are fundamental. Therefore, it is in the link section that the existence of a family of marks and/or the high distinctiveness of the common element are to be taken into consideration in order to be able to assess all relevant factors (10/10/2019, T-428/18, mc dreams hotels Träumen zum kleinen Preis! (fig.) / McDONALD'S et al., EU:T:2019:738, § 65).

The assessment of the distinctiveness of the coinciding element 'PINK' as well as the evidence submitted by the opponent to prove reputation of its earlier marks have already been assessed in the previous sections of this decision. Reference is made to those findings.

In the present case, the opponent has failed to prove that the verbal element 'PINK' has independently acquired distinctive character or reputation.

For the sake of completeness, it is also noted that all the earlier marks invoked as a basis for the opposition have the same verbal elements 'PINK LADY' and differ only in their graphic depictions, so existence of the family of marks characterised by the verbal element 'PINK' cannot be claimed. In any case, the evidence submitted by the opponent does not allow to make such a finding.

Assessment of existence of the 'link' for the goods found identical and similar to a low degree

The signs are similar to a low degree only to the extent that they both contain the non-distinctive verbal element 'PINK', which was not proven to be perceived on its own as an indicator of origin of the opponent's goods.

The signs do not even have this element in the same position.

Furthermore, the degree of reputation of the earlier marks is not very high. Based on the evidence submitted, it was established that the earlier marks enjoy only a considerable degree of reputation in the EU.

In addition, the public is not in the habit of perceiving an element referring to a 'colour' per se as a source of commercial origin of goods. Therefore, the coincidence in the descriptive element 'PINK' is not sufficient for the consumers to establish a link with the earlier mark 'PINK LADY', which enjoys reputation as such (that is both elements combined).

According to the case-law, where the meaning of at least one of the two signs at issue is clear and specific so that it can be grasped immediately by the relevant public, the conceptual differences between those signs may counteract the visual and aural similarities between them. Therefore, the visual and conceptual differences between the marks prevent any possible link to be made between them (21/01/2010, T-309/08, G Stor (fig.) / G-STAR et al., EU:T:2010:22, § 25-36). This applies in the present case as the earlier mark (as such) will be perceived with the specific meaning of a 'lady in pink', whereas the contested sign will not convey the meaning of this conceptual unit. Therefore, even consumers who will not understand the word 'WILD' (e.g. those in Bulgaria, Spain and Poland where reputation is assumed to be considerable), will not associate the contested sign with the earlier mark for the relevant goods. For the part of the public that will understand the verbal element 'WILD' in the contested sign (even the public in Benelux, Denmark and Germany where the earlier marks enjoy considerable reputation), the contested sign will convey a clearly different concept of 'pink found in the wild', and thus association with the earlier mark is even less likely. The association is also less likely for the goods found to be similar to a low degree, both for the public that will and will not understand the verbal element 'WILD' in the contested sign.

It follows that, despite identity of the goods that are closely-related and possibly placed next to each other in the sales outlets (overlap of the relevant market and public), the low degree of attention (for some of the goods), and regardless of the considerable

degree of reputation of the earlier mark and it being known to the commercially pertinent part of the relevant public, it is unlikely that the public will establish a link between the earlier mark and the contested sign.

Assessment of existence of the 'link' for dissimilar goods

The establishment of such a link, while triggered by similarity (or identity) between the signs, requires that the relevant sections of the public for each of the goods and services covered by the trade mark in dispute are the same or overlap to some extent.

According to the Court of Justice of the European Union,

It is therefore conceivable that the relevant section of the public as regards the goods or services for which the earlier mark was registered is completely distinct from the relevant section of the public as regards the goods or services for which the later mark was registered and that the earlier mark, although it has a reputation, is not known to the public targeted by the later mark. In such a case, the public targeted by each of the two marks may never be confronted with the other mark, so that it will not establish any link between those marks.

(27/11/2008, C-252/07, Intel, EU:C:2008:655, § 48.)

The Court of Justice has also noted,

... that certain marks may have acquired such a reputation that it goes beyond the relevant public as regards the goods or services for which those marks were registered. In such a case, it is possible that the relevant section of the public as regards the goods or services for which the later mark is registered will make a connection between the conflicting marks, even though that public is wholly distinct from the relevant section of the public as regards goods or services for which the earlier mark was registered.

(27/11/2008, C-252/07, Intel, EU:C:2008:655, § 51-52.)

In the present case, there is no overlap between the relevant sections of the public for the trade marks in dispute. Each trade mark targets a different type of public. While the contested *fruit flavourings, other than essences* in Class 30, have a different commercial origin and target a professional public in the food and beverage sectors (manufacturers of the foods and beverages), the earlier trade mark was found to have a reputation only for apples (*fresh apples*), targeting the general public. Given that the public for the contested trade mark is completely distinct from the relevant section of the public among which the earlier trade mark enjoys a reputation, no association will be made between the signs. In any case, the opponent did not provide any arguments or evidence that could serve to make a connection between the two sectors together.

Conclusion

Taking into account and weighing up all the relevant factors, the Opposition Division concludes that it is highly unlikely that the relevant public will make a mental connection between the signs in dispute, that is to say, establish a 'link' between them. Given that existence of the link is a necessary condition of the application of Article 8(5) EUTMR, the opposition is not well founded under Article 8(5) EUTMR and must be rejected.

Reputation for goods other than apples in Class 31 has not been proven, and therefore, Article 8(5) EUTMR is rejected for the earlier marks that do not cover these goods.

As the evidence in the present case only proves reputation for apples, the same outcome is applicable in respect of the other earlier marks invoked by the opponent that cover these goods, given that Article 8(5) EUTMR was examined for the part of the public where reputation is stronger and the 'link' would be most likely, as the remaining earlier marks are either identical or even less similar to the mark already analysed above.

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 (former Rule 94(3) and Rule 94(7)(d)(ii) EUTMIR, in force before 01/10/2017), 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

Irena
LYUDMILOVA LECHEVA

Anna PASIUT

Vít MAHELKA

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.