

O/152/20

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3351588 BY  
BÁBEL SAJT Kft  
TO REGISTER:



AS A TRADE MARK IN CLASS 29

AND

IN THE MATTER OF THE OPPOSITION THERETO  
UNDER NO. 415472 BY  
FOUNDATION FOR THE PROTECTION OF THE TRADITIONAL  
CHEESE OF CYPRUS NAMED HALLOUMI

## BACKGROUND AND PLEADINGS

1. BÁBEL SAJT Kft (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the United Kingdom on 7 November 2018. It was accepted and published in the Trade Marks Journal on 16 November 2018 in respect of the following goods:

Class 29

*Milk and milk products; dairy and dairy products; cheese and cheese products.*

2. The application was opposed by the Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi (“the opponent”) on 15 February 2019. The opposition is based upon sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”) and concerns all goods in the application.

3. The opponent is relying upon EU Trade Mark (EUTM) 1082965: **HALLOUMI**. The mark was applied for on 22 February 1999 and registered on 14 July 2000 in respect of the following goods which the opponent is relying on:

Class 29

*Cheese.*

4. This mark is a collective trade mark, which only members of the opponent are entitled to use within the EU in relation to their products. The opponent prescribes conditions regarding composition and method of manufacture with which members must comply in order to use the mark.

5. The opponent claims that the marks are highly similar and that the applicant’s goods are identical or at least highly similar to the goods covered by the earlier mark, leading to a likelihood of confusion on the part of the public. Therefore, registration of the contested mark should be refused under section 5(2)(b) of the Act.

6. Additionally, or alternatively, the opponent claims that use of the applicant’s mark would take unfair advantage of the reputation of the earlier mark, built up by its

members and their predecessors, when the applicant is not a member and has not committed itself to compliance with the opponent's regulations. The opponent also claims that the sale of goods in the UK bearing the applicant's mark will be detrimental to the reputation of the earlier mark, as it will damage its ability to denote goods that are produced by members in accordance with the opponent's regulations, and detrimental to the distinctive character of the earlier mark, as consumers may purchase the applicant's goods on the basis that they believe them to have been produced by the opponent's members and/or that they comply with the characteristics of goods that are produced in accordance with the opponent's regulations. Therefore, registration of the contested mark should be refused under section 5(3) of the Act.

7. The applicant filed a defence and counterstatement, denying the grounds and putting the opponent to proof of use of the earlier mark.

8. The opponent filed evidence in these proceedings. This will be summarised to the extent that is considered necessary.

9. Neither party requested a hearing. The opponent filed written submissions, including written submissions in lieu of a hearing, on 19 July 2019 and 1 November 2019. These will not be summarised but will be referred to as and where appropriate during this decision. The applicant made no written submissions. This decision has been taken following a careful consideration of all the papers.

10. In these proceedings, the opponent is represented by Clifford Chance LLP and the applicant by Bristows LLP.

## **EVIDENCE**

11. The opponent's evidence comes from Dr Stelios Himonas, President of the Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi. It is dated 19 July 2019. Attached to the witness statement are 50 exhibits.

12. Dr Himonas explains that the aims of the Foundation are to promote the production of halloumi cheese in Cyprus, to protect traditional halloumi cheese from imitations

and to enhance economic, agricultural and commercial development based on halloumi products.

13. Use of the collective mark is governed by the Foundation's regulations, which set out requirements as to composition and the geographical origin of production, which must be Cyprus.<sup>1</sup> Cypriot law also lays down the standards that must be complied with if an undertaking wants to trade halloumi cheese, which, since 2014, must contain a minimum quantity of milk from sheep and/or goats of 20%.<sup>2</sup> At the date of the witness statement, there were 59 authorised users of the mark.<sup>3</sup> Dr Himonas states that to the best of his knowledge these 59 producers account for all the cheese exported under the collective mark.

14. Exports of cheese bearing the collective mark were as follows:<sup>4</sup>

<b>Year</b>	<b>EU (kg)</b>	<b>EU (€)</b>	<b>UK (kg)</b>	<b>UK (€)</b>
2014	10,479,518	70,162,387	5,321,927	35,563,513
2015	12,274,187	82,180,570	6,502,583	43,383,030
2016	16,532,508	110,028,382	9,182,897	61,073,392
2017	19,913,908	131,937,059	10,334,711	67,832,868
2018	25,726,157	170,121,980	13,827,452	90,659,776

15. Sales in Cyprus amounted to around €26,102,000 in 2014, €24,649,000 in 2015 and €22,999,000 in 2016. Figures for 2017 and 2018 were not available at the date of the witness statement.<sup>5</sup>

16. The table below shows the expenditure on marketing during the period 2014 to 2018. Dr Himonas says that this covers the costs of participating in exhibitions, organising promotional events, and producing marketing leaflets and articles.<sup>6</sup>

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<sup>1</sup> Exhibit SH1.

