

DECISION
of the Second Board of Appeal
of 25 August 2022

In case R 1758/2021-2

Happy Coco B.V.

Herengracht 124

1015BT Amsterdam

Netherlands

Applicant / Appellant

represented by Schmidt, Zasiusstr. 35, 79102 Freiburg im Breisgau, Germany

v

Mona Naturprodukte GmbH

Lehargasse 11

1060 Wien

Austria

Opponent / Defendant

represented by STONE KING LLP, Boundary House 91 Charterhouse Street, London EC1M 6HR, United Kingdom

APPEAL relating to Opposition Proceedings No B 3 098 385 (European Union trade mark application No 18 056 603)

THE SECOND BOARD OF APPEAL

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

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 29 April 2019, Happy Coco B.V. ('the applicant') sought to register the word mark

HAPPY OATS

for the following list of goods:

Class 29 - Dairy products and dairy substitutes; Oat milk; Oat yoghurt; Oat-based beverages and yoghurt.

- 2 The application was published on 16 July 2019.
- 3 On 16 October 2019, Mona Naturprodukte GmbH ('the opponent') filed an opposition against the registration of the published trade mark application for all the above goods.
- 4 The grounds of opposition were those laid down in Article 8(1)(b) EUTMR.
- 5 The opposition was based on the following earlier rights:

- a) EUTM registration No 17 946 102  filed on 22 August 2018 and registered on 12 July 2019 for, *inter alia*, the following goods:

Class 29 - Non-dairy creamer; Almond milk-based beverages; Artificial milk based desserts; yoghurt made from milk substitutes.

- b) EUTM registration No 4 229 101  filed on 11 February 2005 and registered on 6 February 2006 for, *inter alia*, the following goods:

Class 29 - Soya drinks, fermented soya milk products, including soya yoghurts and soya yoghurt drinks, soya whey drinks, substitutes for dairy products with a soya base, in the form of liquids, pastes and powders.

- c) EUTM registration No 10 607 811  filed on 1 February 2012 and registered on 12 April 2014 for, *inter alia*, the following goods:

Class 29 - Rice drinks, fermented rice milk products, substitutes for dairy products based on rice in the form of liquids, included in this class; Non-alcoholic rice drinks; All the aforesaid goods being limited to plant-based milk substitute products for adult consumption and for wholesaling and retailing;

Class 30 - Beverages with a cereal base, including rice milk; All the aforesaid goods being limited to plant-based milk substitute products for adult consumption and for wholesaling and retailing.

- 6 On 17 July 2020, the applicant request that the opponent provide proof of use of the earlier rights EUTM No 4 229 101  and EUTM No 10 607 811 .
- 7 On 7 December 2020, the opponent provided evidence of use for the aforementioned EUTMs.
- 8 By decision of 20 August 2021 ('the contested decision'), the Opposition Division refused the trade mark applied for, for all the contested goods on the grounds that there was a likelihood of confusion on the basis of the earlier EUTM No 17 946 102. It gave, in particular, the following grounds for its decision:
- The contested dairy substitutes include, as a broader category, the contested 'oat yoghurt; oat-based yoghurt' overlap with, the opponent's 'yoghurt made from milk substitutes'. These are identical to the opponent's goods. The contested 'dairy products; oat milk; oat-based beverages' are similar to a high degree to the opponent's 'artificial milk based desserts', as they at least usually coincide in producer, relevant public, distribution channels and method of use. They are also in competition.
 - The goods are directed at the public at large and the degree of attention is average. Although some of the relevant goods are vegan foodstuffs, it is not reasonable to assume that every consumer of these goods will pay a higher degree of attention when purchasing them simply because they are vegan, since these goods are purchased very often, even on a daily basis, and cannot be classified as expensive. The relevant territory is the European Union.
 - The Opposition Division focuses the comparison of the signs on the English-speaking part of the public. The common element 'Happy' indicates, *inter alia*, 'feeling or showing pleasure or contentment'. 'Happy' is associated by the relevant public with the pleasure to be derived from consuming the goods at issue. This element is weak for these goods. The element 'Almond' refers to 'the oval edible nutlike seed (kernel) of the almond tree, growing in a woody shell, widely used as food'. It is a non-distinctive element since it indicates the main ingredient of the relevant goods. The element 'OATS' refers to 'the grain yielded by the oat plant, used as food' and is non-distinctive for a part of the goods, such as for 'dairy substitutes; oat milk; oat yoghurt; oat-based beverages and yoghurt', since it indicates the product of which these goods may be made. This element is at most weak for the remaining part of the goods, that is, dairy products, since it might be perceived by the relevant public as an ingredient or the flavour of these goods.

