

BL O/0563/24

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION No. 3912489
BY DXC TECHNOLOGY COMPANY
TO REGISTER THE TRADE MARK:

ESSENTIAL EVOLUTION

IN CLASSES 35, 36, 37, 42 AND 45

-AND-

THE OPPOSITION THERETO UNDER No. 600003009
BY EVOLUTIQ GMBH

Background and pleadings

1. On 17 May 2023, DXC Technology Company (“**the Applicant**”) applied to register the trade mark ‘ESSENTIAL EVOLUTION’ in the UK, claiming a priority date of 16 May 2023 from its USA Trade Mark No. 97938409. It was accepted and published in the Trade Marks Journal on 2 June 2023. Registration is sought for a large variety of services in Classes 35, 36, 37, 42 and 45. The applied-for services are set out at Annex 1 of this decision.

2. On 1 September 2023, Evolutiq GmbH (“**the Opponent**”) opposed the application under section 5(2)(b) of the Trade Marks Act 1994 (“**the Act**”). The opposition is directed at all the applied-for services.

3. The Opponent relies on its UK trade mark registration ‘EVOLUTIQ’, trade mark number 918130027, which is a comparable trade mark (EU),¹ filed on 30 September 2019 and became registered on 25 January 2020. It is registered in respect of a variety of services in Classes 35, 36, 37 and 41, which are set out at Annex 1 of this decision. The opponent relies on all the services for which its mark is registered.

4. By virtue of its earlier filing date, the trade mark upon which the Opponent relies qualifies as an earlier trade mark pursuant to section 6 of the Act.

5. The Opponent argues that the marks are similar and that the services are identical or similar, giving rise to a likelihood of confusion.

6. The Applicant filed a defence and counterstatement admitting that there is identity between the parties’ respective services in Classes 35 and 36 but denied that there was any similarity between the remaining applied-for services and the Opponent’s services; and it denied that there is any similarity between the respective marks.

7. This is an opposition to which the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013 applies, deemed a ‘Fast Track’ opposition. As there was no use requirement, the Opponent did not file any evidence with its notice of Opposition. No oral hearing was requested and neither party sought leave to file evidence. Only

¹ Following the end of the transition period of the UK’s withdrawal from the EU, all EU trade marks (“EUTM”) registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A ‘comparable trade mark (EU)’ retains the same filing date, priority date (if applicable) and registration date of the EUTM from which it derives.

the Opponent elected to file final written submissions. This decision is therefore taken following a careful consideration of the papers before me.

8. The Opponent is represented by Harrison IP Limited and the Applicant is represented by Withers & Rogers LLP.

Assimilated law

9. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

DECISION

Legislation and Case Law

10. Section 5(2)(b) the Act is as follows:

“5(2) A trade mark shall not be registered if because-

[...]

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade (mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

11. I am guided by the following principles which are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v.*

Thomson Multimedia Sales Germany & Austria GmbH, Case C-120/04, Shaker di L. Laudato & C. Sas v OHIM, Case C-334/05P and Bimbo SA v OHIM, Case C-591/12P:

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

Comparison of services

12. The competing services are set out in their entirety at Annex 1 of this decision.

13. The Applicant has conceded that *“there is identity between the Applicant’s Services in Classes 35 and 36 and the Opponent’s services in Classes 35 and 36”*.²

14. Bearing this concession in mind, I note by way of example, that at least the following services in Classes 35 and 36 are identical:

Class 35

- the Opponent’s *“Providing business management consultancy [...]”* is self-evidently identical to the Applicant’s *“Business management consulting”*;
- the Opponent’s *“Business consultancy and advisory services”* is self-evidently identical to the Applicant’s *“Business consulting”*;
- the Opponent’s *“Consultancy relating to business efficiency”* is self-evidently identical to the Applicant’s *“Consultancy in the field of business efficiency”*

Class 36

- the Opponent’s *“Financial and monetary services, and banking; Consultancy and information in relation to the aforesaid services, included*

² See the paragraph 10 of the Applicant’s Counterstatement included in its Form TM8 filed on 20 November 2023.

in this class” are self-evidently identical to the Applicant’s “*Financial services, namely, providing consulting and information in the fields of finance and financial services; Information services relating to banking, namely, providing banking information*”, or at least they are identical on the principle outlined in *Gérard Meric v Office for Harmonisation in the Internal Market*,³ in which the General Court held to the effect that goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application and vice versa (this principle equally applies to services).

15. Consequently, I will conduct my assessment on the basis that at least some of the respective services are identical.

The average consumer and the nature of the purchasing act

16. Trade mark questions, including the likelihood of confusion, must be viewed through the eyes of the average consumer of the goods and services in question. It is therefore necessary to determine who the average consumer of the respective services is, and how the consumer is likely to select them.

17. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. The word “average” merely denotes that the person is typical,⁴ which in substance means that they are neither deficient in the requisite characteristics of being well informed, observant and circumspect, nor top performers in the demonstration of those characteristics.⁵

18. The average consumer of the respective services will either be a member of the general public or they will be professional users. The services will be selected either online, from brochures, over the phone or even through word of mouth recommendations, therefore visual and aural considerations will both apply.

19. Given the nature and purpose of the respective services it is likely that the average consumer, irrespective of whether they are members of the public or professional

³ Case T- 133/05

⁴ *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), paragraph 60

⁵ *Schutz (UK) Ltd v Delta Containers Ltd* [2011] EWHC 1712, paragraph 98

users, will want to make sure that the services suit their needs and requirements. I therefore consider the average consumer will pay at least a medium to high degree of attention when selecting the respective services, and that the degree of attention in respect of certain services (such as the various financial services) would be on the high end of that scale. For example, even the average consumer of banking services will want to make sure that they are using the correct service provider and will pay a high degree of attention.

Comparison of marks

20. The respective trade marks are shown below:

| Opponent's trade mark | Applicant's trade mark |
|------------------------------|-------------------------------|
| EVOLUTIQ | ESSENTIAL EVOLUTION |

21. It is clear from established case law that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details.⁶ The assessment of likelihood of confusion must be made by considering and comparing the respective marks – visually, aurally and conceptually – as a whole, by reference to the overall impressions created by the marks in the mind of the average consumer, bearing in mind any distinctive and dominant components of the marks.⁷ The Court of Justice of the European Union stated in *Bimbo SA v OHIM*,⁸ that:

“[...] it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

⁶ *Sabel BV v. Puma AG*, Case C-251/95, paragraph 23

⁷ *Ibid.*

⁸ Case C-591/12P, at paragraph 34.

22. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another*,⁹ Arnold J. (as he then was) considered the impact of the judgment in *Bimbo*, on the Court's earlier judgment in *Medion v Thomson*. Making reference to the composite trade mark for which registration was sought, the judge said that *Bimbo* confirmed three points where a composite mark contains an element which is similar to an earlier mark (my emphasis):

“19. The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. [...] there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20. The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. **That includes the situation where the meaning of one of the components is qualified by another component**, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21. The third point is that, **even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion**. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

23. It would be wrong therefore to dissect the trade marks artificially, although it is necessary to take into account the distinctive and dominant components of the marks

⁹ [2015] EWHC 1271 (Ch)

and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

24. The Opponent made the following submissions in its statement of grounds and in its submissions in lieu of a hearing (my emphasis):

- “The marks being compared are ESSENTIAL EVOLUTION and EVOLUTIQ. Visually and phonetically, they are confusingly similar, both containing the string EVOLUTI. The differences between EVOLUTIQ and EVOLUTION are minimal, and **the addition of the word ESSENTIAL in the application is merely a qualifying adjective.**”
- “The Opponent contends that the most distinctive and dominant element of the later mark is the word EVOLUTION. The first word, **ESSENTIAL, is an adjective, and as such, serves to qualify the nature of the second component.** The fact that the earlier mark is not similar with the first word of the later mark does not obviate confusing similarity of the marks.”

25. The Applicant’s counterstatement included the following submissions:

- “the Opponent has claimed that “EVOLUTIQ” has connotations of “Evolution”. The ending of the word “EVOLUTIQ” in fact hinders the possible connotation with the word “EVOLUTION”, as there are other words that it may be alluding to, such as “Evolute”, which is a common term in geometry unrelated to evolution. The difference in the ending of the words creates a conceptual dissonance which makes the marks as a whole dissimilar.”

Overall impression

26. The Opponent’s trade mark consists of the eight letter word ‘EVOLUTIQ’. The overall impression lies in this word.

27. The Applicant’s trade mark consists of two separate nine letter words, the first being the word ‘ESSENTIAL’ followed by the second word ‘EVOLUTION’. The overall impression of the mark therefore lies in the combination of those two words.

28. I note that although the word 'ESSENTIAL' is an adjective, it doesn't mean that it is to be disregarded when assessing the overall impression of the mark. The Opponent's approach would have me disregard that word in favour of a comparison based on the second word 'EVOLUTION'; this stance seems contradictory insofar as the Opponent explicitly acknowledges that the word 'ESSENTIAL' serves to qualify the second word 'EVOLUTION'.

