

**DECISION
of the First Board of Appeal
of 24 February 2023**

In case R 1682/2022-1

société Air France

45, rue de Paris
95747 Roissy Charles de Gaulle
France

KLM Koninklijke Luchtvaart Maatschappij N.V.

Amsterdamseweg 55
1182 GP Amstelveen,
Netherlands

Opponents/ Appellants

represented by CABINET MEYER & PARTENAIRES, Espace Européen de l'Entreprise 2
rue de Dublin 67300 Schiltigheim, France

v

Teodor-Cristian Rada

Str. Georges Bizet nr. 5, Sc. A, Et. 3, Ap. 12
Sector 2 Bucuresti
Romania

Applicant/ Defendant

represented by Mihai Andrei Enache, Bulevardul Unirii nr. 64, Bl. K4, Sc. 3, Et. 4, Ap. 73,
sector 3 030834 Bucharest, Romania

APPEAL relating to Opposition Proceedings No B 3 133 216 (European Union trade mark
application No 18 263 618)

THE FIRST BOARD OF APPEAL

composed of G. Humphreys (Chairperson), M. Bra (Rapporteur) and A. González Fernández
(Member)

Registrar: H. Dijkema

gives the following

Language of the case: English

Decision

Summary of the facts

- 1 By an application filed on 30 June 2020, Teodor-Cristian Rada ('the applicant') sought to register the mark



for the following list of goods and services:

Class 9: Application software; Mobile apps; Computer software applications, downloadable; Downloadable application software for smart phones; Downloadable applications for use with mobile devices; Electronic publications, downloadable; all these products excluding the ones in connection with customer loyalty programs.

Class 35: Advertising, marketing and promotional services, excluding the services in connection with customer loyalty programs.

Class 39: Transport; Wrapping and warehousing; Travel arrangement; all these services excluding the ones in connection with customer loyalty programs.

Class 43: Services for providing food and drink; Providing temporary accommodation; all these services excluding the ones in connection with customer loyalty programs.

- 2 The application was published on 24 July 2020.
- 3 On 22 October 2020, société Air France, société anonyme and KLM Koninklijke Luchtvaart Maatschappij N.V. ('the opponents') filed an opposition against the registration of the published trade mark application for all the above goods and services.
- 4 The grounds of opposition were those laid down in Article 8(1)(b) and 8(4) EUTMR.
- 5 The opposition was based on the following earlier rights:
 - EUTM registration No 4 003 489 '**FLYING BLUE**' filed on 30 August 2004, registered on 20 January 2009 and duly renewed for the following earlier goods and services:

Class 9: Apparatus and scientific instruments, photographic, cinematographic, optical, checking (inspection), assistance (lifesaving), sound recording apparatus, transmission, reproduction of sound and images, magnetic recording carriers, automatic dispensers, calculators, equipment for processing information and computers, protective devices for personal use against accidents, electronic

agendas, altimeters, anti-glare glasses, anti-dazzle shades, apparatus and instruments for astronomy, protective suits for aviators, azimuth instruments, safety tarpaulins, luminous beacons, video tapes, barometers, note dispensers (tickets) and notamment de tickets de transport and billets d' avions, compasses, pocket calculators, video cameras, smartcards or à microprocesseur, magnetic cards, magnetic identification cards, membership cards (not magnetic), magnetic loyalty cards, magnetic cards or à microprocesseur de paiement, credit or debit, video game cartridges, protective helmets, video cassettes, lifebelts, compact discs (audio-video), optical compact discs, cartoons, slides, time recording apparatus, distance recording apparatus, luminous signs, mechanical signs, instrument and machines for testing materials, electronic labels for goods, cases for spectacles, exposed films (films), lifejackets, holograms, intercommunication apparatus, apparatus for games adapted for use with television receivers only, binoculars (optical), software (recorded programs), spyglasses, magnifiers, articles of eyewear, eyeglasses (optical), sun glasses, respiratory masks (other than for artificial respiration), precision measuring apparatus, meteorological instruments, observation instruments, computers, computers peripherals, illuminated traffic signs or mechanical, radio apparatus, signals (luminous) or mechanical work, aircraft for the safety of aeronautical traffic, electronic display boards, electronic pocket translators.

Class 35: Advertising, business management, business administration, office functions, marketing and promotion for others, arranging newspaper subscriptions (for others), business organisation and management consultancy, professional business consultancy, efficiency experts, business information, business enquiries, bill-posting, appraisals, business appraisals, commercial information agencies, cost-price analysis, dissemination of advertising matter, rental of office machinery and apparatus, transcription, accounting, personnel management consultancy, publicity columns preparation, shop window dressing, dissemination of advertising matter, direct mail advertising, commercial or industrial management assistance, updating of advertising material, document reproduction, market studies, organisation of exhibitions for commercial or advertising purposes, compilation and systemisation of data into a computer database, computer file management, rental of advertising space, modelling for advertising or sales promotion, market research, opinion polling, personnel recruitment, economic forecasting, business management assistance, sales promotion (for others), publication of publicity texts, public relations, drawing up of statements of accounts, secretarial services, statistical information, auditing, management of promotional free gifts, promotional activities aimed at obtaining customer and personnel loyalty, management of a loyalty programme in the field of air transport.

Class 36: Insurance, financial affairs, monetary affairs, financial analysis, insurance consultancy, insurance information, issue and distribution of tokens of value, savings banks, mutual funds, capital management, capital investment, credit card services, guarantees, exchanging money, issuing of travellers' cheques, issuing of gift tokens, financial consultancy, financial appraisals (insurance, banking), trusteeships, financing services, financial information, mutual funds, fund investments, fund management, electronic funds transfer, banking, financial sponsorship, financial transactions, management of property accounts, management

of property accounts in respect of customer loyalty in the field of financial affairs, management of property accounts in respect of customer loyalty in the field of air transport, customs brokerage, insurance, financial affairs, monetary affairs, financial analysis, insurance consultancy, insurance information, issue and distribution of tokens of value, savings banks, mutual funds, capital management, capital investment, credit card services, guarantees, exchanging money, issuing of travellers' cheques, issuing of gift tokens, financial consultancy, financial appraisals (insurance, banking), trusteeships, financing services, financial information, mutual funds, fund investments, fund management, electronic funds transfer, banking, financial sponsorship, financial transactions, management of property accounts, management of property accounts in respect of customer loyalty in the field of financial affairs, management of property accounts in respect of customer loyalty in the field of air transport, customs brokerage, customs clearance.

