

**DECISION
of the Second Board of Appeal
of 7 September 2020**

In case R 723/2021-2

Oatly AB

Box 588

SE-201 25 Malmö

Sweden

Applicant / Appellant

represented by AWA Sweden AB, Matrosgatan 1, SE-211 18 Malmö, Sweden

APPEAL relating to European Union trade mark application No 18 035 560

THE SECOND BOARD OF APPEAL

composed of S. Stürmann (Chairperson), H. Salmi (Rapporteur)
and C. Negro (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 14 March 2019, Oatly AB ('the applicant') sought to register the word mark

IT'S LIKE MILK BUT MADE FOR HUMANS

for the following list of goods:

Class 18 – Briefcases; attaché cases; briefcase-type portfolios; suitcases; suit bags; purses; business card holders; credit card holders; backpacks; key cases; coin holders; trunks and travelling bags; cosmetic bags; toilet bags, and bags for shaving kits; bags; duffle bags, tote bags; handbags; wallets; billfolds; change purses; luggage; overnight cases; umbrellas and parasols; walking sticks;

Class 25 – Clothing; footwear; headwear; clothing, footwear and headwear for women, men, boys and girls, namely, jump suits, shirts, blouses, jackets, bathing suits; clothing, footwear and headwear for women, men, boys and girls, namely, pants, belts, shorts; clothing, footwear and headwear for women, men, boys and girls, namely, warm-up suits, sweatpants and sweatshirts, walking shorts; clothing, footwear and headwear for women, men, boys and girls, namely, jeans, suits, dinner jackets and formal wear, sports jackets; clothing, footwear and headwear for women, men, boys and girls, namely, knitted tops, ties and other neckwear; clothing, footwear and headwear for women, men, boys and girls, namely, stockings, tights; clothing, footwear and headwear for women, men, boys and girls, namely, hats, caps, scarves, shawls, coats, outer coats, vests, sweaters; clothing, footwear and headwear for women, men, boys and girls, namely, dresses, skirts, t-shirts, beach and swimming cover-ups; clothing, footwear and headwear for women, men, boys and girls, namely, rainwear, rain coats, ponchos, tank tops, camisoles; tennis and golf apparel, namely, dresses, tops, skirts, pants, and shorts; biking and running and yoga apparel, namely, tops, tank tops, skirts, pants, short pants, shorts and jackets; footwear, namely, shoes, active sport shoes, sneakers, boots, slippers; blazers, pants, capes, socks, gloves; underwear; underwear, sleepwear and loungewear for men and boys, namely, briefs, boxer shorts; underwear, sleepwear and loungewear for men and boys, namely, athletic underwear, sport knit shirts; underwear, sleepwear and loungewear for men and boys, namely, t-shirts, tank tops, undershirts, basic underwear; underwear, sleepwear and loungewear for men and boys, namely, robes, knitted and woven sleepwear, sleep shirts, pajama tops, pajama bottoms; underwear, sleepwear and loungewear for men and boys, namely, breakfast jackets, smoking jackets, bed jackets, cover-ups; knitted and woven loungewear, lounging pants, and tops, lounge jackets; intimate apparel and bodywear for women and girls, namely, underwear, sleepwear and loungewear; belts; belts [clothing];

Class 29 – Dairy substitutes; dairy product substitutes; milk substitutes; milk substitutes containing oats; oat milk [milk substitute]; oat-based beverages and drinks for use as a milk substitute; milk substitute based beverages and drinks [milk substitute predominating]; almond milk, almond milk-based beverages; coconut milk, coconut milk-based beverages; hemp milk used as milk substitute; peanut milk, peanut milk-based beverages; rice milk, rice milk for use as milk substitute; soya milk, soya bean milk, soya milk [milk substitute]; functional milk substitute beverages; fruit-flavored oat-based drinks; milk substitute-based drinks containing coffee; yoghurt substitutes; yoghurt substitutes containing oats; milk substitute preparations for making yoghurt; oat-based yoghurt substitute; oat-based yoghurt and drinking yoghurt free of milk and lactose; yoghurt and drinking yoghurt substitutes containing oats; fruit-flavored yoghurt substitutes; fruit-flavored yoghurt substitutes containing oats; sour milk substitutes; sour cream substitutes; sour milk substitutes containing oats; sour cream substitutes containing oats; cream substitutes; crème fraiche substitutes; cream substitutes containing oat; crème fraiche substitutes containing oats;

