

**O/0953/23**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION NO. 3806126**

**IN THE NAME OF GRUPA PBI SP. Z O.O.**

**TO REGISTER AS A TRADE MARK**

**agro S**

**IN CLASSES 1, 35 & 44**

**AND**

**IN THE MATTER OF OPPOSITION THERETO**

**UNDER NO. 437778**

**BY VOLAC INTERNATIONAL LIMITED**

## BACKGROUND AND PLEADINGS

1. On 05 July 2022, Grupa PBI Sp. z o.o. (“the applicant”) applied to register trade mark number UK3806126 for the mark “**agro S**” in the United Kingdom. The application was accepted and was published for opposition purposes on 23 September 2022, in respect of goods and services in classes 1, 35 and 44.

2. The application is opposed by Volac International Limited (“the opponent”). The opposition was filed on 30 November 2022 and is based upon Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against all of the goods in Class 1, all of the services in Class 35, and some of the services in Class 44, as listed in the table under paragraph 29 of this decision. The opponent relies upon the following two comparable UK marks:

### **AGROS**

UK trade mark registration number 910730489

Filing date: 15 March 2012

Registration date: 25 July 2012

Registered in Class 1

Relying on all goods, namely:

Class 1: *Forage additives; silage inoculants; silage additives; additives for use in preparation of livestock fodder.*

(The ‘489 mark); and

### **AGROS**

UK trade mark registration number 909713264

Filing date: 04 February 2011

Registration date: 10 February 2012

Registered in Class 31

Relying on all goods, namely:

Class 31: *Additives for animal foodstuffs.*

(The ‘264 mark).

3. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing registered EUTM or International Trade Mark designating the EU. As a result, the opponent's marks were each converted into a comparable UK trade mark. Comparable UK marks are now recorded in the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and the original filing dates remain the same.<sup>1</sup>

4. The opponent submits that there is a strong likelihood of confusion between the competing marks, given their visual and phonetic similarities and the overlap in goods, and that a consumer encountering the contested mark would believe it to be linked to the opponent's goods and would consider it to originate from the same undertaking as the earlier marks.

5. The applicant filed a counterstatement denying the claims. It submits that the competing marks are visually different and that they are aurally "sufficiently different", and that the goods at issue are designed for different purposes and are not interchangeable. It further submits that the opponent's goods are not similar to either the applicant's retail services, or to the contested services in Class 44. The applicant requests that the opposition be rejected in its entirety.

6. Neither party filed written submissions. Only the opponent filed evidence. Neither party requested a hearing, therefore this decision is taken following careful consideration of the papers.

7. In these proceedings, the opponent is represented by Nash Matthews LLP and the applicant is represented by Bonamark Limited.

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<sup>1</sup> See also Tribunal Practice Notice ("TPN") 2/2020 End of Transition Period – impact on tribunal proceedings.

## **OPPONENT'S EVIDENCE**

8. The opponent filed evidence by way of a witness statement dated 15 March 2023 in the name of Jackie Bradley, alongside seven exhibits. Ms Bradley is a Product Manager of the opponent, a position she has held since 2016.

9. The main purpose of the evidence is to demonstrate that the earlier marks have been put to genuine use in the UK during the relevant period.

10. I have read and considered all of the evidence and I will refer to the relevant parts at the appropriate points in the decision.

## **DECISION**

11. Although the UK has left the European Union, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. Therefore, this decision contains references to the trade mark case-law of the European courts.

12. Each of the two trade marks upon which the opponent relies qualifies as an earlier trade mark under Section 6(1) of the Act.

13. The opponent's trade marks each completed the registration process more than five years before the application date of the contested mark, and, as a result, are subject to the provisions on use under Section 6A of the Act. The applicant has required the opponent to provide proof of use of the marks for all the goods on which it relies, as listed under paragraph 2 of this decision.

### **Proof of Use**

14. I will begin by assessing whether there has been genuine use of the earlier marks. The relevant statutory provisions under Section 6A of the Act is as follows:

(1) This section applies where –

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

(a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

15. As the earlier marks are both comparable marks, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

“(1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the relevant period referred to in section 6A(3)(a) (the "five-year period") has expired before IP completion day —

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A(3) and (4) to the United Kingdom include the European Union.

(3) Where [IP completion day] falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day —

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM ; and

(b) the references in section 6A to the United Kingdom include the European Union”.

16. Section 100 of the Act states that:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it”.

17. The relevant period during which genuine use must be shown is the five years ending with the date of application of the contested mark, which was 05 July 2022. The relevant period is 06 July 2017 to 05 July 2022.

18. The case law on genuine use was summarised by Arnold J (as he then was) in *Walton International Limited v Verweij Fashion BV* [2018] EWHC 1608 (Ch):

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversammlung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and

services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

19. Under the Section 5(2)(b) grounds, the opponent has claimed that use has been made of all of its goods for both its marks as registered. I must consider whether, or the extent to which, the evidence shows genuine use of the earlier marks in relation to the goods covered under Class 1 (the ‘489 mark) and Class 31 (the ‘264 mark).

20. Where there is no use of the mark in respect of the goods as registered, it follows there has been no genuine use of the mark: *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL 0/404/13.<sup>2</sup>

21. I note the following from the opponent’s evidence:

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<sup>2</sup> At [22].

- a) The opponent has produced and sold silage inoculants since the 1990s.
- b) The opponent sells its silage inoculants under the AGROS brand directly to distributors who are based throughout the UK. The distributors sell the AGROS products on to farming professionals.
- c) The turnover figures under the AGROS prefix in the UK are given as follows:

	2018 (£)	2019 (£)	2020 (£)	2021 (£)	2022 (£)
UK turnover	44K	33K	32K	17K	16K

- d) There is no specific advertising budget. Literature about AGROS products is printed and distributed “as required”.
- e) Examples of the mark are depicted on the packaging of the goods, as well as being referred to in a written description, as shown on the two distributor websites, below, which offer the goods for sale.<sup>3</sup>

The screenshot shows the Spunhill website, a distributor for Agros products. The header includes the Spunhill logo with the tagline "Growing Specialists", a sales phone number "01691 626006", and a search bar. A navigation menu lists categories: AMENITY, HOME & GARDEN, SEED PRODUCTS, CROP INPUTS, FARM SUPPLIES, EQUESTRIAN, PET & POULTRY, and FARM ADVICE. The main content area is titled "Agros" and features two products:

- Clamp Liquid**: Agros Clamp delivers one million lactic acid-producing bacteria per gram of grass, resulting in... Price: £100.00 (exc VAT). Part Number: FAG02L.
- Corn Liquid Treat**: Agros Corn is a specially formulated inoculant designed to improve the feeding quality of maize... Price: £79.00 (exc VAT). Part Number: FAG04L.

Each product listing includes a quantity selector (set to 1) and an "Add To Basket" button. A sidebar on the left allows users to "Shop By Product" with a list of categories including Livestock, General Farm & Hardware, Seed Products, Clothing, Safety Equipment, and Vehicle Seat Covers.

<sup>3</sup> Exhibit JB3.



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- f) A sample of invoices, dated between 24/01/2018 and 29/06/2022 have been provided.<sup>5</sup> The invoices are all headed Volac International Ltd and the clients (i.e. distributors) invoice account and delivery account details show various locations within the UK. The product descriptions on the invoices relate to a variety of Agros products, which can be cross-referenced against the data sheet outlining the following AGROS products:<sup>6</sup>

Agros Clamp

Agros XL40

Agros Dominator

Agros Hi-Dri

<sup>4</sup> I note that the header on the product on the Mole Avon website refers to “Agroc” Clamp, although the accompanying text reads “Agros” Clamp.

<sup>5</sup> Exhibit JB2.

<sup>6</sup> Exhibit JB1.

## Agros Corn

The product data sheet describes the goods produced under each sign as biological inoculants for grass silage, maize silage and corn silage.

22. As outlined in *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12,<sup>7</sup> the use of the mark encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark. The mark as shown within the evidence continues to indicate origin and may be relied upon by the opponent.

23. The evidence provided in relation to genuine use of the marks is limited; for example, aside from the invoices, the exhibits do not clearly demonstrate that the goods were available for sale during the relevant period. Neither do I have any figures outlining marketing spend, and I have no evidence relating to the size of the corresponding silage inoculant market or the percentage market share enjoyed by the opponent. However, the invoices indicate that there has been some commercial use of the mark AGROS on silage inoculants within the relevant period and within the relevant territory. Further, an assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself. It is possible for an accumulation of evidence to show use, even if individual items of evidence would on their own be insufficient proof: see *New Yorker SHK Jeans GmbH & Co. KG v OHIM*, Case T-415/09, paragraph 53.

24. The most that can be seen from the evidence is that the mark “AGROS” has been used in relation to “*silage inoculants*”. While I acknowledge that silage is a type of fodder (i.e. foodstuff for farm animals), and that the opponent’s “*silage inoculants*” are goods that are added to such fodder, I do not consider the evidence sufficient to establish use for the broader category of “*Additives for animal foodstuffs*” in Class 31, and therefore the ‘264 mark cannot be relied upon for the purposes of section 5(2)(b).

