

OPPOSITION No B 3 087 540

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 (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 3 087 540 is rejected in its entirety.
2. The opponent bears the costs, fixed at EUR 300.

REASONS

On 28/06/2019, the opponent filed an opposition against all the goods of European Union

trade mark application No 18 033 927  (figurative mark). The opposition is based on the following earlier marks:


- 1) Benelux trade mark registration (Belgium, Luxembourg, the Netherlands) No 559 177 'PINK LADY' (word mark);
- 2) German trade mark registration No 2 903 690 'PINK LADY' (word mark);
- 3) UK trade mark registration No 1 582 849 'PINK LADY' (word mark);
- 4) French national trade mark registration No 92 420 538 'PINK LADY' (word mark);
- 5) EUTM registration No 2 042 679 'PINK LADY' (word mark);
- 6) EUTM registration No 2 266 948 'PINK LADY' (word mark);
- 7) EUTM registration No 4 186 169  (figurative mark);
- 8) UK trade mark registration No 3 171 570  (figurative mark);

9) EUTM registration No 14 353 262  (figurative mark).

The opponent invoked Article 8(1)(b) and Article 8(5) EUTMR in relation to all the earlier marks invoked.

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 registrations No 1 582 849 'PINK LADY' (word mark) and No 003 171 570  (figurative mark) no longer constitute 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 these earlier rights.

PRELIMINARY REMARKS

I. *Absolute grounds for refusal*

The opponent requested the Office to re-open absolute grounds examination of the contested mark and submitted, on 31/08/2023, third party observations under Article 45 EUTMR.

The third-party observations concerning the absolute grounds for refusal in relation to

the contested trade mark application No 18 033 927  (figurative mark), were duly forwarded to the Examiner for further analysis (acknowledged in the Communication of the Office of 14/09/2023). However, having considered all relevant factors, including the findings of the related General Court case (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.

II. *Validity of the earlier marks*

The applicant raised various objections against the validity of the earlier 'PINK LADY' trade marks, including arguments relating to refusals of protection for 'PINK LADY' trade marks in Australia, New Zealand and the UK, or objections of 'bad faith' in other jurisdictions, for example in China (e.g. the applicant's submission of 18/05/2020, Exhibits 8 and 15), as well as objections concerning the nature of use of the earlier

marks. For example, in its submission of 22/02/2024, 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.

III. *Claim of existence of family of marks*

The opponent argues that the relevant consumers in the EU, prior to the filing date of the contested sign, 'were already used to the fact that within the "PINK LADY" trade mark family there were (sub)categories' and that 'the commercial segmentation of the "PINK LADY" goods was already a market reality' (opponent's submission of 06/12/2019, page 31, point 100)

The opponent submitted 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



(figurative mark), as well as some evidence concerning use of those additional marks on the market (as listed above).

When an opposition to an EUTM application is based on several earlier marks and those marks display characteristics that give grounds for regarding them as forming part of a single 'series' or 'family', a likelihood of confusion may be created by the possibility of association between the contested trade mark and the earlier marks forming part of the series.

The Courts have given clear indications on the two **cumulative** conditions that have to be satisfied (23/02/2006, T-194/03, Bainbridge (fig.) / Bridge et al., EU:T:2006:65, § 123-127; 13/09/2007, C-234/06 P, Bainbridge (fig.) / Bridge et al., EU:C:2007:514, § 63).

- Firstly, the proprietor of a series of earlier marks must submit proof of use of all the marks belonging to the series or, at the very least, of a number of marks capable of constituting a 'series' (i.e. at least three).
- Secondly, the trade mark applied for must **not only be similar** to the marks belonging to the series but must also display characteristics capable of **associating** it with the series. Association must lead the public to believe that the contested trade mark is also part of the series, that is to say, that the goods and services could originate from the same or connected undertakings. This may not be the case where, for example, the element common to the earlier series of marks is used in the contested trade mark, either in a different position from that in which it usually appears in the marks belonging to the series, or with a different semantic

content (The Office Guidelines, Part C, Section 2 Double identity and likelihood of confusion, Chapter 6 Other factors, Point 2 Family of Marks / Series of Marks).

