

dan wel in strijd met de goede procesorde gehandeld, zo voert het onderdeel aan.

3.5.2 Het hof heeft (in rov. 3.2) vastgesteld dat Hennessy c.s. aan hun verbodsvordering ten grondslag hebben gelegd dat [verweerster] al jaren lang op grote schaal inbreuk maakt op de Hennessy-merken door Hennessy-producten in te (doen) voeren, in voorraad te houden, ter verhandeling aan te bieden, in de handel te brengen, te (doen) decoderen, en/of de Hennessy-merken te gebruiken in zakelijke stukken. Aan die stelling hebben Hennessy c.s., naar de vaststelling van het hof in rov. 5.24, in eerste aanleg en in hun memorie van antwoord in hoger beroep een aantal bewijsmiddelen ten grondslag gelegd.

Het oordeel van het hof dat de door Hennessy c.s. (met het oog op het pleidooi in hoger beroep) door middel van productie 87 overgelegde facturen een nadere onderbouwing vormen van die eerdere stelling, berust op een aan het hof voorbehouden uitleg van de gedingstukken. Dat oordeel geeft geen blijk van een onjuiste rechtsopvatting en is niet onbegrijpelijk, mede gelet op het feit dat de vordering gebaseerd is op stelselmatige merkinbreuk.

3.6 De overige klachten van het middel in het incidentele beroep kunnen evenmin tot cassatie leiden. De Hoge Raad hoeft niet te motiveren waarom hij tot dit oordeel is gekomen. Bij de beoordeling van deze klachten is het namelijk niet nodig om antwoord te geven op vragen die van belang zijn voor de eenheid of de ontwikkeling van het recht (zie art. 81 lid 1 RO).

3.7 Hennessy c.s. zullen, als de in het principale beroep in het ongelijk gestelde partij, en [verweerster] als de in het incidentele beroep in het ongelijk gestelde partij, worden veroordeeld in de kosten van het geding in cassatie.

Nu Hennessy c.s. en [verweerster] op de voet van art. 1019h Rv vergoeding van de kosten in cassatie hebben gevorderd en partijen overeenstemming hebben bereikt over die kosten, zal dienovereenkomstig worden beslist.

4. Beslissing

De Hoge Raad:

in het principale beroep

- verwierpt het beroep;
- veroordeelt Hennessy c.s. in de kosten van het geding in cassatie, tot op deze uitspraak aan de zijde van [verweerster] begroot op € 20.000,-, vermeerderd met de wettelijke rente over deze kosten indien Hennessy c.s. deze niet binnen veertien dagen na heden hebben voldaan;

in het incidentele beroep:

- verwierpt het beroep;
- veroordeelt [verweerster] in de kosten van het geding in cassatie, tot op deze uitspraak aan de zijde van Hennessy c.s. begroot op € 20.000,-, vermeerderd met de wettelijke rente over deze kosten indien [ver-

weerster] deze niet binnen veertien dagen na heden heeft voldaan.

Noot

Zie het artikel van W.J.H. Leppink & A.I.P. Martens, 'Hennessy: een gemiste kans?', IER 2022/2.

IER 2022/6

GERECHT VAN DE EUROPESE UNIE

10 november 2021

(Mrs. A. Marcoulli, J. Schwarcz en C. Iliopoulos)

m.nt. J.R. Torenbosch & J. Vrieling

AC Milan/EUIPO

Normaal gebruik; beoordeling verwarringsgevaar; toepassing van de fasentoets uit het arrest Equivalenza.

Het Gerecht oordeelt dat het Duitse woordmerk Milan normaal wordt gebruikt, ondanks dat het merk in de praktijk bestaat uit een afbeelding van het hoofd van een vogel in combinatie met het woord 'Milan' rechts van de afbeelding in dikgedrukte, blauwe letters. Naar oordeel van het Gerecht is er verwarringsgevaar te duchten tussen het aangevraagde woord-beeldmerk van voetbalclub AC Milan en het Duitse woordmerk Milan.

Art. 8 lid 1 Uniemerkenverordening

T-353/20

ECLI:EU:T:2021:773

Judgment

[...]

Background to the dispute

1 On 2 February 2017, the applicant, Associazione Calcio Milan SpA (AC Milan), submitted an application for international registration designating the European Union to the European Union Intellectual Property Office (EUIPO) under Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended (replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1)).

2 Registration as a mark was sought for the following figurative sign (zie afbeelding op p. 28):



AC MILAN

3 The goods in respect of which registration was sought are in, inter alia, Class 16 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and, following the limitation made in the proceedings before EUIPO, correspond to the following description: 'Paper; cardboard; book covers; glue for stationery or household use; stationery; copying paper [stationery]; writing paper; [stationery]; marker pens; staples for offices; drawing materials; writing materials; school supplies [stationery]; rubber erasers; ink; correcting fluids; stencils [stationery]; pencils; charcoal pencils; slate pencils; pencil leads; pens [office requisites]; steel pens; pencil holders; pencil lead holders; penholders; balls for ball-point pens; writing instruments; drawing instruments; notebooks; seal ink pads; pencil sharpeners; drawing pens'.

4 In the application for registration, the applicant claimed the following colours: red, black and white.

5 The application for registration was published in the *European Union Trade Marks Bulletin* No 2017/023 on 3 February 2017.

6 On 6 April 2017, the other party to the proceedings before the Board of Appeal of EUIPO, InterES Handels- und Dienstleistungs Gesellschaft mbH & Co. KG, filed a notice of opposition under Article 41 of Regulation No 207/2009 (now Article 46 of Regulation 2017/1001) to the registration of the mark in respect of the goods referred to in paragraph 3 above.

7 The opposition was based inter alia on the German word mark Milan, filed on 1 April 1984 and registered on 23 May 1988 under number 1122392, designating inter alia goods in Class 16 corresponding to the following description: 'Paper, paperboards, cardboards, any of the aforesaid items, in particular for writing and packing purposes; stationery, office equipment (except furniture), teaching aids (except apparatus)'.

8 The ground invoked in support of the opposition was that referred to in Article 8(1)(b) of Regulation No 207/2009 (now Article 8(1)(b) of Regulation 2017/1001).

9 At the request of the applicant, the other party to the proceedings before the Board of Appeal was invited by EUIPO to provide evidence of genuine use of the earlier marks relied on in support of its opposition, in accordance

with Article 47(2) and (3) of Regulation 2017/1001. The latter complied with that request within the time limit set by EUIPO for that purpose.

10 By decision of 30 November 2018, the Opposition Division upheld the opposition in its entirety.

11 On 22 January 2019, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 66 to 71 of Regulation 2017/1001, against the decision of the Opposition Division.

12 By decision of 14 February 2020 ('the contested decision'), the Second Board of Appeal of EUIPO dismissed the appeal. In the first place, like the Opposition Division, it considered that, for reasons of procedural economy, the opposition should be examined in relation to the earlier German trade mark No 1122392 ('the earlier mark'). In the second place, having determined that the period during which genuine use of that mark had to be shown was from 24 December 2010 to 23 December 2015 ('the relevant period'), it held that such use had been shown in respect of the goods designated by the earlier mark in Class 16 other than 'teaching aids (except apparatus)', but not in respect of the goods in the other classes for which that mark had been registered. In the third place, the Board of Appeal found, first, that the relevant public consisted of the general public in Germany with a low to medium level of attention. It then agreed with the Opposition Division's assessment that the goods at issue were partly identical and partly similar to a high degree. As regards, moreover, the comparison of the conflicting signs, the Board of Appeal considered, first, that they were visually similar to an average degree, owing to the presence of the element 'milan', secondly, that they were very similar phonetically and, thirdly, that, conceptually, first, they were moderately similar for the part of the relevant public that would attribute meaning to the common word 'milan' and, secondly, that their comparison was irrelevant for the part of that public that would perceive the term 'milan' as fanciful. Finally, it found that the inherent distinctiveness of the earlier mark was normal.

13 The Board of Appeal concluded from all those considerations that there was a likelihood of confusion.

Forms of order sought

14 The applicant claims that the Court should:

- annul the contested decision;
- order EUIPO to pay the costs.

15 EUIPO contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

Law

16 In support of its action, the applicant relies on two pleas in law, the first alleging infringement of Article 10(3) of Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation 2017/1001 and repealing Delegated Regulation (EU) 2017/1430 (OJ 2018

L 104, p. 1) and Article 18(1)(a) of Regulation 2017/1001, and, the second, alleging infringement of Article 8(1)(b) of Regulation 2017/1001.

17 First of all, it should be noted that, in view of the priority date of the international registration at issue, namely 24 December 2015, which, in accordance with Article 29(1) and Article 31 of Regulation No 207/2009 (now Article 34(1) and Article 36 of Regulation 2017/1001), must be regarded as the date on which the application for registration at issue was filed, which is decisive for the purposes of identifying the applicable substantive law, the facts of the case are governed by the substantive provisions of Regulation No 207/2009 (see, to that effect, judgments of 8 May 2014, *Bimbo v OHIM*, C-591/12 P, EU:C:2014:305, paragraph 12, and of 18 June 2020, *Pri-mart v EUIPO*, C-702/18 P, EU:C:2020:489, paragraph 2 and the case-law cited). Furthermore, it should be noted, as did EUIPO, that Article 10 of Delegated Regulation 2018/625 applies in the present case, in accordance with Article 82(2)(d) of that regulation, having regard to the fact that the request for proof of use of the earlier mark was filed on 6 December 2017.

