

O/620/20

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION
NO. 3372004 BY
ETF MANAGERS GROUP LLC
TO REGISTER:**

AIEQ

AS A TRADE MARK IN CLASS 36

AND

**OPPOSITION THERETO
UNDER NO. 416238
BY
PETER KLEINGARN AND HARALD STRELEN**

Background & Pleadings

1. ETF Managers Group LLC (“the applicant”), applied to register the trade mark shown on the front page of this decision in the United Kingdom on 1 February 2019. It was accepted and published in the Trade Marks Journal on 8 February 2019 in respect of the following services:

Class 36

<p><i>Providing exchange-traded fund services; Management of exchange-traded funds that track select groups of securities; Operation, creation and management of exchange-traded funds; Exchange-traded fund consultation services, advisory services, investment services, planning services, development services, research services and analysis services; Providing financial information; Providing financial information in the field of finance, financial investments and exchange-traded funds; Providing information, commentary and advice in the field of finance, financial investments, financial valuations and exchange-traded funds; Providing financial information via a website; Providing investors with financial information; Financial information; Providing financial services with respect to securities and other financial instruments and products, namely, exchange-traded funds; Providing financial services with respect to securities and other financial instruments and products, namely, providing financial market news and commentary; Financial evaluation, tracking, analysis, consultancy, advisory and research services relating to securities and other financial instruments; Information, advisory, consultancy and research services relating to finance and investments; Management of portfolios of transferable securities; Financial planning and investment advisory services; Investment management in the fields of exchange-traded funds; Issuance and provision of financial products and investment products in the nature of exchange-traded funds; Creation, management, issuance and provision of securities portfolios.</i></p>
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2. Peter Kleingarn and Harald Strelen (“the opponents”) oppose the application on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”).
3. The opponents are the proprietors of the European Union Trade Mark (EUTM) registration 017584541 for the word:

AIQU

The mark was filed on 12 December 2017 and registered on 5 June 2018 for various services in Classes 35, 36, and 45. In their notice of opposition, the opponents initially state that all of the services covered by their earlier mark are relied upon; however, they later make a comparison based only on their Class 36 terms, to which I turn to later.

4. The opponents in their TM7, as amended, claim that the services listed in the applicant’s specifications in Class 36 are “partly identical and partly highly similar” to the opponents’ services. Also, the opponents assert that the respective marks are visually highly similar, aurally identical, but conceptually, “the comparison is not possible” due to the “absence of semantic content of the trademarks concerned”. The opponents claim that there is “a serious likelihood of confusion”. Therefore, registration of the contested mark should be refused under section 5(2)(b) of the Act.
5. The applicant filed a defence and counterstatement, denying there will be any likelihood of confusion under Section 5(2)(b) of the Act. The applicant denies all the opponents’ claims, including any similarity between the respective marks and services.
6. Neither of the parties filed submissions or evidence in these proceedings.
7. No hearing was requested, and no submissions were filed in lieu of a hearing. Thus, this decision has been taken following careful consideration of the papers.

8. In these proceedings, the opponents are represented by the Office Freylinger S.A. and the applicant by Withers & Rogers LLP.

Proof of Use

9. As the opponents' earlier mark 017584541 was registered on 5 June 2018, the registration was under five years old at the time that the applicant's mark was filed on 8 February 2019, and proof of use is not relevant in these proceedings, as per Section 6A of the Act.

Decision

10. The relevant statutory provisions are as follows:

Section 5(2)(b) of the Act states:

“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”.

11. An “earlier trade mark” is defined in section 6(1) of the Act:

“In this Act an ‘earlier trade mark’ means –

a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

references in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

12. Under the provisions outlined above, the opponents’ trade mark clearly qualifies as an earlier mark.

13. The principles, considered in this opposition, stem from the decisions of the European Courts 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 Office for Harmonisation in the Internal Market (Trade Marks and Designs) (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-519/12 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, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his 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 great 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 Services

14. When making the comparison, all relevant factors relating to the services in the specifications should be taken into account. In *Canon Kabushiki Kaisha*, the Court of Justice of the European Union (CJEU) stated that:

“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.”¹

15. Guidance on this issue 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;
- (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

¹ Paragraph 23.