<sup>2</sup> The relevant legislation can be found in Exhibits SH2-SH4. The minimum quantity of milk from sheep's and/or goat's milk was higher under earlier legislation.

<sup>3</sup> Exhibit SH8.

<sup>4</sup> Exhibit SH9.

<sup>5</sup> Exhibit SH10.

<sup>6</sup> Exhibit SH11.

Year	Marketing expenditure (€)
2014	39,273
2015	62,113
2016	173,646
2017	76,245
2018	14,072
<b>TOTAL</b>	<b>365,349</b>

17. Exhibit SH12 is a brochure that was reissued in 2016. Dr Himonas states that 500 copies were distributed at trade shows and similar events in 2016 and 2017.

18. Exhibits SH13 and SH17-SH26 contain images of packaging from five different producers and exporters and sample invoices showing exports to the UK and other EU countries (Belgium, Poland, Romania, Bulgaria, Austria, Sweden, Italy, France, Germany, Spain and the Czech Republic) from 28 December 2013 to 11 October 2018. The images all show that the producers are using their own trade marks or signs on the packaging, as well as the earlier mark. Some examples are below:

The screenshot shows the Waitrose and Partners website interface. At the top, there is a navigation bar with a 'SHOP' menu icon, a search bar containing 'Search...', a 'Multi-search' button, and a 'Checkout' button. Below the navigation bar, a promotional message reads: 'New to Waitrose? Enjoy £100 OFF + FREE DELIVERY on your first five online grocery shops. Enter AQ2J191 at checkout. T&Cs apply'. A breadcrumb trail indicates the current location: 'Home > Groceries > Fresh & Chilled > Cheese > Feta & Halloumi > Christis halloumi cheese'. The main product listing is for 'Christis halloumi cheese 250g', which has '3 reviews'. The price is displayed as '£2.95 (£11.80/kg)' with a quantity selector set to '1'. Below the price, there is a 'View all in Feta & Halloumi' button. A small image of the product packaging is visible on the left. At the bottom of the product listing, a description reads: 'Halloumi Medium Fat Hard Cheese made with cows', ewes' and goats' milk.'



19. Exhibit SH27 is a witness statement from a Mr Konstantinos Dafos, the Assistant Commercial Trade Counsellor of the Cyprus Trade Centre for the UK. His witness statement is dated 4 August 2017 and it was prepared for use in other proceedings. Attached to this witness statement are images of halloumi cheese products produced

by Foundation members and available in UK supermarkets.<sup>7</sup> The images are undated but, where visible, the “best before dates” on the products are in 2017 or 2018. Also exhibited with this witness statement is a collection of articles from general publications (*The Independent* and *The Evening Standard*) and more specialist food or travel publications (*Food & Travel Magazine*, *Specialist Food Magazine*). The earliest article is dated 8 May 2004 and the latest August 2017. They promote halloumi cheese as a traditional product of Cyprus.

20. All but one of the remaining exhibits consist of promotional articles, many of which were placed by the Cyprus Trade Centres in the respective countries in which the articles were published: the UK, Greece, Germany, Austria and Poland. The articles are contained in both publications aimed at either the trade or a more general audience. The earliest is a 2003 advert published in Greek newspapers in 2003, which describes halloumi as “the traditional white cheese with authentic flavour, pure ingredients and excellent quality”.<sup>8</sup> The most recent is an extract from the 2019-20 issue of *Caseus Domus*, a German cheese catalogue, which Dr Himonas believes has 20,000 readers. It identifies HALLOUMI as an EU collective trade mark.<sup>9</sup> Some of the articles in trade publications refer to the regulations governing use of the collective mark, while the articles for the general public do not and comment instead on the traditional nature of the cheese and its association with Cyprus.

21. Exhibit SH50, the final exhibit, is an undated extract from the applicant’s website which claims that its “GrillCheese” won a prize at the Austrian Cheese Olympics in 2014. This cheese is described as being “Halloumi-type”.<sup>10</sup>

## **DECISION**

### **PROOF OF USE**

22. Section 6A of the Act states that:

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<sup>7</sup> Sainsbury’s, Asda, Marks & Spencer, Waitrose, Tesco, Aldi, Morrisons and The Co-op.