Class 38: Telecommunications, communications by computer terminals, radio broadcasting, sending of telegrams, communications by telephone, radio broadcasting, television broadcasting, information about telecommunications, rental of telecommunications apparatus, rental of message-sending apparatus, rental of modems, rental of telephones, electronic mail, message sending, computer-aided transmission of messages and images, cellular telephone communication, satellite transmission, telephone communications, telephone services, broadcasting of radio and television programmes, transmission of telegrams, transmission of information via Internet and intranet networks.

Class 39: Transport, packaging and warehousing of goods, transport of passengers, transport of travellers, transport of animals, travel arrangement, escorting of travellers, air steward services (escorting of travellers), air transport, aeronautical transport, chartering, tourist agencies (except for hotel reservation), travel agencies, bus transport, car transport, chauffeuring services, parcel delivery, packaging of goods, mail delivery, newspaper delivery, storage of goods, distribution (delivery) of luggage, products, goods, wrapping of goods, storage information, arranging of tours, freight forwarding, freight (transport of goods), information on transport and rental of vehicles, information on the transport of passengers, goods and animals, vehicle rental, courier service (mail or goods), car parking, booking of seats for travel, storage, taxi transport, sightseeing (tourism), freight forwarding, transport reservation, reservation for the transport of passengers, goods and animals, travel and vehicle rental reservation, transport of valuables, motor shuttle services, registration of luggage, goods and passengers, loading and unloading of aircraft, providing of air vehicles, representation of airlines and vehicle rental companies.

- Domain name ‘**flyblue.com**’ for the territory of the European Union as well as for the territories of the Czech Republic, Austria, Belgium, Poland, Latvia, Bulgaria, Cyprus, Germany, Ireland, Romania, Greece, Slovakia, Denmark, Slovenia, France, Estonia, Luxembourg, the United Kingdom, Hungary, Lithuania, Malta, Croatia, Spain, the Netherlands, Sweden, Portugal, Italy and Finland.

6 The opponents invoked Article 8(1)(b) EUTMR with regard to EUTM registration No 4 003 489 and Article 8(4) EUTMR with regard to the domain name

‘flyingblue.com’. With respect to the latter ground the opponents quoted Article L711-4 of the French Intellectual Property Code, which they also invoked in their opposition notice relying on online substantiation pursuant to Article 7(3) EUTMDR for the identification of the contents of the relevant national law. In addition, the opponents submitted a screenshot of the website ‘legifrance.gouv.fr’, which shows the contents of Article L711-4 as Annex 10 to their submissions of 7 June 2021 as well as a reference to a link to the WHOIS registration website for the domain name ‘flyingblue.com’ (<https://whois.domaintools.com/flyingblue.com>).

- 7 The applicant requested that the opponents submit proof of use of the trade mark on which the opposition is based.
- 8 On 30 September 2021, within the time-limit, the opponents submitted the following evidence of use:

- A number of pictures of magnetic cards branded with the sign ‘Flying Blue’, which is always depicted on the cards with a background of varying colour and in the



following manner: Part of the depictions shows the ‘Flying Blue’ application on smartphones. The pictures are partially dated 20 June 2018, some cards show validity dates falling within the relevant time period (such as 2019), some are undated.

- Presentations, advertising brochures, flyers, communication materials, internal guidelines, all concerning the customer loyalty program ‘Flying Blue’. the various materials are designed for a number of EU Member States. One presentation, dated January 2016, shows how ‘Flying Blue’ was advertised to members in the year 2016, several other presentations explain what the customer loyalty program ‘Flying Blue’ is and how it works. The material is partially undated (some leaflets are dated 2020 or refer to the years 2021 and 2022).
- Newsletters dated 2017, 2018, 2019. to recipients in France, the Netherlands, Germany and Romania. In each newsletter the sign  is indicated in one form or another.
- Copies of AIR FRANCE magazines from the years 2018, 2019, 2020 and 2021. They mention the ‘Flying Blue’ partner airlines and indicate the domain name ‘flyingblue.com’.
- Comprehensive clipping with publications from specialized websites and blogs, all related, among others, to air travel, for instance <https://samchui.com/>, <https://manager24.pl/>, <http://sky-watcher.pl>, <http://sky-watcher.pl>, <https://manager24.pl/https://samchui.com/>, <https://insideflyer.nl>, <https://meilenooptimieren.com>, <https://businessstraveller.pl>, <https://www.ttitalia.com>, with the following articles:

- Press articles from various websites in **Dutch**, dated 19 July 2016, 3 November 2017, 6 November 2017, 15 November 2017, 24 April 2018, 10 October 2018, 30 April 2019, 22 May 2019, 21 June 2019, 19 July 2019, 29 July 2019, 1 September 2019, 8 October 2019, 1 February 2020, 4 March 2020, 16 February 2021.
 - Press articles in **German**, dated 22 June 2018 and 28 August 2019, (Annexes E1 and E10), press articles in Polish dated 13 November 2017, 8 November 2017 and 6 April 2018 (Annexes E3, E4, E23 and E26).
 - Press article in **Spanish** dated 3 February 2016.
 - Press article in **Italian** dated 24 May 2017.
 - Press article in **Slovenian** dated 19 April 2018 and 24 April 2018.
 - Press article in **English**. They present ‘Flying Blue’ as the joint loyalty program of Air France and KLM.
 - Screenshots from the opponents’ ‘Flying Blue’ online websites and the subdomains ‘flyingblue-info.com’ and ‘flyingblue.com’. The screenshots are time stamped 28/09/2021.
 - Screenshots from the website www.klm.com concerning the ‘Flying Blue’ loyalty program. They are time stamped 12/07/2021 and 13/07/2021.
 - Excerpts from the ‘Flying Blue’ Youtube channel, dated 2019.
 - Lists of ‘Flying Blue’ partners and airline partners in the European Union, both undated.
 - Excerpts from the ‘Flying Blue’ website with partner offers. The excerpts are time stamped 28/09/2021 and 29/09/2021.
 - Excerpts from the ‘Flying Blue’ website on the Internet Archive ‘Wayback Machine’, dated 2015, 2016, 2017, 2020.
 - Excerpts from the annual reports of the AIR FRANCE-KLM group for the years 2015, 2016, 2017 and 2019.
 - Copy of the general and new terms and conditions of the ‘Flying Blue’ program.
 - Screenshots from the ‘Flying Blue’ Youtube channel, dated 2019.
 - Video excerpts, undated.
- 9 By decision of 30 June 2022 (‘the contested decision’), the Opposition Division partially upheld the opposition for the following contested services:

Class 35: Advertising, marketing and promotional services, excluding the services in connection with customer loyalty programs.