It follows that to successfully claim existence of a family of marks, inter alia, the following conditions should be met:

- the signs must contain the same distinctive element;
- this common element must play an independent role in the sign as a whole;
- the common element that characterises the family of marks appears in the same position within the conflicting marks.

Concerning the above, the Opposition Divisions notes the following.

The earlier 'PINKIDS' trade marks were not invoked as a basis for the opposition in the notice of opposition. Therefore, no valid claim of existence of family of marks in relation to the above-indicated marks can be invoked.

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 non-distinctive verbal element 'PINK' as such with another verbal element and in a different position, cannot be claimed.

It follows that the opponent's arguments that the relevant consumers in the EU, prior to the filing date of the contested sign, 'were already used to the fact that within the "PINK LADY" trade mark family there were (sub)categories' and that 'the commercial segmentation of the "PINK LADY" goods was already a market reality' (opponent's submission of 06/12/2019, page 31, point 100) are simply unfounded and must be set aside.

IV. Use by third parties – valid consent from the opponent

In its observations of 22/02/2024, 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 appears to apply 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.

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

Both parties participated in various types of proceedings including history of 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 have not 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 22/02/2024).

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 32: *Non-alcoholic fruit drinks and fruit juices; mineral and aerated waters; syrups and other preparations for making mineral and aerated waters.*

- 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 are the following:

Class 29: *Processed fruits.*

Class 31: *Apples (fresh -); live trees; apple trees; fruit trees; fresh fruit.*

Class 32: *Apple juice drinks; apple juice beverages.*

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 29 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).

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 *processed fruits* overlap with the opponent's *preserved, dried and cooked fruits, including apples* covered by the earlier mark 1. Therefore, they are identical.

Contested goods in Class 31

The contested *apples (fresh-), fresh fruit* are included in the broad category of *agricultural, horticultural products including fruit* of earlier mark 2. Therefore, they are identical.

The contested *live trees; apple trees; fruit trees* are included in the broader category of *agricultural, horticultural products including trees, especially apples and apple trees* of earlier mark 2. Therefore, they are identical.

Contested goods in Class 32

The contested *apple juice drinks, apple juice beverages* are included in the opponent's *non-alcoholic fruit drinks and fruit juices* of earlier mark 1. Therefore, they are identical.

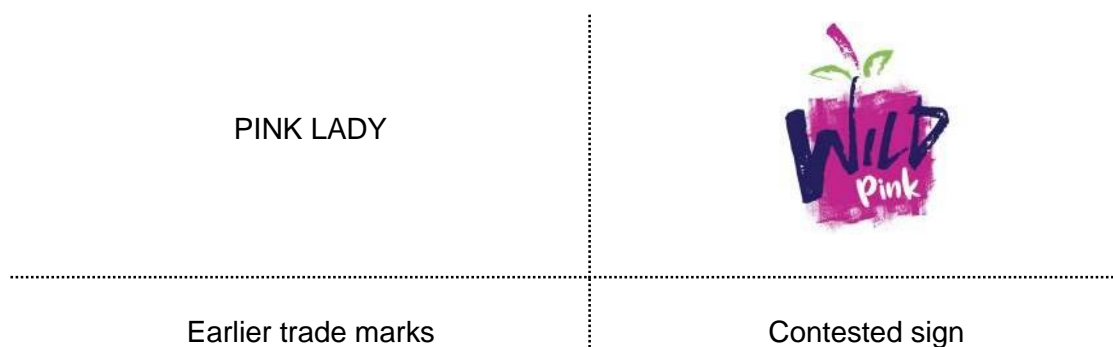
b) Relevant public – degree of attention

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 target the general public as well as professionals in the horticulture sector.

In the present case, contrary to the opponent's arguments, the public's degree of attentiveness may vary from low to at least average, depending on the price or terms and conditions of the goods. The level of attention will be low, at least for the relevant goods in Class 29, and for some of the goods in Class 31, that is for *apples (fresh-), fresh fruit* (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 51). On the other hand, the level of attention will be at least average in relation to *live trees, apple trees and fruit trees* in Class 31 because they are chosen due to their specific characteristics and consumers' preferences. Therefore, a higher level of attention will be displayed in relation to these goods (for both the general and professional public).

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 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.

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 Classes 29, 31 and 32 as it will indicate that the goods are made from such 'uncultivated' goods.

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).

