

O/1117/24

**TRADE MARKS ACT 1994**  
**IN THE MATTER OF**  
**APPLICATION NO. 3827583**  
**IN THE NAME OF FUNK INTELLECTUAL PTY LTD.**  
**TO REGISTER**

**FUNK**

**AS A TRADE MARK IN CLASSES 30, 35, 43**

**AND**

**OPPOSITION THERETO UNDER NO. 438421**

**BY**

**THE CHEESE TRUCK LTD**

## **Background and pleadings**

1. On 8 September 2022, Funk Intellectual Pty Ltd. (“***the Applicant***”) applied to register in the UK the trade mark shown on the cover page of this decision, under number UK00003827583 (“***the Contested Mark***”). Details of the application were published for opposition purposes on 7 October 2022. Registration is sought for the following goods and services:

Class 30      Bagels; Baguettes; Bakery goods; Baps; Bread rolls; Bread; Breakfast cake; Breakfast cereals, porridge and grits; Breakfast cereals; Brioches; Brownies; Buns; Cake preparations; Cakes; Cereal bars and energy bars; Cereal bars; Cereal snacks; Cereals; Chutneys; Cocoa; Coffee beans; Condiments; Cookies; Crepes; Croissants; Crusty rolls; Doughs, batters, and mixes therefor; Filled bread rolls; Filled rolls; Filled sandwiches; Flour; Food flavourings; Food seasonings; Ground coffee; Ice cream; Ice lollies; Ice, ice creams, frozen yogurts and sorbets; Ice; Ices (Edible -); Ices; Marinades; Muesli; Muffins; Oat bars; Oat-based food; Pancakes; Pasta dishes; Pasta; Pasties; Pastries, cakes, tarts and biscuits (cookies); Pastries; Pies; Pizza; Porridge; Pre-packaged lunches consisting primarily of rice, and also including meat, fish or vegetables; Prepared meals consisting primarily of pasta; Prepared meals consisting primarily of rice; Prepared meals containing [principally] rice; Prepared meals in the form of pizzas; Puddings; Rice; Salts, seasonings, flavourings and condiments; Sandwich wraps [bread]; Sandwiches; Sandwiches; Savory sauces, chutneys and pastes; Scones; Snack foods made from cereals; Soft rolls (bread); sweet coatings and fillings, bee products; Sweet glazes and fillings; treacles; Tarts; Toast; Toasted sandwiches; Unroasted coffee; Wraps [sandwich].

Class 35      Advertising; Business management; Business administration; Office functions; Administration of loyalty rewards programs; Administration of the business affairs of franchises; Advertising services; Advice in the running of establishments as franchises; Advisory services relating to publicity for franchisees; Assistance in business management within the framework of a franchise contract; Assistance in franchised commercial

business management; Assistance in product commercialization, within the framework of a franchise contract; Business administration services; Business advertising services relating to franchising; Business advice and consultancy relating to franchising; Business advice relating to franchising; Business advice relating to restaurant franchising; Business advisory services relating to franchising; Business advisory services relating to the establishment and operation of franchises; Business advisory services; Business assistance relating to franchising; Business assistance relating to the establishment of franchises; Business consultancy in relation to franchising; Business consultancy services associated with franchising restaurants, cafes, cafeterias, coffee shops, bars, restaurants, snack bars, catering or other establishment or facilities engaged in providing food or drinks; Business consultancy services associated with operating cafes, cafeterias, coffee shops, bars, restaurants, snack bars, catering or other establishment or facilities engaged in providing food or drinks; Business consultancy services; Business management advisory services relating to franchising; Business management assistance in the field of franchising; Business management assistance in the operation of restaurants; Business management of restaurants; Business operation of cafes, cafeterias, coffee shop, snack bars, catering, restaurants or other establishments or facilities engaged in providing food or drinks prepared for consumption; Dissemination of advertisements; Dissemination of advertising matter online; Dissemination of business information; Dissemination of commercial information; Electronic order processing; Management advisory services related to franchising; Marketing services in the field of restaurants; Marketing services; Online ordering services in the field of take-out and delivery of food and drink; Online advertisements; Online advertising on a computer network; Online ordering services; Ordering services for third parties; Procurement of goods on behalf of other businesses; Promoting the goods and services of others by means of a loyalty rewards card scheme; Providing assistance in the field of business management within the framework of a franchise contract; Providing assistance in the field of product

commercialization within the framework of a franchise contract;  
Providing assistance in the management of franchised businesses;  
Provision of business advice relating to franchising; Provision of  
business information relating to franchising; Public relations services;  
Publicity services; Advertising services; Services rendered by a  
franchisor, namely, assistance in the running or management of  
industrial or commercial enterprises; Retail services, wholesale services,  
mail order services or internet retailing services in relation to Cutlery,  
Cardboard packaging, Paper serviettes, Paper bags, Plastic shopping  
bags, Stationery, Displays, stands and signage, non-metallic, Furniture,  
Dispensers for serviettes, Drinking straws, Tableware, Earthenware,  
Cups, Coffee cups, Paper cups, Cardboard cups, Textile serviettes,  
Clothing, Footwear, Headgear, Dairy products and dairy substitutes,  
Jellies, jams, compotes, fruit and vegetable spreads, Processed fruits,  
fungi, vegetables, nuts and pulses, Soups and stocks, meat extracts,  
Milk, Milkshakes, Milk beverages, Prepared meals containing  
[principally] eggs, Fruit salads, Prepared meals containing [principally]  
chicken, Prepared meals consisting primarily of meat, Prepared meals  
consisting primarily of poultry, Prepared meals consisting substantially  
of seafood, Prepared meals consisting primarily of vegetables, Prepared  
meals consisting primarily of meat substitutes, Vegetable salads, Potato  
salads, Prepared salads, Fritters, Soups, Hummus, Falafel, Cheese,  
Cheeses, Bread, Breakfast cereals, porridge and grits, Cereal bars and  
energy bars, Cereals, Coffee, teas and cocoa and substitutes therefor,  
Doughs, batters, and mixes therefor, Flour, Ice, ice creams, frozen  
yogurts and sorbets, Pastries, cakes, tarts and biscuits (cookies), Syrups  
and treacles, Salts, seasonings, flavourings and condiments, Savory  
sauces, chutneys and pastes, Sugars, natural sweeteners, sweet  
coatings and fillings, bee products, Sweet glazes and fillings, Chocolate,  
Chocolate beverages, Tea, Teas, Coffee, Coffee substitutes, Coffee  
drinks, Coffee beverages, Bagels, Baguettes, Bakery goods, Baps,  
Beverages based on chocolate, Beverages based on coffee, Beverages  
based on tea, Breakfast cake, Breakfast cereals, Brioches, Brownies,  
Buns, Cakes, Cake preparations, Cereal bars, Cereal snacks, Chutneys,