The opposition was rejected for the remaining goods and services, namely:

Class 9: Application software; Mobile apps; Computer software applications, downloadable; Downloadable application software for smart phones; Downloadable applications for use with mobile devices; Electronic publications, downloadable; all these products excluding the ones in connection with customer loyalty programs.

Class 39: Transport; Wrapping and warehousing; Travel arrangement; all these services excluding the ones in connection with customer loyalty programs.

Class 43: Services for providing food and drink; Providing temporary accommodation; all these services excluding the ones in connection with customer loyalty programs.

It gave, in particular, the following grounds for its decision:

Proof of use

- Place of use: The press articles, annual reports, newsletters and website excerpts show that the place of use is mainly and primarily France, the Netherlands, Germany, Romania. This can be inferred from the language of the documents, the currency mentioned ('euro'), the location and language of the websites in the article clipping and the indications provided by the annual reports. Therefore, the evidence relates to the relevant territory.
- Time of use: Most of the evidence is dated within the relevant period.
- Extent of use: The documents filed, namely in particular the annual reports, provide sufficient information concerning the commercial volume, the territorial scope, the duration, and the frequency of use. For instance, the report from the year 2015 details, among other information: 'Furthermore, around 50% of revenue is realized with loyalty scheme customers (members of the Flying Blue frequent flyer program or those whose companies have a corporate contract with the Group).' It further mentions that the program has a membership in the higher double-digit millions and has been growing over a decade. Moreover, it mentions that the program won five 'Freddie Awards' in 2015, including the prestigious 'Program of the Year' accolade and the 'Best Affinity Credit Card' title. According to the report, the (online) 'Flying Blue Store' stocks more than 5,000 items. A sales transaction was realized every five minutes on this platform in the year 2015. Visits to the Flying Blue.com website have increased by 20% in said year. The other reports contain similar information.
- Nature of use: Despite its figurative variations, the evidence shows that the earlier word mark has been used in accordance with its function and as registered for at least for some of the services, namely:

Class 35: Promotional activities aimed at obtaining customer and personnel loyalty, management of a loyalty programme in the field of air transport.

Article 8(1)(b) EUTMR

The goods and services

- The contested goods in Class 9 are dissimilar to the earlier mark’s services for which genuine use has been proven. Firstly, by their nature, goods are generally dissimilar to services. The latter are intangible while the former are tangible. Secondly, the contested goods are not complementary to the opponents’ services, other than that software can be used for or in connection with any services nowadays, however, this is insufficient to find a similarity. The respective goods and services serve different purposes and are not in competition with each other either. Finally, they are usually manufactured or provided by different entities, namely in the case of the contested goods, by software companies, and in the case of the opponents’ services, by specialised advertising agencies.
- The contested services in Class 35 are similar as they usually coincide in producer, relevant public and distribution channels.
- The contested services in Class 39 are transport and travelling arrangement services. While the latter have a point of connection to the opponents’ services as these concern air transport, this connection is not sufficient to conclude a similarity. They do not coincide with the opponents’ services, whether in terms of nature, purpose, method of use, distribution channels or providers. Transport services are offered by transportation companies and travelling arrangement services by travel agencies. By contrast, the opponents’ services are offered by airlines.
- The same applies to services for *providing food and drink; providing temporary accommodation* in Class 43. The first are offered by restaurants while the latter are provided by hotels and private individuals renting out their property. Finally, the contested services in Classes 39 and 43 are neither complementary nor in competition with the opponents’ services. Therefore, and taking further into account that the opponents have not provided any argument allowing to conclude otherwise, the services at issue are dissimilar.

Relevant public

- The services at issue are directed at business customers with specific professional knowledge or expertise. The public’s degree of attentiveness may vary from average to high, depending on the price, specialised nature, or terms and conditions of the goods and services purchased.
- It is appropriate to focus the comparison of the signs on the English-speaking part of the public such as the public in Ireland and Malta.

The signs

- The signs coincide in the elements ‘FLY’ and ‘BLUE’. The signs are visually and aurally similar to an average degree, whereas from the semantic perspective the marks are highly similar.

Global assessment

- There is a likelihood of confusion on the part of the English-speaking part of the public. The opposition is partly well founded with respect to the similar services.
- The opposition is rejected under Article 8(1)(b) EUTMR with respect to the goods and services found to be dissimilar.
- Since the opposition is partially successful on the basis of the inherent distinctiveness of the earlier mark, there is no need to assess the enhanced degree of distinctiveness of the earlier mark due to its extensive use as claimed by the opponents and in relation to similar services. The result would be the same even if the earlier mark enjoyed an enhanced degree of distinctiveness.

Article 8(4) EUTMR

The right under the applicable law

- The opponents relied on online substantiation in their opposition notice but have not submitted a reference to the respective source. Instead, they mention a link to the WHOIS registration website for the domain name ‘flyingblue.com’ (<https://whois.domaintools.com/flyingblue.com>). However, this is not a source for the provisions of the applicable law. As a consequence, the opponents cannot rely on online substantiation.
- The opponents submitted a copy of the provision Article L711-4 from the website ‘legifrance.gouv.fr’, which qualifies as a publication of the relevant legal provisions. However, the excerpt clearly shows that the provision had been repealed at the date the excerpt was submitted. The excerpt shows in the top righthand corner the reference ‘Abrogé par Ordonnance n° 2019-1169 du 13 novembre 2019 - art. 3’, which means in the language of the proceedings ‘Repealed by Ordinance n° 2019-1169 of 13 November 2019 - art. 3’. The French legislator had changed the law by repealing Article L711-4 and revising Article L711-3, which now contains the content of the former Article L711-4 with an explicit reference to domain names and the conditions of their protection in lit. 4 of Article L711-3.
- Consequently, the opponents have not submitted a clear identification of the contents of the national law relied upon. They provided neither the reference to the Article L711-3 of the French Intellectual Property Code nor the content of this provision.
- In addition, the right to the domain name in French law has been strongly influenced by French case-law. However, the opponents merely very generally and superficially

refer to the existence of that case-law but have not submitted examples of this case-law or explained how the decisions are applied in the present case. It is therefore doubtful whether the legal argument is sufficient, but this can be left open for the reasons given above.