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.”

16. The General Court confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, paragraph 29, that, even if goods or services are not worded identically, they can still be considered identical if one term falls within the scope of another, or vice versa:

“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 trade mark application (Case T-388/00 *Institut fur 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”.

17. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term ‘computer software’. In the course of his judgment he set out the following summary of the correct approach to interpreting broad and/or vague terms:

“[...] the applicable principles of interpretation are as follows:

(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded.”

18. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J (as he then was) gave the following guidance on construing the words used in specifications:

“[...] 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 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.”²

19. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated that:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it

² Paragraph 12.

were, the core of the possible meanings attributable to the rather general phrase.”

20. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU held that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods or services. The General Court 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.”³

21. Although the opponents indicated that they rely on all of the services covered by the earlier mark, they focus, as I will do, on the earlier mark’s services in Class 36. The competing services in Class 36 to be compared are shown in the following table:

³ Paragraph 82.

Opponent's Services	Applicant's Services
<p><u>Class 36</u> <i>Insurance; Financial affairs; Monetary affairs; Real estate affairs; Providing financial information via a web site; Financial information; Financial analysis; Financial consulting; Financing and funding services; Financial management; Provident fund services; Evaluation (Financial -) [insurance, banking, real estate]; Business liquidation services, financial; Drafting and carrying out fiscal assessments; Financial advisory services relating to tax; Tax planning [not accounting]; Provision of tax advice [not accounting]; Processing of tax payments and tax refunds; Financial advisory services relating to tax; Planning of finances relating to taxation; Provision of tax advice [not accounting]; Preparation of tax payment plans; Tax and duty payment services; Valuation services of property for fiscal purposes; Tax consultancy (other than book-keeping) in connection with the setting up, structuring and management of regulated and unregulated societies, foundations, investment funds and securitisation structures or other structures for gathering capital.</i></p>	<p><u>Class 36</u> <i>Providing exchange-traded fund services; Management of exchange-traded funds that track select groups of securities; Operation, creation and management of exchange-traded funds; Exchange-traded fund consultation services, advisory services, investment services, planning services, development services, research services and analysis services; Providing financial information; Providing financial information in the field of finance, financial investments and exchange-traded funds; Providing information, commentary and advice in the field of finance, financial investments, financial valuations and exchange-traded funds; Providing financial information via a website; Providing investors with financial information; Financial information; Providing financial services with respect to securities and other financial instruments and products, namely, exchange-traded funds; Providing financial services with respect to securities and other financial instruments and products, namely, providing financial market news and commentary; Financial evaluation, tracking, analysis, consultancy, advisory and research services relating to securities and other financial instruments; Information, advisory, consultancy and research services relating to finance and investments; Management of portfolios of transferable securities; Financial planning and investment advisory services; Investment management in the fields of exchange-traded funds; Issuance and provision of financial products and investment products in the nature of exchange-traded funds; Creation, management, issuance and provision of securities portfolios.</i></p>

22. In the Notice of Opposition, the opponents provide a comparison of the respective services, grouping them under the headings “financial services” and “fund- and security services”. In relation to the former subset, the opponents state that:

“[...] the services of the two trademarks concerned listed in exactly the same terms (such as the term “financial information”) and partly from services with the same meaning (such as financial consultancy in the contested trademark and financial consulting in the earlier trademark). Furthermore, the earlier trademark includes the broad category of “financial and monetary affairs”, which cover the above referenced services of the contested mark in their entirety.”

As for the latter subset, the opponents assert that:

“These services are not only covered by the generic term “financial affairs” as protected by the earlier trademark, but also by the latter's services “provident fund services” and “insurance”. These services are usually based on an overall financial plan and aim at financially securing the future through various instruments such as exchange-traded funds. Both the fund and security related services protected by the contested trademark as well as the “provident fund and insurance services” pursue hence the same purpose of financially securing the future. In addition, these services are of the same nature since both the services protected by the contested trademark and those protected by the earlier trademark are typical services of the financial sector.”