non-dairy creamer; oat-based cooking cream and creamer; vegetable based cream; butter substitutes, margarine substitutes; oat-based butter substitutes; oat-based margarine substitutes; dairy substitutes cheese products; dairy substitutes cheese mixtures; dairy substitutes cheese powder; cheese substitutes; oat-based cheese; instant powder dairy substitutes; milk substitute powder, milk substitute powder for food and nutritional purposes; dried milk substitute powder, cream substitute powder; flavored milk substitute powder for making drinks; vegetable powders; coconut milk powder; compotes, fruit and vegetable spreads; processed fruit, fruit snacks; fruit chips; fruit-based snack foods; fruit juices for cooking; vegetable juices for cooking; vegetable juice concentrates for food; oat-based and vegetable based dairy substitute products for slimming purposes; oat-based dietary supplement drink mixes [milk substitutes]; oat-based dietary supplemental drinks in the nature of vitamin and mineral beverages [milk substitutes]; soup powders; oat-based drinks in powder form (milk substitutes);

Class 30 – Processed grains, starches, and goods made thereof, baking preparations and yeasts; flour, oat-based food and foodstuffs; oatmeal, rolled oats; cereals, processed cereals; food preparations and foodstuffs made from cereals; crisps made of cereals; breakfast cereals; breakfast cereals containing fibre; breakfast cereals containing a mixture of fruit and fibre; cereals flakes; muesli consisting predominantly of cereals; cereal bars and energy-bars; cereal powders; oat flakes; muesli; oat-based gruel; snack foods consisting principally of grain; snack foods consisting principally of extruded cereals; cereal snacks; snack foods and snack products made from cereals; snacks made from muesli; snack foods made of whole wheat; bread; wholemeal bread and bread mixes; wholewheat bread and crisps; whole wheat grains being cooked, precooked and preserved; biscuits; pastry and confectionery; oat-based cake mixes, oat-based biscuit mixes; coffee; decaffeinated coffee; instant coffee; coffee (roasted, in powder form); artificial coffee; coffee drinks and beverages; coffee-based drinks and beverages; coffee-based drinks and beverages containing milk substitutes; pancakes; waffles; pancake batter; liquid batter for making pancakes; oat-based pancakes; oat-based waffles; oat-based pancake batter; oat-based liquid batter for making pancakes; Corn starch derivatives in powder form for making into drinks; powdered preparations containing cocoa for use in making beverages; Food dressings [sauces]; sauces; cooking sauces; prepared foodstuffs in the form of sauces; oat-based sauces; oat-based custard, oat-based vanilla custard, oat-based vanilla sauce; Ice cream substitute; ice cream; ice cream made from milk substitutes; non-dairy ice cream; oat-based ice cream; oat-based flavoured ice-cream; oat-based fruit ice-cream; flavoured ice-cream, fruit ice-cream; soy-based ice cream; milk substitutes frozen yoghurt; non-dairy frozen yoghurt; fermented foodstuffs based on oats; acidified food-stuffs based on oat; oat-based grains and cereals products for slimming purposes; grain-based products for slimming purposes; oat-based food spread;

Class 32 – Preparations for making beverages; non-alcoholic beverages; non-alcoholic drinks; oat-based beverages; oat-based natural energy drinks; oat-based breakfast drinks; oat-based fruit drink beverages; oat-based smoothie beverages; oat-based fruit and berry drinks and beverages; oat-based drinks and beverages for slimming purposes; energy drinks; energy drinks containing caffeine; recovery drinks; sports drinks; functional beverages; functional water-based beverages; nut and soy based beverages; powders for the preparation of beverages, powders used in the preparation of fruit-based drinks and beverages; oat-based dietary supplement drink mixes [not milk substitutes]; oat-based dietary supplemental drinks in the nature of vitamin and mineral beverages [not milk substitutes]; powders for the preparation of beverages; powders for use in preparation of fruit based beverages.

- 2 On 5 September 2019, the examiner took a decision ('the contested decision') partially refusing the trade mark applied for, under Article 7(1)(b), in conjunction with Article 7(2), EUTMR, with regard to the following goods:

Class 29 – Dairy substitutes; dairy product substitutes; milk substitutes; milk substitutes containing oats; oat milk [milk substitute]; oat-based beverages and drinks for use as a milk substitute; milk substitute based beverages and drinks [milk substitute predominating]; almond milk, almond milk-based beverages; coconut milk, coconut milk-based beverages; hemp milk used as milk substitute; peanut milk, peanut milk-based beverages; rice milk, rice milk for use as milk substitute; soya milk, soya bean milk, soya milk [milk substitute]; functional milk substitute beverages; fruit-