- Therefore, the opposition is not well founded under Article 8(4) EUTMR.

10 On 29 August 2022, the opponents 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 28 October 2022.

11 In its response received on 22 November 2022, the applicant requested that the appeal be dismissed.

Submissions and arguments of the parties

12 The arguments raised in the statement of grounds by the opponents may be summarised as follows:

Proof of use

- The genuine use of the mark should be recognized not only in relation to the services of Class 35 but also in relation to the other goods and services claimed and even more specifically with the complementary and inseparable services claimed in Class 39.
- The mark is used in connection with a loyalty program offered to the opponents' consumers, primarily through magnetic cards and online and mobile software applications, falling in Class 9 but also through the FLYING BLUE site, the FLYING BLUE store and some platforms such as YouTube falling in Class 38. All these goods and services are even more specifically closely linked to the main activity of the opponents, that is to say offering to consumers passenger and cargo transportation, warehousing and packing, travel arrangements, vehicle rental and many other related services falling in Class 39. Consequently, the trade mark FLYING BLUE is notably and especially used for transportation services, travel reservations, travel arrangement given that with FLYING BLUE miles (won through the loyalty program), it is possible to book travel or transportation tickets and trips/vacations at low prices.

Comparison of the goods

- The services 'advertising, marketing and promotion, services related to customer loyalty programs' are offered strictly in the context of the provision of transport services. These services are essential to each other. In other words, without transportation services, the customer loyalty programs services would be meaningless. As such, these services are clearly complementary.

- The contested decision erred in its finding that customers first choose the airline before choosing the linked frequent flyer program, which would therefore exclude any risk of confusion with another trade mark because customers could only choose the frequent flyer program linked to the airline. Customers will most of the time look at the benefits/bonuses of joining the frequent flyer program before choosing the corresponding airline.
- The advertising of the FLYING BLUE loyalty service is independent from the one made by the opponents (the airlines AIR FRANCE and KLM), as it can be seen via the Facebook and Instagram pages linked to Flying blue (Annexes A and A’).
- The contested goods and services are related to passenger transportation services. In fact, transport of goods, the provision of temporary accommodation or the provision of catering services, are complementary to passenger transport services. For instance, no consumer will seek temporary accommodation services on the applicant’s website, except in the context of purchasing an airline ticket.
- The earlier mark’s services in Class 35 for which the genuine use has been acknowledged by the contested decision can only be obtained in a similar context, namely the purchase of an air transport service. As such, all these goods are in fact in the same market, have the same final consumer, may have the same suppliers and can be purchased through the same distribution channel.
- In view of the above, there is a great similarity and complementarity between the services of Class 35 for which the Office has recognized the use of the trade mark FLYING BLUE and the contested goods and services claimed and more specifically the services of Class 39.
- The contested mark is confusingly similar to the earlier mark.
- Given the similarity of the goods and services as well as the marks, the fact that the parties operate in the same sector, there is a real risk that consumers will believe that the airline BLUE AIR has reentered or will soon re-enter the opponents’ SkyTeam alliance.

Article 8(4) EUTMR

- According to Article L711-3 of the French Intellectual Property Code (Annex B), it is clearly specified that a trade mark infringing earlier rights having effect in France, in particular a domain name, shall not be validly registered and, if registered, may be declared invalid.
- The only conditions for its enforceability against a subsequent trade mark are that the domain name is registered and used, that its scope is not only local and that there is a risk of confusion in the public mind.
- The domain name ‘flyingblue.com’ has been registered since 2003 (Annex C) and is being continuously used commercially by the opponents to offer their goods and services, at the European level. Its scope is therefore not only local.

- The products and services offered by the opponents through the website associated with the ‘flyingblue.com’ domain name and those of the applicant are aimed at the same field of activity, therefore the same market.
- The domain name is a complete incorporation of the opponents’ earlier mark, and therefore its ability to indicate the commercial origin of the designated goods and services is intrinsic, which is an additional factor to consider in this case.
- The likelihood of confusion between the domain name ‘flyingblue.com’ and the trade mark FLYBLUEAIR.COM is therefore real.
- Reference is made to the following case-law:

*“If it is true that a domain name can be part of the prior rights opposable to the person filing a trademark, even though it is not expressly mentioned in the remuneration of the aforementioned article L. 711-4 (old version), it is still necessary that, in addition to the registration or hosting formalities, it has given rise to actual exploitation in the form of an Internet site” (Tribunal de grande instance, Paris, 3rd chamber, 2nd section, 17 January 2014 - n° 11/03304 – **page 11**) (Annex E)....*

*...and that it benefits from knowledge throughout the national territory (...) Regarding the website hosted under the domain name <ecobank.com> registered since 1998, it should be considered that given its nature, this distinctive sign is intended to be used throughout French territory as soon as it is accessible there (...) it must be demonstrated that the site operates services aimed at the French public and consequently perceived as services constituting the object of the actual activity of the legal person on national territory, [Cour d’Appel Paris, 5 July 2013, n° 12/15747] – **pages 10 and 11**) (Annex F)*

The not only local scope of signs in use must be assessed not only geographically but also economically. Thus, the sign must be “effectively used in a sufficiently significant manner in the course of trade” [CJEU, 29 March 2011, Case C-96/09P].

*“As the list of prior rights defined in the article L711-4 (old version) is not exhaustive, it is accepted in case law that a prior domain name constitutes one of these rights”.
Home Court of Appeal, Nancy, 1st civil chamber, 13 December 2021 - n° 21/00757 – **page 6** (Annex G)*

*“It is accepted that in the event of a conflict between a domain name and a subsequently registered trademark, the anteriority of the domain name will not be considered with regard to its reservation but by taking into account its actual use”
Court of Appeal, Bordeaux, 1st civil chamber, 7 March 2022 - n° 21/04492 – **page 14** (Annex H).*

- In the context of where there is a strong similarity between the conflicting signs and they are used for the conduct of the same commercial activity in relation to transportation services, the registration of the trade mark FLYBLUEAIR.COM by the applicant clearly infringes the opponents’ rights.