<sup>8</sup> Exhibit SH33.

<sup>9</sup> Exhibit SH38.

<sup>10</sup> Page 297.

“(1) This section applies where

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section ‘the relevant period’ means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the register shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

- (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
- (b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes –

- (a) use of a trade mark includes use in a form (the ‘variant form’) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade



mark in the variant form is also registered in the name of the proprietor),  
and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Union.

(5A) In relation to an international trade mark (EC) the reference in subsection (1)(c) to the completion of the registration procedure is to be construed as a reference to the publication by the European Union Intellectual Property Office of the matters referred to in Article 190(2) of the European Union Trade Mark Regulation.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

23. Section 49 of the Act states that :

“(1) A collective mark is a mark which is described as such when it is applied for and is capable of distinguishing the goods and services of members of the association which is the proprietor of the mark from those of other undertakings.

(1A) The following may be registered as the proprietor of a collective mark-

(a) an association of manufacturers, producers, suppliers of services or traders which has the capacity in its own name to enter into contracts and to sue or to be sued; and

(b) a legal person governed by public law.

(2) The provisions of this Act apply to collective marks subject to the provisions of Schedule 1.”

24. The relevant provisions of Schedule 1 of the Act for these proceedings are as follows:

“(2) In relation to a collective mark the reference in section 1(1) (signs of which a trade mark may consist) to distinguishing goods or services of one undertaking from those of other undertakings shall be construed as a reference to distinguishing goods or services of members of the association which is the proprietor of the mark from those of other undertakings.”

25. Section 100 of the Act states that:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

26. The contested mark was applied for on 7 November 2018. The relevant period for the purposes of assessing whether use has been proven is 8 November 2013 to 7 November 2018.

27. In *Walton International Ltd & Anor v Verweij Fashion BV* [2016] EWHC 1608 (Ch), Arnold J (as he then was) summarised the law relating to genuine use as follows:

“114. ... The CJEU has considered what amounts to ‘genuine use’ of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundersvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH*

[2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W. F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principle established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the

proprietor does not suffice: *Ansul* at [37], *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis*

rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

28. As the earlier mark is an EUTM, I bear in mind the decision of the Court of Justice of the European Union (CJEU) in *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, where it held that:

“Article 15(1) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark must be interpreted as meaning that the territorial borders of the Member States should be disregarded in the assessment of whether a trade mark has been put to ‘genuine use in the Community’ within the meaning of that provision.

A Community trade mark is put to ‘genuine use’ within the meaning of Article 15(1) of Regulation No 207/2009 when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the European Community for the goods or services covered by it. It is for the referring court to assess whether the conditions are met in the main proceedings, taking account of all the relevant facts and circumstances, including the characteristics of the market concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity.”

29. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Anor*, [2016] EWHC 52, Arnold J. (as he was then) reviewed the case law since *Leno* and concluded as follows:

“228. Since the decision of the Court of Justice in *Leno* there have been a number of decisions of OHIM Boards of Appeal, the General Court and

national courts with respect to the question of the geographical extent of the use required for genuine use in the Community. It does not seem to me that a clear picture has yet emerged as to how the broad principles laid down in *Leno* are to be applied. It is sufficient for present purposes to refer by way of illustration to two cases which I am aware have attracted comment.

229. In Case T-278/13 *Now Wireless Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* the General Court upheld at [47] the finding of the Board of Appeal that there had been genuine use of the contested mark in relation to the services in issues in London and the Thames Valley. On that basis, the General Court dismissed the applicant's challenge to the Board of Appeal's conclusion that there had been genuine use of the mark in the Community. At first blush, this appears to be a decision to the effect that use in rather less than the whole of one Member State is sufficient to constitute genuine use in the Community. On closer examination, however, it appears that the applicant's argument was not that use within London and the Thames Valley was not sufficient to constitute genuine use in the Community, but rather that the Board of Appeal was wrong to find that the mark had been used in those areas, and that it should have found that the mark had only been used in parts of London: see [42] and [54]-[58]. This stance may have been due to the fact that the applicant was based in Guildford, and thus a finding which still left open the possibility of conversion of the Community trade mark to a national trade mark may not have sufficed for its purposes.