18 Consequently, in the present case, as regards the substantive rules, the references made by the Board of Appeal in the contested decision and by the applicant in the arguments put forward to Article 8(1)(b), Article 18(1)(a) and Article 47(2) of Regulation 2017/1001, should be understood as referring to Article 8(1)(b), Article 15(1)(a) and Article 42(2) of Regulation No 207/2009, as amended.

The first plea in law, alleging infringement of Article 10(3) of Delegated Regulation 2018/625 and Article 15(1)(a) of Regulation No 207/2009

19 The first plea in law is divided into two parts, the first relating to the absence of genuine use of the earlier mark and the second to the existence of use which altered the distinctive character of that mark as registered.

The first part of the first plea in law, relating to the absence of genuine use of the earlier mark

20 The applicant submits that the Board of Appeal wrongly considered that the other party to the proceedings before the Board of Appeal had fulfilled its obligation to show genuine use of the earlier mark in relation to the goods in Class 16. First, it contests the Board of Appeal's assessment in paragraph 27 of the contested decision that the place of use of the earlier mark has been sufficiently demonstrated. Secondly, it complains, in substance, that the Board of Appeal held that the evidence submitted by the other party to the proceedings before the Board of Appeal constituted a body of sufficiently concrete and precise evidence to establish genuine use of the earlier mark, although that board itself had found that, first, some of the documents were not from the relevant period (paragraph 30 of the contested decision), secondly, the catalogues did not indicate the prices or the quantity of goods actually sold (paragraph 35 of the contested decision) and,

thirdly, on the one hand, the goods concerned were not mentioned on the invoices and, on the other hand, the origin of the tables of turnover and sales figures had not been established (paragraph 42 of the contested decision).

21 EUIPO opposes those arguments. It submits that the applicant challenges solely the Board of Appeal's assessment of the place of use of the earlier mark.

22 First of all, it should be noted that, under Article 10(3) and (4) of Delegated Regulation 2018/625, proof of use of an earlier mark must relate to the place, time, extent and nature of the use made of it and is limited, in principle, to the production of documentary evidence such as packages, labels, price lists, catalogues, invoices, photographs, newspaper advertisements, as well as the written statements referred to in Article 78(1)(f) of Regulation No 207/2009 (now Article 97(1)(f) of Regulation 2017/1001).

23 In interpreting the concept of genuine use, account must be taken of the fact that the *ratio legis* for the requirement that the earlier mark must have been put to genuine use is not intended to assess the commercial success or control the economic strategy of an undertaking or to restrict the protection of marks only to their quantitatively significant commercial exploitation (judgments of 8 July 2004, T-203/02, *Sunrider v OHIM – Espadafor Caba(VITAFRUIT)*, T-203/02, EU:T:2004:225, paragraph 38, and of 2 February 2016, *Benelli Q. J. v OHMI – Demharter (MOTOBI B PESARO)*, T-171/13, EU:T:2016:54, paragraph 68). A trade mark is put to genuine use when it is used, in accordance with its essential function of guaranteeing the identity of origin of the goods or services for which it is registered, in order to create or maintain an outlet for those goods or services, to the exclusion of uses of a symbolic nature the sole purpose of which is to maintain the rights conferred by the trade mark (see judgment of 8 June 2017, *W. F. Gözze Frottierweberei and Gözze*, C-689/15, EU:C:2017:434, paragraph 37 and the case-law cited).

24 In order to examine, in a particular case, the genuineness of the use of an earlier mark, an overall assessment must be made, taking into account all the relevant factors of the case. That assessment implies a certain interdependence between the factors taken into account. Therefore, a low volume of goods marketed under that mark may be offset by a high intensity or consistency of use of that mark over time, and vice versa. Furthermore, the turnover achieved and the quantity of sales of goods under the earlier mark cannot be assessed in absolute terms, but must be assessed in relation to other relevant factors, such as the volume of commercial activity, the production or marketing capacities or the degree of diversification of the undertaking exploiting the mark and the characteristics of the goods or services on the market concerned (see judgment of 8 July 2004, *VITAFRUIT*, T-203/02, EU:T:2004:225, paragraph 42 and the case-law cited).

25 Moreover, genuine use of a trade mark cannot be demonstrated by probabilities or presumptions, but must be based on concrete and objective elements which prove

actual and sufficient use of the trade mark on the relevant market (see judgments of 16 June 2015, *Polytetra v OHIM – El du Pont de Nemours (POLYTETRAFLON)*, T-660/11, EU:T:2015:387, paragraph 47 and the case-law cited, and of 9 September 2015, *Inditex v OHIM – Ansell (ZARA)*, T-584/14, not published, EU:T:2015:604, paragraph 19 and the case-law cited).

26 Genuine use of the trade mark presupposes that it is used publicly and externally, and not only within the undertaking concerned (see, to that effect, judgment of 11 March 2003, *Ansul*, C-40/01, EU:C:2003:145, paragraph 37). However, external use of a trade mark is not necessarily equivalent to use directed towards final consumers. Actual use of the mark relates to the market in which the proprietor of the mark carries on business and in which he or she hopes to exploit his or her mark. Thus, to consider that the external use of a trade mark, within the meaning of the case-law, necessarily consists of use directed towards final consumers would be tantamount to excluding trade marks used solely in business-to-business relationships from the protection of Regulation No 207/2009. The relevant public to which trade marks are intended to be directed does not include only final consumers, but also specialists, industrial customers and other professional users (see judgment of 7 July 2016, *Fruit of the Loom v EUIPO – Takko (FRUIT)*, T-431/15, not published, EU:T:2016:395, paragraph 49 and the case-law cited).

27 It is in the light of those considerations that the first part of the first plea in law must be examined.

28 It should be noted at the outset, as did the Board of Appeal, that, in view of the priority date of the mark applied for, namely 24 December 2015, it follows from Article 42(2) of Regulation No 207/2009 that the relevant period is from 24 December 2010 to 23 December 2015, which the applicant does not dispute.

29 In the present case, as is apparent from the file of the proceedings before EUIPO and from paragraphs 7 and 36 of the contested decision, the other party to the proceedings before the Board of Appeal produced the following evidence before the Opposition Division to prove genuine use of the earlier mark:

- an undated affidavit from its Managing Director certifying annual turnover figures for the period 2010 to 2016;
- advertising material in German (numerous copies of catalogues and leaflets) dating from 2009 to 2014 for goods bearing the earlier mark;
- a copy of 43 invoices issued in the period between 2008 and 2014, addressed to various customers in Germany;
- documents concerning turnover and sales figures, dating from the years 2008 to 2016;
- price lists from 2008 to 2014 showing the suppliers of the products of the other party to the proceedings before the Board of Appeal.

30 In the first place, as regards the place of use, the Board of Appeal noted, in paragraph 27 of the contested

decision, that it was clear from the addresses mentioned on the invoices produced by the other party to the proceedings before that board that the place of use of the earlier mark was Germany. It stated that the addresses on those invoices corroborated the information contained in the advertising material, which was written in German, and in the price lists, which were expressed in euro.

31 According to the applicant, the prospectuses and catalogues produced by the other party to the proceedings before the Board of Appeal are devoid of any indication as to their place of distribution. The fact that those documents were written in German does not prove that the products were distributed in Germany, since German is also an official language in Austria and Switzerland. It added that the same was true of the prices indicated in euro. Furthermore, the fact that the place of business of the retailers to which the invoices were sent was in Germany does not prove that the place of distribution was Germany, since the products could have been distributed outside that country.

32 In that regard, first, it is common ground that the invoices submitted as evidence of use of the earlier mark before the Opposition Division were addressed to various retail customers established in Germany. Contrary to the applicant's argument, that genuine use was made of the earlier mark in Germany could not be excluded merely because the invoices were addressed not to final consumers but to retailers. As is clear from the case-law cited in paragraph 26 above, external use of a trade mark does not necessarily amount to use directed at final consumers.

33 Secondly, that evidence is corroborated, as the Board of Appeal pointed out, by the existence of prospectuses and catalogues, written in German, and price lists, indicated in euro. The latter suggest distribution throughout Germany, especially since, as EUIPO points out, the legal notice in one of the catalogues clearly states the name and address in Germany of the other party to the proceedings before the Board of Appeal and specifies that the place of performance of the contract is that where its registered office is located, in this case in Germany.

34 Consequently, the Board of Appeal was right to consider, in paragraph 27 of the contested decision, that the evidence related to use of the earlier mark in Germany.

35 In the second place, with regard to the applicant's argument concerning evidence not dating from the relevant period, it must be noted, as is apparent from the contested decision itself, that some of the documents on which the Board of Appeal based its assessment that genuine use of the earlier mark had been proven do not fall within the relevant period. At issue are catalogues, invoices and sales figures which date from the years 2009 and 2016 or are undated and are therefore not capable, on their own, of serving as evidence of genuine use of the earlier mark during the relevant period, from 24 December 2010 to 23 December 2015 inclusive.

36 However, it should be considered that, as the commercial life of a product generally extends over a period of time and continuity of use is one of the indications to be taken into account in order to establish that the use was objectively intended to create or maintain a market share, documents outside the relevant period, far from being irrelevant, must be taken into account and assessed together with the other evidence, as they may provide evidence of real and genuine commercial exploitation of the mark (see judgment of 16 June 2015, *POLYTETRAFLON*, T-660/11, EU:T:2015:387, paragraph 54 and the case-law cited).

37 It follows that, in so far as the Board of Appeal did not base its assessment of genuine use of the earlier mark solely on the documents referred to in paragraph 35 above, but took those elements into consideration together with other elements in order to find that genuine use of that mark had been proven, it did not err as regards the evidence taken into account in that assessment.