29. It is my opinion that whilst the average consumer will perceive that the applied-for mark consists of two components, I agree with the Opponent that the word 'ESSENTIAL' *"qualifies"* the word 'EVOLUTION', such that the average consumer *"would perceive the composite mark as a unit having a different meaning to the meanings of the separate components."*¹⁰

30. The word 'ESSENTIAL' is therefore not negligible and contributes to the overall impression of the applied-for mark. The mark will therefore be perceived as a whole and I proceed with the comparison on that basis.

Visual comparison

31. The word 'ESSENTIAL' forms the first part of the Applicant's mark, this word is not present in the Opponent's mark and represents a point of visual dissimilarity. The second word of the Applicant's mark shares the same first seven letters as the Opponent's mark i.e. E, V, O, L, U, T and I, in that order. This represents a point of visual identity. However, this sequence of letters in the Opponent's mark is followed by the letter Q, forming the invented word 'EVOLUTIQ', whereas the Applicant's mark ends in the letters O and N, forming the recognisable word 'EVOLUTION'. The endings represent a point of visual dissimilarity.

32. Overall, the marks are similar to a low degree owing to the presence of the word 'ESSENTIAL' in the Applicant's mark, and the different endings of 'Q' and 'ON'.

Aural comparison

33. The Applicant's mark is made up of ordinary words that would be pronounced in their ordinary ways. With regard to the word 'EVOLUTION', I note that it can be

¹⁰ Ibid.

pronounced one of two ways i.e. either 'EH-VOH-LOO-SHUN' – where the 'E' is pronounced as 'EH' (the same as in 'REVOLUTION' for example), and the other is 'EE-VOH-LOO-SHUN' – as though there is a double 'EE' at the beginning.

34. The Opponent's mark is an invented word, therefore, without any evidence I cannot say with any degree of certainty how it should be pronounced, even more so since words ending in the letter 'Q' are not seen in the English language, and therefore having a word ending in 'Q' does not follow any grammatical rules of the English language that I am aware of – the letter 'Q' being conventionally followed by the vowel 'U' in English words for example.

35. The Opponent makes no submissions as to how it considers its mark will be pronounced. The only submissions I have from the Opponent are that the marks are *“phonetically [...] confusingly similar, both containing the string EVOLUTI.”* The Applicant submits that *“the word 'EVOLUTIQ' will be pronounced 'EE-VOH-LOO-TEEK’”*. I agree with the Applicant that this is one possible pronunciation. It also could potentially be pronounced in several other ways, such as:

- 'EE-VOH-LOO-TICK' / 'EH-VOH-LOO-TICK';
- 'EE-VOH-LEW-TEEK' / 'EH-VOH-LEW-TEEK;
- 'EE-VOH-LOO-TEE-KEW' / 'EH-VOH-LOO-TEE-KEW'; and
- 'EE-VOH-LEW-TEE-KEW' / 'EH-VOH-LEW-TEE-KEW'

where the letter 'Q' at the end of the last two examples is pronounced as the letter 'Q' (i.e. 'KEW').

36. Most significantly, I note that despite the shared string 'EVOLUTI', the letters 'TI' in the Applicant's mark combine with the letters 'ON' (i.e. 'TION') to form the phonetically well-known sound 'SHUN' in the English language, and therefore these letters cannot be separated from the letters 'ON' to form a different sound. For example, the word 'EVOLUTION' is not pronounced 'EE-VOH-LOO-TEE-ON'. Whereas the 'TI' in the Opponent's mark can be pronounced in several ways as I have already set out, as they are not followed by the letters 'ON'.

37. Irrespective of which of the possible pronunciations of the Opponent's mark occurs, I consider the words 'EVOLUTIQ' and 'EVOLUTION', at best, only coincide

phonetically with regard to the pronunciation of the first five letters 'EVOLU', representing the first three syllables in both words e.g. 'EE-VOH-LOO' (which is in any event in line with the Applicant's submissions).

38. The presence of the word 'ESSENTIAL' in the Applicant's mark (which falls at the beginning of the mark) has no counterpart in the Opponent's mark; and owing to my finding that the words 'EVOLUTIQ' and 'EVOLUTION' only have, at best, the first three syllables in common, these factors combined lead me to conclude that the overall aural similarity is very low.

Conceptual comparison

39. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.¹¹ The Opponent submits that: "*conceptually, the marks are also similar, as EVOLUTIQ has connotations of Evolution. The same idea is sparked in the consumer's mind*"; and that "*the opponent accepts that the words EVOLUTION and EVOLUTIQ have different endings, however, the general impression left on the consumer by both words is undoubtedly "evolution".*"

40. However, the fact that the first seven letters of the words 'EVOLUTIQ' and 'EVOLUTION' are identical is not necessarily sufficient to identify conceptual similarity.¹² I have no evidence before me to suggest that the average consumer would perceive 'EVOLUTIQ' as alluding to the word 'evolution'. My primary finding is that it is an invented word which does not have an immediately discernible concept.