23. In the Notice of Defence and Counterstatement, the applicant states that:

“It is denied that the Opponent’s Class 35 Services are similar or identical to the Applicant’s Services.”

24. The applicant's terms in Class 36 "*Providing financial information; Providing financial information via a website; Financial information; Financial evaluation, [...], analysis, [...];*" are identical to the opponents' services "*Providing financial information via a web site; Financial information; Financial analysis; Evaluation (Financial-) [...]*", on the basis that they are identically worded, or are ostensibly the same.
25. Applying the principles laid down in the case law, as delineated above, and in particular taking into account the *Meric* principle, the contested services "*Providing information, commentary and advice in the field of finance, financial investments, financial valuations and exchange-traded funds; Information, [...] services relating to finance and investments; Providing financial information in the field of finance, financial investments and exchange-traded funds; Providing investors with financial information;*" either encompass or are encompassed by the opponents' services regarding "*Financial information*", and therefore, they are identical. The opponents' services can fairly be taken to cover a broad range of financial information.
26. As for the applicant's contested services "*[...], advisory, consultancy and research services relating to finance and investments; Providing financial services with respect to securities and other financial instruments and products, namely, providing financial market news and commentary; Providing financial services with respect to securities and other financial instruments and products, namely, providing financial market news and commentary; Providing exchange-traded fund services; Management of exchange-traded funds that track select groups of securities; Operation, creation and management of exchange-traded funds; Exchange-traded fund consultation services, advisory services, investment services, planning services, development services, research services and analysis services; Investment management in the fields of exchange-traded funds; Issuance and provision of financial products and investment products in the nature of exchange-traded funds; Management of portfolios of*"

transferable securities; Financial planning and investment advisory services; Creation, management, issuance and provision of securities portfolios”, these are not everyday services and there is no evidence to guide me. Therefore, I will consider the ordinary and literal meaning of the words at issue.⁴ These are all financial services at their core, offered by undertakings that provide advice and management of financial investments with monetary value, such as exchange-traded funds and securities,⁵ usually traded on stock exchanges and markets. I am, therefore, of the view that these services will fall within the broader terms “*Financial affairs*”, “*Monetary affairs*”, “*Financing and funding services*”. These services are identical under the principle outlined in *Meric*, or else they are highly similar.

27. If I am wrong on identity, the opponents’ terms “*Financial consulting*”,⁶ “*Financial information*”, and “*Financial analysis*”⁷ cover consulting and advice relating to the whole ambit of financial services, including those aimed at enabling investors to invest money for financial gain through the utilisation and analysis of financial data (e.g., financial statements, transactional information, and credit ratings). Such services are similar in nature to the extent that they are financial of one type or another as the services demonstrated above. I find that they share the same general purpose that involves consultation, management and use of monetary funds to make or enhance the investment of funds with the aim of making a profit for the investor (and/or the institution) by using the given funds.

⁴ In accordance with the *Sky v Skykick*.

⁵ According to the Cambridge Dictionary, an ‘Exchange-Traded Fund’ (ETF) is “a fund that follows the level of share prices on a stock market, and that is also traded on a market”; and ‘securities’ are “investments in a company or in government debt that can be traded on the financial markets and produce an income for the investor”.

⁶ The term ‘financial consulting’ is defined by the Cambridge Dictionary as “the business of giving people and companies advice about investing their money, getting loans, etc.”.

⁷ The Cambridge Dictionary defines ‘financial information’ as “the study of financial information about companies, projects, etc. in order to understand their costs, profits, cashflow, etc.”

The method of use will be the investment itself following consultation with the prior management, planning, analysis and research. The services may also be provided by the same or related undertakings as well as share the same trade channels. Also, the respective users will overlap. Lastly, “*Financial consulting*” can be considered to be complementary to the applicant’s services. This is because such services can form an intrinsic part of the applicant’s services. Thus, in my view, there is a reasonably high degree of similarity between the respective services if I am wrong on identity.