Similarly, the English word 'LADY' present in the earlier marks is a basic English word understood by the relevant public throughout the entire EU (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 58-59). 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 figurative element in the contested sign depicting a square-shaped background in pink, along with a petiole and green leaves at its top, does not depict any specific type of fruit. However, it may allude to a notion of a fruit. Therefore, it will allude to the relevant goods in Classes 29 and 31 themselves (*preserved fruits, fresh fruits, fruit trees* or more generally to plants), or to the ingredients the goods in Class 32 are made of. Therefore, it has, at best, a weak distinctive character in relation to all the contested goods. The stylisation of letters and colours in the contested sign do not hinder the legibility of the verbal elements in the signs. They will be perceived by the consumers as decorative features of little trade mark significance. In any case, the figurative elements and aspects of the contested sign all have less impact on the overall impression produced by this sign on consumers. When signs consist of both verbal and figurative components, in principle, the verbal component of the sign usually has a stronger impact on the consumer than the figurative component. This is because the public does not tend to analyse signs and will more easily refer to the signs in question by their verbal element than by describing their figurative elements (14/07/2005, T-312/03, SELENIUM-ACE / SELENIUM SPEZIAL A-C-E (fig.), EU:T:2005:289, § 37).

It follows that the public that does not understand the word 'WILD' will 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). 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). Furthermore, the concept of 'PINK' will be reinforced by the background in pink colour. Even if the figurative element in the contested sign may allude to a concept of a fruit, the meaning of the contested sign 'WILD PINK' as a whole may allude to a vague concept of a 'pink fruit' of a 'pink fruit found in the wild' (for the part of the public that will understand 'WILD'), the meanings are not sufficiently clear and precise in relation to the contested goods in Classes 29, 31 and 32.

The earlier marks, as word marks, do not have a dominant element. However, within the contested sign, due to its size and central placement, the term 'WILD' is the most eye-catching element and constitutes a dominant component thereof.

The opponent refers to the findings of the General Court, which established 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). The above findings pertain to the comparison of the word marks 'PINK LADY' and 'WILD PINK'. While the coincidence in the verbal element 'PINK' cannot be disregarded in the comparison of the marks, in the present case the impact of this verbal element is reduced due to its clearly smaller size and secondary position in the contested sign. Furthermore, contrary to the opponent's

arguments, the fact that the verbal element 'PINK' is depicted in white colour does not counterbalance its secondary character in that sign.

To support its arguments concerning similarity between the signs, the opponent also 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'), or where similarity was found between earlier word marks and the contested figurative marks (13/09/2018, T-418/17, Safari Club / WS Walk Safari (fig.), EU:T:2018:540; 19/04/2016, T-326/14, HOT JOKER / JOKER et al, EU:T:2016:221), or similarity found between figurative marks (19/04/2016, T-326/14, HOT JOKER (fig.) / JOKER et al, EU:T:2016:221; 17/06/2019, R 2165/2018-5, SPS PRADO (fig.) / P PRADO (fig) et al.). 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 of the cases different goods and services were compared. Therefore, the outcome of the comparison of the signs in the present case may not be the same.

Reference is made to the principle that consumers generally tend to focus on the beginning/top of a sign when they encounter a trade mark. This is because the public reads from left to right / top to bottom, which makes the part placed at the left/top 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 distinctive and dominant verbal element 'WILD' at the top of the contested sign, which is where the consumers pay more attention. The signs also differ visually in the figurative elements and aspects in the contested sign, which, irrespective of their distinctiveness, will nevertheless be noticed by consumers. Moreover, the verbal 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). However, in the present case, the verbal element 'PINK' clearly has a secondary position in the contested sign and the contested sign has additional elements.

Therefore, the signs are visually similar to a very low degree and aurally similar to a low degree as established by the General Court (15/10/2018, T-164/17, WILD PINK / PINK LADY et al., EU:T:2018:678, § 81).

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 and regardless of the additional weak concept of a fruit conveyed by the figurative element in the contested sign, 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).

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

d) Distinctiveness of the earlier mark

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

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: *Apples*.

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

Class 31: *Apples*.

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 and reputation 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 **11/03/2019**. 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 in 2019 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.