13 The arguments raised in response by the applicant may be summarised as follows:

Article 8(1)(b) EUTMR

- The fact that the earlier mark has been genuinely used for ‘[p]romotional activities aimed at obtaining customer and personnel loyalty, management of a loyalty program in the field of air transport’ does not give protection for the promoted activities as such, namely transportation. Therefore, no link of similarity can be established between on the one hand ‘promotional activities’ and on the other, accommodation services or goods in Class 9. Indeed, the fact that the opponents’ ‘customer loyalty programs’ may result in obtaining additional miles, points and

discounts for various goods and services does not equal and count as the use for these final goods and services, but merely for ‘customer loyalty programs’.

- Customer loyalty programs must have a per se essential connection to the transport services, as does for instance beer (Class 32) and pubs (Class 43) have. There can be numerous relations with most of the product classes with regards to ‘customer loyalty programs’, without implying and implicit essential relation to all these classes. This does not constitute a monopoly for all these goods and services which can be potentially linked to ‘loyalty programs’.
- Since the nature of ‘loyalty programs’ is to become a member after choosing the transport provider (which has its house mark known by consumers), the risk of confusion can be excluded.

Article 8(4) EUTMR

- The invoked domain name is not a ‘.fr’ one (a French Registry domain name) but is in fact a ‘.com’ one (ICANN governed) and secondly it is noted (from the opponents’ filed Annex C – from the submitted statement of grounds) that the Registrant and Admin Organization for this domain name is in fact Koninklijke Luchtvaart Maatschappij which is an NL (The Netherlands) company and not a French registered company. Therefore, the French Law does not constitute the applicable Law in the sense of Article 8(4) EUTMR and thus the provisions invoked by the opponents and the case-law filed in support thereof are not to be taken into consideration.
- The Benelux Convention on Intellectual Property BCIP (applicable to Dutch Intellectual Property rights) does not have a similar provision as the one conveniently invoked by the opponents from the French Intellectual Property Code. Moreover, as expressly stated in its BOIP Opposition Guidelines, page 19 (Annex 1 of this appeal response), as available on The Benelux Office for Intellectual Property (BOIP) web-site www.boip.int:

4.5.4 Invoked earlier trade name or domain name registration by the opponent

In opposition proceedings the opponent cannot invoke an earlier trade name or domain name registration since no rights may be invoked other than the trademark rights forming part of the dispute (see Article 2.14(1) BCIP and Rule 1.16(1)(c) IR).

- The dispositions of Article L711-4 (repealed on November 13, 2019) differ from the one in force now, Article L711-3. Two of the case-law decisions filed by the opponents in support of their arguments were taken when the old provision was in force, Article L711-4, Annex E (17 January 2014) and Annex F (5 July 2013).
- The opponents erroneously refer to comparisons of the use of the trade marks, alleged commercial use connections and implications as well as competition related assessments.

Reasons

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

Scope of the appeal

15 In the notice of appeal the opponents challenged the contested decision in its entirety. However, pursuant to Article 67 EUTMR, an appeal can only be filed to the extent that the party is negatively affected by the contested decision. It follows that the appeal is limited to the goods and services for which the contested decision rejected the opposition, namely the following:

Class 9: Application software; Mobile apps; Computer software applications, downloadable; Downloadable application software for smart phones; Downloadable applications for use with mobile devices; Electronic publications, downloadable; all these products excluding the ones in connection with customer loyalty programs.

Class 39: Transport; Wrapping and warehousing; Travel arrangement; all these services excluding the ones in connection with customer loyalty programs.

Class 43: Services for providing food and drink; Providing temporary accommodation; all these services excluding the ones in connection with customer loyalty programs.

16 On the other hand, the applicant did not file an appeal or a response seeking a decision annulling or altering the contested decision on a point not raised in the appeal pursuant to Articles 68(2) EUTMR and Article 25 EUTMDR.

17 Consequently, the goods and services under the appeal are those listed in paragraph 15 above. The contested decision is final insofar the opposition was upheld for the services applied for in Class 35.

Proof of use

18 The question concerning proof of genuine use of the earlier mark must be settled before a decision is taken on the opposition itself and is, in that sense, a ‘preliminary issue’ (28/04/2021, T-300/20, ACCUSÌ, EU:T:2021:223, § 20).

19 The specific and preliminary nature of that issue stems from the fact that the analysis of genuine use leads to a determination whether, for the purposes of the examination of the opposition, the earlier mark can be deemed to be registered in respect of the goods or

services concerned. This issue is therefore outside the scope of the examination of the opposition itself, based on the existence of a likelihood of confusion (28/04/2021, T-300/20, ACCUSI, EU:T:2021:223, § 21).

- 20 In the present case the opponents were required to prove that the trade mark on which the opposition is based was put to genuine use in the European Union from 30 June 2015 to 29 June 2020 with respect to the goods and services in Classes 9, 35, 36, 38 and 39, as listed in paragraph 5 above.
- 21 The contested decision found that the earlier mark has been genuinely used in relation to *promotional activities aimed at obtaining customer and personnel loyalty, management of a loyalty programme in the field of air transport* in Class 35.
- 22 The opponents challenge the final finding on proof of use alleging that the genuine use of the mark should be recognized not only in relation to the services in Class 35 but also in relation to the remaining goods and services claimed, particularly for the complementary and inseparable services in Class 39.
- 23 Firstly, the Board duly notes that the contested decision is vitiated by an error since the examiner seems to have overlooked that the earlier mark is registered also with respect to the services in Classes 38 and 39, and assessed the claim for proof of use only in relation to the goods and services in Classes 9, 35 and 36 (reference is made to page 3 of the contested decision).
- 24 Nevertheless, after reviewing the evidence on file, it is true that the opponents' 'FLYING BLUE' is in essence a frequent flyer programme (reference is made to the observations filed by the opponents on 30 September 2020, page 3).
- 25 It is a common knowledge that a frequent-flyer program is a loyalty program offered by an airline which is designed to encourage airline customers enrolled in the program to accumulate 'points', or as referred to by the opponents in their observations dated 30 September 2020, page 8, 'miles' (by flying with a particular airline, spending money at associated retail outlets, car hire companies, hotels, restaurants or other associated businesses) which may then be redeemed for air travel (transport, travel arrangement) or other goods and services (restaurants, hotels i.e. temporary accommodation), the latter rendered in partnership with the air company. These services are rendered by means of magnetic cards (loyalty cards, payment cards, wallet cards, luggage tags) or by mobile applications (reference is made to Annexes A and H, respectively).
- 26 Taking into account the different nature of a wider range of activities rendered within the loyalty program, proof of use can only be admitted for the principal service, otherwise there would be a risk of extending the protection afforded to earlier marks to a disproportionately large group of goods and services (by analogy, 17/03/2021, T-114/20, URSUS KAPITAL, EU:T:2021:144, § 36, citing, 24/04/2018, T-831/16, ZOOM / ZOOM et al., EU:T:2018:218, § 49, 55). This is all the more true, given as shown by the opponents themselves, the ancillary services, except air transport, are rendered by third party companies, i.e. the opponents' business partners (reference is made to both the observations filed by the opponents on 30 September 2020, page 8 and Annex H). Therefore, in this case, since these (goods) and services are only ancillary to the principal 'promotional activities aimed at obtaining customer and personnel loyalty, management

