**BL O/0304/26**

**TRADE MARK ACT 1994**

**IN THE MATTER OF APPLICATION NUMBER UK00004107198**

**BY Molkerei Gropper GmbH & Co. KG**

**TO REGISTER THE FOLLOWING MARK IN CLASSES 29, 30 and 33**

**FOOD IN A BOTTLE**

## Background

1. On the 2 October 2024, Molkerei Gropper GmbH & Co. KG ("the applicant") applied to register the above-mentioned word only mark in respect of the following goods:

> *Class 29:*
> *Dairy products and dairy substitutes; milk; milk products; beverages having milk base; milk drinks with a predominant or high milk content; butter, yogurt; drinks based on yogurt, smetana [sour cream]; desserts made from milk products; condensed milk; drinks based on yogurt; kephir [milk beverage]; chilled dairy desserts; milk-based snacks; skyr; oat milk, soya milk; rice milk; cheese; milk substitutes.*
>
> *Class 30:*
> *Ice creams, frozen yogurts, and sorbets; Coffee, teas and cocoa and substitutes therefore.*
>
> *Class 33:*
> *Alcoholic cocktails containing milk.*

2. On the 7 October 2024 the Intellectual Property Office ("IPO") issued an examination report in response to the application. In the report, the following objection was raised under Section 3(1)(b) and (c) of the Trade Marks Act 1994 ("The Act"):

> *The application is not acceptable in Classes 29 and 30 for the goods listed as unacceptable below. There is an objection under Section 3(1)(b) and (c) of the Act. This is because the mark consists exclusively of a sign which may serve in trade to designate the kind of goods and their packaging, eg: food in a bottle.*
>
> *According to Collins English Dictionary, food can be defined as:*
>
> > *"any substance containing nutrients, such as carbohydrates, proteins, and fats, that can be ingested by a living organism and metabolized into energy and body tissue"*
>
> *As you can see, this definition of food is not confined to goods which are eaten. I have attached a copy of this definition at Annex A below.*
>
> *Given this, I consider that consumers would immediately perceive your mark as an indication that your goods are food (ie: they contain nutrients which can*

*be ingested and metabolized) and that they are provided in a bottle. This objection applies to the following goods:*

***Class 29***
*Dairy products and dairy substitutes; milk; milk products; beverages having milk base; milk drinks with a predominant or high milk content; butter, yogurt; drinks based on yogurt, smetana [sour cream]; desserts made from milk products; condensed milk; drinks based on yogurt; kephir [milk beverage]; chilled dairy desserts; milk-based snacks; skyr; oat milk, soya milk; rice milk; cheese; milk substitutes.*

***Class 30***
*Ice creams, frozen yogurts, and sorbets*

***Please note that there is no objection to the mark for the following goods:***

***Class 30***
*Coffee, teas and cocoa and substitutes therefore.*

***Class 33***
*Alcoholic cocktails containing milk.*

3. In line with IPO procedure, a period of two months was allowed in order for the applicant to respond.

4. On the 2 December 2024, Appleyard Lees IP LLP ("the attorney"), acting on behalf of the applicant requested an extension of time in order to finalise their considerations of the examiners objection. The examiner duly granted a two-month extension of time.

5. On the 7 February 2025, the attorney requested a further three-month extension of time in order to finalise their consideration of the objection, including the preparation of a claim of acquired distinctiveness through use. Again, the examiner duly granted this extension of time.

6. On the 8 May 2025, the attorney again requested an extension of time in order to prepare their response to the objection which would include a claim of acquired distinctive character through use. The examiner confirmed that they would grant this final extension of time, stating that no further extensions of time would be granted. The date of this final deadline was 9 July 2025.