On 06/12/2019 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 Opposition Division thoroughly reviewed the entire evidence provided by the opponent. In its submission of 06/12/2019, 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 21/10/2019 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 2014 and 2019 (Certificate of 21/10/2019) and between 2005 and 2012 (Certificate of 22/01/2013). It shows that the total sales volume of 'PINK LADY' fruits was growing each year and reached nearly 900 000 tonnes in total during the relevant period (2005 to 2012) and exceeded 100 000 tonnes each year during the period 2014 to 2019 (Exhibits 3.1 a-c.).
- b) Budget for TV advertising of 'PINK LADY'. Certificate shows TV budget for 'PINK LADY', inter alia, 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).

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 by the independent research company IPSOS in Belgium, Denmark, the Netherlands and Germany, accompanied by an overview of results of the IPSOS market surveys conducted between 2001 and 2010 in Benelux and Germany, and tables with more detailed comparable data between 2001 and 2010 (Exhibits 4.1, 4.2, 4.3, 4.5, 4.7 and 4.8). 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 a 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).

- b) Survey conducted online by Ipsos in February 2016 entitled 'Assessment of the Awareness of Apple brands/or varieties' (Exhibit 4.11). It includes information on continuous 'PINK LADY' brand awareness monitoring in various EU countries between 2001 and 2016. The survey was conducted on a representative group of 1 000 individuals in the above-indicated countries. According to its main results, based on levels of unaided and assisted awareness, 'PINK LADY' is widely known in northern Europe, including Belgium, Denmark, and Germany. In particular 'PINK LADY' had high top-of-mind and spontaneous awareness levels in Belgium and Denmark as well as substantial spontaneous recognitions levels in Germany and the Netherlands).
- c) Report in French containing results of market surveys '*PINK LADY – Evaluation de la Notoriété de Variétés at Marques de Pommes* conducted in **2019** in various EU countries by IPSOS (Exhibits 4.12 a-c of the opponent's submission of 06/12/2019). The evidence includes a set of documents with a detailed summary of answers and results in English for each country, including information that the surveys were conducted with the use of 'Omnibus' surveying method with questions relating to top-of-mind awareness in the surveys conducted in 2015, 2016 and 2018. It comprises comparable data on the brand awareness between 2005 and 2019, clearly showing a stable growth in brand recognition during this period. The results show that the 'PINK LADY' apple brand maintained high levels of top-of-mind and spontaneous brand awareness in Belgium and Denmark and substantial spontaneous brand awareness levels in Germany and the Netherlands (comparable levels as in 2016).

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).
- b) Article entitled 'Naturally exhilarating Pink Lady®' published in the specialised magazine '*Fruchthandel Leading Brands 2013*' (Exhibit 5.8). It presents Pink Lady® apples as the 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:



- c) Article entitled 'So much more than an apple' published in the specialised magazine '*Fruchthandel Special – Best in Fresh 2020*' (Exhibit 8.2). It informs that the brand awareness of 'PINK LADY' has accelerated in the past 3 years across all European countries and that 'Pink Lady is more than ever the No. 1 branded apple'. In addition, it comprises information on more intensified advertising and promotional efforts to strengthen the brand's image, including the launch of a TV campaign, an intensification of the digital strategy by actions involving consumers' loyalty club, etc.
- d) Printout of an article of 03/07/2019 'Pink Lady apples 'maintained good performance' in difficult EU markets' from the website 'www.freshfruitportal.com' (Exhibit 15.2).
- e) The articles provide information based on data from the opponent's website (www.aapple-pinklady.com). It informs that 'PINK LADY' saw sales growth (compared to 2018) in the three top markets, which included the Netherlands as well as a tangible market share gain, inter alia, in Germany. It also refers to a brand awareness growth compared to 2016 and, in particular, a high global brand recognition in Belgium and Denmark.

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).