of a loyalty programme in the field of air transport' offered to the public, genuine use of the earlier mark may only be admitted for the latter.

- 27 As regards the issue of whether or not, the genuine use has been established with respect to transportation and related services, as claimed in the registration in Class 39, for reasons of procedural economy the Board will initially examine the opposition with respect to the services for which the genuine use has been established in the contested decision, namely *promotional activities aimed at obtaining customer and personnel loyalty, management of a loyalty programme in the field of air transport* in Class 35. The Board will only reassess the proof of use in the context of Class 39 services if the outcome of the case depends on this finding.

Article 8(1)(b) EUTMR

- 28 In accordance with Article 8(1)(b) EUTMR, upon opposition by the proprietor of an earlier trade mark, the trade mark 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.
- 29 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). 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 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).
- 30 Likelihood of confusion must be assessed globally, taking into account all factors relevant to the circumstances of the case (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 16; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 18).

Relevant public and its level of attention

- 31 In the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of goods and services concerned. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 17, 26). It should, however, be recalled that the average consumer's level of attention is likely to vary according to the category of goods or services in question (20/10/2011, T-189/09, P, EU:T:2011:611, § 26; 13/02/2007, T-256/04, Respicur, EU:T:2007:46, § 42).
- 32 The relevant public is composed of users likely to use both the services covered by the earlier mark and the goods and services covered by the mark applied for (01/07/2008, T-328/05, Quartz, EU:T:2008:238, § 23).

- 33 The earlier mark's services are primarily directed at the public at large, i.e. any kind of travellers whose level of attention may vary from average to high depending on the circumstances affecting their choice. In this respect the Board notes that the contested decision erred in its finding that the services at issue are aimed at business customers with specific professional knowledge or expertise. Indeed, the possible purpose of a trip, as the case might be – for business or leisure – is irrelevant for the purpose of defining the relevant public, since that public is defined by taking into account the nature and purpose of the service itself, rather than the subjective motivations of the consumers for using that service. In any event, the public at large encompasses those travelling for business.
- 34 The services applied for are also principally aimed at the public at large. The public's degree of attentiveness may vary from average to high (17/09/2012, R 588/2012-4, THOMPSON HOTELS / THOMSON et al.). In that regard it has to be taken into account, that there exists a very wide price range in the relevant field of travel arrangements including transport and accommodation as well as restaurant services, ranging from very cheap and affordable offers, to very exclusive and expensive offers. Likewise, while for some consumers, eating out or renting an accommodation might be a rare venture, others eat out and travel on a regular basis. As regards the goods in Class 9, those target partly the public at large and partly professionals, and the level of attention will vary from average to high (24/02/2021, T-56/20, Vroom, EU:T:2021:103, § 20 et seq.).
- 35 According to the case-law the likelihood of confusion must be assessed by reference to the public which is least attentive (15/07/2011, T-220/09, ERGO, EU:T:2011:392, § 21), which is in the present case the general, normally attentive public.
- 36 Since the earlier mark is a European Union trade mark the relevant territory for the assessment of the likelihood of confusion is the European Union.
- 37 The unitary character of the European Union trade mark means that an earlier European Union trade mark can be relied on in opposition proceedings against any application for registration of a European Union trade mark that would adversely affect the protection of the first mark, even if only in relation to the perception of consumers in part of the European Union (18/09/2008, C-514/06 P, Armafoam, EU:C:2008:511, § 57). Therefore, a likelihood of confusion for only part of the relevant public of the European Union is sufficient to reject the contested application. Furthermore, even if a likelihood of confusion only exists for part of the relevant public, namely a non-negligible part of relevant consumers, such a finding is sufficient to establish a likelihood of confusion (04/07/2014, T-1/13, GLAMOUR, EU:T:2014:615, § 36).
- 38 Accordingly, the Board following the contested decision's undisputed approach will focus its assessment on the English-speaking part of the public in Ireland and Malta who will understand the meaning of the elements of the marks.

Comparison of the marks

- 39 The contested decision found the marks under comparison visually and aurally similar to an average degree whereas from the semantic perspective, the marks were considered at least similar to an average degree.
- 40 The opponents, who are the appellants in the present case, do not dispute these findings. Conversely, they explicitly agreed with the contested decision's findings regarding the similarity between the conflicting signs.
- 41 In the absence of arguments to dispute the contested decision's findings, the Board may lawfully adopt the reasoning of the contested decision, which then becomes an integral part of the Board's own decision (13/09/2010, T-292/08, *Often*, EU:T:2010:399, § 47-49). The Board sees no obvious reason to reverse the contested decision's correct findings and hereby endorses the contested decision's reasoning and findings regarding the comparison of the marks at issue and their degree of similarity.