7. On the 8 July 2025, the attorney provided the examiner with written submissions in respect of the inherent distinctiveness of the sign 'FOOD IN A BOTTLE'. The general thrust of these written submissions are summarised as follows:

    - *The mark is not descriptive in relation to the objectionable goods as the consumer would not perceive the sign immediately as a description of the goods and their packaging.*

    - *The average consumer is not accustomed to many of the goods concerned being provided in bottles. Depending on the nature of the goods, there are established packaging methods in trade and in respect of the goods concerned, none are typically sold in bottles.*

- *Goods such as milk, cheese, yogurt kefir, skyr and oat, soy and rice milk are typically labelled as milk, dairy or dairy substitute drinks rather than being labelled as a 'food'.*

- *Although products such as milk (and milk-based drinks) may technically fall within the broader definition of 'food' as a consumable product, such goods are not generally described by the average consumer as a 'food'. Instead, the word 'food' is appreciated by average consumers as denoting solid or meal-like consumables.*

- *Given that consumers naturally interpret 'food' as a solid form of nourishment it would strike them as odd for such solids to be offered in a bottle, rendering the sign 'FOOD IN A BOTTLE' unusual and therefor distinctive.*

- *In order to be descriptive, a sign must consist exclusively of signs or indications which may serve in trade to designate a specific characteristic of the goods. Whilst goods such as milk and milk-based beverages can be sold in bottles, they may also be provided in various other containers such as cartons and pouches. A bottle is therefore a form of packaging that is not unique to milk nor does a bottle denote an intrinsic feature of milk or milk-based beverages.*

8. On the 11 July 2025 the examiner responded to the attorney, informing them that they found the written submissions unpersuasive and confirmed that the objection under 3(1)(b) and (c) was maintained.

9. On the 9 September 2025 the attorney requested a hearing before a senior official at the registry with a view to overcoming the outstanding absolute grounds objection. The subsequent hearing was scheduled to take place on 7 October 2025 with Ms Claire Bothma in attendance on behalf of the attorney.

10. At the hearing, Ms Bothma provided oral submissions which amounted to a recapitulation of the written submissions previously offered to the examiner. They are summarised in brief below:

    - *Food is generally understood by the average consumer as a reference to solid consumables and for reasons of convenience are traditionally sold in conventional packaging such as tins, cartons, tubs, etc. The type of packaging selected by a producer is usually dictated by the texture or nature of the foods themselves.*

    - *These conventions are widely understood and well established in trade and consumers have come to expect particular kinds of foods to be packaged in particular kinds of containers. These conventions would be broken when foods which are generally considered to be 'solid' are provided in a bottle which may complicate using or accessing the contents.*

    - *Consumers have a very clear concept of what kinds of consumable products are considered as 'food' and what are considered as 'drink'. They are equally familiar with the notion that food is not sold in bottles. It is this established appreciation of the customs of the food sector that would lead to consumers being struck by the notion of providing 'food' in a 'bottle'.*

- *The examiner's limited examples showing foods being provided in bottles demonstrates that it is unusual in trade to offer such solid consumables in bottle.*

11. I deferred my decision at the hearing to further consider Ms Bothma's submissions, subsequently rendering my decision to maintain the Section 3(1)(b) and (c) objection in my hearing report of 17 October 2025. The reasons stated for the maintaining of the absolute grounds objection are briefly summarised below:

    - *The mark consists of everyday words which are commonly used are readily understood by the British public. When seen in the combination reflected in the mark applied for, the words form a grammatically correct and intellectually meaningful expression, specifically, that the goods consist of foodstuffs provided in a bottle.*

    - *I accepted that there may be instances where the concept being described by a mark will be so unusual that the mark will be rendered distinctive, however, I did not consider this to be the case in this instance.*

    - *I also accepted that there is clearly a distinction to be made between the words 'food' and 'drink'. However, I noted that in respect of dairy-based products they are often referred to as dairy foods.*

    - *The goods were considered to be everyday consumer items of food and drinks and the average consumer would not be particularly attentive. As a result, they would be unlikely to undertake a rigorous analysis of the mark, such that they might contemplate whether the goods concerned would be categorised as a food. Instead, they would take the grammatically correct expression at face value and when seen in connection with consumable foods or drinks, would simply appreciate the sign 'FOOD IN A BOTTLE' as a descriptor.*