41. Regarding the Applicant's mark, it is made up of two ordinary English words which on their own have a separate conceptual meaning to that which they have when combined. For example, 'ESSENTIAL' on its own, in the context of the services would convey a meaning that the services are necessary i.e. a consumer cannot do without them; the word 'EVOLUTION' on its own, conveys the concept of growing and developing. However, when combined they convey the conceptual message of a fundamental or necessary adaptation to something, which in the context of the Class

¹¹ This is highlighted in numerous judgments of the General Court and the CJEU including *Ruiz Picasso v OHIM* [2006] E.C.R. I-643; [2006] E.T.M.R. 29.

¹² See words to that effect *Enercon GmbH v OHIM*, T-472/07, at [43] – a case involving the comparison of the marks TRANSFORMERS ENERGON on the one hand and ENERCON on the other.

35 services for example, conveys the concept that the services help businesses make the necessary changes to grow and develop.

42. As such my primary finding is that I do not consider there to be any conceptual similarity between the respective marks.

43. That said, I note the following finding of the General Court in *Usinor SA v OHIM*:¹³

“62. In the third place, as regards the conceptual comparison, it must be noted that while the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (*Lloyd Schuhfabrik Meyer*, paragraph 25), he will nevertheless, perceiving a verbal sign, break it down into verbal elements which, for him, suggest a concrete meaning or which resemble words known to him (Case T-356/02 *Vitakraft-Werke Wührmann v OHIM – Krafft (VITAKRAFT)* [2004] ECR II-3445, paragraph 51, and Case T-256/04 *Mundipharma v OHIM – Altana Pharma (RESPICUR)* [2007] ECR II-0000, paragraph 57).”

44. Bearing the General Court’s findings in mind, I take into account that, notwithstanding ‘EVOLUTIQ’ is an invented word, it nonetheless shares the same string of seven letters as ‘evolution’, therefore there is a possibility that the average consumer may perceive that it resembles the known word ‘evolution’ and consequently, may attach a meaning to the invented word which derives from that ordinary word.

45. Therefore, if I am wrong in my primary finding, in the alternative, I make a finding that the marks share a low degree of conceptual similarity overall due to the shared string ‘EVOLUTI’ because it may be perceived as alluding to ‘evolution’.

Distinctive character of the earlier mark

46. The degree of distinctiveness of the earlier mark is one of the factors that must be taken into account when assessing whether there is a likelihood of confusion. This is because the more distinctive the earlier mark, the greater the likelihood of confusion

¹³ Case T-189/05.

may be.¹⁴ Although it is the distinctive character of a component that is similar between the marks that is particularly relevant.¹⁵

47. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities.

48. The Opponent makes no claim to enhanced distinctiveness through the use made of the earlier mark, and has filed no evidence of use, therefore I only have the inherent distinctiveness of the mark to consider.

49. My primary finding is that I do not consider the earlier mark to have any allusive qualities with regard to the services for which it is registered, and it also appears to be an invented word such that it enjoys a high degree of inherent distinctive character.

50. However, If I am wrong in my primary finding, and the mark, as a secondary position, has a conceptual meaning derived from the word 'evolution', I consider the average consumer would perceive it as alluding to the services, for example, they help businesses evolve. I therefore find in the alternative, that the earlier mark has a medium degree of distinctive character.

Conclusions on Likelihood of Confusion

51. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them that they have kept in mind.¹⁶ I must also consider the average consumer of the services, the nature of the purchasing process and bear in mind that a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective services and vice versa.¹⁷

¹⁴ *Sabel v Puma*.

¹⁵ *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, paragraphs 38 and 39.

¹⁶ *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.*, Case C-342/97, paragraph 27

¹⁷ *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, Case C-39/97, paragraph 17

52. Making an assessment as to the likelihood of confusion is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused. The global assessment is supposed to emulate what happens in the mind of the average consumer on encountering the later mark with an imperfect recollection of the earlier mark in mind. It is not a process of analysis or reasoning, but an impression or instinctive reaction.¹⁸ The relative weight of the factors is not laid down by law but is a matter of judgement for the tribunal on the particular facts of each case.¹⁹

53. It is well established that confusion can be direct, which is a simple matter of the consumer mistaking one mark for another, or indirect, which is where the consumer notices that the marks are different, but the later mark and the earlier mark share common elements that lead the consumer to conclude that it is another brand of the owner of the earlier mark.²⁰