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<sup>7</sup> At [31 – 35].

25. In relation to the '489 mark, while I note that turnover appears to have fallen year on year from £44k in 2018 to only £16k in 2022, I consider the evidence provided to be sufficient to allow me to find that there has been genuine use of the mark within the relevant period and within the relevant territory in respect of *silage inoculants*. I accept the opponent's explanation that silage inoculants are also referred to as silage additives. However, without further evidence, I am less satisfied about the term "*Forage additives*" and nor do I consider the evidence sufficient to establish use for the broader category "*additives for use in preparation of livestock fodder*". Therefore, I find that the opponent may rely on the following goods in Class 1:

*Silage inoculants; silage additives.*

### **Section 5(2)(b)**

26. Section 5(2)(b) is relied upon, which reads as follows:

"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".

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

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

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater 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 to mind the earlier mark, 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 will wrongly 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**

28. Section 60A of the Act provides:

“(1) For the purposes of this Act goods and services —

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification;

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the “Nice Classification” means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1979.”

29. The goods and services to be compared are:

<b>Opponent's goods</b>
<u>Class 01</u> <i>Silage inoculants; silage additives.</i>
<b>Applicant's goods and services</b>
<u>Class 01</u> <i>Fertilizers; Biological nitrogen fertilizers; Chemically modified compound fertilizers; Calcium cyanamide [fertilizer]; Phosphates [fertilizers]; Gypsum for use as a fertilizer; Soil additives [fertilization]; Fertilizer mixtures; Slow release fertilizer mixtures; Mixtures of chemicals and natural materials for use as agricultural fertilizers; Leaf fertilizer used on arable crops during the stress period; Manganese fertilizer; Urea fertilizer; Ammonium nitrate fertilizer; Ammonium chloride fertilizer; Potassium chloride fertilizer; Ammonium sulphate fertilizer; Potassium sulphate fertilizer; Natural fertilizer; Solid fertilizer; Sodium nitrate fertilizer; Calcium silicate fertilizer; Calcium superphosphate fertilizer; Soil fertilization (Preparations for -); Nitrogen fertilizers; Chlorine-free fertilizers; Biological fertilizers; Biological fertilizers for soil treatment; Biological fertilizers for the treatment of seeds; Chemical fertilizers; Fertilizers for agriculture; Soil fertilizers; Grass fertilizers; Mixed fertilizers; Mineral fertilizers; Natural fertilizers; Organic fertilizers; Potash fertilizers; Artificial fertilizers for use in agriculture; Soil conditioning fertilizers; Fertilizers with a lot of nutrients; Fertilizers containing antioxidants; Fertilizers containing nitrogen compounds; Compound fertilizers; Inorganic fertilizers; Liquid fertilizers; Fertilizing preparations; Soil fertilization preparations; Agriculture (Fertilizers for -); Salts [fertilizers]; Nutritional substances [fertilizers] in liquid form for use in agriculture; Chemical preparations for the treatment of soil; Chemical soil improvers; Chemical preparations for fertilizing the soil; Chemical soil additives; Soil additives; Soil conditioners; Mineral soil improvers; Soil fertilizers; Soil nutrition preparations; Soil conditioners; Soil conditioners for agricultural purposes; Soil conditioners for promoting the growth of agricultural produce; Soil conditioners for agricultural use; Fertilization of the soil (fertilizers for -); Fertilizers and chemical products for agriculture, horticulture and forestry.</i>
<u>Class 35</u> <i>Retail services relating to the following products: fertilizers; Wholesale trade services relating to the following products: fertilizers; Online retail services relating to the following</i>

*products: fertilizers; Retail services related to the following products: biological nitrogen fertilizers; Wholesale trade services related to the following products: biological nitrogen fertilizers; Online retail services relating to the following products: biological nitrogen fertilizers; Retail services related to the following products: chemically modified compound fertilizers; Wholesale trade services related to the following products: chemically modified compound fertilizers; Online retail services relating to the following products: chemically altered compound fertilizers; Retail services related to the following products: calcium cyanamide [fertilizer]; Wholesale trade services related to the following products: calcium cyanamide [fertilizer]; Online retail services relating to the following products: calcium cyanamide [fertilizer]; Retail services related to the following products: phosphates [fertilizers]; Wholesale trade services related to the following products: phosphates [fertilizers]; Online retail services relating to the following products: phosphates [fertilizers]; Retail services relating to the following products: plaster for use as a fertilizer; Wholesale trade services relating to the following products: plaster for use as a fertilizer; Online retail services relating to the following products: plaster for use as a fertilizer; Retail services relating to the following products: soil additives [fertilization]; Wholesale trade services relating to the following products: soil additives [fertilization]; Online retail services relating to the following products: soil additives [fertilization]; Retail services relating to the following products: fertilizer mixtures; Wholesale trade services relating to the following products: fertilizer mixtures; Online retail services relating to the following products: fertilizer mixtures; Retail services relating to the following products: slow release fertilizer mixtures; Wholesale trade services relating to the following products: slow release fertilizer mixtures; Online retail services relating to the following products: slow release fertilizer mixtures; Retail services relating to the following products: mixtures of chemicals and natural materials for use as agricultural fertilizers; Wholesale services relating to the following products: mixtures of chemicals and natural materials for use as agricultural fertilizers; Online retail services relating to the following products: mixtures of chemicals and natural materials for use as agricultural fertilizers; Retail services relating to the following products: foliar fertilizer applied to crops during the stress period; Wholesale trade services related to the following products: foliar fertilizer applied to crops during the stress period; Online retail services relating to the following products: foliar fertilizer applied to crops during the stress period; Retail services related to the following products: manganese fertilizer; Wholesale trade services relating to the following products: manganese fertilizer; Online retail services relating to the following products: manganese fertilizer; Retail services related to the following products: urea fertilizer; Wholesale trade services related to the following products: urea fertilizer; Online retail services relating to the following products: urea fertilizer; Retail*

services related to the following products: ammonium nitrate fertilizer; Wholesale trade services related to the following products: ammonium nitrate fertilizer; Online retail services relating to the following products: ammonium nitrate fertilizer; Retail services related to the following products: ammonium chloride fertilizer; Wholesale trade services related to the following products: ammonium chloride fertilizer; Online retail services relating to the following products: ammonium chloride fertilizer; Retail services related to the following products: potassium chloride fertilizer; Wholesale trade services related to the following products: potassium chloride fertilizer; Online retail services relating to the following products: potassium chloride fertilizer; Retail services related to the following products: ammonium sulphate fertilizer; Wholesale trade services related to the following products: fertilizer based on ammonium sulphate; Online retail services relating to the following products: ammonium sulfate fertilizer; Retail services related to the following products: potassium sulphate fertilizer; Wholesale trade services related to the following products: potassium sulphate fertilizer; Online retail services relating to the following products: potassium sulfate fertilizer; Retail services relating to the following products: manure; Wholesale trade services relating to the following products: manure; Online retail services relating to the following products: manure; Retail services relating to the following products: solid fertilizer; Wholesale trade services relating to the following products: solid fertilizer; Online retail services relating to the following products: solid fertilizer; Retail services related to the following products: sodium nitrate fertilizer; Wholesale trade services related to the following products: sodium nitrate fertilizer; Online retail services related to the following products: sodium nitrate fertilizer; Retail services related to the following products: calcium silicate fertilizer; Wholesale trade services relating to the following products: calcium silicate fertilizer; Online retail services relating to the following products: calcium silicate fertilizer; Retail services related to the following products: calcium superphosphate fertilizer; Wholesale trade services relating to the following products: calcium superphosphate fertilizer; Online retail services relating to the following products: calcium superphosphate fertilizer; Retail services relating to the following products: soil fertilization (Preparations for -); Wholesale trade services relating to the following products: soil fertilization (Preparations for -); Online retail services relating to the following products: soil fertilization (Preparations for -); Retail services related to the following products: nitrogen fertilizers; Wholesale trade services related to the following products: nitrogen fertilizers; Online retail services relating to the following products: nitrogen fertilizers; Retail services related to the following products: chlorine-free fertilizers; Wholesale trade services related to the following products: chlorine-free fertilizers; Online retail services relating to the following products: chlorine-free fertilizers; Retail services related to the following products: biological fertilizers; Wholesale