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 the word mark 'PINK LADY' as well as of various

figurative marks:



, *Pink Lady*,



- Sample invoices for advertising and promotional services, namely 39 invoices for advertising services issued by the companies in Belgium, Holland and Luxembourg between 2006 and 2010 (Exhibits 7.1 to 7.3 of the opponent's submission of 06/12/2019), 44 invoices issued by different German and international marketing companies between 2006 and 2010 (Exhibits 9.1 to 9.44). Most invoices show significant amounts of money for the advertising services rendered.
- Overview on media (including TV) and outdoor campaigns in Denmark between 2009 and 2014 and sample invoices for advertising services in Denmark during this period (Exhibits 13.3 to 13.4). The documents present numerous TV advertising campaigns on main TV channels in Denmark within the above period, with an estimated impact on at least 8 million viewers.
- Affidavit of 24/07/2019 issued by the marketing agency Dentsu Aegis Network France with sample invoices for advertising services including TV adverts in 2018-2019 (Exhibits 13.5-13.6). Although the document is in French it is possible to infer from its content a significant total amount invoiced since 2014 for the advertising services in various EU countries, including Belgium, Denmark, Germany and the Netherlands.
- Sample product leaflets concerning promotions in 2019 (dates of promotions visible) in supermarkets of 'PINK LADY' trade marks in Belgium, Denmark and the Netherlands (Exhibit 22.1). The documents show predominantly use of 'PINK LADY' trade marks (both word and figurative variants), only in

evidence concerning the Netherlands there is sample of use of 'PINKIDS' trade marks.





- f) Affidavit of 04/12/2019 issued by the company, Wonderful, concerning 'PINK LADY' Facebook and Instagram accounts in various EU countries, indicating Germany as a country with one of the highest number of fans (Exhibit 22.2, in French). It includes statistical data concerning visits to the opponent's social media accounts with the breakdown into geographical origin thereof from different EU countries between 27/11/2010 and 03/12/2019, with a visible growth in 2018 and 2019. The data includes information, inter alia, about a considerable number of visits from Denmark and the Netherlands.

V. Extracts from the opponent's website and newsletter

The evidence includes, inter alia, the following.

- a) Printouts (partly undated and partly dated 15/04/2015) from various opponent's websites:
- www.pinkladyeurope.com (EU international home page);
 - www.apple-pinklady.com in various language versions, inter alia, in Danish, Dutch, English and German (Exhibits 14.1, 14.3, 14.4, 14.6, 14.10 and 14.11).

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



figurative marks

- b) 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).

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 (document in French without translation);
- c) printouts from the 'PINK LADY' website (www.pomme-pinklady.com/en/pinkids) relating to 'PINKIDS' (Exhibits 20.1 to 20.3);
- d) printouts from various opponent's websites of 15/04/2015, including Danish, Dutch, English and German language versions, with information about 'PINKIDS' brand (Exhibits 14.4, 14.6, 14.10 and 14.11).

The evidence from the opponent's websites shows the use of 'PinKids®' word mark

and figurative mark  (as depicted below):



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, 2016 and 2019 in all the above countries.

In addition, third party articles of 2009, 2019 and 2020 refer 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 between 2010 and 2019, that is prior to the filing date of the contested trade mark. Data concerning total sales volumes is also confirmed in the articles published on 'www.fruittoday.com' in 2009 and on 'www.freshfruitportal.com' in 2019.

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 2019, 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, 2009 to 2014, and 2018 to 2019, and confirming that various marketing and advertising agencies rendered services to the opponent or companies related thereto in the above-mentioned countries.

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 which thus 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 (11/03/2019), 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 the 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, which is protected for *apples* in Class 29 (this class covers only processed fruit).

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, 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' remains entirely descriptive for certain products. This is the case in the present case, namely that the reputation has been proven for the earlier mark 'PINK LADY' as a whole, but it does not alter the descriptive character of the verbal element 'PINK' alone.

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 predominate 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.

Evidence relating to 'PINKIDS' trade marks

The opponent submitted 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



, as well as some evidence concerning use of those additional marks on the market (as listed above).

Regarding the above evidence the Opposition Divisions notes the following.

The coinciding element 'PINK' in the signs in conflict in the present case is non-distinctive.

Considering the form in which the additional 'PINKIDS' marks are used on the market, namely PinKids® or 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. Furthermore, the consumers are likely to dissect the additional marks 'PINKIDS' 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 use of 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 a confirmation from a marketing agency attesting that the 'PINKIDS' brand was launched on the market only in 2012. Although the evidence mentions sales growth in 2018/2019 of PINKIDS - PINK LADY's brand for kids (Exhibit 15.2), this is the only reference to this factor and there is no other evidence (e.g. invoices) concerning use of those signs on the market and its extent nor, more importantly, how the relevant public perceives those signs. Therefore, the above evidence cannot support the opponent's arguments regarding the alleged enhanced distinctive character acquired through use of the verbal element 'PINK'.