54. I have found as follows:

- (1) at least some of the services are identical;
- (2) the average consumer is either a member of the general public or a professional user, who will pay at least a medium to high degree of attention when selecting the services (although for certain services such as financial services, the degree of attention is high);
- (3) the selection process is predominantly visual, although I do not discount an aural component;
- (4) the Applicant's mark is a composite mark which would be perceived as a unit having a different meaning to the meanings of the separate components, with neither element dominating the overall impression of the mark;
- (5) the marks are visually similar overall to a low degree and aurally similar overall to a very low degree and they do not share any conceptual similarity. However, I have made an alternate finding that the marks share a low degree of conceptual similarity;

¹⁸ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, paragraph 81

¹⁹ See paragraph 33 of the Appointed Person's decision in Case No. O/049/17, (*Rochester Trade Mark*).

²⁰ See *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, paragraphs 16 to 17 wherein Mr Iain Purvis QC, sitting as the Appointed Person, dealt with the distinction between direct and indirect confusion.

- (6) the earlier mark is inherently distinctive to a high degree; or in the alternative, it has a medium degree of distinctive character as it may be perceived as alluding to a quality of the services for which it is registered.

55. The identity of at least some of the services is clearly a factor in favour of the Opponent. However, taking all of the above factors into account, I consider it unlikely that a significant proportion of the average consumer, when paying a medium to high degree of attention when selecting those services, is likely to confuse one mark with the other; nor is it likely that the marks will be mistakenly recalled or misremembered as each other. This is particularly the case given the low degree of visual similarity between the marks, the very low degree of aural similarity, and there being no, or only a low degree of conceptual similarity between the two marks.

56. Furthermore, in the context of a consideration of the likelihood of confusion, assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. Although visually the Opponent's mark and the second word of the Applicant's mark share the first seven letters 'EVOLUTI'; and aurally they share the first three syllables 'EE-VOH-LOO', this is not in itself, sufficient for a finding that the marks are similar overall, particularly since I have found that 'EVOLUTION' is not a distinctive and dominant component of the applied-for mark; and that the word 'ESSENTIAL' cannot be overlooked in the overall comparison. In addition, the word 'ESSENTIAL' forms the first part of the applied-for mark, therefore it represents a significant point of dissimilarity between the two marks. As a general rule of thumb I note that the first part of a mark often tends to have a more visual and aural impact than the remainder.

57. I also do not consider that there would be indirect confusion, since there is no "*proper basis*" for such a finding.²¹ 'EVOLUTION' is not a standalone term within the applied-for mark such that any addition which precedes it could be seen as a sub-brand or brand extension.

58. I make these findings despite the high degree of inherent distinctive character of the earlier mark, this is because the mark is an invented word and its distinctiveness

²¹ *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, paragraph 16

does not lie in the fact that it shares its first seven letters with the ordinary word 'evolution'.

59. Even if I apply my alternate findings, it would still not alter my overall conclusion that there is no likelihood of confusion. This is because, as I have already noted, I do not consider the word 'EVOLUTION' to have an independent distinctive role in the applied-for mark, to this end I also note that *“even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion”*.²²

60. Furthermore, even if, as a secondary position, I find that the marks share a degree of conceptual similarity, this would not counteract the low degree of visual similarity and the very low degree of aural similarity such that it would render the marks confusingly similar, this is especially so when taking into account that the services at hand are likely to be selected predominantly visually and on occasion orally.

61. In *New Look Limited v OHIM*,²³ the General Court stated that:

“it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market [...] If the goods covered by the mark in question are [selected by the consumer relying] primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any aural similarity between the signs.”

62. With the above findings of the General Court in mind, given that I have found that the services will be predominantly selected visually (and potentially aurally), I find that the conceptual similarity cannot be afforded more weight in any event, and my overall findings would still be that the average consumer, who is predominantly selecting the

²² Whyte and Mackay Ltd, paragraph 21.

²³ T-117/03 to T-119/03 and T-171/03.

services visually, will not be confused as to the origin of those services therefore there is no likelihood of confusion.

Final remarks

63. As the outcome is no likelihood of confusion where the respective services are identical, it follows that the outcome would also be the same where the services are only similar, therefore there is no need to return to consider the rest of the Applicant's specification.

OUTCOME

64. The opposition under section 5(2)(b) of the Act fails. Subject to appeal, the application shall proceed to registration for all the services applied for.

COSTS

65. The Applicant has been successful and is entitled to a contribution towards its costs based on the contributory scale for fast-track opposition proceedings set out in Tribunal Practice Notice 1/2023. In the circumstances, I award the Applicant the sum of £250 for considering the notice of opposition and filing a counterstatement.

