

O/0694/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NUMBER UK00004117171

BY ASSUREX LIMITED

TO REGISTER THE FOLLOWING TRADE MARK:



(Series of marks)

IN CLASS 42

AND

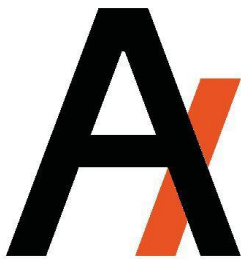
AN OPPOSITION THERETO UNDER NUMBER 452966

BY ABABAX HEALTH GMBH

BACKGROUND AND PLEADINGS

1. On 28 October 2024, Assurex Limited (“the Applicant”) applied to register in the UK the series of trade marks shown on the cover page of this decision (“the contested mark”). The application was accepted and published for opposition purposes on 10 January 2025, and registration is sought for services in class 42, found in the comparison table below at paragraph 20.
2. On 10 March 2025, Ababax Health GmbH (“the Opponent”) opposed the application in full under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”).
3. The Opponent relies upon the following UK trade mark for its opposition:

UK00918215358¹



Filing date: 25 March 2020

Registration date: 30 July 2020

4. For the purposes of these proceedings, the Opponent is relying on all of the goods and services, for which the earlier mark is registered which are found in the comparison table below at paragraph 20.
5. Given the filing dates, the Opponent’s mark is an earlier mark, in accordance with section 6 of the Act. However, as it had not been registered for five years or more

¹ Under Article 54 of the Withdrawal Agreement, the Registry created comparable UK trade marks for all right holders with an existing EUTM. As a result of the opponent’s IR(EU) number 18215358 being protected as at the end of the Implementation Period, a comparable UK trade mark was automatically created. The comparable UK mark now recorded on the UK trade mark register has the same legal status as if it had been applied for and registered under UK law, and retains its original international registration date as its filing date.

at the filing date of the application, it is not subject to the proof of use requirements specified within section 6A of the Act. As a consequence, the Opponent may rely upon all of the goods and services for which the earlier mark is registered without having to establish genuine use.

6. Under section 5(2)(b), the Opponent claims in its statement of grounds that the marks are similar as they will be read as 'AX' and they have a nearly identical colour pattern, as the letter A is black and the line forming the X is a very similar red/orange colour. Further, the Opponent claims the goods and services are either identical or highly similar. It contends that as a result, there exists a likelihood of confusion.²
7. The Applicant filed a defence and counterclaim denying the ground of the opposition.
8. The Applicant is represented by Saurabh Sachdeva and the Opponent is represented by Fred Sonnenberg. Neither the Applicant nor the Opponent filed evidence. Neither party requested a hearing nor filed written submissions in lieu.
9. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Preliminary issues

State of the register evidence

10. The Applicant claims under the heading '*Coexistence of Similar Marks in the Industry*' that there are several trade marks that incorporate A and X in different styles, all of which it claims have been granted coexistence due to their distinctive

² Form TM7, Q9.

artistic expressions.³ Alongside this the Applicant provides in section 2, a table with 5 different registered marks in class 42 that include the letters A and X. Whilst this is referred to as evidence of coexistence, it is not. The principle of coexistence applies to circumstances where the Applicant can evidence that its mark has existed for a considerable length of time on the market alongside the Opponent's. The Applicant has not provided evidence that this is the case. Instead, the evidence that has been provided of other trade marks on the register using the letters A and X, I consider to be what is commonly referred to as 'state of the register' evidence.

11. I take into account the case of *Zero Industry Srl v OHIM*, Case T-400/06, where the General Court ("GC") stated that:

"73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word 'zero', it should be pointed out that the Opposition Division found, in that regard, that '... there are no indications as to how many of such trade marks are effectively used in the market'. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word 'zero' is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T 135/04 GfK v OHIM – BUS(Online Bus) [2005] ECR II 4865, paragraph 68, and Case T 29/04 Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH) [2005] ECR II 5309, paragraph 71)."

12. The fact that there are a number of trade marks that contain the letters A and X for services in the same class as the applied for mark, by itself, does not assist the Applicant. There is no evidence that these marks are used on the market for the services for which they are registered. Therefore, it is impossible to determine that use on the relevant market has led consumers to become accustomed to differentiating between marks using these letters, leading to a weakening of the distinctive character of these elements due to its frequent use. Instead, the

³ Applicant's counterstatement, section 1 point 3.

outcome of this opposition will be determined after making a global assessment whilst taking into account all the relevant factors. I will, therefore, say no more about it.