    - *I indicated that it is a settled principle in law that the expression 'may serve in trade' includes within its scope the possibility of future use even in instances where, at the date of application, the sign for which protection is sought is not used descriptively in trade. Regardless, it was also noted that the examiner had previously provided examples demonstrating foods such as butter, sour cream and kefir being provided in a bottle and so, in my view, the trade was already provided 'food in a bottle' as it were.*

    - *Given the breadth of novel packaging options implemented in the food and beverage industry, it could not be excluded that food can be provided to the public in bottled containers.*

12. My hearing report also highlighted that I had granted the customary two-month period for the attorney to respond to the contents of the hearing report and, if they wished to provide exhibits demonstrated acquired distinctiveness through use, it would not be possible to offer any further extensions of time given their prior extensions. The deadline was set for the 17 December 2025. I also stated that should no response be received, the application would proceed in respect of the following acceptable goods:

***Class 30***
*Coffee, teas and cocoa and substitutes therefore.*

***Class 33***
*Alcoholic cocktails containing milk.*

13. On 19 December 2025, I had not received a response and the application was duly refused in accordance with Section 37(4) of the Trade Marks Act. In response, on the 19 January 2026, the attorney submitted a form TM5 to request a statement of reasons for the registrar's decision. Having received such a request, I now set out my reasons below.

**The Law**

14. The relevant section of the Act reads as follows:

> *3(1) the following shall not be registered-*
>
> *(a) …*
>
> *(b) trade marks which are devoid of any distinctive character,*
>
> *(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or any other characteristic of goods or services,*
>
> *(d) …*
>
> *Provided that, a trade mark shall not be refused registration by virtue of paragraph (b),(c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it."*

**Relevance of EU Law**

15. 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 some decisions of the EU courts which predate the UK's withdrawal from the EU.

**The Relevant Legal Principles – 3(1)(c)**

16. The case law under section 3(1)(c) of the Act was summarised by Arnold J (as he then was) in Starbucks (HK) Ltd v British Sky Broadcasting Group Plc. [2012] EWHC 3074 (Ch). These are the most relevant points:

    a. *The general interest underlying section 3(1)(c) is that of ensuring that descriptive signs relating to one or more characteristics of the goods or*

*services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services.*

b. *With a view to ensuring that that objective of free use is fully met, it is not necessary that the sign in question actually be in use at the time of the application for registration in a way that is descriptive. It is sufficient that the sign could be used for such purposes.*

c. *The application of that ground for refusal does not depend on there being a real, current or serious need to leave a sign or indication free and that it is therefore of no relevance to know the number of competitors who have an interest, or who might have an interest, in using the sign in question. It is, furthermore, irrelevant whether there are other, more usual, signs than that at issue for designating the same characteristics of the goods or services referred to in the application for registration.*

d. *The situations specifically covered by section 3(1)(c) of the Act are those in which the sign in respect of which registration as a mark is sought is capable of designating a 'characteristic' of the goods or services referred to in the application. By using the terms 'the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service', the legislature made it clear, first, that the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service must all be regarded as characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of goods or services may also be taken into account.*

e. *The fact that the legislature chose to use the word 'characteristic' highlights the fact that the signs referred to in section 3(1)(c) of the Act are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. A sign can be refused registration on the basis of section 3(1)(c) only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics.*

f. *In addition, a sign is caught by the exclusion from registration in section 3(1)(c) if at least one of its possible meanings designates a characteristic of the goods or services concerned.*