Cocoa, Cocoa drinks, Condiments, Cookies, Croissants, Crepes, Food flavourings, Food seasonings, Frappes, Ices, Ices (Edible -), Ice lollies, Ice cream, Ice, Marinades, Muesli, Muffins, Pasties, Pasta dishes, Pasta, Oat-based food, Oat bars, Pastries, Pies, Pizza, Prepared meals consisting primarily of rice, Prepared meals consisting primarily of pasta, Prepared meals in the form of pizzas, Pre-packaged lunches consisting primarily of rice, and also including meat, fish or vegetables, Porridge, Puddings, Rice, Sandwiches, Scones, Snack foods made from cereals, Tarts, Toast, Pancakes, Prepared meals containing [principally] rice, Wraps [sandwich], Sandwich wraps [bread], Fresh fruits, nuts, vegetables and herbs, Garden salads, Flavoured carbonated beverages, Juices, Non-alcoholic beverages, Waters, Nut and soy based beverages, Smoothies; Information, advice or consultancy services relating to the aforesaid.

Class 43 Advisory services relating to catering; Booking of catering services; Business catering services; Cafe services; Cafes; Catering services; Coffee bar and coffee house services (provision of food and drink); Coffee shop services; Contract catering services; Food and drink catering; Food and drink catering; Information, advice and reservation services for the provision of food and drink; Mobile catering services; Provision of food and beverages; Provision of food and drink; Restaurant services; Information, advice or consultancy services relating to the aforesaid.

2. The Cheese Truck Ltd ("**the Opponent**") opposes the application in full under section 5(2)(a) of the Trade Marks Act 1994 ("**the Act**").<sup>1</sup> The Opponent relies upon UK trade mark registration number UK00003548619 which has a filing date of 26 October 2020 and a registration date of 5 March 2021 ("**the Earlier Mark**"). For the purposes of this opposition, the Opponent relies upon all the services for which the mark is registered, which are as follows:

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<sup>1</sup> Originally filed on 29 November 2022, subsequently amended a few times, and finally accepted on the re-filing of 6 April 2023.

Class 35: Retail services in relation to dairy products; Mail order retail services related to foodstuffs.

3. By virtue of its earlier filing date, the registration set out above constitutes an earlier mark within the meaning of section 6 of the Act.
4. Given the registration date of the Earlier Mark (as indicated above), it had not completed its registration process more than five years before the filing date of the application in issue. Thus, it is not subject to proof of use pursuant to section 6A of the Act. The Opponent can, therefore, rely upon all of the services it has identified without having to demonstrate use.
5. In the notice of opposition, the Opponent essentially contends that the Earlier Mark is very distinctive, the respective marks are identical, and that the competing goods and services are highly similar giving rise to a likelihood of confusion (either direct or indirect). Therefore, the Opponent asks for the Contested Mark to be rejected in its entirety. Some of the Opponent's comments appear to concentrate on the issue of reputation. However, whether the Opponent has any reputation is irrelevant to the pleaded ground under section 5(2)(a) of the Act. That ground requires, simply, a notional and objective assessment as to whether there is a likelihood of confusion between the marks for any or all of the goods and services at issue.
6. On 28 June 2023 the Applicant filed its defence and counterstatement, denying the marks' identity and the similarity between the goods and services in question. The Applicant also contends that the Earlier Mark, being an English dictionary word, has little or no distinctiveness in relation to the goods in class 30 (i.e., dairy products). Thus, the Applicant requests to reject the opposition under S. 5(2)(a).
7. The Opponent is represented by Trademark Brothers Ltd. The Applicant is represented by Brand Protect Limited.

### **Relevance of EU law**

8. 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.

### **Evidence and submissions**

9. During the evidence rounds neither party filed evidence or submissions<sup>2</sup>. Neither party requested a hearing, but the Applicant provided submissions in lieu.<sup>3</sup>

### **Decision**

#### **The law**

10. The relevant parts of section 5 of the Act are as follows:

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

(a) it is identical with an earlier trade mark and is to be registered for goods or services 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.”

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

#### **Case law**

11. The leading authorities which guide me are from the Court of Justice of the European Union (“CJEU”): *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*,

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<sup>2</sup> The Opponent requested to file evidence after the conclusion of the evidence rounds (as per the email dated 14 March 2024). The Registrar informed the Opponent that it had to provide reasons explaining why the evidence was necessary (see official letter dated 19 March 2024). The Opponent failed to reply, and the case proceeded to a decision from the papers.

<sup>3</sup> Dated 14 March 2024. In its submissions the Applicant relies upon Exhibits EXH 1- 3 containing EUIPO guidance. Since the exhibits contain a public record, they do not need to be covered by a witness statement with a statement of truth.

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.