Goods and services comparison and the target market

13. The Applicant argues within its counterstatement that:

“While both parties may operate under Class 42, the specific nature, scope, and target audience of our services differ significantly from those of the opponent.

Assurex Limited provides technology consultancy, software development, applied research, and digital transformation services, focusing on innovative solutions for enterprise and technical sectors.

Our offerings include custom software engineering, data-driven research projects, and strategic IT advisory, which are distinct from the healthcare-oriented services of the opponent.

The commercial context, branding, and user expectations are sufficiently distinct to avoid any likelihood of confusion.

[...]

We respectfully submit that the shared classification does not imply functional or market overlap, and therefore does not meet the threshold for opposition under Section 5(2).”

14. It is important to note that differences between the goods and services currently provided by the parties are irrelevant, except to the extent that those differences are apparent from each party’s specification. Furthermore, as I have mentioned above, since the Opponent’s earlier mark is not subject to proof of use, it is entitled to protection in relation to all the goods and services for which it is registered. As

such, it is the goods and services as described in each of the parties' specifications that I will be comparing below.

DECISION

Sections 5(2) and 5A and case law

15. Sections 5(2)(b) and 5A of the Act state:

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

(a) ...

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

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

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.”

16. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor*, [2025] UKSC 25:

(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

17. All relevant factors relating to the goods and services should be taken into account, which include, inter alia:⁴

- the physical nature of the goods and services;
- their intended purpose;
- their method of use / uses;
- who the users of the goods and services are;
- the trade channels through which the goods and services reach the market;
- in the case of self-serve consumer items, where in practice they are found or likely to be found in shops and in particular whether they are, or are likely to be, found on the same or different shelves; and
- whether they are in competition with each other (taking into account how those in trade classify the goods and services, for instance whether market research companies put them in the same or different sectors)

or

- whether they are complementary to each other. Complementary signifying that “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 and services

⁴ See *Canon*, Case C-39/97, paragraph 23; and *British Sugar PLC v James Robertson & Sons Ltd.*, [1996] R.P.C. 281 – the “*Treat*” case.

lies with the same undertaking”.⁵ It is noted that complementarity means that there is an autonomous criterion capable of being the sole basis for the existence of similarity.⁶

18. I bear in mind that it is permissible to group goods together for the purposes of assessment: *Separode Trade Mark*.⁷

19. Further, in *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-133/05, the GC stated that:

“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.”

20. The goods and services for comparison are as follows:

Opponent’s specification	Applicant’s specification
<u>Class 5</u> Pharmaceutical and medical preparations; Pharmaceutical and medical preparations for use in conjunction with digital health treatments, diagnosis, examination and monitoring.	

⁵ *Boston Scientific Ltd v OHIM*, Case T-325/06, paragraph 82, see also *Sandra Amalia Mary Elliot v LRC Holdings Limited*, BL O/255/13

⁶ *Kurt Hesse v OHIM*, Case C-50/15 P, see also *Sanco SA v OHIM*, Case T-249/11

⁷ BL O/399/10, paragraph 5

<u>Class 9</u> Software for bioinformatics; Software for the processing of medical data; Software for use in ehealth and digital health treatment, examination, diagnosis and monitoring.	
<u>Class 10</u> Diagnostic, examination and monitoring equipment; Diagnostic, examination and monitoring equipment for use in ehealth and digital health treatments.	
<u>Class 35</u> Business organization and operation consultancy; advisory services relating to business management and business operations; advisory services relating to market research; organisational consultancy and business administration, with and without the aid of electronic databases; business planning services; business management consulting services in the field of information technology; computerised	

business management [for others]; computerised market research; business merger services; business services relating to the establishment of businesses; interviewing for qualitative market research; business strategy services; development of hospital management systems; development of marketing strategies and concepts; business development; business management; business management services relating to the acquisition of businesses; management of health care clinics for others; hospital management; business assistance relating to the formation of commercial undertakings; business project management; human resources management and recruitment services; business risk assessment services; business acquisitions consultation; business advice relating to	
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marketing; business advisory services relating to company performance; business merger consultation; business consultancy services relating to insolvency; business advice relating to marketing management consultations; business advice relating to strategic marketing; business advisory services relating to business liquidations; advice relating to the sale of businesses; business advice relating to growth financing; business consultation and management regarding launching of new products; business administration; business and market research; business management supervision	
<u>Class 36</u> Facilitating and arranging financing; investment consultancy; equity financing; financial consultancy in relation to the buying and selling of businesses; financial	