17. Additionally, a number of judgements have been handed down by the CJEU which have established the scope of Article 3(1)(c) of the First Council Directive 89/104 (recoded and replaced by Directive 2008/95/EC on the 22 October 2008 which in turn, was repealed and replaced by Directive 2015/2436 on the 15 January 2019) and Article 7(1)(c) of the Community Trade Mark Regulations, whose provisions correspond to section 3(1)(c) of the UK Trade Marks Act 1994. For the avoidance of doubt, it is noted that the Trade Marks Act 1994 is largely derived from EU law (Directive 2015/2436). I derive the following main guiding principles from the cases noted below:

- *Subject to any claim in relation to acquired distinctive character, signs and indications which may serve in trade to designate the characteristics of goods or services are deemed incapable of fulfilling the indication of origin function of a trade mark (Wm Wrigley Jr & Company v OHIM, C-191/01P 'Doublemint', paragraph 30);*

- *Article 7(1)(c) (section 3(1)(c)) pursues an aim which is in the public interest, namely that signs or indications relating to the categories of goods or services in respect of which registration is sought may be freely used by all. The provision therefore prevents such signs or indications from being reserved to one undertaking alone because they have been registered as trade marks (see judgment of 4 May 1999 in Joined cases C108/97 and C-109/97 Windsurfing Chiemsee Produktions-und Vertriebs GmbH (WSC) v Boots-und Segelzubehör Walter Huber and Franz Attenberger (Chiemsee) [1999] ECR I2779, at paragraph 25);*

- *It is an accepted principle in law, that in the context of Section 3(1)(c) of the Act, the expression 'may serve in trade' includes within its scope the possibility of future use even in instances where, at the date of application, the sign for which protection is sought is not used descriptively in trade (to that effect, CJEU Cases C-108/97 and C109/97 Windsurfing Chiemsee Produktions und Vertriebs GmbH v Boots and Segelzubehor Walter Huber and others).*

- *Further to the established principle of 'future use', it is also settled in law that the fact there may be little or no current use of the sign in trade at the time of application is not a determinative factor in assessing a marks acceptability for registration. The expression 'may serve in trade' should be interpreted as meaning 'could' the sign for which protection is sought serve to designate a characteristic of the goods or services (Wm Wrigley Jr & Company v OHIM, C-191/01P "Doublemint").*

- *Article 3(1)(c) [Trade Mark Directive] precludes registration of a trade mark which consists exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services in respect of which registration is sought, and that is the case even when there are more usual signs or indications for designating the same characteristics and regardless of the number of competitors who may have an interest in using the signs or indications of which the mark consists (see C-363/99 KPN/BMB Postkantoor).*

- *It is also a well-established principle that the Registrar's role is to engage in a full and stringent examination of the facts, underlying the Registrar's frontline role in preventing the granting of undue monopolies, see to that effect CJEU Case C-51/10 P, Agencja Wydawnicza Technopol sp. z.o.o. v OHIM [2011] ECR I-1541 (Technopol);*

- *When determining whether a sign is devoid of distinctive character or is descriptive of the goods or services in respect of which registration is sought, it is necessary to take into account the perception of the relevant consumer who is reasonably well-informed and reasonably observant and circumspect (Matratzen Concord AG v Hukla Germany SA, C-421/04);*

- *There must be a sufficiently direct and specific relationship between the sign and the goods in question to enable the relevant consumer immediately to perceive, without further thought, a description of the category of goods and services in question or one of their characteristics (Ford Motor Co v OHIM, T67/07).*

18. In respect of my assessment of the of the goods and services, I have taken into account the comments of the CJEU in Case C-239/05, BVBA [2007] E.C.R. I-1455 which stated:

> *"34….an examination of the grounds for refusal listed in Art.3 of the Directive must be carried out in relation to each of the goods and services for which trade mark registration is sought and, secondly, that the decision of the competent authority refusing registration of a trade mark must, in principle, state reasons in respect of each of those goods or services.*
>
> *35 That conclusion cannot be any different where an application to the competent authority for a range of goods or services does not contain a subsidiary application for registrations of the mark concerned for specific classes of goods or services or for goods and services considered separately.*
>
> *36 The duty upon the competent authority to state reasons for refusing to register a trade mark in relation to each of the goods or services for which such registration is sought also arises from the essential requirement for any decision of a national authority refusing the benefit of a right conferred by Community law to be subject to judicial review which is designed to secure effective protection for that right and which, accordingly, must cover the legality of the reasons for the decision….*
>
> *37 However, where the same ground of refusal is given for a category or group of goods or services, the competent authority may use only general reasoning for all of the goods and services concerned."*