*trade services relating to the following products: biological fertilizers; Online retail services relating to the following products: biological fertilizers; Retail services relating to the following products: biological fertilizers for soil treatment; Wholesale trade services relating to the following products: biological fertilizers for soil treatment; Online retail services relating to the following products: biological fertilizers for soil treatment; Retail services relating to the following products: biological fertilizers for seed treatment; Wholesale trade services relating to the following products: biological fertilizers for seed treatment; Online retail services relating to the following products: biological fertilizers for seed treatment; Retail services relating to the following products: chemical fertilizers; Wholesale trade services relating to the following products: chemical fertilizers; Online retail services relating to the following products: chemical fertilizers; Retail services relating to the following products: fertilizers for agriculture; Wholesale trade services relating to the following products: fertilizers for agriculture; Online retail services relating to the following products: fertilizers for agriculture; Retail services relating to the following products: soil fertilizers; Wholesale trade services relating to the following products: soil fertilizers; Online retail services relating to the following products: soil fertilizers; Retail services relating to the following products: grass fertilizers; Wholesale trade services relating to the following products: grass fertilizers; Online retail services relating to the following products: grass fertilizers; Retail services relating to the following products: mixed fertilizers; Wholesale trade services relating to the following products: mixed fertilizers; Online retail services relating to the following products: mixed fertilizers; Retail services relating to the following products: mineral fertilizers; with the following products: mineral fertilizers; Online retail services relating to the following products: mineral fertilizers; Retail services relating to the following products: natural fertilizers; Wholesale trade services relating to the following products: natural fertilizers; Online retail services relating to the following products: natural fertilizers; Retail services relating to the following products: organic fertilizers; Wholesale trade services relating to the following products: organic fertilizers; Online retail services relating to the following products: organic fertilizers; Retail services related to the following products: potassium fertilizers; Wholesale trade services relating to the following products: potassium fertilizers; Online retail services relating to the following products: potassium fertilizers; Retail services relating to the following products: fertilizers for agricultural use; Wholesale trade services relating to the following products: fertilizers for agricultural use; Online retail services relating to the following products: fertilizers for agricultural use; Retail services relating to the following products: soil conditioning fertilizers; Wholesale trade services relating to the following products: soil conditioning fertilizers; Online retail services relating to the following products: soil conditioning fertilizers; Retail services relating to the*

*following products: fertilizers with high amounts of nutrients; Wholesale trade services relating to the following products: fertilizers with large amounts of nutrients; Online retail services relating to the following products: fertilizers with high amounts of nutrients; Retail services related to the following products: fertilizers containing antioxidants; Wholesale trade services relating to the following products: fertilizers containing antioxidants; Online retail services relating to the following products: fertilizers containing antioxidants; Retail services related to the following products: fertilizers containing nitrogen compounds; Wholesale trade services related to the following products: fertilizers containing nitrogen compounds; Online retail services relating to the following products: fertilizers containing nitrogen compounds; Retail services relating to the following products: compound fertilizers; Wholesale trade services relating to the following products: compound fertilizers; Online retail services relating to the following products: compound fertilizers; Retail services related to the following products: inorganic fertilizers; Wholesale trade services relating to the following products: inorganic fertilizers; Online retail services relating to the following products: inorganic fertilizers; Retail services relating to the following products: liquid fertilizers; Wholesale trade services relating to the following products: liquid fertilizers; Online retail services relating to the following products: liquid fertilizers; Retail services relating to the following products: fertilization preparations; Wholesale trade services relating to the following products: fertilization preparations; Online retail services relating to the following products: fertilization preparations; Retail services relating to the following products: soil fertilization preparations; Wholesale trade services relating to the following products: soil fertilization preparations; Online retail services relating to the following products: soil fertilization preparations; Retail services related to the following products: agriculture (Fertilizers for -); Wholesale trade services related to the following products: agriculture (Fertilizers for -); Online retail services relating to the following products: agriculture (Fertilizers for -); Retail services relating to the following products: salts [fertilizers]; Wholesale trade services relating to the following products: salts [fertilizers]; Online retail services relating to the following products: salts [fertilizers]; Retail services relating to the following products: nutrients [fertilizers] in liquid form for use in agriculture; Wholesale trade services relating to the following products: nutrients [fertilizers] in liquid form for use in agriculture; Online retail services relating to the following products: nutrients [fertilizers] in liquid form for use in agriculture; Retail services relating to the following products: soil treatment chemicals; Wholesale services relating to the following products: soil treatment chemicals; On-line retail services relating to soil treatment success; Retail services relating to the following products: soil improvers; Wholesale trade services relating to the following products: soil improvers; Online retail services relating to the following*

*products: soil improvers; Retail services relating to the following products: soil improvers; Wholesale trade services relating to the following products: soil improvers; Online retail services relating to the following products: soil conditioners; Retail services related to the following products: soil chemical additives; Wholesale trade services relating to the following products: soil chemical additives; Online retail services relating to the following products: soil chemical additives; Retail services relating to the following products: soil additives; Wholesale trade services relating to the following products: soil additives; Online retail services relating to the following products: soil additives; Retail services relating to the following products: soil conditioners; Wholesale trade services relating to the following products: soil conditioners; Online retail services relating to the following products: soil conditioners; Retail services relating to the following products: mineral soil conditioners; Wholesale trade services relating to the following products: mineral soil conditioners; Online retail services relating to the following products: mineral soil conditioners; Retail services relating to the following products: soil fertilizers; Wholesale trade services relating to the following products: soil fertilizers; Online retail services relating to the following products: soil fertilizers; Retail services relating to the following products: soil conditioners; Wholesale trade services relating to the following products: soil conditioners; Online retail services relating to the following products: soil conditioners; Retail services relating to the following products: soil conditioners; Wholesale trade services relating to the following products: soil conditioners; Online retail services relating to the following products: soil conditioners for agricultural purposes; Wholesale trade services relating to the following products: soil conditioners for agricultural purposes; Online retail services relating to the following products: soil conditioners for agricultural purposes; Retail services relating to the following products: soil conditioners for promoting the growth of agricultural produce; Wholesale trade services relating to the following products: soil conditioners for promoting the growth of agricultural products; Online retail services relating to the following products: soil conditioners for promoting the growth of agricultural produce; Retail services relating to the following products: soil conditioners for agricultural use; Wholesale trade services relating to the following products: soil conditioners for agricultural use; Online retail services relating to the following products: soil conditioners for agricultural use; Retail services relating to the following products: soil improvement (Fertilizers for -); Wholesale trade services relating to the following products: soil improvement (Fertilizers for -); Online retail services relating to the following products: soil improvement (Fertilizers for -); Retail services relating to the following products: fertilizers and chemicals for agriculture, horticulture and forestry; Wholesale trade services relating to the following products: fertilizers and chemicals for agriculture, horticulture and*

*forestry; Online retail services relating to the following products: fertilizers and chemicals for agriculture, horticulture and forestry; Sales promotion; Online advertising on a computer network; Dissemination of advertising material; Organization of events, exhibitions, fairs and shows for commercial, promotional and advertising purposes; Presentation of goods on media, for retail purposes; Advertising and Marketing.*

**Class 44**

*Cultivation of arable crops; Provision of information relating to horticulture; Horticulture advisory services; Cultivation advisory services in relation to horticulture; Advisory services relating to the cultivation of plants; Information services relating to the use of chemicals in horticulture; Information services relating to the use of manure in horticulture.*

30. In *Gérard Meric v OHIM*, Case T-133/05, the General Court (“GC”) stated that:

“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”.<sup>8</sup>

31. In *Canon*, Case C-39/97, the Court of Justice of the European Union (“CJEU”) stated that:

“In assessing the similarity of the goods or services concerned, ... 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”.<sup>9</sup>

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<sup>8</sup> Paragraph 29

<sup>9</sup> Paragraph 23

32. Additionally, the factors for assessing similarity between goods and services identified in *British Sugar Plc v James Robertson & Sons Limited* (“*Treat*”) [1996] R.P.C. 281 include an assessment users and of the channels of trade of the respective goods or services.

33. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC stated that “complementary” means:

“...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”.<sup>10</sup>

34. For the purposes of considering the issue of similarity of goods, it is permissible to consider groups of terms collectively where appropriate. In *Separode Trade Mark*, BL O-399-10, Mr Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person, said:

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”<sup>11</sup>

35. While making my comparison, I bear in mind the comments of Floyd J. (as he then was) in *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch):

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<sup>10</sup> Paragraph 82

<sup>11</sup> Paragraph 5

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise. ... Nevertheless the principle should not be taken too far. ... Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."<sup>12</sup>

36. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, 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."

37. I am mindful of the fact that the appearance of respective goods and services in the same class is not sufficient in itself to find similarity between those goods and services, and that likewise, neither are goods and services to be automatically found to be dissimilar simply because they fall in a different class.

38. In its counterstatement, the applicant submits that fertilizers are natural or artificial substances which improve growth and productiveness of plants and enhance the natural fertility of the soil. It further submits that, unlike the product of the opponent, fertilizers are not added directly to animal foodstuffs or to livestock fodder.

39. In her witness statement, Ms Bradley states that the opponent's silage inoculants are chemical products used in agriculture which are added to cut grass and other silage to increase the quality of the silage. She submits that "a farmer who is the typical user of fertilizer will be aware that he should be using fertilizers to optimise the nutritional content of his crop before cutting to make silage and will also be using products such as silage additives to improve nutritional properties and prevent

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<sup>12</sup> Paragraph 12

spoilage of the silage”.<sup>13</sup> In its statement of grounds, the opponent further submits that “use of the applicant’s mark in relation to the services as covered by the applicant in class 35 and the opposed services within class 44 will also give rise to a strong likelihood of confusion between the marks...”. I note that in *RALEIGH INTERNATIONAL Trade Mark* [2001] RPC 11, Mr Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person, observed that when goods or services are not identical or self-evidently similar, the opposition should be supported by evidence as to their similarity.<sup>14</sup>

### Contested goods in Class 1

*... chemical products for agriculture, ....*

40. In her witness statement, Ms Bradley states that the opponent’s “*silage inoculants*” are chemical products used in agriculture. As such, I consider the applicant’s broad term “*... chemical products for agriculture, ....*” to encompass the earlier goods, rendering them identical to “*silage inoculants*” as per the principle outlined by *Meric*.