- The stylisation of the verbal elements in the earlier mark has a limited impact on the comparison of the signs. The fact that the coinciding element is at the beginning of the signs is relevant for the comparison.
 - Visually, the signs coincide in the first weak element ‘HAPPY’ of both signs. They differ in the verbal elements, ‘Almond’ of the earlier mark and ‘OATS’ of the contested sign, which are, however, non-distinctive or weak for the relevant goods. The signs also differ in the earlier mark’s arrangement of the elements on two levels and its slightly stylised typeface. The signs are visually similar to an average degree. The signs are aurally similar to an average degree. Conceptually, the signs are similar to an average degree.
 - The earlier mark’s degree of inherent distinctiveness as a whole is low.
 - Although the coinciding element ‘HAPPY’ is weak, it is at the beginning of the signs, which is the part of the marks where people first focus their attention. In principle, a coincidence in an element with a low degree of distinctiveness will not on its own lead to likelihood of confusion, although there may be likelihood of confusion if the other components are of a lower (or equally low) degree of distinctiveness or have an insignificant visual impact and the overall impressions created by the marks are similar. This applies in this case since the weak element ‘Happy’ is followed by the non-distinctive elements ‘Almond’ in the earlier mark and ‘OATS’ in the contested sign, the latter being either non-distinctive or weak for the contested goods.
 - It is highly conceivable that the relevant consumer will perceive the contested mark as a sub-brand, a variation of the earlier mark, configured in a different way according to the type of goods or services that it designates. There is a likelihood of confusion on the part of the English-speaking part of the public.
 - It is a right of a trade mark proprietor to oppose registration of those trade mark applications which could clash with such earlier rights.
- 9 On 12 October 2021, the applicant filed an appeal against the contested decision, requesting that the decision be entirely set aside. The statement of grounds of the appeal was received on 15 December 2021.
- 10 In its response received on 15 February 2022, the opponent requested that the appeal be dismissed.

Submissions and arguments of the parties

- 11 The arguments raised in the statement of grounds may be summarised as follows:
- The market is flooded with ‘Happy’ THIS and ‘Happy’ THAT. ‘Happy’ is an attribute for the product in the sense, that the product makes ‘happy’ or is a ‘happy’ solution to meet a need. Thus, it is descriptive with an infinitesimal small degree of distinctiveness. The abundant use of ‘Happy’ is recognised

by the contested decision. There is the evidence of thousands of hits in Google. The decision, however, does not draw the right conclusion: That there is no more than infinitesimal small distinctiveness to the term 'Happy' itself.

- Where an element is not distinctive, it does not gain distinctiveness merely by the fact, that it is placed before and not after an element, that describes the product. There is only an infinitesimal small degree of distinctiveness of the element 'Happy' due to its abundant descriptive use.
- 'Happy Almond' is characterised by its graphic design. This is the one element of distinctiveness that would reach over to other combinations, such as 'Happy Cats' insofar as the same graphic letter design was used, which is not the case. 'HAPPY OATS' has a distinctiveness that is derived not by the element 'Happy', but by the particular combination of 'HAPPY' and 'OATS'. 'OATS' is merely descriptive as 'Almond' is. 'Happy' is descriptive as well, with an infinitesimal small degree of descriptiveness. 'Happy Almond' derives its low distinctiveness from its common-place graphic design of the letters and in addition only to an extremely low degree from the combination of 'Happy' and 'Almond'. With this extreme low degree of distinctiveness the combination of 'HAPPY' and 'OATS' is distinctive as well, so that it may be registered as a mark.

12 The arguments raised in response may be summarised as follows:

- The other marks which the applicant alleges are used in the marketplace are not relevant to these proceedings and its argument is not valid. The reference to Google searches for the word 'happy' in combination with other (similar) consumer products like 'cashew', 'nuts', 'beans', 'chocolate' and 'ice cream', cannot be taken into account because there is no evidence of any entitlement to use such names as trade marks. Indeed, there are numerous references in the applicant's evidence to products bearing the mark 'HAPPY CASHEW', which has already been refused registration as a trade mark.
- The Opposition Division did not recognise the abundant use of 'happy'. The evidence submitted by the applicant in this regard is not relevant to the appeal.
- The applicant admits that the element 'happy' is distinctive for the relevant goods, albeit to a low degree.
- It is clear that the Opposition Division properly considered the marks as a whole. It correctly applied the global comparison test when determining the likelihood of confusion.
- It is not in dispute that the second word elements of the marks are different, but since those elements are descriptive or of weak distinctive character, the overall impressions created by the marks are similar. The goods are identical or highly similar.

- When the marks are considered as a whole and the weight of their respective elements in the perception of the target public taken into account, the differences between them, namely the non-distinctive and descriptive words ‘OATS’ and ‘ALMOND’, and the stylisation of the earlier mark, are not sufficient to eliminate the existence of a likelihood of confusion in respect of the goods which are identical or similar, from the perspective of the English-speaking consumers, who will pay an average degree of attention.