advisory and management services; arranging the provision of finance; provision of finance for health care; financing in relation to the buying and selling of businesses; financing of mergers; financing of acquisitions; financial management of holding companies; fund management; investment services; escrow services; arranging finance for businesses; financial management.	
<u>Class 42</u> Information technology [IT] consultancy; computer and information technology consultancy services; IT programming services; information technology services for the pharmaceutical and healthcare industries; advisory services relating to science; scientific services and design relating thereto; scientific research services; scientific and technological services	<u>Class 42</u> IT services; Computer programming; Design and creation of web sites for others; Design and graphic arts design for the creation of web sites; Design and graphic arts design for the creation of web pages on the Internet; Design, creation and programming of web pages; Web site design and creation services; Graphic arts design; Design (Graphic arts -); Design of web sites; Graphic design; Graphic design services; Graphic art design; Web site design; Web site design consultancy; Industrial and graphic art design; Web site design services; Website design and development; Design and creation of homepages and web pages; Design of web pages; Web portal design; Graphic illustration design services; Website design; Design and development of homepages and websites; Design and creating web sites for others; Design and

	construction of homepages and websites; Consultancy relating to the creation and design of websites; Computer site design; Artificial intelligence consultancy; Research in the field of artificial intelligence; Technology consultation in the field of artificial intelligence; Research in the field of artificial intelligence technology; Platforms for artificial intelligence as software as a service [SaaS]; Providing artificial intelligence computer programs on data networks; Software as a service [SaaS] featuring computer software platforms for artificial intelligence; Development of software; Software development; Software design and development; Software development in the framework of software publishing; Computer software development; Development of computer software; Development and testing of software; Software development services; Design and development of software for website development; Software development, programming and implementation; Design and development of computer software; Computer software design and development; Design, development and implementation of software; Development of driver software; Research and development of computer software; Development and maintenance of computer software; Design and development of driver software; Development of computer hardware and software; Development of computer software application solutions; Programming of software for website development; Design and development of computer software for logistics; Design and development of computer hardware and software; Design, development and programming of computer software;
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	Computer software development for others; Consultancy in the field of security software; Software consultancy services; Computer and software consultancy services; Computer software consultancy services; Consultancy services in relation to computer software; Testing of computer programs; Testing of computer software; Development of computer programs; Computer programming and maintenance of computer programs; Designing of computer programs; Application service provider (ASP) services, namely, hosting computer software applications of others; Application service provider [ASP], namely, hosting computer software applications of others; Application service provider [ASP] services; Development services relating to computer software application solutions; Computer software integration; Computer software consultancy; Consultancy (Computer software -); Software engineering; Computer software consulting; Software authoring; Computer hardware and software design; Design of computer hardware and software; Computer software design; Software design (Computer -); Computer software (Design of -); Design of computer software; Computer software engineering; Computer software installation; Computer software (Installation of -); Installation of computer software; Update of computer software; Software design; Software installation; Configuration of computer software; Development of computer database software; Computer software maintenance; Maintenance of computer software; Computer software (Maintenance of -); Computer software design services; Design of computer database software; Developing computer
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	software; Upgrading of computer software; Computer software (Updating of -); Computer software programming services; Hiring of computer software; Software as a service [SaaS] featuring software for machine learning; Computer software research; Software consulting services; Information technology consulting; Engineering consultancy; Engineering consultancy services; Computer software consulting services; Computer consultancy and advisory services; Information technology consulting services; Technical advice and consultancy services in the field of telecommunications; Consulting services in the field of software as a service [SaaS]; Technical planning and consulting in the field of light engineering; Control technology consulting services; Consulting services relating to computer software; Professional consulting services and advice about agricultural chemistry; Architectural consultancy services; Technical consulting in the field of environmental engineering; Telecommunications engineering consultancy; Computer consultancy services; Professional consultancy relating to technology; Application service provider services; Software as a service; Public cloud hosting provider service; Private cloud hosting provider service; Software as a service [SAAS] services; Cloud hosting provider services; Outsource service providers in the field of information technology; Hosting services, software as a service, and rental of software; Software as a service [SaaS]; Technological consultancy services for digital transformation; Technological consulting services for digital transformation.
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21. In relation to the goods and services the Opponent claims that:

“Moreover, the goods of the opposition trademark in classes 9, 35 and 42 are identical or at least highly similar to the services of the opposed trademark application in class 42. In particular, the services in class 42 of the opposition trademark are identical to the services in class 42 of the contested trademark application. The goods in class 9 of the opposition trademark are also very similar to the goods in class 42 of the contested trademark application as the goods and services relate to IT and software. The services in class 35 of the opposition trademark are also very similar to the services in class 42 of the contested trademark application as most of the contested services in class 42 relate to consultancy.”