38 In the third place, with regard to the applicant's argument that certain evidence, which is not concrete or objective, should not have been taken into consideration by the Board of Appeal and could not establish genuine use of the earlier mark, it should be pointed out, as is clear from the case-law cited in paragraph 24 above, that, in order to examine the genuineness of the use of an earlier mark, an overall assessment must be carried out, taking into account all the relevant elements of the case.

39 Furthermore, it is settled case-law that it cannot be excluded that a body of evidence is capable of establishing the facts to be proven, even though each of those elements, taken in isolation, would be incapable of proving the accuracy of those facts (judgment of 17 April 2008, *Ferrero Deutschland v OHIM*, C-108/07 P, not published, EU:C:2008:234, paragraph 36; see, also, judgment of 16 June 2015, *POLYTETRAFLON*, T-660/11, EU:T:2015:387, paragraph 94 and the case-law cited).

40 In the present case, the Board of Appeal considered that the evidence taken as a whole demonstrated that the other party to the proceedings before it had made serious efforts to gain a commercial position in the relevant market. In particular, it relied on advertising material, invoices covering the entire relevant period and including the registration of the earlier mark as well as on the affidavit of the managing director of that party.

41 It must be indeed noted, as the applicant rightly pointed out and as the Board of Appeal took into account in paragraph 42 of the contested decision, that the catalogues do not provide information on prices or on the quantity of goods actually sold and that the product names do not appear on the invoices. However, it must be pointed out that a large number of the stationery products designated by the earlier mark were offered in those catalogues during the relevant period. Furthermore, the affidavit contains sales figures for the goods covered by the earlier mark from 2010 to 2016 and annual sales figures for paper and cardboard from 2008 to 2014, which are

corroborated by the data in the other evidence. In particular, the total sales figures contained in the affidavit are corroborated by the documents concerning the sales figures for the years 2008 to 2015 (attachments 24, 26, 28, 30, 32, 34, 36 and 38).

42 Therefore, contrary to what the applicant maintains, the Board of Appeal relied on credible and concrete evidence to establish genuine use of the earlier mark.

43 It follows from all the above that the Board of Appeal did not err in considering, in its overall assessment of the evidence adduced by the other party to the proceedings before it, that proof of genuine use of the earlier mark had been adduced in the present case.

44 Therefore, the first part of the first plea in law must be rejected as unfounded.

The second part of the first plea in law, relating to the alteration of the distinctive character of the earlier mark

45 In paragraph 47 of the contested decision, the Board of Appeal stated, first, that the earlier mark, as registered, appeared on invoices and price lists and, secondly, that part of the evidence showed use of the earlier mark, in its registered form, accompanied by an additional figurative element, namely the head of a bird of prey, such as an eagle.

46 In paragraph 54 of the contested decision, the Board of Appeal considered that the earlier mark as used on the market and that mark as registered could be regarded as broadly equivalent.

47 The applicant contests that assessment. It submits, first, that the added figurative element is the most distinctive and visually eye-catching element of the earlier mark as used on the market because of the position of that element at the beginning of the sign, its size and the fact that it partially overhung the first letter of the word element 'milan'. It adds that the figurative element occupied the initial part of the earlier mark, to which the consumer paid more attention, and that, therefore, that element produced a different overall impression. Secondly, the applicant submits, in essence, that the word 'milan' is understood to refer to the Italian city of Milan or to an English first name, and not to a specific species of bird, and that, at the very least, the word has three possible meanings. Consequently, according to the applicant, since the meaning of the word 'milan' of the earlier mark refers to the Italian city of Milan, the figurative element in the shape of a bird's head did not reinforce the meaning of that word, but was distinctive in relation to the goods concerned. Thirdly, it alleges that there is a contradiction in the Board of Appeal's reasoning in that, on the one hand, in paragraph 49 of the contested decision, it stated that the word 'milan' was understood by the relevant public as designating a species of bird of prey and, on the other hand, in paragraph 76 of the contested decision, it took the view that that word could be associated, first of all, with the name of the Italian city of Milan, next, with an

English first name and, finally, with a species of bird of prey. Fourthly, the applicant complains that the Board of Appeal, in essence, found genuine use of the earlier mark during the relevant period on the basis of evidence showing the earlier mark in a form which altered its distinctive character.

48 EUIPO disputes the applicant's arguments.

49 In that regard, it should be recalled that, under the combined provisions of point (a) of the second subparagraph of Article 15(1), and Article 42(2) and (3) of Regulation No 207/2009 (now point (a) of the second subparagraph of Article 18(1) and Article 47(2) and (3) of Regulation 2017/1001), proof of genuine use of an earlier trade mark, whether national or European Union, which forms the basis of an opposition to an application for an EU trade mark, also includes proof of use of the earlier mark in a form differing in elements which do not alter the distinctive character of that mark in the form under which it was registered (see judgment of 8 December 2005, *Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH)*, T-29/04, EU:T:2005:438, paragraph 30 and the case-law cited; see also, to that effect, judgment of 18 July 2013, *Specsavers International Healthcare and Others*, C-252/12, EU:C:2013:497, paragraph 21).

50 The purpose of point (a) of the second subparagraph of Article 15(1) of Regulation No 207/2009 is to avoid imposing strict conformity between the form in use of the trade mark and the form in which the trade mark was registered and to allow the proprietor of the latter to make variations to the sign, in the course of its commercial exploitation, which, without altering its distinctive character, enable it to be better adapted to the requirements of marketing and promotion of the goods or services concerned. In such situations, where the sign used in the course of trade differs from the form in which it was registered only in negligible respects, so that the two signs may be regarded as equivalent overall, the abovementioned provision provides that the obligation to use the registered trade mark may be fulfilled by adducing evidence of use of the sign which constitutes its form used in the course of trade (see, to that effect, judgment of 23 February 2006, *Il Ponte Finanziaria v OHIM – Marine Enterprise Projects (BAINBRIDGE)*, T-194/03, EU:T:2006:65, paragraph 50; see also, to that effect, judgment of 20 July 2017, *Cafés Pont v EUIPO – Giordano Vini (Art's Cafè)*, T-309/16, not published, EU:T:2017:535, paragraph 15 and the case-law cited).

51 A finding that the distinctive character of the mark as registered has been altered requires an examination of the distinctive and dominant character of the added elements on the basis of the intrinsic qualities of each of those elements and the relative position of the various elements in the configuration of the mark (see judgment of 10 June 2010, *Atlas Transport v OHIM – Hartmann (ATLAS TRANSPORT)*, T-482/08, not published, EU:T:2010:229, paragraph 31 and the case-law cited).

52 In the present case, in the first place, it must be noted that the earlier mark, in the form in which it was registered, is a word mark consisting of the word 'milan'. As is apparent from paragraph 47 of the contested decision and from the file of the proceedings before EUIPO, part of the evidence on which the Board of Appeal based its assessment of genuine use of the earlier mark, namely the invoices and price lists, shows that mark as registered.

53 In the second place, it is apparent from the other evidence that the earlier mark as used on the market comprised a figurative element representing the head of a bird, similar to a bird of prey, to the right of which appeared the word element 'milan', written in bold type and in blue colour, as reproduced below:



54 It thus appears that the elements which differentiated the form used in the earlier mark from that in which that mark was registered were, first, the addition of the figurative element and, secondly, the stylisation of the word element 'milan'.

55 First, as regards the addition of a figurative element to the registered form of the earlier mark, it should be recalled that, where a mark is composed of word and figurative elements, the former are, in principle, more distinctive than the latter, because the average consumer more easily refers to the product in question by quoting the name than by describing the figurative element of the mark (see judgment of 12 March 2014, *Borrajó Canelo v OHIM – Tecnoazúcar (PALMA MULATA)*, T-381/12, not published, EU:T:2014:119, paragraph 38 and the case-law cited).

56 It is also clear from the case-law that the fact that an element is not negligible does not mean that it is dominant, just as the fact that an element is not dominant does not imply that it is negligible (see judgment of 3 September 2010, *Companhia Muller de Bebidas v OHIM – Missiato Industria e Comercio (61 A NOSSA ALEGRIA)*, T-472/08, EU:T:2010:347, paragraph 48 and the case-law cited).

57 In the present case, while it is true that the additional figurative element of the earlier mark as used on the market is not negligible in view of its size and position, that element cannot, however, contrary to what the applicant claims, be regarded as dominant. The size of the figurative element is significantly smaller than that of the word element, 'milan', which occupies more than half of the sign. The fact that the figurative element of the earlier mark slightly overhangs the first letter of its word element cannot distract the relevant public from that word element. The word element 'milan' remains clearly identifiable because of the use of an easily readable font.

58 The above finding is all the more compelling where the relevant public associates the figurative element representing the head of a bird with the word element 'milan'. As stated in paragraph 49 of the contested decision, the word element of the earlier mark may be understood by part of that public as designating a species of bird of prey. For that part of the public, the figurative element therefore reinforces the word element 'milan' by depicting the head of a bird of prey.

59 Furthermore, contrary to what the applicant claims, there is no contradiction between, on the one hand, paragraph 49 of the contested decision, in which the Board of Appeal, in assessing the use of the earlier mark, took account of the perception of the relevant section of the public which understands the word 'milan' as referring to a species of bird of prey, and, on the other hand, paragraph 76 of that decision, in which it was considered that the word 'milan' could be associated, first of all, with the name of the Italian city of Milan, next, with an English first name and, finally, with a species of bird of prey. The fact that paragraph 49 of the contested decision refers to only one of the potential meanings of the word 'milan' is explained by the fact that that paragraph concerns the perception of that word by only part of the relevant public.