*chemical products for ... horticulture and forestry.*

41. Given Ms Bradley’s reference to “*silage inoculants*” as chemical products used in agriculture, in the absence of evidence to the contrary, I do not consider that “*chemical products for ... horticulture and forestry*” to be of the same nature or be used for the same purpose as “*silage inoculants*”. Neither do I consider them to be in competition or complementary in a trade mark sense, as per *Boston Scientific*. Overall, I find the contested goods to be dissimilar to the opponent’s “*silage inoculants*”.

*Fertilizers; Biological nitrogen fertilizers; Chemically modified compound fertilizers; Calcium cyanamide [fertilizer]; Phosphates [fertilizers]; Gypsum for use as a fertilizer; Soil additives [fertilization]; Fertilizer mixtures; Slow release fertilizer mixtures; Mixtures of chemicals and natural materials for use as agricultural fertilizers; Leaf*

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<sup>13</sup> See, in particular, paragraphs 2 and 11 of the witness statement dated 15 March 2023.

<sup>14</sup> Paragraph 20

*fertilizer used on arable crops during the stress period; Manganese fertilizer; Urea fertilizer; Ammonium nitrate fertilizer; Ammonium chloride fertilizer; Potassium chloride fertilizer; Ammonium sulphate fertilizer; Potassium sulphate fertilizer; Natural fertilizer; Solid fertilizer; Sodium nitrate fertilizer; Calcium silicate fertilizer; Calcium superphosphate fertilizer; Soil fertilization (Preparations for -); Nitrogen fertilizers; Chlorine-free fertilizers; Biological fertilizers; Biological fertilizers for soil treatment; Biological fertilizers for the treatment of seeds; Chemical fertilizers; Fertilizers for agriculture; Soil fertilizers; Grass fertilizers; Mixed fertilizers; Mineral fertilizers; Natural fertilizers; Organic fertilizers; Potash fertilizers; Artificial fertilizers for use in agriculture; Soil conditioning fertilizers; Fertilizers with a lot of nutrients; Fertilizers containing antioxidants; Fertilizers containing nitrogen compounds; Compound fertilizers; Inorganic fertilizers; Liquid fertilizers; Fertilizing preparations; Soil fertilization preparations; Agriculture (Fertilizers for -); Salts [fertilizers]; Nutritional substances [fertilizers] in liquid form for use in agriculture; Chemical preparations for fertilizing the soil; Soil fertilizers; Fertilization of the soil (fertilizers for -); Fertilizers ... for agriculture, horticulture and forestry.*

42. The applicant's above listed goods may be classed as forms of fertilisers. To my understanding, the term "silage" refers to grass and crops which are cut in order to be used as food for animals, such as cattle. As per paragraph 39 of this decision, the opponent has outlined the differences between the earlier "*silage inoculants*" and fertilizer, with fertilizers being applied to the ground to enhance growth, while the silage inoculants are applied to cut grass to improve its quality. As such, I consider the opposing goods to be different in nature, purpose and method of use. The goods are not in competition and I do not consider them to be complementary in a trade mark sense - As Mr Daniel Alexander Q.C. (as he then was) noted as the Appointed Person in *Sandra Amalia Mary Elliot v LRC Holdings Limited* BL-O-255-13:

"It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes."<sup>15</sup>

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<sup>15</sup> Paragraph 18

I do not consider that the average consumer of the goods at issue would automatically expect them to originate from the same, or economically-linked, undertakings. While the opponent has stated that it sells its own products directly to distributors, it has provided no clear evidence in relation to channels of trade for the contested goods. Notwithstanding an overlap in users, I find that given the differences between the goods, the applicant's various fertilizers are dissimilar to the opponent's "*silage inoculants*".

*Chemical preparations for the treatment of soil; Chemical soil improvers; Chemical soil additives; Soil additives; Soil conditioners; Mineral soil improvers; Soil nutrition preparations; Soil conditioners; Soil conditioners for agricultural purposes; Soil conditioners for promoting the growth of agricultural produce; Soil conditioners for agricultural use.*

43. The above goods are all used to treat and condition the soil. For the same reasons as outlined in paragraph 42 in relation to the applicant's fertilizers, I consider that the applicant's various soil preparations are dissimilar to the opponent's "*silage inoculants*".

#### Contested services in Class 35

44. In *Oakley, Inc v OHIM*, Case T-116/06, at paragraphs 46-57, the GC 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.

45. In *Tony Van Gulck v Wasabi Frog Ltd*, Case BL O/391/14, Mr Geoffrey Hobbs Q.C. (as he then was) as the Appointed Person reviewed the law concerning retail services v goods. He said (at paragraph 9 of his judgment) that:

"The position with regard to the question of conflict between use of **BOO!** for handbags in Class 18 and shoes for women in Class 25 and use of **MissBoo** for the Listed Services is considerably more complex. There are four main reasons for that: (i) selling and offering to sell goods does not, in itself, amount

to providing retail services in Class 35; (ii) an application for registration of a trade mark for retail services in Class 35 can validly describe the retail services for which protection is requested in general terms; (iii) for the purpose of determining whether such an application is objectionable under Section 5(2)(b), it is necessary to ascertain whether there is a likelihood of confusion with the opponent's earlier trade mark in all the circumstances in which the trade mark applied for might be used if it were to be registered; (iv) the criteria for determining whether, when and to what degree services are 'similar' to goods are not clear cut."

46. However, on the basis of the European courts' judgments in *Sanco SA v OHIM*<sup>16</sup>, and *Assembled Investments (Proprietary) Ltd v. OHIM*<sup>17</sup>, upheld on appeal in *Waterford Wedgwood Plc v. Assembled Investments (Proprietary) Ltd*<sup>18</sup>, Mr Hobbs concluded that:

i) Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the consumer's point of view, they are unlikely to be offered by one and the same undertaking;

ii) In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to envisage the retail services normally associated with the opponent's goods and then to compare the opponent's goods with the retail services covered by the applicant's trade mark;

iii) It is not permissible to treat a mark registered for 'retail services for goods X' as though the mark was registered for goods X;

iv) The General Court's findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to

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<sup>16</sup> Case C-411/13 P

<sup>17</sup> Case T-105/05, at paragraphs [30] to [35] of the judgment.

<sup>18</sup> Case C-398/07 P

exactly the same goods as those for which the other party's trade mark was registered (or proposed to be registered).

*Retail services relating to the following products: ... chemicals for agriculture, ...; Wholesale trade services relating to the following products: ... chemicals for agriculture, ...; Online retail services relating to the following products: ... chemicals for agriculture, ....*

47. As found earlier in this decision, the broad term “chemicals for agriculture, ...” encompasses the likes of the opponent's “silage inoculants; silage additives”. While the opponent's goods are clearly not the same as the retail and wholesale services, I consider there to be an overlap in users and an element of complementarity to the degree that I consider that the average consumer could reasonably expect both the goods and the services to be provided by the same, or economically-related, undertakings. I therefore find the competing goods and services to be similar to a medium degree.

*Retail services relating to the following products: fertilizers; Wholesale trade services relating to the following products: fertilizers; Online retail services relating to the following products: fertilizers; Retail services related to the following products: biological nitrogen fertilizers; Wholesale trade services related to the following products: biological nitrogen fertilizers; Online retail services relating to the following products: biological nitrogen fertilizers; Retail services related to the following products: chemically modified compound fertilizers; Wholesale trade services related to the following products: chemically modified compound fertilizers; Online retail services relating to the following products: chemically altered compound fertilizers; Retail services related to the following products: calcium cyanamide [fertilizer]; Wholesale trade services related to the following products: calcium cyanamide [fertilizer]; Online retail services relating to the following products: calcium cyanamide [fertilizer]; Retail services related to the following products: phosphates [fertilizers]; Wholesale trade services related to the following products: phosphates [fertilizers]; Online retail services relating to the following products: phosphates [fertilizers]; Retail services relating to the following products: plaster for use as a fertilizer; Wholesale trade services relating to the following products: plaster for use as a fertilizer; Online*