Colour pink being the predominant colour in the earlier marks

The opponent also underlines that it uses its earlier marks with the predominant colour pink, which is similar to the colour used in the contested mark.

In this context, in the case (10/10/2019, T-428/18, mc dreams hotels Träumen zum kleinen Preis! (fig.) / McDONALD'S et al., EU:T:2019:738), none of the signs in conflict included the verbal element indicating a colour per se. Under Article 8(5) EUTMR, the General Court confirmed that the opponent proved exceptional reputation of the earlier marks and that the verbal element 'MC' was used in a family of marks encompassing the prefix 'Mc' in combination with other verbal elements. In any event, even if the use of

similar combination of colours was a factor for finding that use of a conflicting mark (without due cause) would take unfair advantage of the reputation of the earlier trade mark under Article 8(5) EUTMR (10/10/2019, T-428/18, mc dreams hotels Träumen zum kleinen Preis! (fig.) / McDONALD'S et al., EU:T:2019:738, § 93-94), this is not relevant in the present case as the earlier marks 'PINK LADY' (as a whole) acquired only considerable reputation whereas the colour pink as such is non-distinctive for the relevant goods.

Therefore, the above referenced case cannot support the opponent's arguments concerning the acquired distinctiveness of the word 'PINK' (as such) as an indication of commercial origin of the goods in the eyes of the relevant public.

Exclusive use of the verbal element 'PINK' on the market

The opponent also refers to its purported 'unique position on the market' and claims that it is the only company using trade marks comprising the verbal element 'PINK' for apples. To support its arguments the opponent submitted a list of cases in which various EUTM applications were withdrawn or limited after receipt of letters from the opponent (Exhibits 17.1 to 17.27). However, this evidence does not prove an actual situation on the market and obviously does not prove that the opponent is indeed the only company in the EU that uses the verbal element 'PINK' in relation to fruits. In any case, the above list does not provide any information on how the relevant public perceives the verbal element 'PINK' as such and whether it is indeed independently perceived as an indication of commercial origin of goods coming from the opponent or companies related thereto.

In summary, 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 a 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 identical. They target the general public and a professional public. The degree of attention varies from low to at least average.

The signs are visually similar to a very low degree and aurally and conceptually similar to a low degree. The coinciding verbal element 'PINK' is non-distinctive or at best weak for the relevant goods. Furthermore, it has a secondary position in the contested sign. On the other hand, the signs have different distinctive verbal elements 'LADY' in the earlier marks and 'WILD' – the dominant element in the contested sign. 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. In addition, the public will perceive the concept of a fruit conveyed by the figurative element in the contested sign.

Indeed, it has been acknowledged that the earlier mark 'PINK LADY' No 2 042 679, as a whole, enjoys reputation and enhanced distinctiveness in relation to apples, however this does not alter the descriptive/weak distinctive 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). Furthermore, the opponent has failed to prove existence of a family of marks characterised by a verbal element 'PINK' playing an independent distinctive role in the earlier marks.

The opponent contends that the 'low degree of attention' is a factor that contributes to likelihood of confusion. While this assertion is true (at least for some of the relevant goods in the present case), it does not alter or counterbalance the descriptive character of the shared verbal element 'PINK'. Furthermore, for part of the relevant goods in Class 31 the level of attention of the relevant public is at least average, because they are chosen due to their specific characteristics (as explained above).

According to the Common Practice 5 (CP5 – the details of Common Practice 5 can be found under the below link: 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' has a weak distinctive character for some of the relevant goods, the same rules as above apply to signs coinciding in only a weakly distinctive element. Therefore, the outcome would be the same.

To support its arguments regarding the existence of the likelihood of confusion, the opponent relates 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', or (in general) involve marks coinciding in the same verbal element:

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)
- 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)
- 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
- b. EUTM application for ENGLISH PINK withdrawn
- 16.5 EU General Court, 15 October 2018, T-164/17, EU:T:2018:678

18. **EUIPO decisions**
- 18.1 EUIPO BoA, 26 June 2018, R45/2018-4, *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
- 18.7 EUIPO BoA 1 June 2015, *HELIOS SOLO FRUTA / STELIOS* (fig.)
- 18.8 EUIPO Opp. Div. 25 February 2010, *MEMO/MEMA* (fig.)