Reasons

- 13 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

Request for confidentiality

- 14 Article 114(4) EUTMR stipulates that files may contain certain documents which are not subject to inspection, in particular if the party concerned has indicated a special interest in keeping them confidential.
- 15 Where a special interest in keeping a document confidential pursuant to Article 114(4) EUTMR is invoked, the Office must verify whether a particular interest is sufficiently demonstrated. That particular interest must exist because of the confidential nature of the document or its status as a trade or trade secret.
- 16 In the present case, the opponent submitted evidence to support its claims in relation to a family of marks and to show use of its earlier marks before the Opposition Division. These documents as well as the opponent’s briefs of 5 May 2020 and 7 December 2020, which include information about the opponent’s sales, were marked as confidential. In particular, this evidence includes ‘Item 1’ referring to a summary of sales in 2017 and 2018 taken from the opponent’s accounting system and ‘Item 2’ including sample invoices between 2007 and 2017.
- 17 In view of the above, the Board will deal with the documentation in question with due care, without disclosing information that is not accessible from public sources. The confidentiality request is granted in relation to the opponent’s briefs of 5 May 2020 and 7 December 2020 and the Items 1 and 2 of the opponent’s submissions of 5 May 2020 and 7 December 2020.

Preliminary remarks

- 18 The Opposition Division examined the opposition in relation to the earlier EUTM

No 17 946 102  (earlier EUTM No 1). As this mark was registered on 12 July 2019, it is not subject to the proof of use requirement.

- 19 However, the Board is of the opinion that the opposition should be examined also in relation to the remaining earlier marks, namely EUTM registration


 No 4 229 101 (earlier EUTM No 2) and EUTM registration

 No 10 607 811 (earlier EUTM No 3).

- 20 The applicant requested that the opponent provide proof of use of the aforementioned earlier rights which are subject to the use requirement.
- 21 For the economy of the procedure, the Board will proceed to the examination of the opposition as if the opponent had proven use for all the earlier rights. For the opponent, this is the best light in which the opposition can be examined.

Article 8(1)(b) EUTMR

- 22 In accordance with Article 8(1)(b) EUTMR, upon opposition by the proprietor of an earlier trade mark, the sign applied for shall not be registered if, because of its similarity to the earlier trade mark and the identity or similarity of the goods covered by the trade marks, there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected.
- 23 The risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion within the meaning of that article (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 16-18; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 30).
- 24 It is clear from that provision that a likelihood of confusion presupposes both that the mark applied for and the earlier mark are identical or similar, and that the goods or services covered by the application for registration are identical or similar to those in respect of which the earlier mark is registered. Those conditions are cumulative (12/10/2004, C-106/03, Hubert, EU:C:2004:611, § 51).
- 25 The likelihood of confusion must be appreciated globally, taking into account all factors relevant to the circumstances of the case. That global appreciation of the visual, aural, or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. In that perspective, the more distinctive the earlier mark, the greater will be the likelihood of confusion (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22-24).

Relevant public and level of attention

- 26 The earlier marks are protected in the European Union which is, therefore, the relevant territory for analysing the likelihood of confusion. However, for an

EUTM application to be refused registration, it is sufficient that the relative ground of Article 8(1)(b) EUTMR exists in only part of the European Union (05/02/2020, T-44/1984, TC Touring Club, EU:T:2020:31, § 84).

- 27 The relevant public is composed of users likely to use both the goods covered by the earlier marks and the goods covered by the mark applied for (01/07/2008, T-328/05, Quartz, EU:T:2008:238, § 23).
- 28 The Board concurs with the Opposition Division and the opponent in that the goods are directed at the public at large (15/10/2021, R 2447/2020-4, A 2 (fig.) / THE a2 MILK COMPANY a2 THE a2 MILK COMPANY (fig.) et al., § 29). As regards everyday consumer goods, bought at affordable prices, such as those at issue, the average consumer's level of attention is at most average (29/10/2015, T-256/14, CREMERIA TOSCANA, EU:T:2015:814, § 25; 09/07/2019, T-397/18, Hugo's Burger Bar (fig.), § 31; 29/11/2018, T-763/17, welly (fig.), EU:T:2018:861, § 31, 32; 09/10/2021, R 295/2020-1, BIONABS (fig.)/ BIONA (fig.), § 25).