66. I therefore order Evolutiq GmbH to pay DXC Technology Company the sum of **£250** which should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 18th day of June 2024

Daniela Ferrari

For the Registrar

ANNEX 1

The parties' services

| Opponent's services | Applicant's services |
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| <p><u>Class 35</u> Business assistance, management and administrative services; Business analysis, research and information services; Business management; Assistance and advice regarding business management; Consultancy regarding business organisation and business management, the organisation and management of businesses and companies, business acquisitions, business planning; Providing business management consultancy, business strategy and marketing; Advisory services for business management; Business consultancy and advisory services; Acquisitions (Advice relating to -); Risk management consultancy [business]; Business efficiency advice; Business acquisitions consultation; Consultancy relating to business efficiency; Consultancy regarding business organisation and business economics; Consultations relating to business disposals; Business consultancy services relating to the supply of quality management systems; Business consultancy relating to the administration of information technology; Business management consulting services in the field of information technology; Advisory services relating to business risk</p> | <p><u>Class 35</u> Business consulting; Business management consulting; Business information; Business strategy development services; Business research services; Business management and business operation research services; Business assistance, namely, outsourcing services; Business process management consultancy; Business process outsourcing services, namely, outsourcing services in the field of business processes; Outsourcing services in the field of arranging service contracts for others in the field of information technology; Outsourcing of telephone call centers and data center operations; Outsourcing of computer data centers for others; Business data analysis; Business consulting in the field of big data; Data processing; Database management; account auditing of legal bills; Business consulting to review business efficiency of legal service providers; Consultancy in the field of business efficiency; Supply chain business consulting and management services; Business consultancy services relating to disaster planning and recovery; Information, consultancy and advisory services relating to all the foregoing services; Updating and</p> |

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| <p>management; Professional business consultation relating to the setting up of businesses; Assistance and advice regarding business organisation and management; Advisory services relating to the corporate structure of businesses; Business consultancy regarding acquisitions, company liquidations, company mergers, mergers and disposals; Business advisory services relating to company performance; Business advice relating to financial re-organisation; Business consultancy services relating to insolvency; Accountancy, book keeping and auditing; Preparation of business balances; Business advice relating to accounting; Business records management; Drawing up of business statistical information.</p> | <p>maintenance of data in computer databases.</p> |
| <p><u>Class 36</u> Real estate services; Financial and monetary services, and banking; Fundraising and financial sponsorship; Financial appraisal services; Consultancy and information in relation to the aforesaid services, included in this class; Real estate affairs; Real estate consultancy; Real estate management; Advisory services relating to real estate valuations; Consultancy in the purchasing of real estate; Advisory services relating to real estate ownership; Real estate consultancy; Corporate real estate advisory services; Corporate real estate advisory services; Assessment and management of real estate; Apartment house management;</p> | <p><u>Class 36</u> Insurance and reinsurance services, namely, insurance claims processing services, insurance claims administration services, insurance claims adjustment services, and assisting others with collecting insurance premiums; Insurance services, namely, providing information on insurance policy quotes, rates, underwriting services, insurance policy issuance and reissue services, and confirming the terms, conditions, inclusions and exclusions of insurance policies in the nature of providing information on insurance policy quotes, rates; Underwriting services; Insurance policy issuance and reissue services;</p> |

Real estate acquisition services; Estate agency; Estate agency; Real estate agency services relating to the purchase and sale of buildings; Estate agency services for sale and rental of buildings; Real estate affairs; Real estate consultancy, real estate management and management of buildings; Administration of financial affairs relating to real estate; Assessment and management of real estate; Financing of property development, of real estate development and of real estate development projects; Estate agency; Estate agency; Real estate procurement for others; Real estate procurement for others; Real estate settlement services [financial services]; Estate management services relating to transactions in real property; Real estate management relating to industrial premises, retail premises and residential units; Real estate management relating to office buildings, housing and real-estate complexes; Real estate management relating to shopping malls, entertainment venues and commercial buildings; Real estate equity sharing; Financing of real estate purchasing; Assisting in the acquisition of real estate; Real estate lending services; Rental of buildings; Rental of real estate and land; Accommodation bureau services [apartments], showrooms, flats and houses; Rental of commercial premises, office spaces and apartments; Arranging the provision of

Consulting and information concerning insurance and reinsurance; Insurance claims processing; Financial services, namely, providing consulting and information in the fields of finance and financial services; Information services relating to banking, namely, providing banking information; Financial consultancy relating to loans; Information, consultancy and advisory services relating to all the foregoing services.