230. In *The Sofa Workshop Ltd v Sofaworks Ltd* [2015] EWHC 1773 (IPEC), [2015] ETMR 37 at [25] His Honour Judge Hacon interpreted *Leno* as establishing that "genuine use in the Community will in general require use in more than one Member State" but "an exception to that general requirement arises where the market for the relevant goods or services is restricted to the territory of a single Member State". On this basis, he went on to hold at [33]-[40] that extensive use of the trade mark in the UK, and one sale in Denmark, was not sufficient to amount to genuine use in the Community. As I understand it, this decision is presently under appeal and

it would therefore be inappropriate for me to comment on the merits of the decision. All I will say is that, while I find the thrust of Judge Hacon's analysis of *Leno* persuasive, I would not myself express the applicable principles in terms of a general rule and an exception to that general rule. Rather, I would prefer to say that the assessment is a multi-factorial one which includes the geographical extent of the use.”

30. The General Court (GC) restated its interpretation of *Leno Marken* in Case T-398/13, *TVR Automotive Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (see paragraph 57 of the judgment). This case concerned national (rather than local) use of what was then known as a Community trade mark (now a European Union trade mark). Consequently, in trade mark opposition and cancellation proceedings the registrar continues to entertain the possibility that use of an EUTM in an area of the Union corresponding to the territory of one Member State may be sufficient to constitute genuine use of an EUTM. This applies even where there are no special factors, such as the market for the goods/services being limited to that area of the Union. Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the EUTM, in the course of trade, sufficient to create or maintain a market for the goods/services at issue in the Union during the relevant five-year period.

31. The evidence shows that the mark is used on the packaging of cheese produced by the opponent's members. So long as an undertaking is a member of the opponent and therefore complies with the regulations, its use of the mark must be with the consent of the proprietor. The cheese producers are all listed in Annex SH8, the list of authorised users of the mark at the date of the witness statement. The list does not show the date of authorisation. However, Dr Himonas states that they were members during the relevant period, and his witness statement has not been challenged by the applicant. The table in paragraph 14 of this decision shows significant and increasing exports that to my mind denote more than token use. The largest markets are Greece, the UK, Germany and Sweden. The quantities of cheese sold in Cyprus must also be taken into account. I find that the opponent has demonstrated genuine use in the European Union of the earlier mark for *Cheese*.

## Section 5(2)(b)

32. Section 5(2)(b) of the Act is as follows:

“A trade mark shall not be registered if because –

...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

33. Section 5A of the Act states that:

“Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

34. In considering the opposition under this section, I am guided by the following principles, gleaned from the decisions of the CJEU in *SABEL BV v Puma AG* (Case C-251/95), *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* (Case C-39/97), *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* (Case C-342/97), *Marca Mode CV v Adidas AG & Adidas Benelux BV* (Case C-425/98), *Matratzen Concord GmbH v OHIM* (Case C-3/03), *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH* (Case C-120/04), *Shaker di L. Laudato & C. Sas v OHIM* (Case C-334/05 P) and *Bimbo SA v OHIM* (Case C-529/12 P):

a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;



b) the matter must be judged through the eyes of the average consumer of the goods or services in question. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but someone who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their mind, and whose attention varies according to the category of goods or services in question;

c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks and vice versa;

h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

### ***Comparison of goods and services***

35. When comparing the goods and services, all relevant factors should be taken into account, per *Canon*:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or complementary.”<sup>11</sup>

36. Guidance was also given by Jacob J (as he then was) in *British Sugar Plc v James Robertson & Sons Limited (“Treat”)* [1996] RPC 281. At [296], he identified the following relevant factors:

“(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

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<sup>11</sup> Paragraph 23.

(e) In the case of self-serve consumer items, where in practice they are respectively found, or likely to be found, in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.”

37. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods or services. The GC clarified the meaning of “complementary” goods or services in *Boston Scientific Ltd v OHIM*, Case T-325/06:

“... there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking.”<sup>12</sup>

38. While making my comparison, I bear in mind the comments of Floyd J (as he then was) in *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch):

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of ‘dessert sauce’ did not include jam, or because the ordinary and natural description of jam was not ‘a dessert sauce’. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in

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<sup>12</sup> Paragraph 82.

question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”<sup>13</sup>

39. I also bear in mind the judgment of the GC in *Gérard Meric v OHIM*, Case T-133/05, where it stated that:

“In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00) *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”<sup>14</sup>

40. The goods to be compared are shown in the table below:

Opponent’s goods	Applicant’s goods
<u>Class 29</u> Cheese	<u>Class 29</u> Milk and milk products; dairy and dairy products; cheese and cheese products.

41. The applicant’s *cheese and cheese products* are self-evidently identical to the opponent’s *Cheese*, which would also be included in the applicant’s more general category of *dairy and dairy products*. Under the *Meric* principle, I find that those goods are also identical.