Comparison of goods

- 29 In assessing the similarity of the goods or services concerned, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 23). Additional factors include the aim of the goods and services, whether or not they can be manufactured, sold or supplied by the same undertaking, or by economically linked undertakings, and also their distribution channels and sales outlets.
- 30 The reference point is whether the relevant public will perceive the goods or services concerned as having the same commercial origin (04/11/2003, T-85/02, Castillo, EU:T:2003:288, § 38) and whether consumers consider it normal that the goods or services are marketed under the same trade mark, which normally implies that a large number of producers or providers are the same (11/07/2007, T-150/04, Tosca Blu, EU:T:2007:214, § 37).
- 31 The goods under comparison are the following:

<i>Goods under the earlier EUTM No 1</i>	<i>Contested goods</i>
Class 29 - Non-dairy creamer; Almond milk-based beverages; Artificial milk-based desserts; yoghurt made from milk substitutes.	Class 29 - Dairy products and dairy substitutes; Oat milk; Oat yoghurt; Oat-based beverages and yoghurt.
<i>Goods under the earlier EUTM No 2</i>	
Class 29 - Soya drinks, fermented soya milk products, including soya yoghurts and soya yoghurt drinks, soya whey drinks, substitutes for dairy products with a soya base, in the form of liquids, pastes and powders	

<i>Goods under the earlier EUTM No 3</i>	
<p>Class 29 - Rice drinks, fermented rice milk products, substitutes for dairy products based on rice in the form of liquids, included in this class; Non-alcoholic rice drinks; All the aforesaid goods being limited to plant-based milk substitute products for adult consumption and for wholesaling and retailing;</p> <p>Class 30 - Beverages with a cereal base, including rice milk; All the aforesaid goods being limited to plant-based milk substitute products for adult consumption and for wholesaling and retailing.</p>	

- 32 The contested ‘dairy substitutes’ as a broader category include the opponent’s ‘non-dairy creamer; almond milk-based beverages; yoghurt made from milk substitutes’ under the earlier EUTM No 1. Therefore, these goods are identical.
- 33 The opponent’s ‘yoghurt made from milk substitutes’ under the earlier EUTM No 1 include the contested ‘oat yoghurt; oat-based beverages and yoghurt’ and are, therefore, identical.
- 34 The contested ‘dairy products’ are highly similar to all of the opponent’s goods under the earlier EUTM No 1 in Class 29, as the latter are explicit substitutes for the contested products at hand (04/02/2013, T-504/11, Dignitude, EU:T:2013:57, § 42). They coincide in their sales outlets, purpose, and targeted consumers. They are generally displayed in the same or nearby sections of supermarkets and can come from the same producers. Finally, they are in competition.
- 35 Finally, the contested ‘oat milk’ is a milk substitute. It is highly similar to all of the opponent’s goods under the earlier EUTM No 1 in Class 29, which are or are made of milk substitutes. For example, the opponent’s ‘yoghurt from milk substitutes’ may be made from ‘oat milk’. Also, the applicant’s ‘oat milk’ is in direct competition with the opponent’s ‘almond milk-based beverages’. They both aim at the same public that opt for dairy milk alternatives. They are sold in the same aisles in supermarkets and grocery stores. Finally, their producers are the same. It is well known that these companies, almost always, offer a variety of milk substitutes made of oat, almond, rice, soya, etc.
- 36 Regarding the goods in Class 29 under the earlier EUTM Nos 2 and 3, the Board will assess the opposition as if they were all identical to the contested goods in Class 29. For the opponent, this is the best light in which the opposition can be examined.

Comparison of marks

- 37 With regard to the comparison of the signs, the likelihood of confusion must be determined by means of a global appraisal of the visual, phonetic, and conceptual similarity of the signs, on the basis of the overall impression given by them, bearing in mind in particular their distinctive and dominant components

(11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 23). The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the global assessment of that likelihood of confusion. In this regard, the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (see by analogy, 05/10/2020, T-602/19, NATURANOVE / NATURALIUM ET AL., EU:T:2020:470, § 25 and case-law cited).

- 38 In general terms, two signs are similar when, from the point of view of the relevant public, they are at least partially identical as regards one or more relevant aspects, namely the visual, aural, and conceptual aspects (23/10/2002, T-6/01, Matratzen, EU:T:2002:261, § 30 upheld on appeal by order of 28/04/2004, C-3/03 P, Matratzen, EU:C:2004:233; 12/07/2006, T-97/05, Marcorossi, EU:T:2006:203, § 39; 22/06/2005, T-34/04, Turkish Power, EU:T:2005:248, § 43, upheld on appeal by order 01/06/2006, C-324/05 P, Turkish Power, EU:C:2006:368).
- 39 In addition, it must be pointed out that the higher or lower level of the distinctive character of the elements common to a mark applied for and an earlier mark is one of the relevant factors in the context of the assessment of the similarity of the signs (see 05/10/2020, T-602/19, NATURANOVE / NATURALIUM et al., EU:T:2020:470, § 26 and case-law cited).
- 40 In order to determine the distinctive character of an element making up a mark, an assessment must be made of the greater or lesser capacity of that element to identify the goods for which the mark was registered as coming from a particular undertaking, and thus to distinguish those goods from those of other undertakings. In making that assessment, account should be taken, in particular, of the inherent characteristics of the element in question in the light of whether it is at all descriptive of the goods for which the mark has been registered (see 05/10/2020, T-602/19, NATURANOVE / NATURALIUM et al., EU:T:2020:470, § 27 and case-law cited).
- 41 It must be borne in mind that, although the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details, the fact remains that, while perceiving a word sign, s/he will identify the elements which, for him/her, suggest a concrete meaning or resemble words known to her/him (see 05/10/2020, T-602/19, NATURANOVE / NATURALIUM et al., EU:T:2020:470, § 28 and case-law cited).