60 Accordingly, it is without committing an error that, in the contested decision, the Board of Appeal considered that, although the figurative element present in the earlier mark as used on the market was not negligible, its addition was not capable of altering the distinctive character of the word element constituting the earlier mark as registered.

61 Secondly, as regards the stylisation of the word element 'milan', it should be recalled that, according to settled case-law, the concrete representation of a word mark is not generally such as to alter the distinctive character of that mark as registered (see judgment of 23 September 2015, *L'Oréal v OHIM – Cosmética Cabinas (AINHOA)*, T-426/13, not published, EU:T:2015:669, paragraph 28 and the case-law cited). In the present case, since the earlier mark, as registered, is a word mark, it may be used with a different graphic design. Furthermore, as is clear from paragraph 57 above, the word element, the only component of that mark, is always clearly legible in the form of that mark as used on the market.

62 Therefore, the Board of Appeal was right to find, in paragraphs 51 and 52 of the contested decision, that the slight stylisation of the letters making up the word element and the presence of the colour blue did not affect the distinctive character of the earlier mark, as registered, and did not alter the overall impression produced by it.

63 Nor can the applicant's other arguments show that the form of the earlier mark as used on the market alters the distinctive character of the earlier mark as registered.

64 In the first place, the applicant's argument that the other party to the proceedings before the Board of Ap-

peal was itself aware that the earlier mark, as registered, was not identical to its figurative marks cannot succeed, since it did not base its opposition on figurative marks No 1093378 and No 303405120. Although it is true that the opposition could have been based on the said figurative marks, the fact remains that, in view of the above, genuine use of the earlier mark has been demonstrated and that the latter mark could therefore serve as a basis for the opposition, even though it was sometimes used in a slightly different form.

65 In the second place, as regards the applicant's reference to the decisions of the Board of Appeal in Cases R 2262/2018-4, R 440/2019-1 and R 1037/2018-5, in which it was held that the additional elements used in the course of trade altered the distinctive character of the marks concerned as registered, it is sufficient to recall that the legality of the decisions of the Boards of Appeal is assessed solely on the basis of Regulation No 207/2009, as interpreted by the EU Courts, and not on the basis of the boards' previous decision-making practice (see, to that effect, judgments of 16 March 2005, *L'Oréal v OHIM – Revlon (FLEXI AIR)*, T-112/03, EU:T:2005:102, paragraph 68 and the case-law cited, and of 13 June 2014, *Grupo Flexi de León v OHIM (FLEXI)*, T-352/12, not published, EU:T:2014:519, paragraph 32 and the case-law cited). For the sake of completeness, it should be noted that, although grounds of fact or law contained in an earlier decision may constitute arguments in support of a plea alleging infringement of a provision of Regulation No 207/2009, it must be pointed out that, in the earlier decisions relied on by the applicant, the impact of the added word or figurative elements on the distinctive character of the marks concerned is not comparable to that of the figurative element added to the earlier mark in the present case.

66 Having regard to all the foregoing considerations, the Board of Appeal was correct in considering that the differences between the earlier mark in its registered form and the sign in the form in which it had been used on the market did not alter the distinctive character of that mark.

67 It follows that the second part of the first plea in law must also be rejected as unfounded.

68 It follows from the foregoing that the first plea in law must be rejected.

The second plea in law, alleging infringement of Article 8(1)(b) of Regulation No 207/2009

69 The applicant claims that the Board of Appeal wrongly found that there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 207/2009. In particular, it complains that the Board of Appeal, first, failed to take into account the high reputation of the mark applied for, secondly, incorrectly assessed the dominant and distinctive elements of the mark, thirdly, erred in its assessment of the comparison of the conflicting signs and, fourthly, erred in its overall assessment of the likelihood of confusion.

70 EUIPO disputes the applicant's arguments.

71 Under Article 8(1)(b) of Regulation No 207/2009, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is to be refused registration where, because of its identity or similarity to an earlier trade mark and because of the identity or similarity of the goods or services which the two trade marks designate, there is a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected. The likelihood of confusion includes the likelihood of association with the earlier mark. Furthermore, according to Article 8(2)(a)(ii) of Regulation No 207/2009, earlier trade marks include trade marks registered in a Member State with a date of application for registration prior to that of the application for registration for an EU trade mark.

72 According to settled case-law, a likelihood of confusion is the likelihood that the public might believe that the goods or services in question come from the same undertaking or, where appropriate, from undertakings which are economically linked. According to that case-law, the likelihood of confusion must be assessed globally, according to the perception which the relevant public has of the signs and the goods or services in question, and taking account of all the relevant factors in the case, in particular the interdependence of the similarity of the signs and that of the goods or services designated (see judgment of 9 July 2003, *Laboratorios RTB v OHIM – Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)*, T-162/01, EU:T:2003:199, paragraphs 30 to 33 and the case-law cited).

73 For the purposes of the application of Article 8(1)(b) of Regulation No 207/2009, a likelihood of confusion presupposes both an identity or similarity of the marks at issue and an identity or similarity of the goods or services which they designate. Those conditions are cumulative (see judgment of 22 January 2009, *Commercy v OHIM – easyGroup IP Licensing (easyHotel)*, T-316/07, EU:T:2009:14, paragraph 42 and the case-law cited).

74 It is in the light of those considerations that it must be assessed whether the Board of Appeal was right to find that there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 207/2009 in this case.

75 The Board of Appeal stated that, since the earlier mark was a German mark, the German public had to be taken into account (paragraph 65 of the contested decision). It also considered that the goods at issue were intended for the general public, whose level of attention varied from low to medium (paragraph 67 of the contested decision). Furthermore, the Board of Appeal accepted the Opposition Division's assessment that the products in question were partly identical and partly similar to a high degree (paragraphs 7 and 68 of the contested decision). The applicant does not contest those assessments of the Board of Appeal. Moreover, there is nothing in the file to call them into question.

The comparison of the signs

76 The overall assessment of the likelihood of confusion must, as regards the visual, phonetic or conceptual similarity of the conflicting signs, be based on the overall impression produced by them, taking into account, in particular, their distinctive and dominant elements. The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the overall assessment of that likelihood. In that respect, the average consumer normally perceives a trade mark as a whole and does not examine its individual details (see judgment of 12 June 2007, *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 35 and the case-law cited).

77 First of all, it should be noted that the signs to be compared are those constituting, first, the figurative mark applied for, ACM 1899 AC MILAN, and, secondly, the earlier word mark, Milan.

78 The mark applied for consists of a figurative element representing a coat of arms comprising a circle within which there are two different flags, one showing alternating black and red stripes and the other showing a red cross on a white background. The word elements 'acm', written in capital letters, and '1899' are located above and below the circle respectively. All of those word and figurative elements are surrounded by a black oval, which is itself surrounded by a dark red oval. In the lower part of the mark applied for, below that figurative element, is the word element 'ac milan', written in large, black, stylised capital letters.

79 The earlier mark consists of the word element 'milan'.

The distinctive and dominant elements of the sign applied for

80 In the contested decision, first, the Board of Appeal considered that the word element 'milan' would be associated, for part of the relevant public, with the Italian city of Milan and, consequently, with the place of origin of the goods at issue or the place of the registered office of the undertaking supplying those goods. While referring to the judgment of 19 June 2019, *Marriott Worldwide v EUIPO – AC Milan (AC MILAN)* (T-28/18, not published, EU:T:2019:436, paragraph 38), it considered that, in so far as that word element would be perceived as a reference to the Italian city of Milan, it had at most a weak distinctive character. The Board of Appeal noted, however, that for another part of the relevant public the word 'milan' would refer to a foreign-sounding male first name or to a specific species of bird of prey. In its view, none of those three meanings relates to the goods at issue. Secondly, the Board of Appeal found, in essence, that if the word element 'ac' were to be perceived by the relevant public as the acronym for 'associazione calcio' (football association), it would have distinctive character having regard, in particular, to the nature of the goods at issue. Thirdly, the Board of Appeal considered that the word element 'ac milan' was dominant in the mark applied for. Fourthly, it consid-

ered that, although the figurative element of the mark is not insignificant because of its size and position, it will be perceived by a large majority of the public primarily as a decorative element, and not as an element indicating the commercial origin of the goods.

81 According to the applicant, the Board of Appeal erred in its analysis by misapplying the principle that, where a mark is composed of word and figurative elements, the former are, in principle, more distinctive than the latter. It argues, in essence, that the figurative element representing a coat of arms is the most 'eye-catching' element and constitutes the dominant element of that mark, given its central and upper position, its size in relation to the element 'ac milan', its colours and its reputation in Germany. In support of its argument, it relies on the judgment of 19 June 2019, *AC MILAN* (T-28/18, not published, EU:T:2019:436, paragraphs 37 and 38).

82 EUIPO disputes the applicant's arguments.

83 First of all, it should be borne in mind that, in accordance with the case-law referred to in paragraph 55 above, where a trade mark is composed of word and figurative elements, the former are, in principle, more distinctive than the latter, since the average consumer will more easily refer to the goods at issue by citing the name of the trade mark than by describing its figurative element.