flavored oat-based drinks; milk substitute-based drinks containing coffee; yoghurt substitutes; yoghurt substitutes containing oats; milk substitute preparations for making yoghurt; oat-based yoghurt substitute; oat-based yoghurt and drinking yoghurt free of milk and lactose; yoghurt and drinking yoghurt substitutes containing oats; fruit-flavored yoghurt substitutes; fruit-flavored yoghurt substitutes containing oats; sour milk substitutes; sour cream substitutes; sour milk substitutes containing oats; sour cream substitutes containing oats; cream substitutes; crème fraîche substitutes; cream substitutes containing oat; crème fraîche substitutes containing oats; non-dairy creamer; oat-based cooking cream and creamer; vegetable based cream; butter substitutes, margarine substitutes; oat-based butter substitutes; oat-based margarine substitutes; dairy substitutes cheese products; dairy substitutes cheese mixtures; dairy substitutes cheese powder; cheese substitutes; oat-based cheese; instant powder dairy substitutes; milk substitute powder, milk substitute powder for food and nutritional purposes; dried milk substitute powder, cream substitute powder; flavored milk substitute powder for making drinks; vegetable powders; coconut milk powder; compotes, oat-based and vegetable based dairy substitute products for slimming) purposes; oat-based dietary supplement drink mixes [milk substitutes]; oat-based dietary supplemental drinks in the nature of vitamin and mineral beverages [milk substitutes]; soup powders;

Class 30 – Oat-based cake mixes, oat-based biscuit mixes; coffee-based drinks and beverages containing milk substitutes; pancakes; waffles; pancake batter; liquid batter for making pancakes; oat-based pancakes; oat-based waffles; oat-based pancake batter; oat-based liquid batter for making pancakes; Corn starch derivatives in powder form for making into drinks; powdered preparations containing cocoa for use in making beverages; oat-based drinks in powder form; Food dressings [sauces]; sauces; cooking sauces; prepared foodstuffs in the form of sauces; oat-based sauces; oat-based custard, oat-based vanilla custard, oat-based vanilla sauce; Ice cream substitute; ice cream; ice cream made from milk substitutes; non-dairy ice cream; oat-based ice cream; oat-based flavoured ice-cream; oat-based fruit ice-cream; flavoured ice-cream, fruit ice-cream; soy-based ice cream; milk substitutes frozen yoghurt; nondairy frozen yoghurt; fermented foodstuffs based on oats; acidified foodstuffs based on oat; oat-based grains and cereals products for slimming purposes; grain-based products for slimming purposes; oat-based food spread;

Class 32 – Preparations for making beverages; non-alcoholic beverages; non-alcoholic drinks; oat-based beverages; oat-based natural energy drinks; oat-based breakfast drinks; oat-based fruit drink beverages; oat-based smoothie beverages; oat-based fruit and berry drinks and beverages; oat-based drinks and beverages for slimming purposes; energy drinks; energy drinks containing caffeine; recovery drinks; sports drinks; functional beverages; nut and soy based beverages; powders for the preparation of beverages, powders used in the preparation of fruit-based drinks and beverages; oat-based dietary supplement drink mixes [not milk substitutes]; oat-based dietary supplemental drinks in the nature of vitamin and mineral beverages [not milk substitutes]; powders for the preparation of beverages; powders for use in preparation of fruit based beverages.

- 3 On 30 October 2019, the applicant filed an appeal (R 2446/2019-5) against the contested decision, requesting that the application be accepted for registration for all goods applied for, including those refused in the contested decision. The statement of grounds of the appeal was received on 20 December 2019.
- 4 By decision of 7 February 2020, the Fifth Board of Appeal dismissed the applicant's appeal (07/02/2020, R 2446/2019-5, It's like milk but made for humans). The Board found, in essence, that the mark applied for does not go beyond its obvious promotional and laudatory meaning. The Board considered, in line with the Examiner, that the expression 'IT'S LIKE MILK' just indicates that the applicant's products are or contain milk substitutes which are like real milk in terms of e.g. consistency, nutrition and uses. The term 'BUT MADE FOR HUMANS' clearly indicates that the applicant's milk substitutes are more apt for human consumption than real milk or those containing real milk. As a result, the mark applied for is incapable of performing the essential function of a trade mark

and does not enable the consumer who bought the goods in question to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition.