42 The signs to be compared are:

<p><i>Earlier EUTM No 1</i> Happy Almond</p> <p><i>Earlier EUTM No 2</i> Happy Soya</p> <p><i>Earlier EUTM No 3</i> Happy Rice</p>	<p>HAPPY OATS</p>
<p><i>Earlier EUTMs</i></p>	<p><i>Contested sign</i></p>

- 43 The Board is of the opinion that the term ‘HAPPY’, which is present in both the contested and earlier marks is non-distinctive in relation to the goods in question. As it has been correctly noted by the applicant, ‘Happy’ appears as an attribute for the product in the sense, that the product makes the consumers ‘happy’ or is a ‘happy’ solution to meet a need. This element only has a minimal degree of distinctive character, if any, in relation to the goods in Classes 29 and 30.
- 44 The Boards of Appeal have in many decisions found that the term ‘happy’ is weak or non-distinctive in relation to a wide range of goods and services. For instance, in the decision of 26 February 2018, R 1906/2017-4, HAPPY DRINK, the Board found that ‘HAPPY’ is not only used to describe happy people but is generally used for things and events which are found to be happy. Expressions such as ‘Happy Day’ or ‘Happy Journey’ do not designate days or journeys which feel happy, but those which proceed happily for the person who experiences or undertakes them. Therefore, ‘Happy’ is also used to promote a wide variety of products and offers. For example, the concept of the ‘Happy Hour’ designates a fixed period during which drinks are sold at a reduced price, that is to say an hour which makes the customer happy. On account of these uses, the consumer will immediately understand the expression ‘HAPPY DRINK’ in the sense of a drink that makes people happy and therefore as a reference to a positive characteristic of the drink designated in this way. The fact that sensations of happiness may individually be very different, and the expression does not reveal the specific way in which the drink generates feelings of happiness does not preclude this descriptive understanding. Consumers know that the consumption of certain meals and drinks may not only affect their general physical condition but may also affect their mood; they will therefore understand ‘HAPPY DRINK’ as a description of a drink that gives rise to a positive mood. In respect of the drinks

claimed, namely ‘milk; milk shakes; beverages having a milk base; flavoured milk beverages; milk drinks containing fruits; lactic acid bacteria drinks; milk-based beverages flavoured with chocolate; milk beverages, milk predominating; milk-based beverages containing coffee; milk-based beverages containing fruit juice’ in Class 29 and ‘coffee, teas and cocoa and substitutes therefor; coffee-based beverages containing milk; prepared coffee and coffee-based beverages’ in Class 30, ‘HAPPY DRINK’ therefore directly describes the nature and quality thereof, to the effect that they are drinks that make the consumer happy.’ (§ 14-16, emphasis added).

- 45 In the decision of 7 January 2013, R 1628/2012-4, BE HAPPY, the Board found that the expression ‘be happy’ ‘is restricted to a laudatory statement inciting a purchase, which is intended to convey to customers that they can be happy in association with the purchase of the product or precisely through its purchase’ (§ 16). ‘Consumers would in fact understand the statement merely as a general invitation to purchase, in the sense that customers could be pleased to be given the opportunity to purchase that product and could consider themselves happy to be able to purchase it (§ 17). ‘The statement “Be happy” cannot personalise a supplier, precisely from the point of view of potential customers. It cannot therefore distinguish any of those suppliers from one another. It is a positive invitation, which can apply to any supplier and to any purchase situation. Nor does this obviously promotional statement include anything imprecise or requiring interpretation. It does not seek to convey to customers that they should ask questions, but simply seeks to incite customers to buy the goods of the applicant.’ (§ 18-19, emphasis added).
- 46 In the decision of 17 October 2013, R 32/2013-1, BE HAPPY, the Board found that the expression ‘BE HAPPY’ was of a generally laudatory and promotional, yet emotive, nature and not capable of individualising providers. Especially from the view of a potential customer, it will be perceived as a positive request which may apply to any provider and to any purchasing situation (§ 21-22). Likewise, in the decision of 10 July 2015, R 2986/2014-5, LIVE HAPPY, the Board found that that expression would lead the public to associate it instantaneously with a promotional message, indicating to the consumer the positive aspects of the goods concerned (§ 21, emphasis added).
- 47 In the decision of 30 April 2014, R 1669/2013-2, HAPPY BABY, in relation to goods in Class 29, the Board found that the sign did not immediately indicate to the consumer the origin of his/her intended purchase, but just gave him/her purely promotional information, he/she would not take the time either to enquire into the sign’s various possible functions or to mentally register it as a trade mark. It was concluded that the sign would be perceived by the relevant public primarily as a banal promotional slogan, rather than as a trade mark (§ 26).
- 48 The word ‘HAPPY’ forms part of the basic English vocabulary and it will be understood by all the relevant consumers in the EU as referring to a feeling or showing pleasure or contentment. Also, it is known and customary across the entire EU not least on account of its use in ‘Happyend’, ‘Happyhour’ or the well-known song titles ‘Happy birthday’ and ‘Don’t worry, be happy’ (see by analogy,

