

**O/634/18**

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION UK3243547

BY

ŞÖLEN ÇİKOLATA GIDA SANAYI VE TİCARET ANONİM ŞİRKETİ  
TO REGISTER THE FOLLOWING TRADE MARK IN CLASS 30



AND

OPPOSITION THERETO (NO. 410605)

BY

YADEx INTERNATIONAL GMBH

## Background and Pleadings

1. ŞÖLEN ÇİKOLATA GIDA SANAYI VE TİCARET ANONİM ŞİRKETİ (the Applicant) applied to register the trade mark, shown on the cover page of this decision, on the 13 July 2017 for goods outlined in class 30 below. It was accepted and published on the 21 July 2017.

CLASS 30: Coffee, tea, cocoa and artificial coffee; rice; tapioca and sago; flour and preparations made from cereals; bread, pastries; edible ices; sugar, honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); spices; ice; Confectionery, chocolates, biscuits, crackers, wafers, milk compound chocolate, tarts, cakes, chocolate and confectioneries with caramel. Chewing gums. Ice-cream, edible ices. Cereal-based snack food, popcorn, crushed oats, corn chips, breakfast cereals, processed wheat for human consumption, crushed barley for human consumption, processed oats for human consumption, processed rye for human consumption.

2. YADEX INTERNATIONAL GMBH (the Opponent) opposes the application under section 5(2)(b)<sup>1</sup> of the Trade Marks Act 1994 (the Act), relying on its EU Designation of International trade mark registration "SÖLEN" number WE1308730, which has a designation date of 7 April 2016 with a priority date from 3 November 2015. The International Registration is not yet protected. The goods relied upon in class 29, 30 and 32 are shown<sup>1</sup> below:

Class 29: Meat; fish; poultry; game; meat extracts; sausages; seafood; dried and cooked fruits and vegetables; meat, fish, fruit and vegetable jellies; frozen fish; frozen meat products; hamburger meat; meatballs; preserves; jams; eggs; milk; dairy products; creamery products; butter; cheese; cream cheese; white cheese; hard cheese; cheese mixtures; cream [cream]; yoghurt; powdered milk

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<sup>1</sup> By way of a letter dated 17 May 2018, the Opponent restricts its opposition to the section 5(2)(b) ground only, withdrawing its section 5(3) ground and withdrawing its reliance upon another earlier mark which was subject to proof of use.

for food purposes; milkshakes; drinks made of milk or milk-containing beverages; yoghurt drinks; milk creams [yogurt]; milk-based desserts; dips [dairy products]; low fat spreads from dairy products; cheese dips; edible oils; edible fats; soy milk [milk substitute]; rice milk [milk substitutes]; canned fruit and vegetables; meat, fish, fruit and vegetable preserves; frozen ready meals consisting mainly of vegetables; ready meals mainly consisting of meat.

Class 30: Coffee; tea; cocoa; sugar; rice; tapioca; sago; coffee substitutes; flour and preparations made from cereals [with the exception of animal feed]; bread; bakery products; pastries; frozen pastries; cheesecake; crackers with cheese flavour; ready to eat desserts [pastry]; frozen pastry stuffed with meat and/or vegetables; confectionary; fine confectionary; confectionary with milk; frozen dairy confectionary; ice cream; ice tea; fruit sauces; tea-based beverages; frozen yoghurt [ice cream]; honey; yeast; baking powder; salt; mustard; vinegar; sauces [except salad dressings]; spices; ice; salad dressings.

Class 32: Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; non-dairy-milk; syrups and other preparations for making beverages.

3. The Opponent relies on all the goods in class 29, 30 and 32 for which the earlier mark is registered, claiming that there is a likelihood of confusion because the trade marks are similar and are registered for goods identical with or similar to those for which the earlier mark is protected.

4. The Opponent submits that

*“The trade marks are confusingly similar from visual, phonetic and conceptual perspectives”*

*“The marks share the word “Solen” as their primarily element.”*

*“...registration of the Applicant’s mark ..would give rise to the likelihood of confusion on the part of the relevant purchasing public, including the likelihood of association (as a result of the applicant’s mark being perceived as the sign used by or with the permission of the Opponent for products that are identical/similar; thus giving rise to the perception that The Applicant’s mark is a sub or “sister” brand to The Earlier Mark)”*

5. The Applicant filed a defence and counterstatement denying the claims made and requesting the Opponent provides proof of use of its earlier mark relied upon. The Applicant submits that

*“There is no substance to the opposition.”*

*“Marks are clearly not identical and similar only to an extremely low degree”*

6. The Opponent is represented by Groom Wilkes & Wright LLP. The Applicant is represented by Briffa & Co. Neither party filed evidence. Both parties filed submissions. Neither party requested a hearing however the Opponent filed written submissions in lieu of a hearing. The decision is taken upon the careful perusal of the papers and the parties’ submissions.