42. I turn now to the applicant’s *Milk and milk products*. The ordinary and natural meaning of *milk products* would include milk-based drinks such as milkshakes, but not, to my mind, products that would belong to another category, for example butter, yogurt or cheese. Cheese is made from milk but that does not necessarily mean that

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<sup>13</sup> Paragraph 12.

<sup>14</sup> Paragraph 29.

the goods are similar, as the GC commented in *Les Éditions Albert René v OHIM*, Case T-336/03:

“... The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their nature, intended purpose and the customers for those goods may be completely different.”<sup>15</sup>

43. Both the opponent's and the applicant's goods are edible, with the applicant's being liquid while the opponent's are solid. *Milk products* will be drunk, with the aim of quenching thirst and providing nutrition, while *cheese* is eaten to satisfy hunger and provide nutrition. The purposes are therefore overlapping and the users will be the same. The goods will share the same distribution channels and will be sold fairly close together in the chilled aisles of supermarkets. If there is competition between the two, it is at a fairly low level. However, I find that the goods are complementary. It seems to me that the average consumer is likely to think that the responsibility for the goods lies with the same undertaking, given the crucial role of milk in cheese production. Consequently, I find that there is a high degree of similarity between the goods.

### ***The average consumer and the purchasing process***

44. In *Hearst Holdings & Anor v A.V.E.L.A. Inc & Ors* [2014] EWHC 439 (Ch), Birss J described the average consumer in these terms:

“The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person.

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<sup>15</sup> Paragraph 61.

The word ‘average’ denotes that the person is typical. The term ‘average’ does not denote some form of numerical mean, mode or median.”<sup>16</sup>

45. For the purpose of assessing the likelihood of confusion, I must bear in mind that the average consumer’s level of attention is likely to vary according to the category of goods or services in question: see *Lloyd Schuhfabrik Meyer*.

46. The average consumer would be a member of the general public, who would select the goods themselves from the supermarket shelves or online from a website. The visual element will therefore be the most significant and, as the goods are fairly low cost and everyday purchases, the average consumer will be paying no more than a medium level of attention.

47. The opponent submits that the average consumer will also be a trader in cheese. The CJEU addressed the significance of the trade’s perception of trade marks in *Björnekulla Fruktingustrier AB v Procordia Food AB*, Case C-371/02, where it found that:

“24. In general, the perception of consumers or end users will play a decisive role. The whole aim of the commercialisation process is the purchase of the product by those persons and the role of the intermediary consists as much in detecting and anticipating the demand for that product as in increasing or directing it.

25. Accordingly, the relevant circles comprise principally consumers and end users. However, depending on the features of the product market concerned, the influence of intermediaries on decisions to purchase, and thus their perception of the trade mark, must also be taken into consideration.”

48. The goods at issue are ones that will be purchased regularly, as part of a weekly shop, and the average consumer will not seek the advice of an intermediary in making

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<sup>16</sup> Paragraph 60.

their purchase. It is true that specialist cheese retailers exist, but it seems to me that the goods will tend to be purchased most often from a more general retail outlet, such as a supermarket. Consequently, I find that the average consumer is a member of the general public.

### ***Comparison of marks***

49. It is clear from *SABEL v Puma* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo* that:


“... it is necessary to ascertain in each individual case, the overall impression made on the target public by the sign for which the registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and of all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”<sup>17</sup>

50. It would be wrong, therefore, artificially to dissect the marks, although it is necessary to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

51. The respective marks are shown below:

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<sup>17</sup> Paragraph 34.

Earlier mark	Contested mark
HALLOUMI	

52. The earlier mark consists of the word “HALLOUMI” in capital letters and a standard font. The overall impression of the mark lies in the word itself.

53. The contested mark consists of a red oval which contains the word “Hajdú” in white letters in title case. The dot on the top of the j is part of a device which resembles an incomplete flower. The dot is the centre and around it are four shapes that look like petals. At the very top of the oval, the red colour fades. Below the oval is another red shape with curved edges and this contains the word “HALLOUMI” in smaller white capital letters. The verbal elements are presented in a standard font. The consumer’s eye is drawn to the verbal elements and because of its size and position it is the word “Hajdú” that is more noticeable. However, the figurative elements and the word “HALLOUMI” also make a contribution to the overall impression of the mark.

*Visual comparison*

54. The earlier mark is wholly contained in the contested mark. However, the additional verbal and figurative elements in the contested mark are noticeable points of difference. Overall, I find the visual similarity between the marks to be low.