## **The Principles**

(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 goods and services**

12. When making the comparison, all relevant factors relating to the goods and services in the specification should be taken into account. In *Canon*, the CJEU stated at paragraph 23 of its judgment:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

13. In terms of being complementary (one of the factors referred to in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*), this relates to close connections or relationships that are important or indispensable for the use of the other. In *Boston Scientific Ltd v OHIM* Case T- 325/06, it was stated:

“It is true that goods are complementary if 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 customers may think that the responsibility for those goods lies with the same undertaking”.

14. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services;

c) The respective trade channels through which the goods or services reach the market;

d) In the case of self serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

15. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16 (*'Avnet'*), Jacob J. (as he then was) stated that:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

16. The General Court (“GC”) confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, that, even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

17. For the purposes of considering the issue of similarity of goods and services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

18. The competing goods and services are as follows:

Applicant's goods and services	Opponent's goods and services
<p><b><u>Class 30</u></b></p> <p>Bagels; Baguettes; Bakery goods; Baps; Bread rolls; Bread; Breakfast cake; Breakfast cereals, porridge and grits; Breakfast cereals; Brioches; Brownies; Buns; Cake preparations; Cakes; Cereal bars and energy bars; Cereal bars; Cereal snacks; Cereals; Chutneys; Cocoa; Coffee beans; Condiments; Cookies; Crepes; Croissants; Crusty rolls; Doughs, batters, and mixes therefor; Filled bread rolls; Filled rolls; Filled sandwiches; Flour; Food flavourings; Food seasonings; Ground coffee; Ice cream; Ice lollies; Ice, ice creams, frozen yogurts and sorbets; Ice; Ices (Edible -); Ices; Marinades; Muesli; Muffins; Oat bars; Oat-based food; Pancakes; Pasta dishes; Pasta; Pasties; Pastries, cakes, tarts and biscuits (cookies); Pastries; Pies; Pizza; Porridge; Pre-packaged lunches consisting primarily of rice, and also including meat, fish or vegetables; Prepared meals consisting primarily of pasta; Prepared meals consisting primarily of rice; Prepared meals containing [principally] rice; Prepared meals in the form of pizzas; Puddings; Rice;</p>	

<p>Salts, seasonings, flavourings and condiments; Sandwich wraps [bread]; Sandwiches; Sandwiches; Savory sauces, chutneys and pastes; Scones; Snack foods made from cereals; Soft rolls (bread); sweet coatings and fillings, bee products; Sweet glazes and fillings; treacles; Tarts; Toast; Toasted sandwiches; Unroasted coffee; Wraps [sandwich].</p>	
<p><b><u>Class 35</u></b></p>	<p><b><u>Class 35</u></b></p>
<p>Advertising; Business management; Business administration; Office functions; Administration of loyalty rewards programs; Administration of the business affairs of franchises; Advertising services; Advice in the running of establishments as franchises; Advisory services relating to publicity for franchisees; Assistance in business management within the framework of a franchise contract; Assistance in franchised commercial business management; Assistance in product commercialization, within the framework of a franchise contract; Business administration services; Business advertising services relating to franchising; Business advice and consultancy relating to franchising; Business advice relating to franchising; Business advice relating to restaurant franchising; Business</p>	<p>Retail services in relation to dairy products; Mail order retail services related to foodstuffs.</p>

advisory services relating to franchising; Business advisory services relating to the establishment and operation of franchises; Business advisory services; Business assistance relating to franchising; Business assistance relating to the establishment of franchises; Business consultancy in relation to franchising; Business consultancy services associated with franchising restaurants, cafes, cafeterias, coffee shops, bars, restaurants, snack bars, catering or other establishment or facilities engaged in providing food or drinks; Business consultancy services associated with operating cafes, cafeterias, coffee shops, bars, restaurants, snack bars, catering or other establishment or facilities engaged in providing food or drinks; Business consultancy services; Business management advisory services relating to franchising; Business management assistance in the field of franchising; Business management assistance in the operation of restaurants; Business management of restaurants; Business operation of cafes, cafeterias, coffee shop, snack bars, catering, restaurants or other establishments or facilities engaged in providing food or

drinks prepared for consumption; Dissemination of advertisements; Dissemination of advertising matter online; Dissemination of business information; Dissemination of commercial information; Electronic order processing; Management advisory services related to franchising; Marketing services in the field of restaurants; Marketing services; Online ordering services in the field of take-out and delivery of food and drink; Online advertisements; Online advertising on a computer network; Online ordering services; Ordering services for third parties; Procurement of goods on behalf of other businesses; Promoting the goods and services of others by means of a loyalty rewards card scheme; Providing assistance in the field of business management within the framework of a franchise contract; Providing assistance in the field of product commercialization within the framework of a franchise contract; Providing assistance in the management of franchised businesses; Provision of business advice relating to franchising; Provision of business information relating to franchising; Public relations services; Publicity services;

Advertising services; Services rendered by a franchisor, namely, assistance in the running or management of industrial or commercial enterprises; Retail services, wholesale services, mail order services or internet retailing services in relation to Cutlery, Cardboard packaging, Paper serviettes, Paper bags, Plastic shopping bags, Stationery, Displays, stands and signage, non-metallic, Furniture, Dispensers for serviettes, Drinking straws, Tableware, Earthenware, Cups, Coffee cups, Paper cups, Cardboard cups, Textile serviettes, Clothing, Footwear, Headgear, Dairy products and dairy substitutes, Jellies, jams, compotes, fruit and vegetable spreads, Processed fruits, fungi, vegetables, nuts and pulses, Soups and stocks, meat extracts, Milk, Milkshakes, Milk beverages, Prepared meals containing [principally] eggs, Fruit salads, Prepared meals containing [principally] chicken, Prepared meals consisting primarily of meat, Prepared meals consisting primarily of poultry, Prepared meals consisting substantially of seafood, Prepared meals consisting primarily of vegetables, Prepared meals