19. I have also taken into account the consequences for third parties of granting the holder a monopoly. In Linde A.G. v Rado Uhren A.G. Case C-53/01 the following guidance was given:

> *"73. According to the Court's case-law "Article 3(1)(c) of the Directive pursues an aim which is in the public interest, namely that descriptive signs or indications relating to the characteristics of goods or services in respect of which registration is applied for may be freely used by all, including as collective marks or as part of complex or graphic marks. Article 3(1)(c) therefore prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks (see to that effect, Windsurfing Chiemsee, paragraph 25).*
>
> *74. The public interest underlying Article 3(1)(c) of the Directive implies that, subject to Article 3(3) any trade mark which consists exclusively of a sign or indication which may serve to designate the characteristics of goods or a*

*service within the meaning of that provision must be freely available to all and not be registrable."*

**Application of legal principles**

20. In regard to identifying the average consumer, it is clear from the specification included in the application that the average consumer will consist of members of the general public who are seeking out goods which could be categorised as everyday food and drink products. Accordingly, I believe the consumer will likely be paying no more than a medium degree of attention when engaging with the mark concerned.

21. Having established the sector in which the goods in question would be marketed and sold, as well as the likely level of attention of the average consumer, I now turn to consider the distinctive character of the mark in relation to the goods for which protection is sought.

22. In my view, it is reasonable to suggest that the mark 'FOOD IN A BOTTLE' is formed from words which are commonly used and widely understood by the UK public and that, moreover, the expression formed by these words is grammatically correct. It is of course necessary for me to consider how, assuming notional and fair use in trade, this grammatically correct expression will be perceived by the average consumer of the food and beverages.

23. In this respect, it is considered that a average consumer, paying a medium level of attention would be unlikely to undertake a rigorous analysis of the sign 'FOOD IN A BOTTLE' when seen in connection with the food and drink products; they would instead read the words and, applying their understanding of the normal rules of English language and grammar, take the words at face value. Consequently, they would perceive the expression as nothing more than a description of goods being provided in a bottled container.

24. It was stated in the attorney's written and oral submissions, that the inclusion of the word 'FOOD' within the mark would strike the consumer as unusual when used in respect of goods such as milk, milk-based beverages, and other beverages based on dairy and dairy alternatives. I respectfully disagree with these submissions, I do not believe that upon being presented with the sign 'FOOD IN A BOTTLE', the average consumer would pause to analyse whether the word 'FOOD' was an appropriate descriptor of the contents of the bottle. Instead, it is my view, an average consumer would, when confronted with the sign 'FOOD IN A BOTTLE' in relation to a consumable product, merely apply a broad understanding of the word 'FOOD', appreciating the word as describing the contents as a *"**substance containing nutrients**, such as carbohydrates, proteins and fat, **that can be ingested by a living organism and metabolised into energy and body tissue**"* (Collins dictionary). Accordingly, the word 'FOOD' would not resonate with them such that they would attribute any trade mark significance to the sign, when it is considered as a whole.

25. I would also observe that goods such as milk, milk-based drinks, drinks based on yogurt, kephir and oat, soya and rice milks may generally be understood as being high in nutritional value. I believe this fact further influences the perception of the average consumer insofar as they will be less likely to view the word 'FOOD' as striking or

unusual when seen as part of the expression ‘FOOD IN A BOTTLE’, when used in relation to beverages which are particularly rich in protein, calcium and vitamins.