84 In the first place, as regards the dominant elements of the sign which constitutes the mark applied for, it must be considered, as did the Board of Appeal, that the figurative element will not be overlooked by the relevant public, in particular in view of its size and position, and therefore that it is not negligible in the overall impression produced by that sign. Although the figurative element does not go unnoticed, the attention of the relevant public will not be focused on that element. The attention of the relevant public will be drawn to the word element consisting of the letters 'ac' and the word 'milan', because they are reproduced in capital letters and in a stylised font, and the element which they form is considerably longer than the figurative element. According to the case-law, when the word element of a trade mark is substantially longer than the figurative element of that mark, it attracts the attention of the average consumer more by virtue of its greater size (see judgment of 8 July 2020, *Scorify v EUIPO (SCORIFY)*, T-328/19, not published, EU:T:2020:311, paragraph 60 and the case-law cited).

85 Furthermore, the reference made by the applicant to the judgment of 19 June 2019, *AC MILAN* (T-28/18, not published, EU:T:2019:436, paragraphs 37 and 38), in which the Court held that, because of its size, position and colours, the figurative element of the sign constituting the mark applied for in the case which gave rise to that judgment, depicting a round-shaped object with red and black stripes, constituted the visually dominant element, is irrelevant to the present case. In that judgment, three elements of that sign were different from the elements of the mark applied for in the present case. First, the word element 'ac' was insignificant or illegible for part of the rele-

vant public, due to its very small size and its less prominent position in the sign applied for. Secondly, the word element 'ac milan' did not significantly exceed the figurative element in length. Thirdly, the figurative element was proportionately much larger than the figurative element of the mark applied for in the present case.

86 In the second place, as regards the distinctive character of the elements making up the mark applied for, it should first be observed that its figurative element has no connection with the goods at issue and cannot be regarded as descriptive of those goods. It follows that, as the Board of Appeal found, that figurative element has distinctive character.

87 Next, as regards the word element 'ac', as the Board of Appeal rightly pointed out, it will be regarded by the relevant public as a combination of letters without meaning and is therefore distinctive. In any event, even if that element were to be perceived by part of the relevant public as the acronym for 'associazione calcio' (football association), it would have distinctive character in view of the nature of the goods at issue.

88 Finally, as regards the word element 'milan', it will be perceived as a reference either to the Italian city of Milan or to the male first name Milan, or to a species of bird of prey. As the Board of Appeal rightly pointed out, for the part of the relevant public which will perceive that element as a reference to the Italian city of Milan and which could therefore associate it with the place of origin of the goods at issue or with the place of the registered office of the undertaking supplying those goods, it is at most of weak distinctive character.

89 That being so, the weak distinctiveness of the word element 'milan' for part of the relevant public does not call into question the fact that it is the essential component of the dominant element of the sign constituting the mark applied for. As is apparent from the case-law, the weak distinctiveness of an element of a complex mark does not necessarily mean that it cannot constitute a dominant element, provided that, by reason, in particular, of its position in the sign or its size, it is capable of imposing itself on the perception of the consumer and of being retained in the consumer's memory (see judgment of 12 June 2018, *Cotécnica v EUIPO – Mignini & Petrini (cotecnica MAXIMA)*, T-136/17, not published, EU:T:2018:339, paragraph 52 and the case-law cited).

90 In the light of the findings in paragraph 84 above, it must be concluded that, despite the weak distinctive character of the element 'milan', the element 'ac milan' constitutes the dominant element of the mark applied for.

91 It follows from all the foregoing that the Board of Appeal was right to consider, in paragraph 83 of the contested decision, that the word element 'ac milan' was the dominant element of the sign applied for.

– *The visual comparison*

92 The Board of Appeal considered that the conflicting signs had an average degree of visual similarity, due to the presence of the common word element 'milan'.

93 The applicant contests that assessment of the Board of Appeal. It claims that the conflicting signs are not visually similar in view of the presence in the mark applied for of the figurative element representing a coat of arms.

94 In that regard, it should be noted that the fact that the word 'milan', first, is the only element of the earlier mark and, secondly, is, by virtue of its size, the most important element of the word element 'ac milan', which dominates the overall impression produced by the mark applied for, is a particularly important factor of similarity. Since the conflicting signs are distinguished by the presence of the figurative element and the additional word elements 'ac', 'acm' and '1899' in the sign constituting the mark applied for, the Board of Appeal rightly held that there was an average degree of visual similarity.

– *The phonetic comparison*

95 The Board of Appeal considered that, because of the common presence of the word 'milan', the conflicting signs were very similar phonetically. It added that it could not be entirely excluded that, for reasons of simple economy of language, but also in view of their secondary position and the size of their letters, which are smaller than those used for the element 'milan', part of the relevant public would omit to pronounce the elements 'acm' and '1899' of the sign applied for.

96 The applicant merely alleges that the conflicting signs have a very low degree of phonetic similarity.

97 First of all, it should be recalled that the figurative elements of the sign applied for have no bearing on the phonetic comparison between the conflicting signs (see, to that effect, judgment of 11 September 2014, *Aroa Bodegas v OHIM – Bodegas Muga (aroa)*, T-536/12, not published, EU:T:2014:770, paragraph 45 and the case-law cited).

98 In the first place, it must be considered, as did the Board of Appeal, that the word elements 'acm' and '1899' are unlikely to be pronounced by the relevant public inasmuch as they occupy a secondary place in relation to the word element 'ac milan' and are written in small letters. In the present case, therefore, the word element 'milan' in the earlier mark and the word element 'ac milan' in the mark applied for must be compared.

99 In the second place, it must be noted that the conflicting signs coincide in the word 'milan' and differ only in the presence of the additional word element 'ac' in the mark applied for.

100 It must therefore be concluded that the degree of phonetic similarity is high and that, consequently, the Board of Appeal did not make an error of assessment in that regard.

– *The conceptual comparison*

101 The Board of Appeal found that, for the part of the relevant public attributing meaning to the word 'milan', the conflicting signs had an average degree of conceptual similarity, since they were distinguished only by the presence of the figurative element in the mark applied for. By contrast, the Board of Appeal considered that that comparison was not relevant for the part of the public for whom the word 'milan' will be perceived as fanciful.

102 The applicant contests the Board of Appeal's assessment that the conflicting signs are conceptually similar. According to the applicant, the signs are different in that respect. In particular, it submits that, in view of the documents it has produced, there is no doubt that the relevant public will associate the mark applied for with the famous Italian football club or, at least, with the Italian city of Milan where that club is located, and not with a first name or a specific species of bird.

103 As regards the conceptual comparison, it should be borne in mind that the word element 'milan', which is common to the conflicting signs, may have different meanings. For example, that term may be associated, for some of the relevant public, with the Italian city of Milan and, for another part of the relevant public, with the male first name Milan. Moreover, it cannot be ruled out that, at least for part of the relevant public with specific knowledge, the word 'milan' refers to a species of bird of prey, since, as the Board of Appeal rightly found, that word is also used in the German language.

104 In the present case, since the word element 'milan' is present in both the mark applied for and the earlier mark, the conflicting signs must be regarded as similar conceptually to an average degree for the part of the relevant public for whom that word has a meaning.

105 In any event, even assuming that, as the applicant claims, part of the relevant public perceives the word element 'ac milan' in the mark applied for as a reference to that football club in the city of Milan, the conflicting signs both refer to the Italian city of Milan. The conclusion drawn in paragraph 104 above would therefore also apply.

106 In view of the foregoing, it is necessary to uphold the Board of Appeal's finding concerning, first, the average degree of conceptual similarity between the conflicting signs for the part of the relevant public attributing meaning to the word 'milan' and, secondly, the irrelevance of the conceptual comparison for the part of the relevant public for whom the word 'milan' was devoid of meaning.

The likelihood of confusion

107 The overall assessment of the likelihood of confusion involves a certain interdependence of the factors taken into account and, in particular, of the similarity of the marks and the similarity of the goods or services designated. Thus, a low degree of similarity between the goods or services designated may be offset by a high degree of similarity between the marks, and vice versa (judgments of 29 September 1998, *Canon*, C-39/97, EU:C:1998:442, para-

graph 17, and of 14 December 2006, *Mast-Jägermeister v OHIM – Licorera Zacapaneca (VENADO with frame and others)*, T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 74).

108 In the present case, the Board of Appeal noted, first, that the earlier mark had normal inherent distinctiveness, which is not disputed by the applicant. Secondly, it noted that the goods at issue were identical or similar to a high degree and that the conflicting signs were, as a whole, similar. It added that the visual differences between the conflicting signs, due mainly to the figurative element of the mark applied for, were not sufficient to neutralise the similarities that existed at phonetic level and, at least for part of the relevant public, at conceptual level. Finally, it stated that the identity or high degree of similarity of the goods at issue was such as to compensate for the perceptible differences between the conflicting signs. On the basis of those elements, the Board of Appeal considered that there was a likelihood of confusion. For the sake of completeness, it stated that such a likelihood would exist even if the distinctive character of the earlier mark were weak.

109 The applicant considers, on the contrary, that there is no likelihood of confusion on the part of the relevant public. In particular, it claims, relying on the judgment of 8 February 2019, *Serendipity and Others v EUIPO – CKL Holdings (CHIARA FERRAGNI)* (T-647/17, not published, EU:T:2019:73, paragraph 85), that the Board of Appeal disregarded the fact that, in the present case, the visual aspect is of particular importance in the overall assessment of the likelihood of confusion, since the choice of an item of stationery would, generally, be made in a visual manner. Moreover, the applicant complains that the Board of Appeal failed to take into account, in the context of the assessment of the likelihood of confusion, the high reputation of the sign constituting the mark applied for and of the football club AC Milan.