- 5 The applicant lodged an action before the General Court. By judgment of 20 January 2021 (20/01/2021, T-253/20, IT'S LIKE MILK BUT MADE FOR HUMANS, EU:T:2021:21), the Court annulled the decision of the Fifth Board of Appeal on the following grounds:

Infringement of Article 7(1)(b) EUTMR

- As regards the meaning of the mark applied for, on account of the presence of the coordinating conjunction ‘but’ in the middle of that mark, the consumer will perceive an opposition between the first part of the mark (‘it’s like milk’) and the second part of the mark (‘made for humans’). As a result, the mark applied for conveys not only the idea that the goods at issue, which are foodstuffs, are akin to milk and are intended for human consumption, but also the idea that milk itself is not.
 - By means of such a meaning, the mark applied for calls into question the commonly accepted idea that milk is a key element of the human diet, as is shown by the evidence which the applicant put forward before the Board of Appeal and then the Court, from which it is apparent that the launch of the mark applied for gave rise to controversy in the Netherlands, Sweden and the United Kingdom.
 - The mark applied for thus conveys a message which is capable of setting off a cognitive process in the minds of the relevant public making it easy to remember and which is consequently capable of distinguishing the applicant’s goods from goods which have another commercial origin. The mark applied for therefore has the minimum degree of distinctive character required by Article 7(1)(b) EUTMR.
 - The Board of Appeal therefore erred in finding that the mark applied for was devoid of any distinctive character within the meaning of Article 7(1)(b) EUTMR.
- 6 On remittal to the Boards of Appeal, the Presidium referred the case to the Grand Board by decision of 24 March 2021, considering that the case raised a number of issues and that other grounds for refusal under Article 7(1) EUTMR could potentially be applicable. The case was allocated the number R 723/2021-G.
 - 7 On 6 April 2022, the Grand Board issued an interim decision inviting the President of the Boards of Appeal to reallocate the case to a Board of Appeal pursuant to Article 35(4) EUTMDR which is summarized as follows:
 - The Grand Board considers that the case at hand is not appropriate for addressing neither the deceptive character of signs applied for plant-based products, nor the applicability of unfair competition and labelling rules to

EUTM applications. The conditions for the original referral within the meaning of Article 37(3) EUTMDR are, therefore, not met.

- The sign applied for stresses that the products marketed are ‘like milk but made for humans’. It is capable of setting off a cognitive process in the minds of the relevant public, making it easy to remember and allowing it to distinguish the applicant’s goods from goods which have a different commercial origin (20/01/2021, T-253/20, IT’S LIKE MILK BUT MADE FOR HUMANS, EU:T:2021:21, § 46). Moreover, the sign introduces an element of conceptual intrigue, contradiction and negation that challenges common beliefs about consumption of milk by human beings.
 - In view of its structure and the manner in which the message is conveyed, the sign does not appear to be suitable for addressing the extent to which an application for an EUTM may be deceptive or contravene unfair competition and labelling rules, thereby setting a precedent for similar cases (Article 166(8) EUTMR).
 - For the reasons mentioned above, the Grand Board considers that a Board of Appeal is well-placed to hear the case in a three-member composition and take the necessary measures to comply with the aforementioned judgment of the General Court in accordance with Article 72(6) EUTMR.
- 8 On 4 May 2022, case R 723/2021-G was reallocated to the second Board with the following case number R 723/2021-2.

Reasons

- 9 Pursuant to Article 72(6) EUTMR the Board is called upon to give a ruling taking into consideration the judgment of the General Court of 20/01/2021, T-253/20, IT’S LIKE MILK BUT MADE FOR HUMANS, EU:T:2021:21. In doing so, the Board is bound by the order of this judgment and by its *ratio decidendi*.
- 10 The examiner rejected the contested mark pursuant to Article 7(1)(b) EUTMR. The examiner found that the EUTM applied for as a whole will simply be perceived by the relevant consumers as a typical laudatory promotional message which simply indicates that the applicant’s goods, being of plant origin, are very similar to milk, and that they, in contrast to cow’s, goat’s and sheep’s milk, are specifically made and apt for human consumption, in terms of for e.g. nutrition and digestibility, etc. This finding was confirmed by the Fifth Board of Appeal in its decision of 7 February 2020.
- 11 However, the Court found that the Board of Appeal erred in finding that the mark applied for was devoid of any distinctive character within the meaning of Article 7(1)(b) EUTMR.
- 12 Furthermore, the Grand Board in its interim decision of 6 April 2022 found that in view of its structure and the manner in which the message is conveyed, the sign does not appear to be suitable for addressing the extent to which an application

for an EUTM may be deceptive or contravene unfair competition and labelling rules, thereby setting a precedent for similar cases (Article 166(8) EUTMR).

- 13 In addition, no other reasons to deny the contested mark protection for the goods under appeal have been brought forward by the examiner in the contested decision nor are there such reasons apparent to the Board.
- 14 Consequently, the appeal is upheld, and the contested decision must be annulled in its entirety. The contested mark may proceed to publication for all the goods applied for.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision;**
- 2. Allows EUTM application No 18 035 560 to proceed to publication for all the goods.**

Signed

S. Stürmann

Signed

H. Salmi

Signed

C. Negro

Registrar:

Signed

H.Dijkema