26. The attorney also submitted that the packaging of goods such as butter, yogurt, smetana, skyr, cheese, ice cream, sorbets and chilled dairy desserts, are typically dictated by the characteristics of the product in question. In particular, it was argued that because such goods are semi-solid in nature there are specific packaging conventions which are established in trade; generally, the goods concerned are provided in tubs, pots or cartons which facilitate easy access to the product inside. The attorney expanded on this, stating that the average consumer is familiar with these established trade practices and as a result, would find the concept of selling these particular foods in a bottle to be jarring. As a result, the inclusion of the word ‘BOTTLE’ serves to render the sign ‘FOOD IN A BOTTLE’ as distinctive to an average consumer.

27. In my view and as was stated in my hearing report, it is immediately apparent that manufacturers within the food and drink sector invest heavily in the design of their packaging with a breadth of novel packaging options being developed and implemented within the industry. Whilst it does not have a bearing on the outcome of this decision per se, and is merely included to illustrate a point, it is noted that the applicant themselves appear to acknowledge this with a prominent page titled ‘Packaging Development’ contained on their website which comments on their efforts to develop ‘new packaging concepts’ (see below).

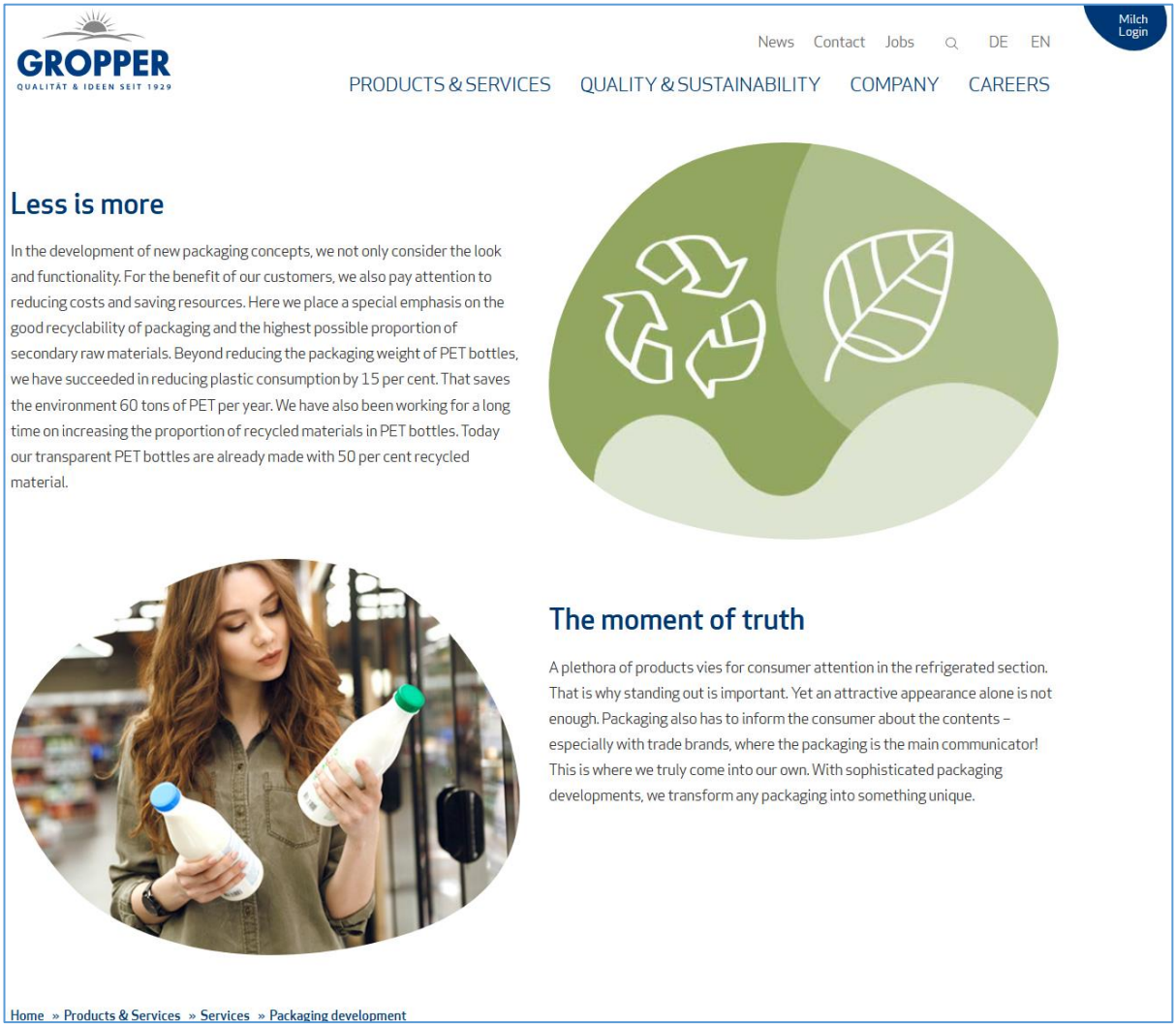


*Figure 1 - Applicant's website highlighting their packaging development efforts (https://www.gropper.de/en/products-services/services/packaging-development)*