28. Further, the opponents’ claim that part of the applicant’s services⁸ outlined in paragraph 26 are covered by the terms “*Insurance*”⁹ and “*Provident fund services*”¹⁰ of the earlier mark. The use and investment of funds/financial assets is at the core of these services. In light of this, one can choose any sector, including insurance, to invest and further build up their funds. Consequently, the respective services are based on the same matter, which is the investment of funds/financial assets. Therefore, there is a reasonably high degree of similarity between the respective services.

Average Consumer and the Purchasing Act

29. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purposes of assessing the

⁸ These are the following: “*Providing exchange-traded fund services; Management of exchange-traded funds that track select groups of securities; Operation, creation and management of exchange-traded funds; Exchange-traded fund consultation services, advisory services, investment services, planning services, development services, research services and analysis services; Investment management in the fields of exchange-traded funds; Issuance and provision of financial products and investment products in the nature of exchange-traded funds; Management of portfolios of transferable securities; Financial planning and investment advisory services; Creation, management, issuance and provision of securities portfolios.*”

⁹ Providing insurance is the promise of monetary compensation in the form of reimbursement when the said risk or loss occurs, such as life insurance including annuities. Importantly, one can invest funds, run by insurance companies, in the form of insurance funds, bonds or securities.

¹⁰ Based on the Oxford English Dictionary, the term ‘provident fund’ is defined as “a fund into which money is deposited or invested to provide for future needs”.

likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97. 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. The word ‘average’ denotes that the person is typical. The term ‘average’ does not denote some form of numerical mean, mode or median.”¹¹

30. In relation to the respective services under Class 36, some consumers may be high-net-worth, experienced investors and others may be members of the general public, investing savings. Either will take care in deciding upon financial investments but, for the former type of consumer, the selection process is likely to be more complex and elaborated. Nevertheless, for all investors, including those procuring a financial service, a higher than average to a high level of attention will be paid when selecting a service provider in order to ensure the safety of financial transactions. Likewise, there will be a higher than average level of attention during the selection process for financial information services. The consumers typically conduct market research before choosing providers of such services to entrust them with the management of their financial data and assets.

31. Primarily, the average consumer’s encounter with such services will be on a visual level, such as signage on premises, newspapers, journal

¹¹ Paragraph 60.

advertisements and reports, and website use. However, the possibility for oral use must also be recognised for various types of financial services, such as oral recommendation and use over the telephone.

Comparison of Trade Marks

32. It is clear from *Sabel BV v. Puma AG* (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 at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“[...] it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which 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 all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

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

34. The marks to be compared are:

Earlier mark	Contested mark
AIQU	AIEQ

35. Both the applied for mark and the earlier mark consist of the word “AIEQ” and “AIQU”, respectively, presented in capital letters and a standard font. Registration of a word mark protects the word itself presented in any normal font and irrespective of capitalisation.¹² The overall impression of the respective marks lies in the words themselves.
36. Visually, there is similarity between the respective marks given that both are four letters long, sharing three out of four letters. Whilst just rules of thumb, I also bear in mind that both words are short (which sometimes helps differences stand out more), but that the first part of a mark usually has more impact. Sequentially, both word marks start with identical letters, namely “A” and “I”, but the letter “Q” is in the third place in the earlier mark, as opposed to the contested mark in which it appears last. There are other visual differences between the marks in that the earlier mark ends with the letter “U” and the word mark of the application contains the letter “E”. Taking everything into account, the respective marks are similar to a medium degree.
37. Aurally, even though the average consumer would normally attempt to articulate a mark which they encounter, it is, in my view, not obvious that they would attempt to do so with either the applied for mark or the earlier mark, due to their unusual constructions. Instead, they would most likely articulate them as four separate letters of which they are composed. The opponents provide a letter by letter spelling and pronunciation for the respective marks and claim that these will be pronounced as “A-I-KJU” and “A-I-E-KJU”. However, this approach does not, in my view, properly replicate the articulation of the letter “U” in the earlier mark nor the “U” sound in the applied for mark. Consequently, the earlier mark will be pronounced as “AY-IE-KYOO-YOO” and the contested mark as “AY-IE-EE-KYOO”. The articulation of the respective first two letters, namely “AY-

¹² See *Bentley Motors Limited v Bentley 1962 Limited*, BL O/158/17, paragraph 16.