17/10/2013, R 32/2013-1, BE HAPPY, § 18; 28/01/2016, R 1556/2015-1, SEITENBACHER HAPPY FRUITS / HAPPY FRUTTIS, § 25). English-language word combinations having the component ‘HAPPY’ are used on the EU market as advertising promises in order to suggest that the relevant goods in some way make one happy or are in a state of happiness. The component ‘HAPPY’ in composite trade marks is also used to convey a positive image of the product or to evoke a positive opinion in relation to its characteristics and qualities. Its intended effect is for potential consumers to be encouraged to buy the goods (see 28/01/2016, R 1556/2015-1, SEITENBACHER HAPPY FRUITS / HAPPY FRUTTIS, § 27).

- 49 From the perspective of the English-speaking part of the relevant public that will understand the meaning of all the word elements of the respective marks, the marks will be understood by the relevant public primarily as a laudatory statement about a product, and not as an indication of origin, and thus they have only a low degree of distinctive character. The distinctive character, if any exists at all, results from the personified consideration of a nut or cereal as well as the stylised font of the earlier marks (see 28/01/2016, R 1556/2015-1, SEITENBACHER HAPPY FRUITS / HAPPY FRUTTIS, § 28). For the sake of clarity and as it has been explained above, the element ‘HAPPY’ would be perceived as laudatory across the entire EU (even for consumers that do not understand the meaning of the word elements ‘oats’ and ‘almond’).
- 50 Visually, the signs are similar insofar as they have in common the element ‘Happy’. Their second elements are completely different. The stylised typeface of the earlier marks has the result of producing an overall visual impression which is different from the one produced by the contested mark (see 13/01/2014, R 769/2013-1, HAPPY NAPPY / HAPPYPUPPY (fig.), § 22). The signs are visually similar to a low degree.
- 51 Aurally, the pronunciation of the signs coincides in the syllables ‘HA-PPY’, present identically at the beginning of both signs. The pronunciation differs in the syllables ‘AL-MOND’/‘SO-YA’/‘RI-CE’ of the earlier marks and ‘OATS’ of the contested sign. The signs are aurally similar to an, at most, average degree.
- 52 The signs are dissimilar because the differentiating elements convey different concepts, the concept of almond/soya/rice in the earlier marks and oats in the contested sign. The coincidence in the element ‘happy’ establishes a conceptual link between the signs. Nevertheless, this is not an ‘operative’ link in a trade mark sense. In summary, the signs are similar to the extent that they share the element ‘happy’, but the similarity is of a most modest kind, given the different connotations conveyed by the earlier marks stemming from the presence of the words almond/soya/rice in the earlier marks and oats in the contested sign (see by analogy, 20/04/2016, R 928/2015-5, WE LOVE!! DESIGUAL (FIG.) / WE LOVE, § 48).

Distinctiveness of the earlier mark

- 53 Before the Opposition Division, the applicant claimed that a simple internet search yields thousands of results showing the use of the term ‘HAPPY’ in combination with other descriptive words, such as ‘cashew’, ‘nuts’, ‘chocolate’, etc. Moreover, it submitted a list of more than 600 EUTMs that contain the word ‘HAPPY’ in relation to goods in Classes 29 and 30.
- 54 Regarding the data from the Office’s database, it is noted that it is not the abstract situation on the trade mark register but the actual use of trade marks on the market in relation to the goods in question that is relevant. Therefore, the mere fact that a number of trade marks designating similar goods contain the word ‘happy’ is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, 05/10/2012, T-204/10, Color Focus, EU:T:2012:523, § 53; 04/09/2013, R 974/2012-5, SIMPLY HAPPY (fig.) / HAPPY DAY, § 36; 22/03/2019, R 1873/2018-5, Kissa / Kiss, § 61).
- 55 Furthermore, regarding the evidence showing internet results of products marketed under a combination of the term ‘HAPPY’ and a descriptive term, while it shows actual market presence of ‘HAPPY’ marks, it demonstrates that the great majority of examples do not relate to dairy products or dairy substitutes, but to pulses, dry nuts, chocolate etc. Only ‘happy cashew’ is related to dairy product alternatives. However, this indication cannot prove the applicant’s allegation as the opponent has successfully opposed the EUTM application No 17 959 800 ‘Happy Cashew’ for goods in Classes 29 and 30 (Opposition Division case No B 3 077 303). The Office is not in a position to know whether the opponent has also taken measures against the market use of these products. In any event, this evidence does not help the applicant, as there is neither sales evidence nor any indication to the date of circulation of these products to assess whether they had been circulating on the market before the registration of the earlier marks (see by analogy, 22/03/2019, R 1873/2018-5, Kissa / Kiss, § 63).
- 56 However, as it has been analysed above, it is a well-known fact, which is also reflected in the case-law referred to above, that the term ‘happy’ is widely used on the market as a mere promotional or laudatory message for the marketing of any kind of goods.
- 57 As the earlier marks are registered, it has to be acknowledged that they have a certain degree of distinctiveness, which in the present case is very low (24/05/2012, C-196/11 P, F1-LIVE, EU:C:2012:314, § 47; 11/12/2014, T-10/09R, F1-LIVE, EU:T:2014:1061, § 33).