*retail services relating to the following products: plaster for use as a fertilizer; Retail services relating to the following products: soil additives [fertilization]; Wholesale trade services relating to the following products: soil additives [fertilization]; Online retail services relating to the following products: soil additives [fertilization]; Retail services relating to the following products: fertilizer mixtures; Wholesale trade services relating to the following products: fertilizer mixtures; Online retail services relating to the following products: fertilizer mixtures; Retail services relating to the following products: slow release fertilizer mixtures; Wholesale trade services relating to the following products: slow release fertilizer mixtures; Online retail services relating to the following products: slow release fertilizer mixtures; Retail services relating to the following products: mixtures of chemicals and natural materials for use as agricultural fertilizers; Wholesale services relating to the following products: mixtures of chemicals and natural materials for use as agricultural fertilizers; Online retail services relating to the following products: mixtures of chemicals and natural materials for use as agricultural fertilizers; Retail services relating to the following products: foliar fertilizer applied to crops during the stress period; Wholesale trade services related to the following products: foliar fertilizer applied to crops during the stress period; Online retail services relating to the following products: foliar fertilizer applied to crops during the stress period; Retail services related to the following products: manganese fertilizer; Wholesale trade services relating to the following products: manganese fertilizer; Online retail services relating to the following products: manganese fertilizer; Retail services related to the following products: urea fertilizer; Wholesale trade services related to the following products: urea fertilizer; Online retail services relating to the following products: urea fertilizer; Retail services related to the following products: ammonium nitrate fertilizer; Wholesale trade services related to the following products: ammonium nitrate fertilizer; Online retail services relating to the following products: ammonium nitrate fertilizer; Retail services related to the following products: ammonium chloride fertilizer; Wholesale trade services related to the following products: ammonium chloride fertilizer; Online retail services relating to the following products: ammonium chloride fertilizer; Retail services related to the following products: potassium chloride fertilizer; Wholesale trade services related to the following products: potassium chloride fertilizer; Online retail services relating to the following products: potassium chloride fertilizer; Retail services related to the following products: ammonium sulphate fertilizer; Wholesale trade services related to the*

*following products: fertilizer based on ammonium sulphate; Online retail services relating to the following products: ammonium sulfate fertilizer; Retail services related to the following products: potassium sulphate fertilizer; Wholesale trade services related to the following products: potassium sulphate fertilizer; Online retail services relating to the following products: potassium sulfate fertilizer; Retail services relating to the following products: manure; Wholesale trade services relating to the following products: manure; Online retail services relating to the following products: manure; Retail services relating to the following products: solid fertilizer; Wholesale trade services relating to the following products: solid fertilizer; Online retail services relating to the following products: solid fertilizer; Retail services related to the following products: sodium nitrate fertilizer; Wholesale trade services related to the following products: sodium nitrate fertilizer; Online retail services related to the following products: sodium nitrate fertilizer; Retail services related to the following products: calcium silicate fertilizer; Wholesale trade services relating to the following products: calcium silicate fertilizer; Online retail services relating to the following products: calcium silicate fertilizer; Retail services related to the following products: calcium superphosphate fertilizer; Wholesale trade services relating to the following products: calcium superphosphate fertilizer; Online retail services relating to the following products: calcium superphosphate fertilizer; Retail services relating to the following products: soil fertilization (Preparations for -); Wholesale trade services relating to the following products: soil fertilization (Preparations for -); Online retail services relating to the following products: soil fertilization (Preparations for -); Retail services related to the following products: nitrogen fertilizers; Wholesale trade services related to the following products: nitrogen fertilizers; Online retail services relating to the following products: nitrogen fertilizers; Retail services related to the following products: chlorine-free fertilizers; Wholesale trade services related to the following products: chlorine-free fertilizers; Online retail services relating to the following products: chlorine-free fertilizers; Retail services related to the following products: biological fertilizers; Wholesale trade services relating to the following products: biological fertilizers; Online retail services relating to the following products: biological fertilizers; Retail services relating to the following products: biological fertilizers for soil treatment; Wholesale trade services relating to the following products: biological fertilizers for soil treatment; Online retail services relating to the following products: biological fertilizers for soil treatment; Retail services relating to the following products: biological fertilizers for*

*seed treatment; Wholesale trade services relating to the following products: biological fertilizers for seed treatment; Online retail services relating to the following products: biological fertilizers for seed treatment; Retail services relating to the following products: chemical fertilizers; Wholesale trade services relating to the following products: chemical fertilizers; Online retail services relating to the following products: chemical fertilizers; Retail services relating to the following products: fertilizers for agriculture; Wholesale trade services relating to the following products: fertilizers for agriculture; Online retail services relating to the following products: fertilizers for agriculture; Retail services relating to the following products: soil fertilizers; Wholesale trade services relating to the following products: soil fertilizers; Online retail services relating to the following products: soil fertilizers; Retail services relating to the following products: grass fertilizers; Wholesale trade services relating to the following products: grass fertilizers; Online retail services relating to the following products: grass fertilizers; Retail services relating to the following products: mixed fertilizers; Wholesale trade services relating to the following products: mixed fertilizers; Online retail services relating to the following products: mixed fertilizers; Retail services relating to the following products: mineral fertilizers; with the following products: mineral fertilizers; Online retail services relating to the following products: mineral fertilizers; Retail services relating to the following products: natural fertilizers; Wholesale trade services relating to the following products: natural fertilizers; Online retail services relating to the following products: natural fertilizers; Retail services relating to the following products: organic fertilizers; Wholesale trade services relating to the following products: organic fertilizers; Online retail services relating to the following products: organic fertilizers; Retail services related to the following products: potassium fertilizers; Wholesale trade services relating to the following products: potassium fertilizers; Online retail services relating to the following products: potassium fertilizers; Retail services relating to the following products: fertilizers for agricultural use; Wholesale trade services relating to the following products: fertilizers for agricultural use; Online retail services relating to the following products: fertilizers for agricultural use; Retail services relating to the following products: soil conditioning fertilizers; Wholesale trade services relating to the following products: soil conditioning fertilizers; Online retail services relating to the following products: soil conditioning fertilizers; Retail services relating to the following products: fertilizers with high amounts of nutrients; Wholesale trade services relating to the following products:*

*fertilizers with large amounts of nutrients; Online retail services relating to the following products: fertilizers with high amounts of nutrients; Retail services related to the following products: fertilizers containing antioxidants; Wholesale trade services relating to the following products: fertilizers containing antioxidants; Online retail services relating to the following products: fertilizers containing antioxidants; Retail services related to the following products: fertilizers containing nitrogen compounds; Wholesale trade services related to the following products: fertilizers containing nitrogen compounds; Online retail services relating to the following products: fertilizers containing nitrogen compounds; Retail services relating to the following products: compound fertilizers; Wholesale trade services relating to the following products: compound fertilizers; Online retail services relating to the following products: compound fertilizers; Retail services related to the following products: inorganic fertilizers; Wholesale trade services relating to the following products: inorganic fertilizers; Online retail services relating to the following products: inorganic fertilizers; Retail services relating to the following products: liquid fertilizers; Wholesale trade services relating to the following products: liquid fertilizers; Online retail services relating to the following products: liquid fertilizers; Retail services relating to the following products: fertilization preparations; Wholesale trade services relating to the following products: fertilization preparations; Online retail services relating to the following products: fertilization preparations; Retail services relating to the following products: soil fertilization preparations; Wholesale trade services relating to the following products: soil fertilization preparations; Online retail services relating to the following products: soil fertilization preparations; Retail services related to the following products: agriculture (Fertilizers for -); Wholesale trade services related to the following products: agriculture (Fertilizers for -); Online retail services relating to the following products: agriculture (Fertilizers for -); Retail services relating to the following products: salts [fertilizers]; Wholesale trade services relating to the following products: salts [fertilizers]; Online retail services relating to the following products: salts [fertilizers]; Retail services relating to the following products: nutrients [fertilizers] in liquid form for use in agriculture; Wholesale trade services relating to the following products: nutrients [fertilizers] in liquid form for use in agriculture; Online retail services relating to the following products: nutrients [fertilizers] in liquid form for use in agriculture; Retail services relating to the following products: soil treatment chemicals; Wholesale services relating to the following products: soil treatment chemicals; On-*

*line retail services relating to soil treatment success; Retail services relating to the following products: soil improvers; Wholesale trade services relating to the following products: soil improvers; Online retail services relating to the following products: soil improvers; Retail services relating to the following products: soil improvers; Wholesale trade services relating to the following products: soil improvers; Online retail services relating to the following products: soil conditioners; Retail services related to the following products: soil chemical additives; Wholesale trade services relating to the following products: soil chemical additives; Online retail services relating to the following products: soil chemical additives; Retail services relating to the following products: soil additives; Wholesale trade services relating to the following products: soil additives; Online retail services relating to the following products: soil additives; Retail services relating to the following products: soil conditioners; Wholesale trade services relating to the following products: soil conditioners; Online retail services relating to the following products: soil conditioners; Retail services relating to the following products: mineral soil conditioners; Wholesale trade services relating to the following products: mineral soil conditioners; Online retail services relating to the following products: mineral soil conditioners; Retail services relating to the following products: soil fertilizers; Wholesale trade services relating to the following products: soil fertilizers; Online retail services relating to the following products: soil fertilizers; Retail services relating to the following products: soil conditioners; Wholesale trade services relating to the following products: soil conditioners; Online retail services relating to the following products: soil conditioners; Retail services relating to the following products: soil conditioners; Wholesale trade services relating to the following products: soil conditioners; Online retail services relating to the following products: soil conditioners; Retail services relating to the following products: soil conditioners for agricultural purposes; Wholesale trade services relating to the following products: soil conditioners for agricultural purposes; Online retail services relating to the following products: soil conditioners for agricultural purposes; Retail services relating to the following products: soil conditioners for promoting the growth of agricultural produce; Wholesale trade services relating to the following products: soil conditioners for promoting the growth of agricultural products; Online retail services relating to the following products: soil conditioners for promoting the growth of agricultural produce; Retail services relating to the following products: soil conditioners for agricultural use; Wholesale trade services relating to the following products: soil conditioners for*