*Aural comparison*

55. The earlier mark will be pronounced “HA-LOO-ME”. The average consumer will, in my view, not be certain how to pronounce the contested mark, so is likely to articulate it phonetically: “HAJ-DOO” or, if the second word is pronounced, “HAJ-DOO HA-LOO-ME”. If the whole of the contested mark is articulated, there is, to my mind, a



medium degree of similarity; if just the first word is articulated, I find the marks to have a very low level of aural similarity.

### *Conceptual comparison*

56. The earlier mark will be recognised by the average consumer as referring to a type of cheese. In my view, the contested mark will be understood to mean the same type of cheese, produced by an entity called “Hajdú”, which the average consumer will see as an invented or foreign word. The flower-like device could make the average consumer think that the goods bearing the mark are natural products, but the remaining figurative elements will be seen as merely decorative. The marks have, to my mind, no more than a medium degree of conceptual similarity.

### ***Distinctiveness of the earlier mark***

57. There is, as has already been noted, a greater likelihood of confusion if the earlier mark is highly distinctive. The CJEU provided guidance on assessing a mark’s distinctive character in *Lloyd Schuhfabrik Meyer*:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain 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 which, 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 (see *Windsurfing Chiemsee*, paragraph 51).

58. The opponent submits that its earlier mark has a high level of distinctive character. It drew my attention to the opinion of the Advocate General of the CJEU in *Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v European Union Intellectual Property Office (EUIPO)*, Case C-766/18 P, in which the opponent had submitted that a collective mark necessarily enjoys increased protection. The CJEU gave its decision in this case on 5 March 2020. It held that:

“71. The appellant’s argument that the distinctiveness of the earlier mark should, having regard, in particular, to Article 66(2) of Regulation No 207/2009, be assessed differently where the earlier mark is an EU collective mark cannot be accepted.

72. In that regard, it must be noted that in the absence of any provision to the contrary in Articles 67 to 74 of Regulation No 2007/2009, Article 7(1)(b) and Article 7(3) of that regulation apply to EU collective marks. Consequently, those marks must in any event, whether intrinsically or through use, be distinctive.

73. Article 66(2) of Regulation No 207/2009 is not an exception to that requirement of distinctiveness. While that provision permits, by way of derogation from Article 7(1)(c) of that regulation, registration as EU collective marks of signs which may serve to designate the geographical origin of goods or services, it does not, on the other hand, allow the signs thus registered to be devoid of distinctiveness. Where an association applies for a registration, as an EU collective mark, of a sign which may designate a geographical origin, it is therefore incumbent on it to ensure that that sign has elements which enable the consumer to distinguish the goods or services of its members from those of other undertakings.

74. Therefore, even supposing that the EU collective mark HALLOUMI implicitly refers, as the appellant claims, to the Cypriot geographical origin of the goods covered, that mark must nevertheless still fulfil its essential function, namely to distinguish the goods or services of the members of the association which is the proprietor of that mark from those of other undertakings, and the degree of distinctiveness of that mark is, in accordance with the case-law referred to in paragraph 70 above, a relevant factor for the purposes of assessing whether there is a likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009, between that mark and the mark applied for BBQLOUMI.

75. It follows that the General Court did not err in law in assessing the degree of distinctiveness of the earlier mark HALLOUMI and in including that factor in its assessment of the existence of a likelihood of confusion.

76. Furthermore, contrary to the appellant's claim, it does not appear that the General Court, in making that assessment, 'deprecated' the distinctiveness of the earlier mark HALLOUMI or that it relied on a premiss of weak distinctiveness which it was for the appellant to rebut. On the contrary, it is apparent from paragraphs 42 and 70 of the judgment under appeal that the General Court objectively found, as did the Board of Appeal after analysing the evidence adduced by the appellant, that the term 'halloumi', the sole element of which that earlier mark consists, designates a particular type of cheese produced according to a special recipe and that the distinctiveness of such a mark, which is restricted to designating a type of product, is weak."

59. On the basis of the evidence before me, I see no reason to disagree with this analysis. A registered mark must be assumed to have at least some distinctive character: see *Formula One Licensing BV v OHIM*, Case C-196/11 P, paragraphs 41-44. I find that the distinctiveness of the mark is inherently weak.

60. The evidence does show efforts to inform the public that production of halloumi cheese is governed by rules: see, for example, the article in *Specialty Food Magazine*

from August 2017, in Exhibit KD3 to the witness statement of Mr Konstantinos Dafos.<sup>18</sup> However, as I have already noted, the publications aimed at a general, rather than a trade, audience merely state that the cheese comes from Cyprus and do not mention any regulations concerning its production or the existence of the opponent.<sup>19</sup> In my view, the average consumer (who is a member of the public) would think that halloumi was a type of cheese from Cyprus and would not identify the goods or services as originating from a member of the Foundation. I find that the mark has not been enhanced through use.