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| <p>finance for construction operations; Brokerage of commercial property, of real estate, arranging of shared ownership of real estate and of residential properties; Management of commercial properties, real estate portfolios, and real estate and property; Valuations and financial appraisals of real estate and buildings; Valuations and financial appraisals of property; Real-estate valuations; Land leasing services; Arranging letting of real estate; Letting of trade centres; Land leasing services; Collection of debt on real estate rental; Rent collection; Asset management; Banking and financing services; Asset and portfolio management; Financing services for companies; Equity financing; Facilitating and arranging financing; Raising of financial capital; Financial planning and management; Business liquidation services, financial; Planning (estate -) [financial]; Financial planning and management; Investment services; Personal equity plan investment; Capital management; Venture capital financing; Provision of finance for enterprises; Wealth management; Wealth management; Financial management; Venture capital funding for companies and for commercial entities, venture capital funding for non-profit entities; Venture capital funding for research institutions, inventors and for developing new technologies; Providing funding for commercial entities; Providing funding for inventors, inventions and research</p> | |
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| <p>institutions; Arranging the providing of finance, arranging financing and corporate finance; Venture capital and project capital investment services; Financial banking; Financial investment; Management of financial assets; Management of financial assets; Financial consultancy in the field of risk management; Financial consultancy services relating to infrastructure investment; Securing of funds; Financial services in respect of real estate and buildings and relating to the acquisition and sale of property; Personal and partnership financing services; Financing services for the securing of funds for business and for financial management; Financing services relating to property and the providing and structuring of capital; Financing services for securing funds and money; Financial risk assessment services; Financial risk management services; Financial management of risk capital, investment capital and development capital; Financing and funding services; Financial services and monetary affairs; Financial assistance; Financing of building projects; Financial management of building projects; Financing services relating to real estate development; Financial planning services relating to building projects; Financial management of building renovation projects; Financing in relation to the buying and selling of businesses; Provision of finance for enterprises; Provision of finance for</p> | |
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| <p>business ventures; Funding of product development, projects, businesses, acquisitions and mergers; Financial management of shares in other companies; Financial management for businesses, holding companies and companies; Venture capital funding services to emerging and start-up companies; Escrow services; Management of corporate finances, deposit taking, financial assets, deposit-holding and personal equity plan management [financial services]; Fund raising services via crowdfunding website; Crowdfunding; Benevolent fund services; Arranging charitable collections [for others]; Arranging of financing for humanitarian projects; Financial sponsorship; Financial sponsorship of cultural events; Financial sponsorship of visual arts events; Financial sponsorship and patronage; Financing services for sponsoring businesses; Charitable fundraising services for underprivileged children; Charitable fundraising by means of entertainment events; Investment of funds for charitable purposes; Eleemosynary services in the field of monetary donations; Charitable services, namely financial services; Organisation of fundraising activities for businesses; Arranging charitable fundraising events; Organisation of monetary collections, charitable fundraising activities, charitable collections for others and charitable fundraising; Arranging of finance for</p> | |
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| <p>sporting, cultural and entertainment projects; Philanthropic services concerning monetary donations; Fundraising; Providing of charitable fundraising services relating to carbon offsetting for political and charitable purposes; Financial grant services; Providing educational scholarships; Arranging of funds for overseas aid projects; Providing monetary grants to charities; Providing information relating to charitable fundraising; Providing fundraising activities to support medical research and procedures for those in need.</p> | |
| <p><u>Class 37</u> Building, construction and demolition; Consultancy and information in relation to the aforesaid services, included in this class; Construction of complexes for business; Building of shops; Residential and commercial building construction; Construction of office buildings; Building construction supervision services for building projects; Building services relating to building for habitation; Building services relating to building for industry purposes; Construction of property; Construction project management services; Residential construction.</p> | <p><u>Class 37</u> Installation, maintenance and repair of computer hardware; Installation, maintenance and repair of computer hardware systems; Installation, maintenance and repair of computer networking hardware; Installation, maintenance and repair of telecommunications hardware; Information, consultancy and advisory services relating to all the foregoing services.</p> |
| <p><u>Class 41</u> Education; Education; Entertainment and sport; Consultancy and information in relation to the aforesaid services, included in this class; Arranging and conducting competitions; Arranging and conducting of conferences; Arranging</p> | |