22. I make the following findings:

Computer programming

23. I consider the above term to simply be another way of expressing the Opponent's term “*IT programming services*”. Consequently, these services are **identical**.

IT services

24. The above term is a wide term that would encompass the Opponent's services “*Information technology [IT] consultancy; computer and information technology consultancy services*”. Further it also falls into the Opponent's broad term “*scientific and technological services*”. As such, the terms are **identical** under *Meric*.

Design and creation of web sites for others; Design and graphic arts design for the creation of web sites; Design and graphic arts design for the creation of web pages on the Internet; Design, creation and programming of web pages; Web site design and creation services; Graphic arts design; Design (Graphic arts -); Design of web sites; Graphic design; Graphic design services; Graphic art design; Web site design; Web site design consultancy; Industrial and graphic art design; Web site design services; Website design and development; Design and creation of homepages and web pages; Design of web pages; Web portal

design; Graphic illustration design services; Website design; Design and development of homepages and websites; Design and creating web sites for others; Design and construction of homepages and websites; Consultancy relating to the creation and design of websites; Computer site design.

25. All of the above are services related to the design of websites and graphic design and all fall within the opponent's broad term "scientific and technological services". As such they are **identical** under *Meri*c.

Artificial intelligence consultancy; Research in the field of artificial intelligence; Technology consultation in the field of artificial intelligence; Research in the field of artificial intelligence technology; Platforms for artificial intelligence as software as a service [SaaS]; Providing artificial intelligence computer programs on data networks; Software as a service [SaaS] featuring computer software platforms for artificial intelligence.

26. The above services are all types of scientific or technological services relating to artificial intelligence as such they are all encompassed under the opponent's wider term "scientific and technological services". Consequently, the services are **Meric identical**.

Development of software; Software development; Software design and development; Software development in the framework of software publishing; Computer software development; Development of computer software; Development and testing of software; Software development services; Design and development of software for website development; Software development, programming and implementation; Design and development of computer software; Computer software design and development; Design, development and implementation of software; Development of driver software; Research and development of computer software; Development and maintenance of computer software; Design and development of driver software; Development of computer hardware and software; Development of computer software application solutions; Programming of software for website development; Design and

development of computer software for logistics; Design and development of computer hardware and software; Design, development and programming of computer software; Computer software development for others; Development of computer programs; Computer programming and maintenance of computer programs; Designing of computer programs; Development services relating to computer software application solutions; Computer hardware and software design; Design of computer hardware and software; Computer software design; Software design (Computer -); Computer software (Design of -); Design of computer software; Computer software installation; Computer software (Installation of -); Installation of computer software; Update of computer software; Software design; Software installation; Configuration of computer software; Development of computer database software; Computer software maintenance; Maintenance of computer software; Computer software (Maintenance of -); Computer software design services; Design of computer database software; Developing computer software; Upgrading of computer software; Computer software (Updating of -); Computer software programming services; Software authoring; Computer software research; Testing of computer programs; Testing of computer software.

27. The above are all IT services for the design, development, research, installation, maintenance, updating, testing and programming of computer software or hardware. These are all included within the Opponent's broader terms "*scientific and technological services*" and "*IT programming services*". As such, the competing services are *identical* under *Meri*c.

Software engineering; Computer software engineering; Engineering consultancy; Engineering consultancy services; Computer software integration.

28. These are all software engineering services or in the case of "*Computer software integration*", services that would be provided under software engineering services. All of which would be encompassed under the Opponent's broader terms "*Information technology [IT] consultancy; computer and information technology*

consultancy services; scientific and technological services” therefore, it follows that the services are Meric **identical**.

Consultancy in the field of security software; Software consultancy services; Computer and software consultancy services; Computer software consultancy services; Consultancy services in relation to computer software; Computer software consultancy; Consultancy (Computer software -); Computer software consulting; Software consulting services; Computer software consulting services; Computer consultancy and advisory services; Information technology consulting services; Consulting services in the field of software as a service [SaaS]; Computer consultancy services; Professional consultancy relating to technology; Consulting services relating to computer software; Software consulting services; Information technology consulting; Technological consultancy services for digital transformation; Technological consulting services for digital transformation; Outsource service providers in the field of information technology; Control technology consulting services.