### ***Conclusions on likelihood of confusion***

61. In assessing the likelihood of confusion, I must adopt the global approach set out in the case law to which I have already referred in paragraph 34 of this decision. I must also have regard to the interdependency principle, that a lesser degree of similarity between the goods may be offset by a greater degree of similarity between the marks, and vice versa: see *Canon*, paragraph 17. The distinctiveness of the earlier mark must also be taken into account.

62. Such a global assessment does not imply an arithmetical exercise, where the factors are scored and combined to reveal the likelihood of confusion. I must keep in mind the average consumer of the goods and the nature of the purchasing process. I note that it is generally accepted that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture they have kept in their mind: see *Lloyd Schuhfabrik Meyer*, paragraph 27.

63. The opponent submits that the identical HALLOUMI element retains its distinctive character within the contested mark and cited the CJEU's judgment in *Medion*. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Anor* [2015] EWHC 1271 (Ch), Arnold J (as he then was) considered the impact of the CJEU's judgment in *Bimbo* on the *Medion* judgment:

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<sup>18</sup> The witness statement is Exhibit SH27.

<sup>19</sup> *The Independent*, *The Evening Standard* and *Food & Travel Magazine*, Exhibit KD3, pages 193, 195 and 201.

“18. The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19. The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20. The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21. The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

64. The opponent’s submission is that the average consumer would be used to seeing the products of Foundation Members sold under both a producer mark and the earlier

collective mark. Examples are reproduced in paragraph 18 of this decision. I agree that the average consumer, on seeing the contested mark, would believe “Hajdú” to be the producer of the goods, which are described by the word “HALLOUMI”. Thus they have independent distinctive roles, but this does not, as the court said, necessarily result in a likelihood of confusion. I must make the global assessment based on all relevant factors.

65. There are two types of confusion: direct and indirect. In *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10, Mr Iain Purvis QC, sitting as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognised that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: ‘The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (‘26 RED TESCO’ would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as 'LITE', 'EXPRESS', 'WORLDWIDE', 'MINI' etc.)

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ('FAT FACE' to 'BRAT FACE' for example)."

66. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor QC, sitting as the Appointed Person, commented on the passage above, stressing that the examples given by Mr Purvis were not exhaustive and should not be taken as akin to a statutory test:

"81.2 ... the reason why the CJEU stressed the importance of the global assessment is, in my view, because it is supposed to emulate what happens in the mind of the average consumer on encountering, for example, the later mark applied for with an imperfect recollection of the earlier mark in mind. It is not a process of analysis or reasoning, but an impression or instinctive reaction.

81.3 ... when a tribunal is considering whether a likelihood of confusion exists, it should recognise that there are four options:

81.3.1 The average consumer mistakes one mark for the other (direct confusion);

81.3.2 The average consumer makes a connection between the marks and assumes that the goods or services in question are from the same or economically linked undertakings (indirect confusion);

81.3.3 The various factors considered in the global assessment lead to the conclusion that, in the mind of the average consumer,

the later mark merely calls to mind the earlier mark (mere association);

81.3.4 For completeness, the conclusion that the various factors result in the average consumer making no link at all between the marks, but this will only be the case where either there is no or very low similarity between the marks and/or significant distance between the respective goods or services;

81.3.5 Accordingly, in most cases, it is not necessary to explicitly set out this fourth option, but I would regard it as a good discipline to set out the first three options, particularly in a case where a likelihood of indirect confusion is under consideration.

81.4 ... I think it is important to stress that a finding of indirect confusion should not be made merely because the two marks share a common element. When Mr Purvis was explaining in more formal terms the sort of mental process involved at the end of his [16], he made it clear that the mental process did not depend on the common element alone: 'Taking account of the common element in the context of the later mark as a whole.' (my emphasis)."

67. I found the goods to be identical or highly similar. Nevertheless, it seems to me that the differences between the marks are such that the average consumer is unlikely to mistake one for the other, and so I find that there is no likelihood of direct confusion.

68. It is indirect confusion that the opponent submits is likely to occur:

"... the relevant public will associate the Applicant's composite mark with the Collective Mark and the goods sold under the Collective Mark by Foundation Members."