110 In the first place, with regard to the applicant's argument that the Board of Appeal did not attach sufficient importance to the visual aspect of the conflicting signs, first, it should be noted that, in the context of the overall assessment of the likelihood of confusion, the visual, phonetic and conceptual aspects of the conflicting signs do not always have the same weight and that it is therefore important to analyse the objective conditions in which the marks may appear on the market. The importance of the elements of similarity or difference between the conflicting signs may depend, inter alia, on the intrinsic characteristics of the signs or the marketing conditions of the goods or services they designate. If the goods designated by the marks at issue are normally sold in self-service shops where the consumer chooses the product himself or herself and must therefore rely primarily on the image of the mark applied to that product, which is the case with the goods at issue, in Class 16, a visual similarity of the signs will, as a general rule, be of greater significance (judgment of 6 October 2004, *New Look v OHIM –*

Naulover (NLSPORT, NLJEANS, NLACTIVE and NLCollection), T-117/03 to T-119/03 and T-171/03, EU:T:2004:293, paragraph 49).

111 However, the marketing conditions of the goods at issue and, consequently, the importance of a visual similarity between the conflicting signs linked to the nature of those goods is only one of the elements to be taken into account in the overall assessment of the likelihood of confusion on the part of the relevant public. In the present case, even if the Board of Appeal should have considered that, having regard to the marketing conditions of the goods at issue, particular importance should be attached to the visual similarity of the conflicting signs, it should be borne in mind that, as was found in paragraph 94 above, the similarity in that respect is average and that that similarity is reinforced by the similarities found between the marks at issue on the other two aspects of comparison, so that the similarities of those marks are, taken as a whole, of a sufficient degree to conclude that there is a likelihood of confusion.

112 Secondly, the reasoning in the judgment of 8 February 2019, *CHIARA FERRAGNI* (T-647/17, not published, EU:T:2019:73), relied on by the applicant, is not transposable to the present case since, in the case which gave rise to that judgment, the conflicting signs were only weakly similar from a visual point of view and similar only to an average extent in phonetic terms. It should also be noted that, unlike the present case, that case concerned the existence of a likelihood of confusion in respect of two marks relating to goods in the clothing sector. The applicant does not give any reasons why that case-law should be applied to stationery products in Class 16.

113 In the second place, with regard to the applicant's argument based on the reputation of the mark applied for in Germany, it should be noted, as EUIPO rightly pointed out, that only the reputation of the earlier mark, and not that of the mark applied for, must be taken into account in order to assess whether the similarity of the goods designated by the two marks is sufficient to give rise to a likelihood of confusion (see, to that effect, judgment of 3 September 2009, *Aceites del Sur-Coosur v Koipe*, C-498/07 P, EU:C:2009:503, paragraph 84 and the case-law cited). That case-law is in line with the objective of Article 8(1)(b) of Regulation No 207/2009, which is to provide adequate protection for the proprietors of earlier rights against subsequent applications for identical or similar European Union trade marks (judgment of 29 January 2019, *The GB Foods v EUIPO – Yatecomeré (YATEKOMO)*, T-336/17, not published, EU:T:2019:840, paragraph 49).

114 Therefore, the applicant's argument based on the alleged reputation of the mark applied for is entirely irrelevant.

115 Consequently, the Board of Appeal did not err in considering, in the context of an overall assessment, that there was a likelihood of confusion on the part of the relevant public.

116 In view of all the foregoing, the second plea in law must be rejected as unfounded and, consequently, the action must be dismissed as a whole.

Costs

117 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Moreover, under Article 135(2) of those rules, the Court may order a party, even if successful, to pay some or all of the costs, if that appears justified by the conduct of that party, including before the proceedings were brought, especially if that party has made the opposite party incur costs which the Court holds to be unreasonable or vexatious.

118 In the present case, since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by EUIPO. Nevertheless, the Court considers that, by its conduct, EUIPO caused the applicant to incur travel expenses which could have been avoided. As is apparent from the applicant's request that EUIPO be ordered to pay travel expenses even if its action is dismissed, the applicant had incurred costs for the travel of its lawyers to the oral hearing initially scheduled for 11 June 2021 and cancelled following the withdrawal of the request for a hearing by EUIPO on 3 June 2021.

119 In those circumstances, even though the applicant has been unsuccessful, the Court considers that proper account of the circumstances of the present case will be taken by deciding that EUIPO should bear the travel expenses incurred by the applicant.

On those grounds,
THE COURT (Sixth Chamber)
hereby:

1. **Dismisses the action;**
2. **Orders Associazione Calcio Milan SpA (AC Milan) to pay the costs, with the exception of the travel expenses incurred by the latter;**
3. **Orders the European Union Intellectual Property Office (EUIPO) to bear the travel expenses incurred by AC Milan.**

Noot

1. De bekende Italiaanse voetbalclub AC Milan wil graag zijn eveneens bekende beeld-woord teken (hierna: het AC Milan-merk) inschrijven als EU-merk voor, kort gezegd, kantoor- en schoolartikelen (klasse 16). Een Duits bedrijf stelt op basis van haar nationale Duitse woordmerk 'Milan' (ook ingeschreven voor klasse 16) oppositie in: er zou sprake zijn van verwarringsgevaar. Bij het Gerecht gaat AC Milan voor twee ankers liggen. Allereerst stelt AC Milan dat geen sprake is van normaal gebruik van het Duitse woordmerk zoals ingeschreven. Ten tweede betwist AC

Milan dat er verwarringsgevaar is te duchten tussen het AC Milan-merk en het woordmerk van de opposant. Het Gerecht is van mening dat er wél verwarringsgevaar is te duchten tussen het AC Milan-merk en het woordmerk Milan. Wij menen dat dit oordeel onjuist is en daarom besteden wij in deze noot aandacht aan de beoordeling van het verwarringsgevaar.¹

2. Het Gerecht gaat vanaf r.o. 76 te werk conform de fasentoets en begint in fase 1, het *sec* vergelijken van de conflicterende tekens.² Het Gerecht stelt eerst vast dat het AC Milan-merk bestaat uit een figuratief schild met daarin twee vlaggen (één met afwisselend rode en zwarte strepen en één met een rood kruis op een wit veld), de woord-elementen 'ACM' en '1899' in het schild en het woord-element 'AC Milan' daaronder geschreven in gestileerde letters (r.o. 78). Vervolgens stelt het Gerecht vast wat de totaalindruk is van het AC Milan-merk. Dit doet het Gerecht door vast te stellen wat de dominerende en onderscheidende bestanddelen zijn van het AC Milan-merk. Omdat het figuratieve schild niet beschrijvend is of anderszins een relatie heeft met de waren of diensten waarvoor inschrijving is aangevraagd, is het schild een onderscheidend bestanddeel (r.o. 86). Ook het bestanddeel 'AC' is onderscheidend, zelfs als het door het publiek wordt opgevat als de afkorting voor 'associazione calcio' (Italiaans voor voetbalclub); in dat laatste geval blijft volgens het Gerecht het bestanddeel onderscheidend in het licht van de waren van het geval (r.o. 87). Minder onderscheidend is het bestanddeel 'Milan'. Een deel van het relevante publiek zal dit bestanddeel namelijk opvatten als een verwijzing naar de stad Milaan (r.o. 88). Uiteindelijk oordeelt het Gerecht dat, ondanks het beperkte onderscheidend vermogen van het element 'Milan', de gestileerde woordencombinatie 'AC Milan' het meest dominante bestanddeel is van het AC Milan-merk vanwege zijn grootte in relatie tot de andere bestanddelen ervan (r.o. 84 en r.o. 89-90).

3. Wij menen dat hier op een onjuiste manier de totaalindruk van het AC Milan-merk wordt vastgesteld voor de beoordeling van de overeenstemming in fase 1. In fase 1 moet de overeenstemming tussen de conflicterende tekens worden vastgesteld op basis van de totaalindrucken die de tekens achterlaten bij het publiek, mede in aanmerking genomen hun *dominerende en onderscheidende bestanddelen*. Het Gerecht vat deze rechtsregel zo op dat bij het vaststellen van de onderscheidende bestanddelen in

¹ Daarmee is niet gezegd dat de beoordeling over het normaal gebruik niet lezenswaardig is. Vooral de vraag of sprake is van normaal gebruik van het woordmerk 'Milan', terwijl dit woordmerk in de praktijk steevast in combinatie wordt gebruikt met een beeldteken van een vogel, is in dit opzicht noemenswaardig, zie r.o. 45 e.v. Zie ook artikel 18 lid 1 sub a Uniemerkenverordening.

² Voor een uitgebreide uiteenzetting van de fasentoets, verwijzen wij naar onze eerdere bijdrage in dit blad, 'Punten van overeenstemming wegen zwaarder dan punten van verschil?', *IER* 2021/19, par. 2. Voor een beknopte weergave van de fasentoets zij verwezen naar onze noot onder Gerecht EU 16 juni 2021 ECLI:EU:T:2021:372, T-368/20, *IER* 2021/31, m.nt. J.R. Toerenbosch & J. Vrieling (*Miley Cyrus*).

fase 1 moet worden vastgesteld welke bestanddelen *onderscheidend vermogen* hebben. Dit is niet juist. Het Hof heeft in *Ferrero* al duidelijk gemaakt dat onderscheidend vermogen geen rol mag spelen bij de beoordeling van de overeenstemming in fase 1.³ Het Hof heeft dit uitgangspunt recentelijk ook weer expliciet benoemd. In *China Construction Bank* oordeelde het Hof namelijk in een vergelijkbare situatie dat wat het Gerecht (ook daar) doet, niet door de beugel kan. In die zaak overwoog het Hof in dit kader onder meer:

“In dit verband zij opgemerkt dat de bepaling van het dominerende bestanddeel van een teken weliswaar relevant kan zijn voor de vergelijking van de conflicterende tekens (arrest van 22 oktober 2015, BGW, C-20/14, EU:C:2015:714, punt 37 en aldaar aangehaalde rechtspraak), maar dat daaruit nog niet volgt dat de bekendheid en de mate van onderscheidend vermogen van dat teken, die betrekking hebben op het teken in zijn geheel, het mogelijk maken te bepalen welk bestanddeel van dat teken domineert in de perceptie van het relevante publiek.