Overall assessment of the likelihood of confusion

- 58 A likelihood of confusion on the part of the public must be assessed globally. That global assessment implies some interdependence between the factors taken into account and in particular similarity between the trade marks and between the goods or services covered. Accordingly, a lesser degree of similarity between

these goods or services may be offset by a greater degree of similarity between the marks, and vice versa (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17). The more distinctive the earlier mark, the greater the risk of confusion, and marks with a highly distinctive character, either per se or because of the reputation they possess on the market, enjoy broader protection than marks with a less distinctive character (29/09/1998, C-39/97, Canon, EU:C:1998:442, § 18).

- 59 The goods covered by the signs in dispute are identical or similar. The marks are visually similar to a low degree and aurally similar to an average degree and conceptually dissimilar. The distinctiveness of the earlier mark is very low. As it has been pointed out, the element ‘happy’ has at most a very weak distinctive quality in all the signs throughout the EU. Descriptive or banal verbal elements may be freely used by all, including as part of complex or graphic marks (06/09/2018, C-488/16 P, NEUSCHWANSTEIN, EU:C:2018:673, § 36). The opponent cannot be given an unconditional right to oppose the registration of any subsequent sign containing that word, in respect of goods related to drinks (with reference to everyday word elements, 23/09/2020, T-421/18, MUSIKISS, EU:T:2020:433, § 144). The remaining elements of the earlier marks (and the graphic representation of the earlier marks) show no element of visual, phonetic, or conceptual similarity. Accordingly, they compensate for the similarities that result from the presence of the component ‘happy’, common to the signs at issue (see 30/11/2020, R 2844/2019-2, L-RUN (fig.) / I-run, § 57).
- 60 According to case-law, descriptive or non-distinctive elements are usually not capable of identifying the commercial origin of goods (15/02/2005, T-169/02, Negra modelo, EU:T:2005:46, § 34; 03/09/2010, T-472/08, 61 a nossa alegria, EU:T:2010:347, § 47 and the case-law cited therein). Also, elements that are allusive and/or laudatory are unable to serve as indicators of commercial origin (13/05/2020, T-381/19, City Mania / City Lights, EU:T:2020:190, § 43-44; 09/09/2020, T-879/19, Dr. Jacob's essentials (fig.) / COMPAL essential (fig.) et al., EU:T:2020:401, § 44, 48, 50).
- 61 Everyone should be able to use descriptive/non-distinctive terms (05/02/2010, C-80/09 P, Patentconsult, EU:C:2010:62, § 34). If the earlier mark consists of an ordinary word commonly used in everyday language, the holder of that mark cannot be given an unconditional right to oppose the registration of any subsequent mark containing that word because that would result in the improper monopolisation of that everyday word element (23/09/2020, T-421/18, MUSIKISS / KISS et al., EU:T:2020:433, § 144; 08/04/2022, R 1210/2021-2, Vegetal Value / Vegeta, § 71).
- 62 The Boards have also already held that, whereas a company is certainly free to choose a trade mark with descriptive and non-distinctive words, and use it on the market, it must also accept that in so doing that competitors are equally entitled to use trade marks with similar or identical descriptive components (23/05/2012, R 1790/2011-5, 4REFUEL (fig.)/REFUEL, § 15).
- 63 Thus, there is no reason to assume that the element ‘happy’ will dominate the overall impression of the signs at issue nor does this element exert an independent

distinctive role in the signs (24/06/2010, C-51/09 P, Barbara Becker, EU:C:2010:368, § 31- 40; 30/11/2020, R 2844/2019-2, L-RUN (fig.) / I-run, § 58). In these circumstances, there is nothing else to suggest that the weak element ‘happy’ may serve as a sufficient basis for a likelihood of association. In the Board’s opinion, the weakness and functional quality of the word ‘happy’ mean that, assuming that the relevant public has previously encountered the opponent’s signs, the latter would not be even brought to mind (see also, 12/05/2021, T-70/20, MUSEUM OF ILLUSIONS (fig.) / MUSEUM OF ILLUSIONS (fig.), EU:T:2021:253, § 95).