consisting primarily of meat substitutes, Vegetable salads, Potato salads, Prepared salads, Fritters, Soups, Hummus, Falafel, Cheese, Cheeses, Bread, Breakfast cereals, porridge and grits, Cereal bars and energy bars, Cereals, Coffee, teas and cocoa and substitutes therefor, Doughs, batters, and mixes therefor, Flour, Ice, ice creams, frozen yogurts and sorbets, Pastries, cakes, tarts and biscuits (cookies), Syrups and treacles, Salts, seasonings, flavourings and condiments, Savory sauces, chutneys and pastes, Sugars, natural sweeteners, sweet coatings and fillings, bee products, Sweet glazes and fillings, Chocolate, Chocolate beverages, Tea, Teas, Coffee, Coffee substitutes, Coffee drinks, Coffee beverages, Bagels, Baguettes, Bakery goods, Baps, Beverages based on chocolate, Beverages based on coffee, Beverages based on tea, Breakfast cake, Breakfast cereals, Brioches, Brownies, Buns, Cakes, Cake preparations, Cereal bars, Cereal snacks, Chutneys, Cocoa, Cocoa drinks, Condiments, Cookies, Croissants, Crepes, Food flavourings, Food seasonings, Frappes, Ices, Ices (Edible -), Ice lollies, Ice cream, Ice,

<p>Marinades, Muesli, Muffins, Pasties, Pasta dishes, Pasta, Oat-based food, Oat bars, Pastries, Pies, Pizza, Prepared meals consisting primarily of rice, Prepared meals consisting primarily of pasta, Prepared meals in the form of pizzas, Pre-packaged lunches consisting primarily of rice, and also including meat, fish or vegetables, Porridge, Puddings, Rice, Sandwiches, Scones, Snack foods made from cereals, Tarts, Toast, Pancakes, Prepared meals containing [principally] rice, Wraps [sandwich], Sandwich wraps [bread], Fresh fruits, nuts, vegetables and herbs, Garden salads, Flavoured carbonated beverages, Juices, Non-alcoholic beverages, Waters, Nut and soy based beverages, Smoothies; Information, advice or consultancy services relating to the aforesaid.</p>	
<p><b><u>Class 43</u></b></p>	
<p>Advisory services relating to catering; Booking of catering services; Business catering services; Cafe services; Cafes; Catering services; Coffee bar and coffee house services (provision of food and drink); Coffee shop services; Contract catering services; Food and drink catering; Food and drink catering; Information, advice and reservation services for the</p>	

provision of food and drink; Mobile catering services; Provision of food and beverages; Provision of food and drink; Restaurant services; Information, advice or consultancy services relating to the aforesaid.	
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### **Class 30**

- *“Various Foodstuff (including beverages)”*

19. The Applicant concedes that *“the only goods and services in the application that are similar to the services in the Registration are those in class 30”*.<sup>4</sup> The Applicant also submitted that all of the Applicant’s ‘foodstuff’ goods are similar to the Opponent’s *“Mail order retail services related to foodstuffs”*.<sup>5</sup> As the Applicant did not specify the level of similarity between the competing goods and services, I will carry out my own assessment. Regarding the similarity between the (mail order) retail services of foodstuff and the various ‘foodstuff’ goods in Class 30, as this assessment pertains to a comparison of retail services and goods, I remind myself of the case of *Oakley, Inc v OHIM*, Case T-116/06 wherein the GC, at paragraphs 46-57, held that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree.

20. The foodstuff goods in the Applicant’s specification are inexpensive everyday food products made for consumption that are sold by a wide variety of bricks-and-mortar and internet retailers, department stores, and supermarkets. The Opponent’s services would involve selecting and bringing those goods together and services aimed at encouraging the consumer to buy the goods there, rather than from another retailer.

21. There is no similarity of nature or purpose between the respective goods and services. However, the users of the retail services will be the same as the users of

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<sup>4</sup> Submissions in lieu, paragraph 29.

<sup>5</sup> Submissions in lieu, paragraph 18.

the goods, and trade channels will be the same. There is no competition but there is, to my mind, a degree of complementarity as the various types of foodstuff goods are indispensable to the service of retailing of foodstuff and the consumer may believe that the retail services and the goods are the responsibility of the same undertaking.

22. Therefore, I find there to be at least a medium degree of similarity between the Opponent's services and the Applicant's goods.

### **Class 35**

- *“Advertising; Advertising services; Advisory services relating to publicity for franchisees; Business advertising services relating to franchising; Dissemination of advertisements; Dissemination of advertising matter online; Dissemination of business information; Dissemination of commercial information; Marketing services in the field of restaurants; Marketing services; Online advertisements; Online advertising on a computer network; Promoting the goods and services of others by means of a loyalty rewards card scheme; Public relations services; Publicity services; Advertising services”*

23. The Applicant's services listed above essentially consist of advertising/marketing/promotional type services. The Applicant contended these services differ from the Opponent's retail services in class 35.<sup>6</sup> I agree with the Applicant, bearing in mind the core meaning of the respective services, as per *Avnet*. Whilst a retailer may market or use in-house marketing tools/social media to market its own goods and/or promote its retail services, the retailer itself does not provide a marketing/advertising/promotional service that falls within class 35 because it does not provide such services to third-party undertakings. Therefore, the Applicant's services would be provided by specialist marketing/advertising companies and the like, that provide such services for third parties whereas the Opponent's services would be provided by retailers and retail stores. These services appear to be fundamentally different in nature, purpose, or method of use to those provided by a retailer, which are directed at encouraging consumers to buy goods from them rather than from another retailer of those goods. Therefore,

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<sup>6</sup> Submissions in lieu [19] – [20].

the services are clearly neither in competition nor complementary, and I find that the services are dissimilar.