29. The above services are all various types of IT consultancy services which would all fall under the Opponent’s terms “*Information technology [IT] consultancy*” and “*computer and information technology consultancy services*”. Therefore, these services are **identical** under the Meric principle.

Application service provider (ASP) services, namely, hosting computer software applications of others; Application service provider [ASP], namely, hosting computer software applications of others; Application service provider [ASP] services; Application service provider services; Software as a service; Public cloud hosting provider service; Private cloud hosting provider service; Software as a service [SAAS] services; Cloud hosting provider services; Hosting services, software as a service, and rental of software; Software as a service [SaaS]; Hiring of computer software; Software as a service [SaaS] featuring software for machine learning.

30. These are all 'software as a service' type services, including cloud hosting services, and software rental/hiring services. They are all services that would be covered under "*scientific and technological services*", as such, the services are **identical** under the principles of *Meric*.

Technical advice and consultancy services in the field of telecommunications; Technical planning and consulting in the field of light engineering; Technical consulting in the field of environmental engineering.

31. The above are all services for providing technical advice and consultancy in various fields, as such, I find that they are all included within the Opponent's wider term "*scientific and technological services*". Consequently, the services are all *Meric* **identical**.

Telecommunications engineering consultancy; Professional consulting services and advice about agricultural chemistry; Architectural consultancy services.

32. The remaining services vary, but they would all fall under the Opponent's broad terms "*scientific and technological services; advisory services relating to science; scientific services and design relating thereto*", as such these services are **identical** under the principles of *Meric*. In relation to "*Architectural consultancy services*", I make this finding as I consider these to be hybrid services that combines scientific design and technical expertise, to create functional and artistic spaces which would therefore fall under the Opponent's broad terms. However, if I am wrong, I still consider that these services are highly similar as they overlap in nature, method of use and intended purpose. Further, the trade channels and users would be the same.

The average consumer and the purchasing act

33. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' services. I must then determine

the manner in which the services are likely to be selected by the average consumer.⁸

34. In *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor*, [2025] UKSC 25, the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that:

- (a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;
- (b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;
- (c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;
- (d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by enabling courts and tribunals to determine such issues so far as possible without the need for evidence;
- (e) The average consumer's level of attention varies according to the category of goods or services in question; and

⁸ *Lloyd Schuhfabrik Meyer*, Case C-342/97

(f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

35. Neither party has addressed who the average consumer would be.

36. The average consumer for the services may be either a member of the general public or a business/professional user. Whilst the services will vary in price, the average consumer is likely to consider various factors. When selecting the services, the average consumer will consider factors such as functionality, compatibility with existing systems, customer service standards, reputation and technical expertise, etc. Consequently, I consider that **at least a medium** degree of attention will be paid during the purchasing process.

37. The services are likely to be purchased after viewing signage on physical premises, and advertisements. Consequently, visual considerations will dominate the selection process. However, I do not discount an aural component to the purchase given that advice may be sought following word-of-mouth recommendations.

Comparison of trade marks

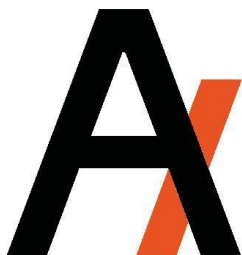
38. It is clear from *Sabel* that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union (“CJEU”) stated at paragraph 34 of its judgment in *Bimbo*, that:

“...it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relevant weight in the perception of the target public, and then, in the light of

that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

39. It would be wrong, therefore, to dissect the trade marks artificially, although it is necessary to take into account the distinctive and dominant components of the trade marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

40. The marks to be compared are as follows:

The opponent's earlier mark	The applicant's contested mark
	 (Series of marks)

41. Given the similarity in the colours used, I find that the second mark within the series of marks applied for is most similar to the Opponent's earlier mark, as such I will continue to compare the second mark within the series with the Opponent's mark as if there is a likelihood of confusion based on these marks I will not need to go on to consider the first mark in the series, however, if I do not find a likelihood of confusion between these marks then it follows that there will not be a likelihood of confusion between the first mark in the series and the Opponent's earlier mark.

42. I observe that both parties refer to the letters “A” and “X” being present within both of the competing marks,⁹ which I will take into consideration when conducting a comparison of the marks.