IE”, is identical and will be spoken first, and the letter “Q”, pronounced as “KYOO”, is spoken in both marks but in different order.

38. Further, the opponents’ claim that the marks, if pronounced as a word, are phonetically identical because the earlier mark will be articulated as “EYE-KJU” and the contested mark as “AYY-KJU”. I do not have any evidence or submissions before me by the applicant to assist me with the pronunciation of the contested mark. Nonetheless, even in the case where a group of consumers might pronounce the respective marks as a word, I believe both marks will share the sound of “AI” at the beginning of the word and the sound of the uncommon letter “Q” at the end.

39. Overall, I find the marks to be aurally similar to a higher than medium degree if they are articulated either as a word or separate letters.

40. Conceptually, neither mark has a meaning, so the conceptual comparison is neutral.

Distinctive Character of the Earlier Trade Mark

41. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, paragraph 22 and 23, the CJEU stated that:

“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).

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).”

42. The opponents have not shown use of their mark and, thus, they cannot benefit from any enhanced distinctiveness; hence, I have only the inherent distinctiveness of the earlier mark to consider. As noted above, the earlier mark is the word “AIQU”, which has no meaning. The mark has a high degree of inherent distinctive character as an invented word with no allusive or suggestive characteristics.

Likelihood of Confusion

43. 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 13 of this decision. Such a global assessment is not a mechanical exercise. 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.¹³ It is essential to keep in mind the distinctive character of the opponent’s trade mark since the more distinctive the trade mark, the greater the likelihood of confusion. I must also keep in mind that the average consumer rarely has the opportunity to

¹³ See *Canon Kabushiki Kaisha*, paragraph 17.

make direct comparisons between trade marks and must instead rely upon imperfect recollection.¹⁴

44. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other. Indirect confusion is where the consumer notices the differences between the marks but concludes that the later mark is another brand of the owner of the earlier mark or a related undertaking. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Iain Purvis Q.C., 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 recognized 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.”

45. Earlier in this decision I have concluded that:

- the respective services are identical;
- the average consumer of the parties’ services is a business user or an individual. The level of attention paid will range from higher than average to high, and the selection process is likely to consist of a

¹⁴ See *Lloyd Schuhfabrik Meyer*, paragraph 27.

mixture of visual and aural considerations, with visual playing a more prominent role;

- the competing marks are visually similar to a medium degree, aurally similar to a higher than medium degree and conceptually neutral;
- the earlier mark has a high degree of distinctive character.

46. Taking all of the above into consideration, the factors persuade me that there is a likelihood of confusion. I found that the services will be selected with a higher than average level of attention which may reduce, but not rule out, the effect of imperfect recollection. Set against that, however, is that the services are identical; the highly distinctive character of the earlier word mark, "AIQU", which is an invented word; and the similarity of the marks. There is a medium visual similarity and higher than medium aural similarity in this case. Additionally, the respective marks are conceptually neutral. The absence of conceptual meaning, in this case, contributes to the effect of imperfect recollection, as there is no conceptual hook to aid recall. Therefore, the increased level of attention of the average consumer during the purchasing process will not be sufficient to counteract the similarities between the marks and services as well as militate against imperfect recollection. This leads me to conclude that there is a likelihood of direct confusion against all of the applicant's services. For the sake of completeness, I consider this to be the case even where the services, including those outlined in paragraph 26 were not identical, I have found them to be similar at a reasonably high degree and would have reached the same conclusion.

Outcome

47. The opposition under section 5(2)(b) of the Act is successful in its entirety. Therefore, subject to appeal, the application will be refused.

Costs

48. The opponents have been successful and are entitled to a contribution towards their costs. In the circumstances, I award the opponents the sum of £450 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

£100	Official opposition fee
£350	Filing a Notice of Opposition and considering the counterstatement
£450	Total

49. I, therefore, order ETF Managers Group LLC to pay Peter Kleingarn and Harald Strelen the sum of £450. 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 10th day of December 2020

Dr Stylianos Alexandridis
For the Registrar,
The Comptroller General