- *“Business management; Business administration; Office functions; Administration of loyalty rewards programs; Administration of the business affairs of franchises; Advice in the running of establishments as franchises; Assistance in business management within the framework of a franchise contract; Assistance in franchised commercial business management; Assistance in product commercialization, within the framework of a franchise contract; Business administration services; Business advice and consultancy relating to franchising; Business advice relating to franchising; Business advice relating to restaurant franchising; Business advisory services relating to franchising; Business advisory services relating to the establishment and operation of franchises; Business advisory services; Business assistance relating to franchising; Business assistance relating to the establishment of franchises; Business consultancy in relation to franchising; Business consultancy services associated with franchising restaurants, cafes, cafeterias, coffee shops, bars, restaurants, snack bars, catering or other establishment or facilities engaged in providing food or drinks; Business consultancy services associated with operating cafes, cafeterias, coffee shops, bars, restaurants, snack bars, catering or other establishment or facilities engaged in providing food or drinks; Business consultancy services; Business management advisory services relating to franchising; Business management assistance in the field of franchising; Business management assistance in the operation of restaurants; Business management of restaurants; Business operation of cafes, cafeterias, coffee shop, snack bars, catering, restaurants or other establishments or facilities engaged in providing food or drinks prepared for consumption; Management advisory services related to franchising; Procurement of goods on behalf of other businesses; Providing assistance in the field of business management within the framework of a franchise contract; Providing assistance in the field of product commercialization within the framework of a franchise contract; Providing assistance in the management of franchised businesses; Provision of business advice relating to franchising; Provision of business information relating to franchising; Services rendered by*

*a franchisor, namely, assistance in the running or management of industrial or commercial enterprises”*

24. The Applicant’s services essentially consist of consultancy services in the field of business administration. I believe the Applicant’s services are dissimilar from the Opponent’s “*Retail services in relation to dairy products; Mail order retail services related to foodstuffs*”. Professional undertakings normally provide consulting services to third-party organisations to improve their performance, whilst companies usually offer for sale products (i.e., foodstuff goods) directly to consumers. Accordingly, I find that the respective services do not have the same nature (consultancy against retail), intended purpose (business management against product selling), and method of use. Also, I find the respective services do not share the same channels of trade, have different users, are not in competition with each other, and they are not complementary.

- “*Electronic order processing; Online ordering services in the field of take-out and delivery of food and drink; Online ordering services; Ordering services for third parties*”

25. Online ordering is the process of ordering goods and/or services from a website or other application. The contested (online) ordering services and related order processing services are services whereby the provider of the ordering services takes orders from the general public (i.e., the customers placing orders) and transfers such orders to third-party businesses. Conversely, the Opponent provides retail of foodstuff which is generally offered directly to the customers. Thus, it is my view that, whilst both competing services will be used by general members of the public (meaning that there may be a broad overlap in users), the competing services have different nature (ordering against retail), purpose (placing an order against selling goods) and method of use; they do not share the same trade channels and are neither complementary nor in competition. Therefore, I find the respective services to be dissimilar.

- “*Retail services, wholesale services, mail order services or internet retailing services in relation to [foodstuff (including beverages)]”*

26. The Applicant conceded that the competing services are identical to all of the Opponent's services on the basis of the principle outlined in *Merix*.<sup>7</sup>

- *“Retail services, wholesale services, mail order services or internet retailing services in relation to Cutlery, Cardboard packaging, Paper serviettes, Paper bags, Plastic shopping bags, Stationery, Displays, stands and signage, non-metallic, Furniture, Dispensers for serviettes, Drinking straws, Tableware, Earthenware, Cups, Coffee cups, Paper cups, Cardboard cups, Textile serviettes, Clothing, Footwear, Headgear”*

27. The Applicant directed me to the EUIPO trade mark Guidelines which state that:

“Retail services of specific goods and retail services of other specific goods have the same nature as both are retail services, have the same purpose of allowing consumers to conveniently satisfy different shopping needs, and have the same method of use.

Similarity is found between the retail services of specific goods where the goods are commonly retailed together in the same outlets and they are directed at the same public. However, the degree of similarity between retail of specific goods on the one hand and retail of other specific goods on the other hand may vary depending on the proximity of the retailed goods and the particularities of the respective market sectors.

Similarity is, in principle, excluded where the goods concerned are not commonly retailed together and target different publics, or are dissimilar. Nevertheless, a degree of similarity may still be found if, because of the particularities of the market, such dissimilar goods are retailed together in the same outlets and target the same public.”

28. The Applicant contended that goods such as cutlery, packaging and tableware whilst they may be used in conjunction with foods, they are not similar due to their different trade channels and uses.<sup>8</sup> The Applicant also submitted that goods such as stationery, signage, furniture, and clothing are dissimilar to foodstuffs (and the

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<sup>7</sup> Submissions in lieu, paragraph 21.

<sup>8</sup> Submissions in lieu, paragraph 25.

retail thereof) as they have different uses, trade channels and are neither in competition nor complementary goods.<sup>9</sup>

29. I find that none of the goods listed as the subjects of the Opponent's retail services appear to be the same as the goods covered by the Applicant's specified retail services above or likely to be marketed by the same kind of retailer. Whilst I appreciate that there may be some very limited superficial overlap between the services regarding their nature (retail of goods), purpose (distribution of goods), method of use, and users (general public), I find that there is no evidence before me to suggest that the respective retail services are typically offered through the same trade channels. I concur with the Applicant that the nature of the goods being retailed is very different and, in the absence of any submissions from the Opponent of the contrary, I find the respective services to differ in their channels of trade and be neither complementary nor in competition. Therefore, in light of my assessment above, I find the respective services must be considered dissimilar.