Comparison of the goods and services

- 42 In assessing the similarity between the goods or services in question, all the relevant features of the relationship between those goods or services should be taken into account. Those factors include, inter alia, their nature, their intended purpose, their method of use, their end-users and whether they are in competition with each other or are complementary (29/09/1998, C-39/97, *Canon*, EU:C:1998:442, § 23). Other factors may also be taken into account such as, for example, the distribution channels of the goods and services concerned (11/07/2007, T-443/05, *Pirañam*, EU:T:2007:219, § 37). The reference point is whether the relevant public would perceive the relevant goods and services as having a common 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).
- 43 Complementary goods and services are those which are closely connected in the sense that one is indispensable or important for the use of the other so that consumers may think that the same undertaking is responsible for the production of both goods or rendering services, respectively (01/03/2005, T-169/03, *Sissi Rossi*, EU:T:2005:72, § 60, confirmed by 18/07/2006, C-214/05 P, *Sissi Rossi*, EU:C:2006:494). On the other hand, the complementary character of goods or services does not just encompass any situation in which two goods or services can be used alongside each other, but requires that there is a close connection between the two goods or services, in the sense that one is indispensable or important for the use of the other (7/02/2006, T-202/03, *Comp USA*, EU:T:2006:44, § 46; 11/07/2007, T-443/05, *Pirañam*, EU:T:2007:219, § 48).
- 44 Given that Nice Classification exclusively serves administrative purposes, goods and services may not be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification (Article 28(7) EUTMR, 09/07/2015, R 863/2011-G, *MALTA CROSS + INTERNATIONAL + FOUNDATION*

(fig.) / Malteserkreuz (fig.), § 56; 17/10/2013, C-597/12 P, Zebexir, EU:C:2013:672, § 27; 10/07/2014, C-420/13, Netto Marken Discount, EU:C:2014:2069, § 8).

45 The system for bringing opposition proceedings on the basis of a relative ground of refusal is based on the principle enshrined in Article 95(1) EUTMR, according to which in proceedings relating to relative grounds for refusal of registration, the Office shall be restricted in this examination to the facts, evidence, and arguments provided by the parties and the relief sought. The Board may not, merely on the ground that the comparison between the contested goods and services constitutes a matter of law, examine the underlying legal framework by relying on facts that have not been raised by the parties.

46 However, nothing prevents the Office from taking account of facts that are well known, that is, which are likely to be known by anyone or which may be learnt from generally accessible sources (22/06/2004, T-185/02, Picaro, EU:T:2004:189, § 29), or which stem from the practical experience generally acquired from the marketing of general consumer goods, which are likely to be known by any person and in particular by consumers of those goods or services. In such a case, the Board of Appeal is not even required to submit examples of that practical experience (03/02/2011, T-299/09 & T-300/09, Gelb-Grau, EU:T:2011:28, § 36 and the case-law cited).

47 The goods and services applied for which are at issue in the present appeal are the following:

Class 9: Application software; Mobile apps; Computer software applications, downloadable; Downloadable application software for smart phones; Downloadable applications for use with mobile devices; Electronic publications, downloadable; all these products excluding the ones in connection with customer loyalty programs.

Class 39: Transport; Wrapping and warehousing; Travel arrangement; all these services excluding the ones in connection with customer loyalty programs.

Class 43: Services for providing food and drink; Providing temporary accommodation; all these services excluding the ones in connection with customer loyalty programs.

48 The services covered by the earlier mark services with respect to which the genuine use has been initially proven are the following:

Class 35: Promotional activities aimed at obtaining customer and personnel loyalty, management of a loyalty programme in the field of air transport.

49 As already mentioned above, it is a common knowledge that the opponents' frequent-flyer program is a loyalty program offered by an airline which is designed to encourage airline customers enrolled in the program to accumulate 'points' (by flying with a particular airline, spending money at associated retail outlets, car hire companies, hotels, restaurants or other associated businesses) which may then be redeemed for air travel (transport, travel arrangement) or other goods and services (restaurants, hotels i.e. temporary accommodation). These services are rendered by means of magnetic cards (loyalty cards, payment cards, wallet cards, luggage tags) or by mobile applications (reference is made to Annex A).

- 50 In the present case, despite the fact that the genuine use has not been acknowledged with respect to ancillary goods and services rendered by the opponents in order to prevent extending the protection afforded to a disproportionately large group of goods and services (by analogy, 17/03/2021, T-114/20, *URSUS KAPITAL*, EU:T:2021:144, § 36, citing, 24/04/2018, T-831/16, *ZOOM / ZOOM et al.*, EU:T:2018:218, § 49, 55), the Board reminds that when assessing the similarity of goods and services for the purpose of ruling on the existence of a likelihood of confusion, it must be assessed whether the relevant consumers would consider that these goods and services may originate from the same or from economically linked undertakings. For that purpose, one of the relevant factors to be taken into account is whether they are complementary.
- 51 Goods or services which are complementary are those where there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that consumers may think that the responsibility for the production of those goods or provision of those services lies with the same undertaking. That implies that complementary goods or services can be used together, which presupposes that they are intended for the same public (12/07/2012, T-361/11, *Dolphin*, EU:T:2012:377, § 48 and case-law cited therein).
- 52 Therefore, the goods and services may be considered to be complementary, if in the eyes of the relevant public, they belong to a single product or service family and may easily be regarded as components of a general range of products or services capable of having a common commercial origin (04/11/2003, T-85/02, *Castillo*, EU:T:2003:288, § 36). Given the nature the earlier mark's services on the one hand and the contested goods and services, on the other hand, this is the case here.
- 53 The findings below cannot be altered by the applicant's limitation to exclude '*the ones in connection with customer loyalty programs*'. Indeed, the relevant question is whether the public may confuse the origin of the goods and services on the market which, for the reasons given below and not disproven, cannot be excluded in the present case.

Contested goods in Class 9

- 54 Although by reason of their very nature, goods are generally different from services, it nevertheless remains the case that they can be complementary, in the sense that, for example, the maintenance of the goods complements the goods themselves, or that the services may have the same purpose or use as the goods, and thus compete with each other. It follows that, under certain circumstances, even goods and services may be found similar (27/10/2005, T-336/03, *Mobilix*, EU:T:2005:379, § 66).
- 55 As can be seen from the evidence on file (reference is made to Annex A), the opponents' services are rendered by means of magnetic cards (loyalty cards, payment cards, wallet cards, luggage tags) or mobile applications (virtual mobile cards).
- 56 Thus, it is reasonable to conclude that the contested *application software; mobile apps; computer software applications, downloadable; downloadable application software for smart phones; downloadable applications for use with mobile devices* serve as means for loyalty program operations via the internet or other means of telecommunication.