- 64 In addition to the fact that the similarity between the signs at hand is based on weak elements, there are other verbal and graphic elements which contribute towards differentiating the conflicting signs (12/05/2021, T-70/20, MUSEUM OF ILLUSIONS (fig.) / MUSEUM OF ILLUSIONS (fig.), EU:T:2021:253, § 67; 19/06/2018, T-859/16, EISKELLER (fig.) / KELER et al., EU:T:2018:352, § 33, 44; 19/06/2019, T-28/18, AC MILAN (fig.) / AC et al., EU:T:2019:436, § 70).
- 65 Even with a low degree of similarity between the signs, there may exist a likelihood of confusion on the relevant public’s part, given the existence of other relevant factors such as the reputation or repute of the earlier marks (04/03/2020, C-328/18P, BLACK LABEL BY EQUIVALENZA (fig.) / LABELL (fig.) et al., EU:C:2020:156, § 60). However, this is not the case here. As regards the registered goods of Classes 29 and 30, the earlier marks have only a low degree of distinctiveness.
- 66 The opponent, before the Opposition Division, claimed that the earlier marks belong to a family of marks, a factor which would support the favourable outcome of its opposition. Indeed, when an opposition is based on several earlier marks and those earlier marks display characteristics that give ground for regarding them as forming part of a ‘family’, a likelihood of confusion may be created by the possibility of association between the contested mark and the earlier marks forming part of the family. In this respect, two cumulative conditions have to be satisfied (23/02/2006, T-194/03, Bainbridge, EU:T:2006:65, § 123-127, confirmed by 13/09/2007, C-234/06 P, Bainbridge, EU:C:2007:514, § 63).
- 67 Firstly, the proprietor of a series of earlier marks must submit proof of use of all the marks belonging to the series or, at the very least, of a number of marks capable of constituting a ‘series’ (i.e. at least three). Secondly, the trade mark applied for must not only be similar to the marks belonging to the series, but must also display characteristics capable of associating it with the series. Association must lead the public to believe that the contested sign is also part of the series, that is to say, that the goods could originate from the same or connected undertakings. This may not be the case where, for example, the element common to the earlier series of marks is used in the contested sign, either in a different position from that in which it usually appears in the marks belonging to the series, or with a different semantic content.

- 68 The opponent must prove within the time-limit to substantiate the opposition that it has used the marks forming the alleged family on the marketplace to such an extent that the relevant public has become familiar with this family of marks as designating the goods of a particular undertaking.
- 69 A positive finding that the opponent has a family of marks entails the use of at least three marks, the minimum threshold for such an argument to be taken into due consideration. Proof of use relating to only two trade marks cannot substantiate the existence of a series of marks.
- 70 An assumption of a family of marks on the part of the public requires that the common denominator of the contested application and the earlier family of marks must have a distinctive character to allow a direct association between all of these signs. However, in the present case, the opponent cannot claim that it has formed a family of marks as a result of the use of the term ‘happy’ in all of the earlier marks. As it has been analysed above, the element ‘happy’ is at most weak (if non-distinctive) in relation to the goods at hand. A family of marks cannot be established on the basis of so weak or non-distinctive elements. Therefore, this argument is rejected as unfounded.
- 71 In light of the foregoing, taking into account the relevant factors and their mutual interdependence, there is no reason to assume that a significant part of the relevant public displaying an average degree of attention will be misled into thinking that the goods bearing the signs in dispute come from the same undertaking or, as the case may be, from undertakings that are economically linked, even for the goods that have been found identical.
- 72 The contested decision is annulled insofar as it found there was a likelihood of confusion between the signs in question.
- 73 The appeal is upheld.

Costs

- 74 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the opponent, as the losing party, must bear the applicant’s costs of the opposition and appeal proceedings.
- 75 As to the appeal proceedings, these consist of the appeal fee of EUR 720 and the applicant’s costs of professional representation of EUR 550.
- 76 As to the opposition proceedings, the opponent must reimburse the applicant’s cost of professional representation of EUR 300. The total amount is fixed at EUR 1 570.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision;**
- 2. Rejects the opposition in its entirety;**
- 3. Orders the opponent to bear the applicant's costs in the opposition and appeal proceedings to a total amount of EUR 1 570.**

Signed

S. Stürmann

Signed

H. Salmi

Signed

C. Negro

Registrar:

Signed

H.Dijkema