- *“Information, advice or consultancy services relating to the aforesaid”*

30. The Applicant's services above involve the provision of information, advice or consultancy in relation to the types of services contained in class 35 (i.e., advertising/marketing/promotional services, consultancy services in the field of business administration, online ordering services, and retail services). With regard to the information/advice/consultancy in the fields of marketing/advertising/promotion, business administration, and online ordering services, these services relate to market fields distinct from those of the Opponent's (i.e., retail services). Therefore, there is no similarity between these respective services as they have different nature (information/advice/consultancy against retail), method of use, intended purpose (purchase of goods against seeking advice/information/consultancy), consumers, and they are neither in competition nor complementary. Turning to the Applicant's information/advice/consultancy services in relation to retail of 'non-foodstuff' goods, whilst the respective users may be the same, I can see no other points of obvious similarity between those services and the Opponent's services; they are dissimilar. Finally, turning to the Applicant's information/advice/consultancy

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<sup>9</sup> Submissions in lieu, paragraph 26.

services in relation to the retail of 'foodstuffs (including beverages)' I believe that the respective services may overlap in consumers because the retail providers of the kind specified in the Opponent's specification may also offer customer care services providing consumers with information/advice/consultancy services relating to the retail service that they provide. It seems to me that the Applicant's services may be important for the Opponent's services in such a way that the average consumer believes that they come from the same undertaking. There is therefore some complementarity in play. I find that the respective services to be similar to at least a low degree.

### **Class 43**

- *“Advisory services relating to catering; Booking of catering services; Business catering services; Cafe services; Cafes; Catering services; Coffee bar and coffee house services (provision of food and drink); Coffee shop services; Contract catering services; Food and drink catering; Food and drink catering; Information, advice and reservation services for the provision of food and drink; Mobile catering services; Provision of food and beverages; Provision of food and drink; Restaurant services; Information, advice or consultancy services relating to the aforesaid.”*

31. The Applicant argues the respective services are dissimilar.<sup>10</sup> I agree with the Applicant. Whilst the respective services could have the same intended purpose (i.e., provide food to consumers), they substantially differ in their nature, method of use, and trade channels as foodstuff is retailed to consumers usually through shops or supermarkets, whilst the provision of food/drink usually takes place in cafes and restaurants and the like. Additionally, consumers usually purchase retailed food for preparing it (or consuming it) at home while the provision of food in cafes/restaurants is usually meant for consumption directly in the café/restaurant. Accordingly, the channels of trade through which the respective services are provided differ greatly and such services cannot be considered in competition as they address different consumers' needs. In absence of evidence from the Opponent showing the similarity of these services, I find them to be dissimilar.

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<sup>10</sup> Submissions in lieu paragraphs 27 and 28.

### Conclusion on the goods and services comparison

32. As some degree of similarity between the respective goods and services is necessary to engage the test for likelihood of confusion, my findings above mean that the opposition reliant upon the 5(2)(a) ground aimed against those goods and services I have found to be dissimilar must fail.<sup>11</sup>

33. The Applicant contended that section 5(2)(a) of the Act cannot apply when the goods or services are found to be identical, only when they are similar.<sup>12</sup> Whilst I appreciate that section 5(2)(a) of the Act does not expressly mention identity between the goods and services, it is my view that section 5(2)(a) must apply also in those circumstances where identity between the competing goods/services is found, otherwise the perverse situation would arise where the opposition succeeds for the goods/services that are similar owing to a likelihood of confusion, but fails for those that are identical even though the likelihood of confusion is even greater as regards the latter. Such an approach cannot be correct.

34. In light of my findings above, the opposition proceeds only in relation to the following goods and services:

Class 30      Bagels; Baguettes; Bakery goods; Baps; Bread rolls; Bread; Breakfast cake; Breakfast cereals, porridge and grits; Breakfast cereals; Brioches; Brownies; Buns; Cake preparations; Cakes; Cereal bars and energy bars; Cereal bars; Cereal snacks; Cereals; Chutneys; Cocoa; Coffee beans; Condiments; Cookies; Crepes; Croissants; Crusty rolls; Doughs, batters, and mixes therefor; Filled bread rolls; Filled rolls; Filled sandwiches; Flour; Food flavourings; Food seasonings; Ground coffee; Ice cream; Ice lollies; Ice, ice creams, frozen yogurts and sorbets; Ice; Ices (Edible -); Ices; Marinades; Muesli; Muffins; Oat bars; Oat-based food; Pancakes; Pasta dishes; Pasta; Pasties; Pastries, cakes, tarts and biscuits (cookies); Pastries; Pies; Pizza; Porridge; Pre-packaged lunches consisting primarily of rice, and also including meat, fish or vegetables; Prepared meals consisting primarily of pasta; Prepared

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<sup>11</sup> See *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA and *Waterford Wedgwood PLC v OHIM* - C398/07 P.

<sup>12</sup> Submissions in lieu, paragraph 22.

meals consisting primarily of rice; Prepared meals containing [principally] rice; Prepared meals in the form of pizzas; Puddings; Rice; Salts, seasonings, flavourings and condiments; Sandwich wraps [bread]; Sandwiches; Sandwiches; Savory sauces, chutneys and pastes; Scones; Snack foods made from cereals; Soft rolls (bread); sweet coatings and fillings, bee products; Sweet glazes and fillings; treacles; Tarts; Toast; Toasted sandwiches; Unroasted coffee; Wraps [sandwich].