28. It is with an appreciation of the extensive range of packaging solutions implemented within the food and drink sector in mind that I respectfully disagree with the attorney's submissions, that the semi-solid foods described in paragraph 26 above, could not be provided in bottled packaging. Of course, I realise that there may be examples where it would be impractical to select a certain packaging option for particular goods, for example, butter sold in a narrow-necked glass bottle. However, as was demonstrated by the examiner in their correspondence with the attorney, butter provided in a plastic squeezy bottle has previously been available to purchase in UK supermarkets (*see example below which was included in the examiner's correspondence to the attorney*):

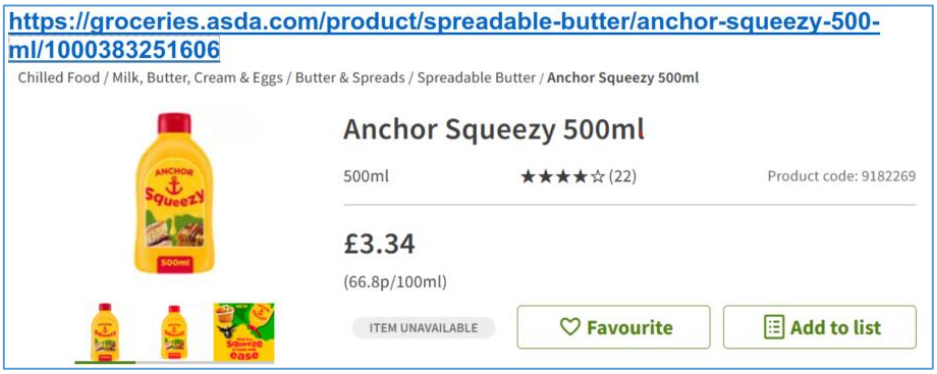
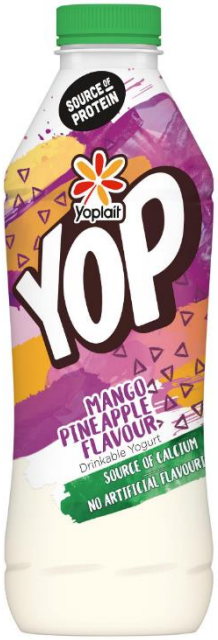



*Figure 1 - Example of butter product provided in plastic bottle packaging.*

29. Other examples (*shown below*) include skyr and yogurt, available in bottled form.


30. In light of the above, it is submitted that whilst there may be packaging solutions which are better suited to specific goods, it is apparent that the goods described above are presently sold in bottled containers or, it cannot be discounted that that the food

products may be sold in such a container in future. Consequently, I do not accept that an average consumer would, when presented with the descriptive expression 'FOOD IN A BOTTLE', find the notion of these foods being sold in a bottle as so striking that they would attach any trade mark significance to the sign. Instead, they would simply take the expression 'FOOD IN A BOTTLE', when seen in connection with a food or drink product, at face value and understand the sign as exclusively descriptive.