*agricultural use; Online retail services relating to the following products: soil conditioners for agricultural use; Retail services relating to the following products: soil improvement (Fertilizers for -); Wholesale trade services relating to the following products: soil improvement (Fertilizers for -); Online retail services relating to the following products: soil improvement (Fertilizers for -); Retail services relating to the following products: fertilizers ... for agriculture, horticulture and forestry, chemicals for horticulture and forestry; Wholesale trade services relating to the following products: fertilizers ... for agriculture, horticulture and forestry, chemicals for horticulture and forestry; Online retail services relating to the following products: fertilizers ... for agriculture, horticulture and forestry, chemicals for horticulture and forestry .<sup>19</sup>*

48. In paragraphs 41 to 43 of this decision, I found dissimilarity between the applicant's various fertilizers, soil preparations and chemicals for horticulture and forestry and the opponent's "*silage inoculants*". I consider that the retail and wholesale of the applicant's same goods to be even further removed from the earlier goods. Consequently, I find the above-listed services to be dissimilar to the goods relied upon by the opponent.

*Sales promotion; Online advertising on a computer network; Dissemination of advertising material; Organization of events, exhibitions, fairs and shows for commercial, promotional and advertising purposes; Presentation of goods on media, for retail purposes; Advertising and Marketing.*

49. The opponent has provided no evidence to support a finding of similarity between "*silage inoculants*" and the above-listed services, which are self-evidently different in nature, purpose and method of use. I do not consider the goods and services to be in competition, and neither do I consider them to be complementary as outlined in *Boston Scientific*. The goods and services are fundamentally directed towards different target audiences through different channels of trade. Consequently, I find the above services dissimilar to the opponent's "*silage inoculants*".

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<sup>19</sup> I acknowledge that the listed services also include the retail and wholesale of manure, which I consider would be used as a form of fertilizer.

## Contested services in Class 44

*Cultivation of arable crops; Provision of information relating to horticulture; Horticulture advisory services; Cultivation advisory services in relation to horticulture; Advisory services relating to the cultivation of plants; Information services relating to the use of chemicals in horticulture; Information services relating to the use of manure in horticulture.*

50. Again, I find that the applicant's services in Class 44 to be different in nature, purpose and method of use to the opponent's "*silage inoculants*". The applied-for services relate to 'horticulture', which is essentially the growing of the plants; the opponent's goods are to treat feed for animals. While there may be an overlap in users who seek information or advice regarding the growth of the crops prior to cutting to produce silage, I do not consider it reasonable for the average consumer to expect the competing goods and services to originate from the same or related undertakings. In the absence of evidence to the contrary, I find the above services to be dissimilar to the opponent's earlier goods.

51. A degree of similarity between the goods and/or services is essential for there to be a finding of likelihood of confusion: *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA. 41. In relation to the goods and services which I have found to be dissimilar, as there can be no likelihood of confusion under section 5(2)(b), I will take no further account of such goods and services, with the opposition failing to that extent.

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

52. The average consumer is a legal construct, who is deemed to be reasonably well informed and reasonably circumspect: see *Hearst Holdings Inc & Anor v A.V.E.L.A. Inc & Ors*, [2014] EWHC 439 (Ch), paragraph 60. For the purpose 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 or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97, at [26].

53. The average consumer of the competing goods and retail and wholesale services for which I found similarity will most likely be the farming community. In my view, the goods and services are likely to be provided through specialist suppliers, either online, through tele-sales, or in bricks and mortar stores. I consider the selection of both the goods and the services will be a predominantly visual one, although aural considerations will play a part.

54. Considerations during selection of the goods will include suitability of the product to the consumers' specific needs, i.e. the type of crop on which the goods will be used, as well as cost. Given that the goods will ultimately have an effect on the welfare of the animal, I would expect the degree of attention paid to the selection of the goods to be medium to high. For the services at issue, the average consumer will make their choice based on the range of goods available and prices charged, customer services offered, and other factors, for example, in the case of physical stores, the location. These are services that the consumer will be using because they wish to purchase the goods stocked. Overall, I consider the average consumer will pay a medium level of attention to the selection of the services.

### **Comparison of marks**

55. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a 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 marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM* Case C-591/12P, that:

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

impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”<sup>20</sup>

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

57. The respective trade marks are shown below:

Opponent’s trade mark	Applicant’s trade mark
<b>AGROS</b>	<b>agro S</b>

58. The opponent submits that the competing marks are visually and phonetically similar. The applicant submits that the marks are visually and aurally different, with the space between the word “agro” and the letter “S” dividing its mark, compared to the single word which makes up the opponent’s mark. It further submits that the marks share no conceptual similarity.

### **Overall impression**

59. The opponent’s mark consists of the single word “AGROS” presented in a standard typeface in upper case with no other elements to contribute to the overall impression, while the application mark consists of the word “agro” presented in a standard typeface in lower case with a space between the subsequent capital letter “S”, with no other elements to contribute to the overall impression.

### **Visual comparison**

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<sup>20</sup> Paragraph 34

60. It is well established that a ‘word mark’ protects the word itself, not simply the word presented in the particular font or capitalization which appears in the Register of Trade Marks: *Groupement Des Cartes Bancaires v China Construction Bank Corporation*, Case BL O/281/14.<sup>21</sup>

61. Visually, the competing marks both contain the identical five letters, **A G R O S**, presented in the same order. In the earlier mark, there are no breaks between the letters, and as such it is presented as the single word “AGROS”. The applicant’s mark contains a space between the lowercase word “agro” and the subsequent letter “S”. While the break between the word and letter in the applicant’s mark will not go unnoticed, considering the marks as a whole, I find there to be a high degree of visual similarity between them.

### **Aural comparison**

62. The earlier mark will be pronounced as two syllables, AGG-ROSS or AGG-ROSE, while the contested mark will be pronounced as three syllables, AGG-ROH-ES. Considering the identical pronunciation of the first syllable, and the slightly lesser degree of similarity between the second syllables, depending on the consumer’s exact pronunciation, overall, I consider the marks to be aurally similar to at least a medium degree.

### **Conceptual comparison**

63. With regard to conceptual comparison, in *Luciano Sandrone v European Union Intellectual Property Office (EUIPO)*, Case T-268/18, the GC held:

“... In that regard, it must be borne in mind that the purpose of the conceptual comparison is to compare the ‘concepts’ that the signs at issue convey. The term ‘concept’ means, according to the definition given, for example, by the Larousse dictionary, a ‘general and abstract idea used to denote a specific or abstract thought which enables a person to associate with that thought the

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<sup>21</sup> At [21].

various perceptions which that person has of it and to organise knowledge about it.”<sup>22</sup>

64. I acknowledge the applicant’s submission that the earlier mark is likely to be perceived as an invented word, while it considers that the contested mark will be connected to the agro-industry. Earlier in this decision I found that the average consumer of the goods and services would be a member of the farming community. In my view, it is highly likely that such consumers will notice the letters “agro” common to both marks and assume that in each case it alludes to a connection with agriculture, being suggestive of the type of goods and services being offered, i.e. agricultural goods and the retail or wholesale of such goods. In spite of the earlier mark being presented as a single word, taking into account the shared letters “AGRO” at the start of each of the competing marks, I consider the marks overall to be conceptually similar to a high degree.

#### **Distinctive character of the earlier marks**

65. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91.

66. 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-

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<sup>22</sup> Paragraph 8.

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)."

67. Registered trade marks possess varying degrees of inherent distinctive character, being lower where they are allusive or suggestive of a characteristic of the goods and services, ranging up 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 made of it.

68. The opponent's mark comprises the single word "AGROS", which is likely to be perceived by the average consumer as alluding to the nature of the goods as those used in agriculture. Overall, I consider the earlier mark to be inherently distinctive to no more than a medium degree.

69. I now turn to the matter of enhanced distinctiveness. The opponent has filed evidence in support of the earlier mark relied upon. The territory relevant to the assessment of enhanced distinctiveness is the United Kingdom. I must now assess if that evidence demonstrates whether, at the application date of the contested mark, the earlier mark enjoyed an enhanced degree of distinctive character by virtue of the use made of it in relation to the UK market.

70. As considered earlier in this decision, the evidence of use is somewhat limited. Given that I have no figures to show advertising spend or market share figures in

relation to the mark being used in the UK market during the relevant period, and given the modest levels of sales, I do not consider the evidence sufficient to establish that the distinctive character of the mark has been enhanced through use.

### **Likelihood of confusion**

71. There is no simple formula for determining whether there is a likelihood of confusion. It is clear that I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them 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 (*Canon* at [17]). I must consider the various factors from the perspective of the average consumer, bearing 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]).