Integendeel, verordening nr. 207/2009 kan niet aldus worden begrepen dat de bekendheid of het grote onderscheidend vermogen van een merk kan leiden tot de vaststelling dat een van de bestanddelen van dit merk domineert ten opzichte van een ander bestanddeel ervan bij de beoordeling van de overeenstemming van de conflicterende tekens.”⁴

4. Dat onderscheidend vermogen en het vaststellen van de onderscheidende bestanddelen niet hetzelfde zijn, volgt ook uit het feit dat de waren en diensten waarvoor een teken is ingeschreven noodzakelijkerwijs een rol spelen bij het vaststellen van het onderscheidend vermogen. In *Equivalenza* heeft het Hof echter beslist dat in fase 1 géén rekening mag worden gehouden met de waren of diensten waarvoor een teken is ingeschreven, omdat de beoordeling in fase 1 anders kan leiden ‘tot het absurde resultaat dat dezelfde tekens hetzij als overeenstemmend hetzij als verschillend zouden kunnen worden aangemerkt naargelang van de waren en diensten waarop zij betrekking hebben [...]’.⁵ Bovendien oordeelt het Hof in *Equivalenza* dat de beoordeling in fase 1 ‘in het licht van de intrinsieke kwaliteiten van de conflicterende tekens’ moet worden gemaakt.⁶ Onderscheidend vermogen is niet ‘intrinsiek’ aan een bestanddeel.

5. Een onderscheidend bestanddeel in fase 1 is dus niet hetzelfde als een bestanddeel met onderscheidend vermogen. Enigszins onduidelijk is wat dan wel een onderscheidend bestanddeel is dat de totaalindruk van een teken kan bepalen. Ook is niet geheel duidelijk wat precies het verschil is tussen een onderscheidend bestanddeel en een dominerend bestanddeel. De terminologie laat zich aldus makkelijk lenen voor een semantische discussie. Onzes inziens is een onderscheidend bestanddeel een bestanddeel dat zich onderscheidt van andere bestanddelen door zijn opvallende of ongebruikelijke vorm, kleur, positionering of een ander opvallend of ongebruikelijk intrinsiek kenmerk. Dominerende bestanddelen zijn daarentegen bestanddelen die de totaalindrukken overheersen door bijvoorbeeld hun formaat ten opzichte van andere bestanddelen. Het betreft overigens voornamelijk een theoretisch verschil: veelal is het effect dat een dominerend bestanddeel heeft op de totaalindruk van een teken hetzelfde als het effect van een onderscheidend bestanddeel op de totaalindruk. In de context van fase 1 komt dit erop neer dat beide begrippen duiden op een bestanddeel van een teken dat door grootte, opvallende kleur, positionering, vorm etc. bepalend (ongebruikelijk c.q. overheersend) is ten opzichte van andere bestanddelen en daarom – vanwege deze intrinsieke eigenschap – de totaalindruk in grote mate bepaalt.

6. Na het vaststellen van de dominerende en onderscheidende bestanddelen van het AC Milan-merk, gaat het Gerecht over op de beoordeling van de overeenstemming in fase 1. Op de beoordeling van de visuele en auditieve overeenstemming is niets aan te merken: op basis van de totaalindrukken van de tekens stelt het Gerecht de overeenstemming vast. Bij de vergelijking van de visuele aspecten oordeelt het Gerecht dat ‘Milan’ het dominerende bestanddeel is en overeenstemt met het oudere merk, maar dat de onderdelen ‘AC’, het figuratieve schild en de tekst in dat schild (‘ACM’ en ‘1899’) verschillen (r.o. 94). Daardoor is er slechts een gemiddelde visuele overeenstemming. Een vergelijkbare redenering volgt het Gerecht ook bij de beoordeling van de auditieve aspecten, alhoewel het figuratieve schild daar niet wordt meegewogen, omdat figuratieve aspecten niet relevant zijn bij de auditieve vergelijking.

7. Bij de vaststelling van de begripsmatige overeenstemming maakt het Gerecht in onze ogen echter een niet goed te volgen keuze. Het Gerecht neemt namelijk als uitgangspunt dat “*it should be borne in mind that the word element ‘milan’, which is common to the conflicting signs, may have different meanings*” (r.o. 103). Vervolgens oordeelt het Gerecht dat “*since the word element ‘milan’ is present in both the mark applied for and the earlier mark, the conflicting signs must be regarded as similar conceptually to an average degree*” (r.o. 104). Het Gerecht gaat bij de vergelijking op begripsmatig niveau dus níet uit van de eerder vastgestelde totaalindruk van het AC Milan-merk (zie eerder punt 2 van de noot). In plaats daarvan isoleert het Gerecht het bestanddeel ‘Milan’ uit het AC Milan-merk

3 HvJ EG 28 maart 2011, ECLI:EU:C:2011:177, C-552/09 (*Ferrero*), r.o. 58.

4 HvJ EU 11 juni 2020, ECLI:EU:C:2020:469, C-115/19 P (*China Construction Bank/EUIPO*), r.o. 61-62. Zie over de beoordeling van het Gerecht r.o. 60 van het arrest.

5 HvJ EU 4 maart 2020, ECLI:EU:C:2020:156, C-328/18 P, *BIE* 2020/7, m.nt. M.F.J. Haak; *IER* 2021/22 (*Equivalenza Manufactory*), r.o. 72.

6 HvJ EU 4 maart 2020, ECLI:EU:C:2020:156, C-328/18 P, *BIE* 2020/7, m.nt. M.F.J. Haak; *IER* 2021/22 (*Equivalenza Manufactory*), r.o. 71.

en vergelijkt het dit met het eerdere woordmerk 'Milan'. Deze in onze ogen onjuiste beoordeling van de begripsmatige overeenstemming leidt er onzes inziens toe dat de neutralisatieleer ten onrechte niet wordt toegepast (zie nr. 10 hieronder). De beoordeling van de begripsmatige overeenstemming door het Gerecht is namelijk niet in lijn met de fasentoets. Het is uiteraard niet de bedoeling om het eerder vastgestelde dominante bestanddeel van het AC Milan-merk te isoleren van de overige bestanddelen en deze overige terzijde te schuiven.⁷ Ook bij de beoordeling van de begripsmatige overeenstemming zijn de totaalindrukken van de tekens leidend. Zoals sinds jaar en dag al treffend in Kort Begrip is opgeschreven: "Men mag beide tekens dus niet op de snijtafel leggen, eruit halen wat niet van pas komt en de rest vergelijken."⁸

8. Had het Gerecht wel een vergelijking gemaakt op basis van de totaalindrukken, dan had de beoordeling van de begripsmatige overeenstemming er heel anders uitgezien. De begripsmatige betekenis van het AC Milan-merk in zijn geheel bezien, is namelijk wezenlijk anders dan de begripsmatige betekenis van het dominerende bestanddeel 'Milan' los bezien. Op basis van de totaalindrukken had het Gerecht in dit geval moeten vaststellen dat de merkaanvraag refereert aan voetbalclub AC Milan. De totaalindruk verwijst in dit geval immers naar een andere betekenis dan het dominerende bestanddeel 'Milan'. De tekst 'AC Milan' in combinatie met het schild, verwijst onlosmakelijk naar een wereldberoemde voetbalclub, terwijl het woordmerk Milan verschillende andere betekenissen heeft – hetgeen door het Gerecht is vastgesteld.

9. Daarnaast is ook de overweging van het Gerecht dat, al verwijst het bestanddeel 'AC Milan' voor een deel van het relevante publiek inderdaad naar de voetbalclub in Milaan, er nog steeds begripsmatige overeenstemming is omdat beide tekens naar de stad Milaan verwijzen, onzes inziens niet juist (r.o. 105). Er zit begripsmatig een verschil tussen een voetbalclub uit Milaan en de stad zelf, net zoals er een begripsmatig verschil zit tussen het Amsterdam Museum en de stad Amsterdam. Voornoemde verwijst naar een instelling, terwijl laatstgenoemde verwijst naar een stad. Bovendien heeft het Gerecht zelf vastgesteld dat 'Milan' zowel naar een stad, voornamelijk als vogelsoort kan verwijzen. Ten aanzien van het deel van het publiek dat 'Milan' opvat als verwijzing naar de voornaam of vogelsoort, is er begripsmatig in ieder geval een verschil met het AC Milan-merk.

10. Aangenomen dat de tekens begripsmatig verschillen, dient zich een vervolgvraag aan: is de neutralisa-

tieleer van toepassing?⁹ De merkaanvraag verwijst immers naar een beroemde voetbalclub, terwijl het oudere merk naar een stad, voornamelijk of vogelsoort verwijst. Eén van beide tekens heeft een vaste, duidelijk betekenis – het AC Milan-merk verwijst louter naar de voetbalclub. Als het publiek deze betekenis ook onmiddellijk herkent, dan is de neutralisatieleer van toepassing. Het is goed verdedigbaar dat hier, in navolging van het arrest *Messi*, aan is voldaan.¹⁰ AC Milan is een dermate bekende voetbalclub, dat de merkaanvraag – ook al is het relevante publiek in kwestie geen specifiek voetbalpubliek – bij de gemiddelde consument van de waren in kwestie bekend staat als verwijzing naar de club. Het Gerecht zou in dit geval niet aan de beoordeling van het verwarringsgevaar toekomen, omdat het begripsmatig verschil overeenkomsten op auditief en visueel vlak neutraliseert.