- 57 In this respect, the Board notes that even though it is true that the relevant public is well aware that the opponents do not actually create the applications themselves, that same public is also aware that the creation of such applications is typically subcontracted to IT specialists, insofar as they are necessary to make the services available to the public. Whether the creation of the applications is made internally or subcontracted to IT specialists, the fact remains that such applications are necessary in order for the opponents to make their services available to the public and therefore, they are complementary to them. In a similar vein, the contested *electronic publications, downloadable*, which as shown by the opponents in their evidence (reference is made to Annex D), are necessary to provide ‘promotional activities aimed at obtaining customer and personnel loyalty, management of a loyalty programme in the field of air transport’. As it can be seen from the evidence on file, such electronic publications as well as applications are downloadable from the opponents’ website (reference is made to Annex A and D).
- 58 Bearing in mind the above considerations, these goods and services have a relevant degree of complementarity, usually originate from the same (or economically linked) producers and may coincide in distribution channels and relevant public. Thus, they are considered similar at least to a low degree.
- 59 The above findings regarding at least a low degree of similarity between the contested goods in Class 9 and the opponents’ services in Class 35 cannot be altered by applicant’s limitation for the reasons given above (reference is made to paragraph 53 above).

Contested services in Classes 39 and 41

- 60 It is a well-known fact that loyalty schemes typically offer advantages for ancillary services provided by air-carriers, such as passenger and cargo transportation, cargo storage and packaging, travel arrangements, including temporary accommodation, vehicle rental or services for providing food and drink, such as airport VIP lounges etc. This well-known fact is also confirmed by the evidence filed by the opponents to prove genuine use of the earlier mark (Annexes A-N).
- 61 In light of the above, it is reasonable to conclude that there is a relevant degree of complementarity between on the one hand the earlier mark’s services and on the other, the contested *transport; wrapping and warehousing; travel arrangement* in Class 39 and *services for providing food and drink; providing temporary accommodation* in Class 41. Indeed, the earlier mark’s services are obviously not rendered *in abstracto*, but *in concreto*, i.e. in relation with specific activities, as the ones applied for. As explained above and by means of an example, a frequent flyer by gaining points (opponents’ miles) may use it for ‘free’ or discounted or upgraded flights (including free storage or packaging), accommodation or access to airport VIP lounges.
- 62 Therefore, the contested services in Classes 39 and 41, are not only aimed at the same public (12/07/2012, T-361/11, Dolphin, EU:T:2012:377, § 48 and case-law cited therein) but also in the eyes of the relevant public, they may easily be regarded as components of a general range of products or services capable of having a common (or economically linked) commercial origin (04/11/2003, T-85/02, Castillo, EU:T:2003:288, § 36).

63 Consequently, the services under comparison are at least similar to a low degree.

Overall assessment of the likelihood of confusion

64 According to established case-law, the likelihood of confusion must be appreciated globally, taking into account all factors relevant to the circumstances of the case (11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 22; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 16; 22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 18).

65 Such a global assessment of a likelihood of confusion implies some interdependence between the relevant factors, and in particular a similarity between the trade marks and between the goods or services. Accordingly, a greater degree of similarity between the goods may be offset by a lower degree of similarity between the marks, and vice versa (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 20; 11/11/1997, C-251/95, Sabèl, EU:C:1997:528, § 24; 29/09/1998, C-39/97, Canon, EU:C:1998:442, § 17).

66 In addition, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his or her trust in the imperfect picture of them that he or she has kept in his or her mind (22/06/1999, C-342/97, Lloyd Schuhfabrik, EU:C:1999:323, § 26).

67 In the present case, the goods and services at issue are at least similar to a low degree. The signs are visually and aurally similar to an average degree whereas conceptually, the signs are at least similar to an average degree. Finally, the distinctiveness of the earlier trade mark is normal, as found by the contested decision and not disputed by the parties.

68 Even though, the actual commercial activities of the respective parties are not of relevance for the assessment (22/04/2008, T-233/06, El tiempo, EU:T:2008:121, § 30; 23/10/2002, T-388/00, ELS, EU:T:2002:260, § 50; 16/06/2010, T-487/08, Kremezin, EU:T:20), in the case at hand, it is not completely without relevance to consider, merely for illustrative purposes, what allowing the contested goods and services would imply in practice.

69 The applicant, as shown by the opponents, is the shareholder of AIRLINE INVEST S.A., which in turn is a shareholder of BLUE AIR AVIATION S.A., a company operating in the same air transport as the opponents, namely AIR FRANCE and KLM belonging to SkyTeam alliance.

70 Taking into account the notion of imperfect recollection and the interdependence of the various factors, there exists a likelihood of confusion, including association, within the meaning of Article 8(1)(b) EUTMR on at least part of the relevant English-speaking public at large. Therefore, a significant part of the relevant consumers (frequent flyers) of the goods and services at issue, when seeing the marks under comparison, could easily be led to believe that the parties share the same loyalty program or that the mark applied for has re-entered or will soon re-enter the opponents' SkyTeam alliance. Thus, at least a substantial part of relevant public is likely to at least associate the marks.

71 Since the opposition is successful under Article 8(1)(b) EUTMR, there is no need to enter into analysis under Article 8(4) EUTMR.

72 In light of the above, the appeal is upheld, the opposition succeeds in its entirety, and the contested application is also refused for all the contested goods and services that fall within the scope of the present appeal.

Costs

73 Pursuant to Article 109(1) EUTMR and Article 18 EUTMIR, the applicant, as the losing party, must bear the opponents' costs of the opposition and appeal proceedings.

74 As to the appeal proceedings, these consist of the appeal fee of EUR 720 and the opponents' costs of professional representation of EUR 550.

75 As to the opposition proceedings, the applicant must reimburse the opposition fee of EUR 320 and the opponents' cost of professional representation of EUR 300. The total amount is fixed at EUR 1 890.

Order

On those grounds,

THE BOARD

hereby:

- 1. Allows the appeal;**
- 2. Partially annuls the contested decision to the extent it rejected the opposition with respect to the goods and services in Classes 9, 39 and 43, and refuses the contested application for all the goods and services applied for;**
- 3. Orders the applicant to bear the opponents' costs incurred in the appeal and opposition proceedings in the amount of EUR 1 890.**

Signed

G. Humphreys

Signed

M. Bra

Signed

A. González Fernández

Registrar:

Signed

H. Dijkema