Class 35 Retail services, wholesale services, mail order services or internet retailing services in relation to Dairy products and dairy substitutes, Jellies, jams, compotes, fruit and vegetable spreads, Processed fruits, fungi, vegetables, nuts and pulses, Soups and stocks, meat extracts, Milk, Milkshakes, Milk beverages, Prepared meals containing [principally] eggs, Fruit salads, Prepared meals containing [principally] chicken, Prepared meals consisting primarily of meat, Prepared meals consisting primarily of poultry, Prepared meals consisting substantially of seafood, Prepared meals consisting primarily of vegetables, Prepared meals consisting primarily of meat substitutes, Vegetable salads, Potato salads, Prepared salads, Fritters, Soups, Hummus, Falafel, Cheese, Cheeses, Bread, Breakfast cereals, porridge and grits, Cereal bars and energy bars, Cereals, Coffee, teas and cocoa and substitutes therefor, Doughs, batters, and mixes therefor, Flour, Ice, ice creams, frozen yogurts and sorbets, Pastries, cakes, tarts and biscuits (cookies), Syrups and treacles, Salts, seasonings, flavourings and condiments, Savory sauces, chutneys and pastes, Sugars, natural sweeteners, sweet coatings and fillings, bee products, Sweet glazes and fillings, Chocolate, Chocolate beverages, Tea, Teas, Coffee, Coffee substitutes, Coffee drinks, Coffee beverages, Bagels, Baguettes, Bakery goods, Baps, Beverages based on chocolate, Beverages based on coffee, Beverages based on tea, Breakfast cake, Breakfast cereals, Brioches, Brownies, Buns, Cakes, Cake preparations, Cereal bars, Cereal snacks, Chutneys, Cocoa, Cocoa drinks, Condiments, Cookies, Croissants, Crepes, Food flavourings, Food seasonings, Frappes, Ices, Ices (Edible -), Ice lollies, Ice cream, Ice, Marinades, Muesli, Muffins, Pasties, Pasta dishes,

Pasta, Oat-based food, Oat bars, Pastries, Pies, Pizza, Prepared meals consisting primarily of rice, Prepared meals consisting primarily of pasta, Prepared meals in the form of pizzas, Pre-packaged lunches consisting primarily of rice, and also including meat, fish or vegetables, Porridge, Puddings, Rice, Sandwiches, Scones, Snack foods made from cereals, Tarts, Toast, Pancakes, Prepared meals containing [principally] rice, Wraps [sandwich], Sandwich wraps [bread], Fresh fruits, nuts, vegetables and herbs, Garden salads, Flavoured carbonated beverages, Juices, Non-alcoholic beverages, Waters, Nut and soy based beverages, Smoothies; Information, advice or consultancy services relating to the aforesaid.

### **The average consumer and the nature of the purchasing act**

35. It is necessary to determine who the average consumer is for the respective parties' goods and services. The relevant goods and services are those for which I have found identity or similarity. I must then decide the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. In *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), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median”.

36. The average consumer of the category of goods and services concerned is deemed to be reasonably well-informed and reasonably observant and circumspect (see, to that effect, Case C-210/96, *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 31).

37. For the purposes of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods and services in question.<sup>13</sup>

38. The foodstuff goods (and the retail services thereof) are reasonably cheap, made for every-day consumption, and are likely to be purchased by the general public frequently, whilst exercising a fairly low level of attention. This is because the consumer will merely consider elements such ingredients, cooking time, suitability, and quality when buying the goods without paying attention to other aspects. Similar considerations apply to the contested services.

39. The goods and services are likely to be obtained directly from the provider online (via websites or application) or in specialised retail outlets such as supermarkets or shops. As such, it is my view that the purchasing process will be predominantly visual in nature for the goods at issue. I would also expect the Applicant's services to be encountered primarily visually. However, aural considerations in the form of word-of-mouth recommendations or verbal discussions with the provider, for instance, cannot be excluded entirely.

### **Comparison of trade marks**

40. In *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, the CJEU held that:

“54... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.”

41. The trade marks to be compared are as follows:

<b>Earlier trade mark</b>	<b>Contested trade mark</b>
Funk	FUNK

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<sup>13</sup> *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel BV*, (Case C-342/97, para 26).

42. The Earlier Mark consists of the word “Funk” with the first letter capitalised. The Contested Mark consists of the same word “FUNK” all capitalised. Since the protection conferred by the registration of a word mark applies to the word stated in the application for registration and not to the individual graphic features that the mark might possess (22/05/2008, T 254/06, RadioCom, EU:T:2008:165, § 43), it is irrelevant whether a word mark is depicted in lower- or upper-case letters, or in a combination thereof in a manner that does not depart from the usual way of writing, as in the case of the Contested Mark. Consequently, the difference in the signs under comparison in this regard is immaterial. Absent any other stylisation, the marks are clearly identical.

### **Distinctive character of the Earlier Mark**

43. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

44. Registered trade marks possess varying degrees of inherent distinctive character. These range from the very low, such as those which are suggestive or allusive of the goods/services, to those with high inherent distinctive character, such as invented words.

45. Although the distinctiveness of a mark may be enhanced as a result of it having been used in the market, the Opponent has filed no evidence of use of its mark. Accordingly, I have only the inherent position to consider.

46. In its counterstatement the Applicant contended that:

*“The Opponent has not explained why the earlier mark, being a word in the English language, should be considered very strong and very distinctive. Instead, a word which is understood to mean a strong offensive smell according to the Merriam Webster dictionary (<https://www.merriamwebster.com/dictionary/funk>, accessed 28 June 2023) can be said to have little or no distinctiveness in relation foods such as dairy products, as relied on by the Opponent. Dairy products such as cheeses can be said to have strong and offensive odours.”*

47. I must remind myself that for a concept to be relevant, it must be capable of immediate grasp by the relevant consumer (*The Picasso Estate v OHIM*, Case C-361/04 P). Considering that the Opponent’s services are not for cheese per se but, rather, for “retail services related to dairy products” (albeit including cheese), I do not believe that the relevant consumers will immediately understand the Opponent’s mark as conveying such a meaning. Differently, it is my view that the relevant consumer is more likely to readily perceive the Earlier Mark as referring to the well-known English dictionary word “funk” indicating “a style of dance music based on jazz and blues”.<sup>14</sup> Therefore, the Earlier Mark is a word that is neither descriptive of the services at hand (and the goods to which the services relate) nor does it have any other semantic correlation with the services (and the goods to which the services relate). Even if I am wrong and the average consumer does immediately perceive the meaning of a ‘strong, offensive odour’, I do not consider that such a meaning describes or alludes to the specific services relied upon by

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<sup>14</sup> <https://www.collinsdictionary.com/dictionary/english/funk>.

the Opponent. For this reason, I find the Earlier Mark has a medium degree of inherent distinctive character, either way.