*31.* In summary, it is accepted that the words 'food' and 'drink' may be appreciated by the average consumer as distinct in respect of their precise definitions in some circumstances, for example, when viewing items categorised on a menu. However, it is not necessarily the case that such a prescriptive understanding of the word 'food' will be applied by the average consumer when they are confronted by the expression 'FOOD IN A BOTTLE' on a consumable product during the purchasing act. It is also, in my view, reasonable to suggest that the food and beverage industry is highly innovative in their efforts to develop and utilise novel packaging solutions to attract consumers to their products. Accordingly, it is reasonable to state that the 'semi-solid' goods previously described are either currently available in bottles or may be provided in a bottled container in the future. In this respect, I would highlight the legal principle that in the context of Section 3(1)(c) of the Act, the expression '*may serve in trade*' includes within its scope the possibility of future use even in instances where, at the date of application, the sign for which protection is sought is not used descriptively in trade *(to that effect, CJEU Cases C-108/97 and C109/97 Windsurfing Chiemsee Produktions und Vertriebs GmbH v Boots and Segelzubehor Walter Huber and others)."*

*32.* Although it was submitted that the concept of food being sold in a bottle is unusual, it is vital to acknowledge the now well-established legal principle that it is sufficient that I establish that the term 'FOOD IN A BOTTLE' 'could' designate a characteristic of the goods concerned. As was noted by the ECJ:

> *Further to the established principle of 'future use', it is also settled in law that the fact there may be little or no current use of the sign in trade at the time of application is not a determinative factor in assessing a marks acceptability for registration. The expression 'may serve in trade' should be interpreted as meaning 'could' the sign for which protection is sought serve to designate a characteristic of the goods or services (Wm Wrigley Jr & Company v OHIM, C-191/01P "Doublemint").*

*33.* In light of all of the above, I am mindful of the risks to trade which are inherent should the registrar grant rights in a sign which may be serve an exclusively descriptive purpose. As was noted by the CJEU:

> *"Article 7(1)(c) (section 3(1)(c)) pursues an aim which is in the public interest, namely that signs or indications relating to the categories of goods or services in respect of which registration is sought may be freely used by all. The provision therefore prevents such signs or indications from being reserved to one undertaking alone because they have been registered as trade marks (see judgment of 4 May 1999 in Joined cases C108/97 and C-109/97 Windsurfing Chiemsee Produktions-und Vertriebs GmbH (WSC) v Boots-und Segelzubehör Walter Huber and Franz Attenberger (Chiemsee) [1999] ECR I2779, at paragraph 25);"*

34. Given that the mark, in my view, merely serves to exclusively designate a characteristic of the goods, it is considered that the objection under 3(1)(b) is contingent on the 3(1)(c) objection, there is no separate 3(1)(b) objection under consideration.

35. For the sake of completeness, I also confirm that no objection under 3(1)(b) and (c) was raised at the examination stage in respect of the goods listed below. This was because it was considered as reasonable to conclude that the average consumer would categorise goods such as tea, coffee or alcoholic cocktails as being drinks. Accordingly, they may perceive the term 'food' as unusual if used as a descriptor for such goods;

    ***Class 30***
    *Coffee, teas and cocoa and substitutes therefore.*

    ***Class 33***
    *Alcoholic cocktails containing milk*

**Conclusion**

36. In this decision, I have carefully considered all the submissions and arguments made during the proceedings and, having done so, concluded that for the reasons set out above, the application is refused in respect of the goods applied for because it fails to qualify for registration under Section 3(1)(b) and (c) of the Act.

**Dated this 8th day of April 2026**

**Darren Smith**

**For the Registrar**