Overall Impression

43. The applicant’s mark is a figurative mark and consists of the letter A without the crossbar and a diagonal line of the same height crossing the second diagonal stem of that letter. The letter A is presented in black whilst the diagonal line crossing through the second stem is presented in red that could be seen as representing the letter X. The overall impression lies in the mark as a whole.

44. The Opponent’s mark is also a figurative mark with a black letter A in the foreground and a slightly shorter reddish orange line crossing the second diagonal stem of the letter A in the background which could be recognised by some consumers as representing the letter X. The overall impression lies in the mark as a whole.

Visual similarity

45. In relation to the visual similarity, the Applicant states:

“1. Significant Visual and Stylistic Differences

- Our mark has a sleek, modern, and uniquely stylized representation of 'A' and 'X', incorporating an angled and intersecting design.
- The objecting trademark utilizes a bold, straight-edged typographic approach with a clearly defined 'A' overlapping an 'X', which differs in proportions, alignment, and font treatment from our mark.
- The typography, spacing, and angles used in our mark create a distinct commercial impression that is visually separate from the objecting mark.”

⁹ See in relation to the Opponent Form TM7, Q9, and in relation to the Applicant its counterstatement, section 1 point 1.

46. The marks coincide in the presence of the letter A which are both found in black, although the cross bar is missing from the applied for mark. In addition, both marks also have a respective diagonal line crossing the second stem of the letter A that could be understood as the letter X and that are presented in very similar colours. Further, in contrary to the Applicant's claim, I note that the respective diagonal lines are even positioned in the same angle, although one is slightly shorter and one crosses in the foreground whilst the other crosses the letter A in the background. As such, I consider the marks to be visually similar to a **high** degree.

Aural similarity

47. As I have mentioned above, both parties agree that the marks contain the letters 'A' and 'X', as such I find that they will be identically pronounced. Consequently, it follows that the marks are aurally **identical**.

Conceptual similarity

48. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29.

49. I agree with the parties that both marks will be perceived as containing the letters 'A' and 'X', which do not appear to be an abbreviation or shortening for anything. As such, I keep in mind that a letter per se does not convey a clear concept in the sense described in case law.¹⁰ Consequently, the marks are conceptually **neutral**.

Distinctive character of the earlier mark

50. In *Lloyd Schuhfabrik Meyer* 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

¹⁰ *Poloplast v OHIM — Polypipe (P)*, Case T-189/09, at paragraph 83

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)."

51. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

52. No evidence has been provided by the Opponent for me to determine whether the mark's distinctiveness has been enhanced by use, as such, I have only the inherent position to consider.

53. The earlier mark which I have described above, does not appear to relate to the services, and indeed, no such argument has been advanced by the parties. Consequently, overall, I find the earlier mark enjoys a medium level of distinctiveness.

Likelihood of confusion

54. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the services at issue, and the nature of the purchasing process. In doing so, I must be alive to the fact 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 that he has retained in his mind, as well as the interdependency principle.

55. I have found the marks to be visually similar to a high degree, aurally identical and conceptually neutral. I have found the earlier mark to possess a medium level of distinctiveness. I have identified the average consumer to be either the general public or a business/professional user who will pay at least a medium level of attention, and the services to be identical.

56. The marks coincide in the presence of the letter A which are both found in black, although the cross bar is missing from the applied for mark, as well as in their respective red/reddish orange diagonal line crossing the second stem of the letter A at the same angle which could be understood in both marks to represent the letter X. Whilst there are some small differences such as the absence of the cross bar in the letter A in the applied for mark, the height of the diagonal line, and whether it crosses in the foreground or background, in my view these slight differences will all be overlooked. Moreover, as the same letters are used in the respective marks along with the highly similar colour pattern used for the letter A

and the diagonal line representing the letter X it will be even harder for consumers to distinguish between the marks. Particularly, when considering the principles of imperfect recollection and interdependency as the services at issue are identical. As such I find there to be a likelihood of confusion.

CONCLUSION

57. The opposition based upon 5(2)(b) has been entirely successful and the application subject to any appeal, will be refused for all the applied for services.

COSTS

58. The Opponent has been successful and is entitled to an award of costs. The relevant scale is contained in Tribunal Practice Notice ("TPN") 1/2023. Applying the guidance in the TPN, I award the following:

Official fee	£100
Preparing a statement and considering the other side's statement	£250
Total	£350

59. I therefore order Assurex Limited to pay Ababax Health GmbH the sum of £350. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 31st day of July 2026

Sarah Wallace
For the Registrar