11. Het laatste onderdeel dat wij kort willen aanstippen, is de overweging van het Gerecht in r.o. 113 en 114 dat de vermeende reputatie van AC Milan irrelevant is voor de beoordeling van het verwarringsgevaar (fase 2). Het Gerecht oordeelt terecht dat er een verschil is tussen de invloed van de reputatie van een merkaanvraag bij de beoordeling van de overeenstemming in fase 1 en bij de beoordeling van het verwarringsgevaar in fase 2. Het Hof heeft dit immers bepaald in het arrest *Aceites del Sur-Coosur/Koipe*: de bekendheid van de merkaanvraag waartegen oppositie is ingesteld, mag niet worden meegewogen bij de beoordeling van het verwarringsgevaar.¹¹ Dit oordeel is ook in lijn met het doel van bescherming tegen verwarringsgevaar: hoe bekender een merk, hoe meer beschermingsomvang dit merk toekomt, zodat wordt voorkomen dat andere tekens te dicht in de buurt komen bij het oudere merk.¹² Het is moeilijk met dit doel te verenigen dat een jonger teken een beroep op haar reputatie kan doen als verweer tegen de aanwezigheid van verwarringsgevaar met een ouder merk. Immers, als de conflicterende tekens en de waren en/of diensten overeenstemmen, kan er verwarringsgevaar tussen het oudere merk en jongere merk zijn, ongeacht de eventuele reputatie van het jongere merk.¹³ Het verdient de aanbeveling om het verschil tussen de invloed van de reputatie van een jonger teken in

⁷ Het is bij een samengesteld merk slechts toegestaan om bestanddelen weg te laten als deze verwaarloosbaar zijn in het geheel, zie HvJ EG 12 juni 2007, ECLI:EU:C:2007:333, C-334-05, *IER* 2007/85 (*Limoncello/Limonchelo*), r.o. 42. Hiervan is uiteraard geen sprake bij het AC Milan-merk.

⁸ P.G.F.A. Geerts & A.M.E. Verschuur (red.), *Kort begrip van het intellectuele eigendomsrecht*, Deventer: Wolters Kluwer 2020/353. Vgl. ook HvJ EG 3 september 2009, ECLI:EU:C:2009:503, C-498/07 (*Aceites del Sur-Coosur/Koipe*), r.o. 61.

⁹ HvJ EU 4 maart 2020, ECLI:EU:C:2020:156, C-328/18 P, *BIE* 2020/7, m.nt. M.F.J. Haak; *IER* 2021/22 (*Equivalenza Manufactory*), r.o. 74-75.

¹⁰ HvJ EU 17 september 2020, ECLI:EU:C:2020:722, C-449/18 P, *IER* 2021/23 (*Massi/Messi*). Wij herinneren de lezer er graag aan dat een vergelijkbaar oordeel niet is geveld in Gerecht EU 16 juni 2021, ECLI:EU:T:2021:372, T-368/20, *IER* 2021/31, m.nt. J.R. Torenbosch & J. Vrielink (*Miley Cyrus/Cyrus*). In deze zaak gingen beide partijen uit van de beroemdheid van Miley Cyrus, waardoor het Gerecht hierover geen oordeel heeft geveld, zie uitgebreid punt 9 van onze noot onder het Miley Cyrus-arrest.

¹¹ HvJ EG 3 september 2009, ECLI:EU:C:2009:503, C-498/07 (*Aceites del Sur-Coosur/Koipe*), r.o. 84.

¹² Vgl. A.A. Quaedvlieg, 'Herkomst- en goodwillinbreuk in het merkenrecht na INTEL en L'Oréal', *AA* 2009, p. 802.

¹³ P.G.F.A. Geerts & A.M.E. Verschuur (red.), *Kort begrip van het intellectuele eigendomsrecht*, Deventer: Wolters Kluwer 2020/363.

respectievelijk fase 1 en fase 2 scherp op het netvlies te houden.

J.R. Torenbosch & J. Vrieling

Reclamerecht

IER 2022/7

RECLAME CODE COMMISSIE (COLLEGE VAN BEROEP)

12 oktober 2021

m.nt. S.M. Wertwijn

Pfizer (ANWB)

Het College van Beroep RCC oordeelt dat een uiting van Pfizer richting het publiek over de mogelijke gevolgen van tekenbeten en de bescherming daartegen, ongeoorloofde publieksreclame betreft voor haar TBE-vaccin. Strijd met artikel 1 lid 1 sub xx Geneesmiddelenwet, artikel 2 Nederlandse Reclamecode en artikel 3 onder a Code Publieksreclame Geneesmiddelen. Ruime uitleg begrip "(publieks)reclame voor receptgeneesmiddelen".

Art. 1 lid 1 sub xx Geneesmiddelenwet; art. 2 Nederlandse Reclamecode; art. 3 onder a Code Publieksreclame Geneesmiddelen

2021/00231 – CVB

Uitspraak CvB RCC 12 oktober 2021:

De klacht is gericht tegen een uiting van Pfizer in de ANWB Kampioen. Daarin staat onder de aanhef 'Wandelaars weten alles van verrassingen' de volgende tekst:

'Laat je daarom niet verrassen door teken & TBE
Goed voorbereid de natuur in? Voorkom vervelende verrassingen zoals een tekenbeet. Die kan vervelende gevolgen hebben zoals de ziekte van Lyme. Maar een teek kan ook het TBE-virus bij zich dragen dat hersenvliesontsteking veroorzaakt. Bescherm jezelf tegen TBE en draag in bossen en natuurgebieden lange kleding en gebruik een insectenwerend middel met DEET. Vaccinatie kan helpen om TBE te voorkomen. Informeer naar de mogelijkheden bij jouw huisarts, GGD of apotheker.'

Onderaan de uiting staat:

'Loop jij risico? Kijk op meerwetenoovertbe.nl' met daarnaast het logo van Pfizer.

De klacht luidt dat in de uiting verboden reclame wordt gemaakt voor vaccinatie. Duidelijk is dat men bijvoorbeeld bij een bezoek aan de huisarts zal vragen naar een Pfizer vaccin, gezien het logo van Pfizer.

De Commissie heeft de klacht aldus opgevat dat appellant de uiting in strijd acht met het verbod op publieksreclame voor receptgeneesmiddelen in artikel 85 onder a Geneesmiddelenwet en in artikel 3 onder a van de Code Publieksreclame voor Geneesmiddelen (CPG). De Commissie heeft overwogen dat men in de uiting wordt gewaarschuwd voor de mogelijk vervelende gevolgen van een tekenbeet, zoals de ziekte van Lyme en door het TBE-virus veroorzaakte hersenvliesontsteking. In dit verband wordt de lezer in het bijzonder aangespoord om zich tegen het TBE-virus te beschermen, ten eerste door in bossen en natuurgebieden lange kleding te dragen en een insectenwerend middel met DEET te gebruiken, maar vervolgens ook door zich te laten vaccineren. Nu men in de uiting wordt aangespoord om zich voor wat betreft vaccinatie ter voorkoming van TBE te laten informeren bij huisarts, GGD of apotheker en daaronder het logo van Pfizer is opgenomen, terwijl Pfizer een TBE-vaccin levert, is er volgens de Commissie sprake van een vorm van beïnvloeding met het kennelijke doel het voorschrijven, ter hand stellen of gebruiken van een geneesmiddel te bevorderen, dan wel het geven van de opdracht daartoe. Hierdoor gaat het om reclame als bedoeld in artikel 1 lid 1 onder xx van de Geneesmiddelenwet. Aannemelijk is dat de lezer van de uiting, die zich naar aanleiding hiervan nader laat informeren, bij de huisarts, GGD of apotheker zal vragen naar een vaccin van Pfizer. Het verweer dat de CPG in dit geval niet van toepassing is, gelet op het bepaalde in artikel 2 CPG, kan niet slagen, aangezien de uiting niet beperkt is tot informatie betreffende gezondheid of ziekte bij de mens. Omdat het in dit geval gaat om een geneesmiddel dat uitsluitend op recept ter hand mag worden gesteld, is artikel 85 van de Geneesmiddelenwet en derhalve artikel 2 NRC overtreden. Bovendien is de uiting in strijd met artikel 3 onder a CPG.

De grieven

Deze komen in de kern erop neer dat de Commissie de uiting ten onterechte in strijd heeft geacht met artikel 2 NRC en artikel 3 onder a CPG, althans dit onvoldoende heeft gemotiveerd. De afzonderlijke grieven worden als volgt weergegeven.

Grief 1

De Commissie maakt een onjuiste koppeling tussen de verschillende elementen in de uiting. De Commissie stelt dat men in de uiting wordt gewaarschuwd voor de vervelende gevolgen van een tekenbeet, zoals de ziekte van Lyme en door het TBE-virus veroorzaakte hersenvliesontsteking. Vervolgens stelt de Commissie dat de lezer wordt aangespoord om zich tegen het TBE-virus te beschermen, ten eerste door lange kleding te dragen en een insectenwerend middel met DEET te gebruiken, maar ook door zich te laten vaccineren. Daarna koppelt de Commissie de volledige tweede helft van de uiting aan de mogelijkheid tot vaccinatie. Dat is onjuist. Het element 'Loop jij risico? Kijk op meerwetenoovertbe.nl' en de vermelding van Pfi-