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'). Furthermore, in cases concerning the absolute grounds for refusal for the EUTM applications for 'WILD FRUITS' and 'FRESH & WILD' for goods in Class 31, the meaning of those signs was recognised as sufficiently direct and clear in relation to the relevant goods (which is not the case in the present case, especially in relation to the contested sign).

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 aim 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, in the context of existence of likelihood of confusion, the opponent relates to 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
- 17.12 Result of action against FLANDERS PINK
- 17.13 Result of action against SILKY PINK
- 17.14 Result of action against SNOW PINK
- 17.15 Result of action against INDICAPINK
- 17.16 Result of action against LADY PINK GRAPEFRUIT
- 17.17 Result of action against PINK BLOSSOM
- 17.18 Result of action against PINK LEGGINGS
- 17.19 Result of action against PINK LIPS
- 17.20 Result of action against PINK NOISE
- 17.21 Result of action against PINK PERCEPTION
- 17.22 Result of action against PINK PIZZA
- 17.23 Result of action against PINK PRESENT
- 17.24 Result of action against PINK PRINCE
- 17.25 Result of action against PRETTY IN PINK
- 17.26 Result of action against I'M PINK
- 17.27 Result of action against PINK SAPPHIRE

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 decisions of proprietors 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, considering the very low degree of visual similarity and low degree of aural and conceptual similarity between the signs, and even acknowledging the enhanced distinctiveness and reputation of the earlier marks 'PINK LADY' (as such), the mere coincidence in the non-distinctive/weakly distinctive verbal element 'PINK' is insufficient to lead the consumers, even if displaying a low degree of attention, to perceive that the 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 public displaying an average degree of attention.

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 relevant public.

Therefore, the opposition must be rejected.

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

- 1) Benelux trade mark registration (Belgium, Luxembourg, the Netherlands) 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.*

- 2) 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.*

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


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

- 4) 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 31: *Fresh fruit; apples; fruit trees; apple trees.*

Class 32: *Fruit drinks and fruit juices, syrups; preparations for making fruit drinks; soda water; apple juice.*

- 5) EUTM registration No 14 353 262  (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 31: *Agricultural and horticultural products excluding Coreopsis L (tickseed), Hebe Comm Ex Juss (hebe) and Phlox I (phlox); fruit, including apples; plants excluding Coreopsis L (tickseed), Hebe Comm Ex Juss (hebe) and Phlox I (phlox) and trees, including apple trees.*

Class 32: *Mineral and aerated waters and other non-alcoholic beverages; fruit beverages and fruit juices; syrups and other preparations for making beverages.*

Some of the additional marks are identical to 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.

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 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 visually similar to a very low degree due to the coincidence in the non-distinctive verbal element 'PINK'.

The contested goods are the following:

Class 29: *Processed fruits.*

Class 31: *Apples (fresh -); live trees; apple trees; fruit trees; fresh fruit.*

Class 32: *Apple juice drinks; apple juice beverages.*

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.

In addition, the evidence submitted by the opponent does not allow to acknowledge the existence of a family of marks characterised by the verbal element 'PINK'.

Similarly, the opponent has also not submitted sufficient and convincing evidence to prove its claim that it is a unique undertaking in the EU that uses the word 'PINK' for fruits on the market.

The signs are visually similar to a very 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 the coinciding element in the same position.

Even if the evidence shows use of the earlier marks with the predominant colour pink, the relevant public will perceive it as simply reinforcing the meaning of the coinciding verbal element 'PINK'. In any case, the opponent has not submitted any direct and sufficient evidence that would prove that the colour pink is perceived by the relevant public as an indication of commercial origin of the goods.

Furthermore, contrary to opponent's claims, the degree of reputation of the earlier marks is not exceptionally high. Based on the evidence submitted, it was established that the earlier marks enjoy only a considerable degree of reputation in the EU.

Finally, 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, bearing in mind the nature of 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 settled 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. This finding holds true for the part of the public displaying a low degree of attention as well as the public displaying an average degree of attention (for some of the goods in Class 31).

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.

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, 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

Maria del Carmen SUCH
SANCHEZ

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.