72. There are two types of possible confusion: direct, where the average consumer mistakes one mark for the other, or indirect, where the average consumer recognises that the marks are different, but assumes that the goods and/or services are the responsibility of the same or connected undertakings: *L.A. Sugar Limited v Back Beat Inc*, Case BL-O/375/10.<sup>23</sup>

73. Earlier in this decision, I found the majority of the contested goods and services to be dissimilar, with the exception of those listed under paragraphs 40 and 47. I found the level of attention of the average consumer to be medium to high when selecting the goods in common, and medium when selecting the conflicting services, with both goods and services being selected by predominantly visual means, although I did not discount aural considerations. The competing trade marks are visually similar to a high degree and are aurally similar to at least a medium degree, with a high degree of conceptual similarity, while the earlier mark is inherently distinctive to no more than a medium degree.

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<sup>23</sup> At [16-17].

74. I have weighed up each of the competing factors in my decision, including the differences and the similarities between the competing marks, and I take into consideration the degree of inherent distinctive character of the earlier mark. Allowing that the average consumer is unlikely to see the marks side-by-side and will therefore be reliant on the imperfect picture of them they have kept in their mind, given the degree of visual, aural and conceptual similarity between the marks, in my view, the similarities between the marks are such that they are likely to be mistakenly recalled as each other. Consequently, I find that there is a likelihood of direct confusion in relation to all the goods and services for which I found similarity.

75. The opposition under section 5(2)(b) succeeds in relation to the following goods and services only:

Class 1

*... chemical products for agriculture, ....*

Class 35

*Retail services relating to the following products: ... chemicals for agriculture, ...; Wholesale trade services relating to the following products: ... chemicals for agriculture, ...; Online retail services relating to the following products: ... chemicals for agriculture, ... .*

**CONCLUSION**

76. The opponent has been partially successful under Section 5(2)(b) of the Act in relation to the Class 1 goods and Class 35 services listed under paragraph 75 of this decision. Subject to any successful appeal, the application by Grupa PBI Sp. z o.o. may proceed to registration in respect of the remaining goods and services, as follows:

Class 1

*Fertilizers; Biological nitrogen fertilizers; Chemically modified compound fertilizers; Calcium cyanamide [fertilizer]; Phosphates [fertilizers]; Gypsum for use as a fertilizer; Soil additives [fertilization]; Fertilizer mixtures; Slow release fertilizer mixtures; Mixtures of chemicals and natural materials for use as agricultural fertilizers; Leaf*

*fertilizer used on arable crops during the stress period; Manganese fertilizer; Urea fertilizer; Ammonium nitrate fertilizer; Ammonium chloride fertilizer; Potassium chloride fertilizer; Ammonium sulphate fertilizer; Potassium sulphate fertilizer; Natural fertilizer; Solid fertilizer; Sodium nitrate fertilizer; Calcium silicate fertilizer; Calcium superphosphate fertilizer; Soil fertilization (Preparations for -); Nitrogen fertilizers; Chlorine-free fertilizers; Biological fertilizers; Biological fertilizers for soil treatment; Biological fertilizers for the treatment of seeds; Chemical fertilizers; Fertilizers for agriculture; Soil fertilizers; Grass fertilizers; Mixed fertilizers; Mineral fertilizers; Natural fertilizers; Organic fertilizers; Potash fertilizers; Artificial fertilizers for use in agriculture; Soil conditioning fertilizers; Fertilizers with a lot of nutrients; Fertilizers containing antioxidants; Fertilizers containing nitrogen compounds; Compound fertilizers; Inorganic fertilizers; Liquid fertilizers; Fertilizing preparations; Soil fertilization preparations; Agriculture (Fertilizers for -); Salts [fertilizers]; Nutritional substances [fertilizers] in liquid form for use in agriculture; Chemical preparations for the treatment of soil; Chemical soil improvers; Chemical preparations for fertilizing the soil; Chemical soil additives; Soil additives; Soil conditioners; Mineral soil improvers; Soil fertilizers; Soil nutrition preparations; Soil conditioners; Soil conditioners for agricultural purposes; Soil conditioners for promoting the growth of agricultural produce; Soil conditioners for agricultural use; Fertilization of the soil (fertilizers for -); Fertilizers for agriculture, horticulture and forestry.*

Class 44 – all services<sup>24</sup>

Class 35

*Retail services relating to the following products: fertilizers; Wholesale trade services relating to the following products: fertilizers; Online retail services relating to the following products: fertilizers; Retail services related to the following products: biological nitrogen fertilizers; Wholesale trade services related to the following products: biological nitrogen fertilizers; Online retail services relating to the following products: biological nitrogen fertilizers; Retail services related to the following products: chemically modified compound fertilizers; Wholesale trade services related*

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<sup>24</sup> I note that only some of the Class 44 services were opposed in these proceedings. For the avoidance of doubt, Class 44 in its entirety is listed under Annex A of this decision.

*to the following products: chemically modified compound fertilizers; Online retail services relating to the following products: chemically altered compound fertilizers; Retail services related to the following products: calcium cyanamide [fertilizer]; Wholesale trade services related to the following products: calcium cyanamide [fertilizer]; Online retail services relating to the following products: calcium cyanamide [fertilizer]; Retail services related to the following products: phosphates [fertilizers]; Wholesale trade services related to the following products: phosphates [fertilizers]; Online retail services relating to the following products: phosphates [fertilizers]; Retail services relating to the following products: plaster for use as a fertilizer; Wholesale trade services relating to the following products: plaster for use as a fertilizer; Online retail services relating to the following products: plaster for use as a fertilizer; Retail services relating to the following products: soil additives [fertilization]; Wholesale trade services relating to the following products: soil additives [fertilization]; Online retail services relating to the following products: soil additives [fertilization]; Retail services relating to the following products: fertilizer mixtures; Wholesale trade services relating to the following products: fertilizer mixtures; Online retail services relating to the following products: fertilizer mixtures; Retail services relating to the following products: slow release fertilizer mixtures; Wholesale trade services relating to the following products: slow release fertilizer mixtures; Online retail services relating to the following products: slow release fertilizer mixtures; Retail services relating to the following products: mixtures of chemicals and natural materials for use as agricultural fertilizers; Wholesale services relating to the following products: mixtures of chemicals and natural materials for use as agricultural fertilizers; Online retail services relating to the following products: mixtures of chemicals and natural materials for use as agricultural fertilizers; Retail services relating to the following products: foliar fertilizer applied to crops during the stress period; Wholesale trade services related to the following products: foliar fertilizer applied to crops during the stress period; Online retail services relating to the following products: foliar fertilizer applied to crops during the stress period; Retail services related to the following products: manganese fertilizer; Wholesale trade services relating to the following products: manganese fertilizer; Online retail services relating to the following products: manganese fertilizer; Retail services related to the following products: urea fertilizer; Wholesale trade services related to the following products: urea fertilizer; Online retail services relating to the following products: urea fertilizer; Retail services related to the following products:*

*ammonium nitrate fertilizer; Wholesale trade services related to the following products: ammonium nitrate fertilizer; Online retail services relating to the following products: ammonium nitrate fertilizer; Retail services related to the following products: ammonium chloride fertilizer; Wholesale trade services related to the following products: ammonium chloride fertilizer; Online retail services relating to the following products: ammonium chloride fertilizer; Retail services related to the following products: potassium chloride fertilizer; Wholesale trade services related to the following products: potassium chloride fertilizer; Online retail services relating to the following products: potassium chloride fertilizer; Retail services related to the following products: ammonium sulphate fertilizer; Wholesale trade services related to the following products: fertilizer based on ammonium sulphate; Online retail services relating to the following products: ammonium sulfate fertilizer; Retail services related to the following products: potassium sulphate fertilizer; Wholesale trade services related to the following products: potassium sulphate fertilizer; Online retail services relating to the following products: potassium sulfate fertilizer; Retail services relating to the following products: manure; Wholesale trade services relating to the following products: manure; Online retail services relating to the following products: manure; Retail services relating to the following products: solid fertilizer; Wholesale trade services relating to the following products: solid fertilizer; Online retail services relating to the following products: solid fertilizer; Retail services related to the following products: sodium nitrate fertilizer; Wholesale trade services related to the following products: sodium nitrate fertilizer; Online retail services related to the following products: sodium nitrate fertilizer; Retail services related to the following products: calcium silicate fertilizer; Wholesale trade services relating to the following products: calcium silicate fertilizer; Online retail services relating to the following products: calcium silicate fertilizer; Retail services related to the following products: calcium superphosphate fertilizer; Wholesale trade services relating to the following products: calcium superphosphate fertilizer; Online retail services relating to the following products: calcium superphosphate fertilizer; Retail services relating to the following products: soil fertilization (Preparations for -); Wholesale trade services relating to the following products: soil fertilization (Preparations for -); Online retail services relating to the following products: soil fertilization (Preparations for -); Retail services related to the following products: nitrogen fertilizers; Wholesale trade services related to the following products: nitrogen fertilizers; Online retail services relating to the following*