69. Earlier in my decision, I found that the opponent's mark had a weak level of distinctiveness and I was unpersuaded by the evidence that the average consumer



would understand the mark as anything other than the name of a type of cheese. In my view, the average consumer is unlikely to think that the applicant's goods are connected with the association that owns the earlier mark. I find there to be no likelihood of indirect confusion.

70. The opposition under section 5(2)(b) has failed.

### **Section 5(3)**

71. Section 5(3) of the Act states that a trade mark which is identical with or similar to an earlier trade mark

“shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC) in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

72. Section 5(3A) of the Act states that:

“Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected.”

73. The relevant case law can be found in the following judgments of the CJEU: *General Motors Corp v Yplon SA* (Case C-375/97), *Intel Corporation Inc v CPM United Kingdom Ltd* (Case C-252/07), *Adidas Salomon AG v Fitnessworld Trading Ltd* (Case C-487/07), *L'Oréal SA & Ors v Bellure NV & Ors* (Case C-487/07) and *Marks and Spencer v Interflora* (Case C-323/09). The law appears to be as follows:

a) The reputation of a trade mark must be established in relation to the relevant section of the public, as regards the goods or services for which the mark is registered: *General Motors*, paragraph 24.

b) The trade mark for which protection is sought must be known by a significant part of that relevant public: see *General Motors*, paragraph 26.

c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind: *Adidas Salomon*, paragraph 29, and *Intel*, paragraph 63.

d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods or services, the extent of the overlap between the relevant consumers for those goods or services, and the strength of the earlier mark's reputation and distinctiveness: *Intel*, paragraph 42.

e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future: *Intel*, paragraph 68. Whether this is the case must also be assessed globally, taking account of all relevant factors: *Intel*, paragraph 79.

f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods or services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods or services for which the earlier mark is registered, or a serious risk that this will happen in the future: *Intel*, paragraphs 76 and 77.

g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character: *Intel*, paragraph 74.

h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a

characteristic or quality which is liable to have a negative impact on the earlier mark: *L'Oréal*, paragraph 40.

i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation: *Marks and Spencer*, paragraph 74, and the court's answer to question 1 in *L'Oréal*.

### ***Reputation***

74. The CJEU gave guidance on the assessment of reputation in *General Motors*:

“24. The public amongst which the earlier trade mark must have acquired a reputation is that concerned by the trade mark, that is to say, depending on the product or service marketed, either the public at large or a more specialised public, for example traders in a specific sector.

25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and

duration of its use, and the size of the investment made by the undertaking in promoting it.”

75. Reputation therefore assumes knowledge on the part of the relevant public. A significant part of this public must know that a mark distinguishes the goods and/or services of the proprietor from those of another undertaking. In the case of a collective mark, the public must know that the mark distinguishes the goods and/or services of members of the association which is the proprietor of the mark from those of other undertakings, per section 49(1) of the Act.

76. Dr Himonas states that:

“The average consumer in Greece is aware that ‘HALLOUMI’ cheese is produced in Cyprus and is subject to strict regulations concerning its production and use.”<sup>20</sup>

However, no evidence is adduced to corroborate this statement. Attached as Exhibits are articles from Greece, Germany, the UK, Austria and Poland that refer to the regulations but these come from publications aimed at the trade or with relatively low circulation figures.<sup>21</sup> The publications aimed at a general audience, such as the Austrian *GrillZeit*, simply refer to “halloumi” as a typical Cypriot cheese.<sup>22</sup>

77. In my view, the evidence does not show reputation among a significant part of the relevant public. The opposition under section 5(3) fails.

## **CONCLUSION**

78. The opposition has failed. The application by BÁBEL SAJT Kft may proceed to registration in respect of all the applied-for goods, which are listed in paragraph 1 of this decision.

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<sup>20</sup> Paragraph 46.

<sup>21</sup> For example, *WINE PLUS*, the source of an article in Exhibit SH36, has a circulation of 6,000 readers which is relatively small for the EU as a whole.

<sup>22</sup> See Exhibits SH40 and SH42.

## **COSTS**

79. The applicant has been successful and is entitled to a contribution towards its costs. In the circumstances I award the applicant the sum of £500 as a contribution towards the costs of the proceedings. I have taken account of the fact that the applicant filed no evidence and made no written submissions.

*Preparing a statement and considering the other side's statement: £300*

*Consideration of the other side's evidence: £200*

***TOTAL: £500***

80. I therefore order the Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi to pay BÁBEL SAJT Kft the sum of £500. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

**Dated this 11<sup>th</sup> day of March 2020**

**Clare Boucher**

**For the Registrar,**

**Comptroller-General**