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| <p>and conducting of lectures; Arranging and conducting award ceremonies; Organization of exhibitions for cultural or educational purposes; Organisation of games and competitions; Arranging of games; Organisation of sports tournaments; Organisation of competitions [education or entertainment]; Arranging of athletics competitions; Organising of entertainment competitions; Arranging and conducting of sports events.</p> | |
| | <p><u>Class 42</u> Design and development of computer hardware and software; Information technology (IT) consulting services; Providing technical advice relating to operation of computer hardware and software; Design, testing, installation, integration, hosting, and updating of computer software and computer programs of others; Software as a service (SaaS) services featuring a full line of non-downloadable software for customer relationship management, enterprise resource management, cloud management and excluding software for use with laboratory equipment in the nature of automated sample handling equipment, clinical laboratory analyzers, and chemistry analyzers; Providing a full line of on-line non-downloadable software for customer relationship management, enterprise resource management, cloud management and excluding software for use with laboratory equipment in the nature of automated sample handling equipment,</p> |

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| | <p>clinical laboratory analyzers, and chemistry analyzers; Platform as a Service (PaaS) featuring a full line of computer software platforms for use in database management excluding software platforms for use with laboratory equipment in the nature of automated sample handling equipment, clinical laboratory analyzers, and chemistry analyzers; Computer security consultancy and assessments; Computer anti-virus protection services, namely, providing temporary use of non-downloadable computer anti-virus software; Provision of security services for computer software, computer networks, and computer systems, namely, computer security services in the nature of administering digital certificates, computer security consultancy in the field of scanning and penetration testing of computers and networks to assess information security vulnerability, Internet security consultancy, restricting and controlling access privileges of users of computing resources for cloud, mobile or network resources based on assigned credentials; Research in the fields of information technology and computer security; Cybersecurity services, namely, computer security threat analysis for protecting data, and providing cybersecurity risk assessments of electronic information and computer systems; Infrastructure as a Service (IaaS), namely, hosting servers for use by others for providing</p> |
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| | <p>virtual computer systems through cloud computing and computer networks on a consumption-based model and for providing virtual firewalls for data security, and electronic storage of data through cloud computing; Providing virtual computer environments through cloud computing; Computer and technical support services, namely, troubleshooting of computer software problems; Computer and technical support services, namely, 24/7 service desk or help desk services for IT infrastructure, operating systems, database systems, and web applications; Recovery of computer data; Operating and outsourcing of computer data centers for others, namely, outsource service provider in the field of information technology for the operation of computer data centers for others; Computer services, namely, computer system administration for others; Database development services; Maintenance of online databases for others; Design, development, configuration, and integration of computer systems and networks; Monitoring of computer systems to ensure proper functioning; Cloud hosting provider services; Cloud data migration services in the nature of migration of computer software to the cloud for others; Cloud computing in the nature of technical support services, namely, remote and on-site infrastructure management services for monitoring, administration and</p> |
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| | <p>management of public, hybrid, and private cloud computing IT and application systems; Cloud services, namely, integration of private and public cloud computing environments; Computer services, namely, providing online portals in the nature of providing a web site featuring technology that enable employees of an enterprise to access and install computer software applications from such enterprise's online software application store; Providing a web-based system and online portal, namely, providing a web site featuring technology for users to remotely manage, lock, unlock, wipe data on, and locate mobile and wireless devices; Research in the field of information technology; Data security services, namely, data security consultancy, and data encryption services; Data migration services; Electronic data storage; Remote computer backup services; Encryption and decryption of information, messages and data; Authentication of information, messages and data, namely, providing user authentication services using single sign-on technology for online software applications using technology to authenticate user identity in computer systems and networks; Administration of user rights in computer networks, namely, computer system administration for others; Computer disaster recovery planning services; Product research, design, and</p> |
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| | <p>development in the field of new products; Authentication, issuance and validation of digital certificates; Electronic identification verification services using technology to authenticate users identity, namely, providing user authentication services using single sign-on technology for online software application; Outsource service provider in the field of information technology consulting; Information, consultancy and advisory services relating to all the foregoing services; computer security services, namely, restricting and controlling access privileges of users of computing resources for cloud, mobile or network resources; provision of security services for computer software, computer networks, and computer systems, namely, computer security services in the nature of administering digital certificates, computer security consultancy in the field of scanning and penetration testing of computers and networks to assess information security vulnerability, Internet security consultancy, restricting and controlling access privileges of users of computing resources for cloud, mobile or network resources based on assigned credentials; Research in the fields of information technology and computer security; cybersecurity services, namely, computer security threat analysis for protecting data, and providing cybersecurity risk assessments of electronic information</p> |
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| | and computer systems; data security services, namely, data security consultancy, and data encryption services; computer security consultancy and assessments. |
| | <u>Class 45</u> Advisory services relating to regulatory affairs, namely, advice and consultancy on regulatory matters in the field of life sciences, finances, information technology and the Internet, and insurance. |