*products: nitrogen fertilizers; Retail services related to the following products: chlorine-free fertilizers; Wholesale trade services related to the following products: chlorine-free fertilizers; Online retail services relating to the following products: chlorine-free fertilizers; Retail services related to the following products: biological fertilizers; Wholesale trade services relating to the following products: biological fertilizers; Online retail services relating to the following products: biological fertilizers; Retail services relating to the following products: biological fertilizers for soil treatment; Wholesale trade services relating to the following products: biological fertilizers for soil treatment; Online retail services relating to the following products: biological fertilizers for soil treatment; Retail services relating to the following products: biological fertilizers for seed treatment; Wholesale trade services relating to the following products: biological fertilizers for seed treatment; Online retail services relating to the following products: biological fertilizers for seed treatment; Retail services relating to the following products: chemical fertilizers; Wholesale trade services relating to the following products: chemical fertilizers; Online retail services relating to the following products: chemical fertilizers; Retail services relating to the following products: fertilizers for agriculture; Wholesale trade services relating to the following products: fertilizers for agriculture; Online retail services relating to the following products: fertilizers for agriculture; Retail services relating to the following products: soil fertilizers; Wholesale trade services relating to the following products: soil fertilizers; Online retail services relating to the following products: soil fertilizers; Retail services relating to the following products: grass fertilizers; Wholesale trade services relating to the following products: grass fertilizers; Online retail services relating to the following products: grass fertilizers; Retail services relating to the following products: mixed fertilizers; Wholesale trade services relating to the following products: mixed fertilizers; Online retail services relating to the following products: mixed fertilizers; Retail services relating to the following products: mineral fertilizers; with the following products: mineral fertilizers; Online retail services relating to the following products: mineral fertilizers; Retail services relating to the following products: natural fertilizers; Wholesale trade services relating to the following products: natural fertilizers; Online retail services relating to the following products: natural fertilizers; Retail services relating to the following products: organic fertilizers; Wholesale trade services relating to the following products: organic fertilizers; Online retail services relating to the following products: organic fertilizers; Retail services related to the following products:*

potassium fertilizers; Wholesale trade services relating to the following products: potassium fertilizers; Online retail services relating to the following products: potassium fertilizers; Retail services relating to the following products: fertilizers for agricultural use; Wholesale trade services relating to the following products: fertilizers for agricultural use; Online retail services relating to the following products: fertilizers for agricultural use; Retail services relating to the following products: soil conditioning fertilizers; Wholesale trade services relating to the following products: soil conditioning fertilizers; Online retail services relating to the following products: soil conditioning fertilizers; Retail services relating to the following products: fertilizers with high amounts of nutrients; Wholesale trade services relating to the following products: fertilizers with large amounts of nutrients; Online retail services relating to the following products: fertilizers with high amounts of nutrients; Retail services related to the following products: fertilizers containing antioxidants; Wholesale trade services relating to the following products: fertilizers containing antioxidants; Online retail services relating to the following products: fertilizers containing antioxidants; Retail services related to the following products: fertilizers containing nitrogen compounds; Wholesale trade services related to the following products: fertilizers containing nitrogen compounds; Online retail services relating to the following products: fertilizers containing nitrogen compounds; Retail services relating to the following products: compound fertilizers; Wholesale trade services relating to the following products: compound fertilizers; Online retail services relating to the following products: compound fertilizers; Retail services related to the following products: inorganic fertilizers; Wholesale trade services relating to the following products: inorganic fertilizers; Online retail services relating to the following products: inorganic fertilizers; Retail services relating to the following products: liquid fertilizers; Wholesale trade services relating to the following products: liquid fertilizers; Online retail services relating to the following products: liquid fertilizers; Retail services relating to the following products: fertilization preparations; Wholesale trade services relating to the following products: fertilization preparations; Online retail services relating to the following products: fertilization preparations; Retail services relating to the following products: soil fertilization preparations; Wholesale trade services relating to the following products: soil fertilization preparations; Online retail services relating to the following products: soil fertilization preparations; Retail services related to the following products: agriculture (Fertilizers for -); Wholesale trade services related to the

*following products: agriculture (Fertilizers for -); Online retail services relating to the following products: agriculture (Fertilizers for -); Retail services relating to the following products: salts [fertilizers]; Wholesale trade services relating to the following products: salts [fertilizers]; Online retail services relating to the following products: salts [fertilizers]; Retail services relating to the following products: nutrients [fertilizers] in liquid form for use in agriculture; Wholesale trade services relating to the following products: nutrients [fertilizers] in liquid form for use in agriculture; Online retail services relating to the following products: nutrients [fertilizers] in liquid form for use in agriculture; Retail services relating to the following products: soil treatment chemicals; Wholesale services relating to the following products: soil treatment chemicals; Online retail services relating to soil treatment success; Retail services relating to the following products: soil improvers; Wholesale trade services relating to the following products: soil improvers; Online retail services relating to the following products: soil improvers; Retail services relating to the following products: soil improvers; Wholesale trade services relating to the following products: soil improvers; Online retail services relating to the following products: soil conditioners; Retail services related to the following products: soil chemical additives; Wholesale trade services relating to the following products: soil chemical additives; Online retail services relating to the following products: soil chemical additives; Retail services relating to the following products: soil additives; Wholesale trade services relating to the following products: soil additives; Online retail services relating to the following products: soil additives; Retail services relating to the following products: soil conditioners; Wholesale trade services relating to the following products: soil conditioners; Online retail services relating to the following products: soil conditioners; Retail services relating to the following products: mineral soil conditioners; Wholesale trade services relating to the following products: mineral soil conditioners; Online retail services relating to the following products: mineral soil conditioners; Retail services relating to the following products: soil fertilizers; Wholesale trade services relating to the following products: soil fertilizers; Online retail services relating to the following products: soil fertilizers; Retail services relating to the following products: soil conditioners; Wholesale trade services relating to the following products: soil conditioners; Online retail services relating to the following products: soil conditioners; Retail services relating to the following products: soil conditioners; Wholesale trade services relating to the following products: soil conditioners; Online retail services relating to the following products: soil conditioners; Retail services relating to the following products: soil conditioners; Wholesale trade services relating to the following products: soil conditioners; Online retail services relating to the following products: soil*

*conditioners; Retail services relating to the following products: soil conditioners for agricultural purposes; Wholesale trade services relating to the following products: soil conditioners for agricultural purposes; Online retail services relating to the following products: soil conditioners for agricultural purposes; Retail services relating to the following products: soil conditioners for promoting the growth of agricultural produce; Wholesale trade services relating to the following products: soil conditioners for promoting the growth of agricultural products; Online retail services relating to the following products: soil conditioners for promoting the growth of agricultural produce; Retail services relating to the following products: soil conditioners for agricultural use; Wholesale trade services relating to the following products: soil conditioners for agricultural use; Online retail services relating to the following products: soil conditioners for agricultural use; Retail services relating to the following products: soil improvement (Fertilizers for -); Wholesale trade services relating to the following products: soil improvement (Fertilizers for -); Online retail services relating to the following products: soil improvement (Fertilizers for -); Retail services relating to the following products: fertilizers for agriculture, horticulture and forestry, chemicals for horticulture and forestry; Wholesale trade services relating to the following products: fertilizers for agriculture, horticulture and forestry, chemicals for horticulture and forestry; Online retail services relating to the following products: fertilizers for agriculture, horticulture and forestry, chemicals for horticulture and forestry; Sales promotion; Online advertising on a computer network; Dissemination of advertising material; Organization of events, exhibitions, fairs and shows for commercial, promotional and advertising purposes; Presentation of goods on media, for retail purposes; Advertising and Marketing.*

## **COSTS**

77. In these proceedings, both parties have enjoyed a share of success, with the greater part going to the applicant, who is therefore entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice (“TPN”) 2/2016. Taking into account the partial extent of the success, I have made a reduction to the costs to reflect this, and as such, I consider the following to be reasonable:

Considering the notice of opposition and filing a counterstatement: £300

**Total:**

**£300**

78. I therefore order Volac International Limited to pay Grupa PBI Sp. z o.o. the sum of £300. 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 5<sup>th</sup> day of October 2023**

**Suzanne Hitchings**

**For the Registrar,**

**the Comptroller-General**

## **Annex A**

### **Applicant's services in Class 44:**

Landscape gardening; Gardening and landscaping; Gardening consultancy; Floriculture; Garden maintenance; Lawn care; Maintenance of potted plants; Planting garden trees; Destruction of weeds; Cultivation of arable crops; Planting plants; Providing information on the identification of plants and flowers for horticultural purposes; Provision of information relating to horticulture; Laying turf; Arranging flowers; Providing information relating to the planting of garden trees; Horticulture advisory services; Advisory services relating to aquatic gardening; Consultancy services relating to the selection of turf; Consultancy services relating to the laying of turf; Cultivation advisory services in relation to horticulture; Advisory services relating to the cultivation of plants; Information services relating to the use of chemicals in horticulture; Information services relating to the use of manure in horticulture; Lawn mowing services; Gardening services; Lawn care services.