### **Likelihood of confusion**

48. There is no simple formula for determining whether there is a likelihood of confusion. The factors considered above have a degree of interdependency (*Canon* at [17]). I must make a global assessment of the competing factors (*Sabel* at [22]), considering the various factors from the perspective of the average consumer and deciding whether the average consumer is likely to be confused. In making my assessment, I must keep in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

49. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other (*L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10).

50. I have found the respective goods and services similarity to range from low to medium to identity. The level of attention is fairly low for the general public. The distinctiveness of the Earlier Mark is medium. The purchase of the contested goods and services is considered to be mainly visual but the potential for aural use is borne in mind. The respective marks are identical. Weighing all of these factors I find that the average consumer is likely to mistake one mark for the other. Thus, there is a likelihood of direct confusion between the marks in relation to the respective goods and services which I have found to be similar. I would have reached the same conclusion even if I had found the degree of attention was medium rather than fairly low.

### **Conclusion**

51. The opposition under section 5(2)(a) of the Act has partially succeeded. Therefore, the Application is, subject to appeal, refused registration for the following goods and services:

Class 30      Bagels; Baguettes; Bakery goods; Baps; Bread rolls; Bread; Breakfast cake; Breakfast cereals, porridge and grits; Breakfast cereals; Brioches;

Brownies; Buns; Cake preparations; Cakes; Cereal bars and energy bars; Cereal bars; Cereal snacks; Cereals; Chutneys; Cocoa; Coffee beans; Condiments; Cookies; Crepes; Croissants; Crusty rolls; Doughs, batters, and mixes therefor; Filled bread rolls; Filled rolls; Filled sandwiches; Flour; Food flavourings; Food seasonings; Ground coffee; Ice cream; Ice lollies; Ice, ice creams, frozen yogurts and sorbets; Ice; Ices (Edible -); Ices; Marinades; Muesli; Muffins; Oat bars; Oat-based food; Pancakes; Pasta dishes; Pasta; Pasties; Pastries, cakes, tarts and biscuits (cookies); Pastries; Pies; Pizza; Porridge; Pre-packaged lunches consisting primarily of rice, and also including meat, fish or vegetables; Prepared meals consisting primarily of pasta; Prepared meals consisting primarily of rice; Prepared meals containing [principally] rice; Prepared meals in the form of pizzas; Puddings; Rice; Salts, seasonings, flavourings and condiments; Sandwich wraps [bread]; Sandwiches; Sandwiches; Savory sauces, chutneys and pastes; Scones; Snack foods made from cereals; Soft rolls (bread); sweet coatings and fillings, bee products; Sweet glazes and fillings; treacles; Tarts; Toast; Toasted sandwiches; Unroasted coffee; Wraps [sandwich].

Class 35 Retail services, wholesale services, mail order services or internet retailing services in relation to [...] Dairy products and dairy substitutes, Jellies, jams, compotes, fruit and vegetable spreads, Processed fruits, fungi, vegetables, nuts and pulses, Soups and stocks, meat extracts, Milk, Milkshakes, Milk beverages, Prepared meals containing [principally] eggs, Fruit salads, Prepared meals containing [principally] chicken, Prepared meals consisting primarily of meat, Prepared meals consisting primarily of poultry, Prepared meals consisting substantially of seafood, Prepared meals consisting primarily of vegetables, Prepared meals consisting primarily of meat substitutes, Vegetable salads, Potato salads, Prepared salads, Fritters, Soups, Hummus, Falafel, Cheese, Cheeses, Bread, Breakfast cereals, porridge and grits, Cereal bars and energy bars, Cereals, Coffee, teas and cocoa and substitutes therefor, Doughs, batters, and mixes therefor, Flour, Ice, ice creams, frozen yogurts and sorbets, Pastries, cakes, tarts and biscuits (cookies), Syrups

and treacles, Salts, seasonings, flavourings and condiments, Savory sauces, chutneys and pastes, Sugars, natural sweeteners, sweet coatings and fillings, bee products, Sweet glazes and fillings, Chocolate, Chocolate beverages, Tea, Teas, Coffee, Coffee substitutes, Coffee drinks, Coffee beverages, Bagels, Baguettes, Bakery goods, Baps, Beverages based on chocolate, Beverages based on coffee, Beverages based on tea, Breakfast cake, Breakfast cereals, Brioches, Brownies, Buns, Cakes, Cake preparations, Cereal bars, Cereal snacks, Chutneys, Cocoa, Cocoa drinks, Condiments, Cookies, Croissants, Crepes, Food flavourings, Food seasonings, Frappes, Ices, Ices (Edible -), Ice lollies, Ice cream, Ice, Marinades, Muesli, Muffins, Pasties, Pasta dishes, Pasta, Oat-based food, Oat bars, Pastries, Pies, Pizza, Prepared meals consisting primarily of rice, Prepared meals consisting primarily of pasta, Prepared meals in the form of pizzas, Pre-packaged lunches consisting primarily of rice, and also including meat, fish or vegetables, Porridge, Puddings, Rice, Sandwiches, Scones, Snack foods made from cereals, Tarts, Toast, Pancakes, Prepared meals containing [principally] rice, Wraps [sandwich], Sandwich wraps [bread], Fresh fruits, nuts, vegetables and herbs, Garden salads, Flavoured carbonated beverages, Juices, Non-alcoholic beverages, Waters, Nut and soy based beverages, Smoothies; Information, advice or consultancy services relating to the aforesaid.

### **Costs**

52. As both parties have had a reasonable degree of success, I decline to favour either with an award of costs.

**Dated this 25<sup>th</sup> day of November 2024**

**Andrea Rossi**

**For the Registrar**