## **Decision**

7. The opposition is based on section 5(2)(b) of the Act which states:

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

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

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

8. An earlier trade mark is defined in section 6 of the Act, which states:

“6. - (1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK), Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

9. In these proceedings, the Opponent is relying upon its EU registration which qualifies as an earlier trade mark under section 6 of the Act. As the earlier mark had been registered for less than five years at the date the application was published it is not subject to the proof of use provisions contained in section 6A of the Act. Consequently, the Opponent is entitled to rely upon all the goods of its registration without having to establish genuine use.

10. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case

*C-342/97, Marca Mode CV v Adidas AG & Adidas Benelux BV, Case C-425/98, Matratzen Concord GmbH v OHIM, Case C-3/03, Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH, Case C-120/04, Shaker di L. Laudato & C. Sas v OHIM, Case C-334/05P and Bimbo SA v OHIM, Case C-591/12P.*

The principles:

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

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

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

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

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

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

(g) a lesser degree of similarity between the goods or services may be offset by a 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**

11. When conducting a goods comparison, all relevant factors should be considered as per the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*

*Kabushiki Kaisha v Metro Goldwyn Mayer inc* Case C-39/97, where the court stated at paragraph 23 of its judgment that:

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

12. I am also guided by the relevant factors for assessing similarity identified by Jacob J in *Treat*, [1996] R.P.C. 281 namely:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

13. In addition, in *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J stated that:

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks)* (IP

*TRANSLATOR*) [2012] ETMR 42 at [47]-[49]. Nevertheless, the principle should not be taken too far. *Treat* was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. 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."

14. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court ("GC") stated that:

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

15. The Opponent submits that

*"with regard to class 30 the respective goods ...are in part identical and in the other part confusingly similar"*

*"turning to classes 29 and 32 the goods... are similar, or at least complementary, to those for which the Application seeks protection; all being food and beverage products and having same uses, end users, and channels of trade"*

16. The Applicant accepts that there is

*"some cross over in goods in class 30 but there are many different goods. As the marks are dissimilar this detracts from any similarity between the goods"*

*“Applicant doesn’t contain any goods identical to those in class 29 and 32 of opponent’s mark, if there is any similarity then that would be low.”*

17. I note that there is an overlap between the parties’ specifications within class 30 where the identical wording is used as per the table below, and on the *Meric* principle.

<b>Applicant</b>	<b>Opponent</b>
Coffee, tea, cocoa and artificial coffee;	Coffee; tea; cocoa; coffee substitutes;
rice; tapioca and sago;	rice; tapioca; sago;
salt; mustard; vinegar, sauces (condiments); spices	salt; mustard; vinegar; sauces [except salad dressings]; spices; salad dressings.
yeast, baking-powder;	yeast; baking powder;
ice; Ice-cream, edible ices.	ice cream; ice; frozen yoghurt [ice cream]
bread, pastries;	bread; pastries;
Confectionery, chocolates, chocolate and confectioneries with caramel, milk compound chocolate; chewing gum	confectionary; fine confectionary; confectionary with milk;
tarts, cakes, biscuit	bakery products;
crackers, wafers	crackers with cheese flavour;
flour and preparations made from cereals;  Cereal-based snack food, popcorn, crushed oats, corn chips, breakfast cereals, processed wheat for human	flour and preparations made from cereals [with the exception of animal feed];

consumption, crushed barley for human consumption, processed oats for human consumption, processed rye for human consumption.	
sugar, honey, <b>treacle</b>	sugar; honey;

18. That leaves “*treacle*”. “*Treacle*” is a thick viscous syrup made from refined sugar. It is often found on the same shelves as sugar and honey and is used in baking or confectionary production. Whilst honey and treacle have a similar consistency they are produced differently the former being made by bees the latter manufactured from refined sugar cane. The nature of the product however is highly similar to honey in its look, taste and method of use, and the purpose of both is to sweeten. The users and channels of trade would be identical. “*Treacle*” is therefore highly similar to “*sugar*” and “*honey*”.

### **Average consumer**

19. When considering the opposing trade marks I must determine first of all who the average consumer is for the goods and the purchasing/selection process.

20. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words

“average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

21. The average consumer of the goods at issue is a member of the general public who is likely to choose the goods from a shop or supermarket through self-selection or following an advertisement. The purchasing process is therefore likely to be a visual rather than an aural process although I do not discount the possibility of a sales assistant assisting in the process. The applicant submits that the average consumer would pay

*“a low level of attention when making a purchasing decision as these are low priced goods that could be purchased on any shopping trip and put into a supermarket trolley with not much thought”.*

The opponent agrees that the average consumer would be the general public and that the level of attention is “*relatively low*”.

22. However I consider that the average consumer would take into consideration several aspects in the purchasing process, to include the price, size, ingredients, suitability and appeal of the product. They would therefore pay an average degree of attention in their selection process.

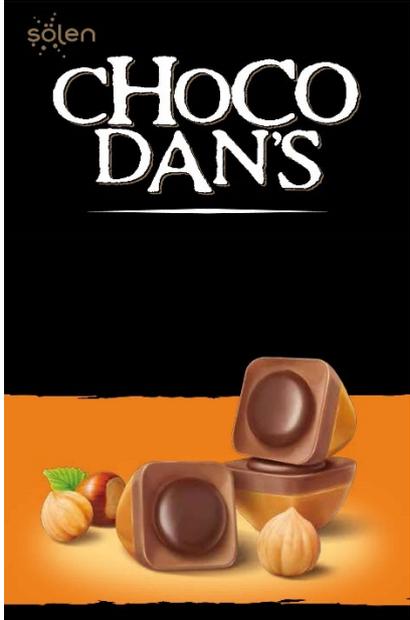
### **Comparison of the marks**

23. 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 Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, 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.”

24. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to consider 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.

25. The respective trade marks are shown below:

Applicant's mark	Opponent's mark
	SÖLEN

26. The Opponent's mark comprises of a single word "SÖLEN" presented in block capitals. The "O" has an umlaut above it giving the impression of a foreign word. The overall impression of the mark resides in the totality of the word.

27. The Applicant's mark comprises of a number of elements:

(i) the word "Solen" in the top left-hand corner presented in gold lettering with some stylised dots in the shape of an "X" above and below the "o". Immediately above the "o" there are two dots which could give the impression of an umlaut (although the Applicant disputes that this is the case);

(ii) the words "CHOCO DAN'S" presented in larger white block capitals with some stylisation in the size, design, font and configuration of the letters;

(iii) a black and orange background;

(iv) a picture of some hazelnuts and chocolate/confectionary.

28. The three main components are the picture of the nuts and chocolate, the words "Choco Dan's" and the word "Solen". The words "Choco Dan's" due to their size font and colour as well as their positioning would have the greatest impact in the overall impression. The picture is an important component of the mark as is the word CHOCO as they are either directly descriptive or highly allusive of the applicant's goods in relation to chocolate/ confectionary. "Dan's" in isolation is neither descriptive nor distinctive for such goods. The combination of the words and the picture are the dominant elements of the mark and will make roughly an equal contribution to the overall impression. The black and orange colours act primarily as a background and have a limited contribution to the overall impression of the mark. The word "Solen" although distinctive, has no particular link to the other components. However, its size, and positioning gives this element the impression of a house mark.

## **Visual**

29. The only point of visual similarity between the marks is the word “Solen” which is identical in both marks. The Applicant’s mark is more complex than the earlier mark and consists of a number of components; the words Choco Dan’s, the picture of nuts and chocolate, and the black and orange coloured background. The applicant submits that the average consumer paying a low level of attention may not pronounce the word Solen and would only notice the other elements. However, although the words are identical, Solen is a small part of the Applicant’s mark and therefore I consider that there is a low degree of visual similarity between the two.

## **Aural**

30. It is well established that when a trade mark consists of a combination of words and figurative components it is by the word component that it is most likely to be referred. The only common aural element is the word “Solen”. The Applicant’s mark consists of a further verbal element namely “Choco Dan’s”. However, it submits that the average consumer is unlikely to pronounce the word Solen when referring to its mark giving the example of “Nestle Kit Kat” to illustrate this where consumers would refer to “Kit Kat” and not “Nestle Kit Kat”. Normally marks are read from left to right and therefore comparing “Sölen” with “Solen Choco Dan’s” the word Solen is the first word which will be read. Taking all this into account I consider there to be a medium degree of aural similarity, if Solen would be pronounced in the Applicant’s mark.

## **Conceptual**

31. There is no formal evidence in the proceedings from either party as to whether the average consumer would have any understanding of the meaning of “Sölen” or “Solen”. Although the Opponent submits that it means feast in Turkish the average UK consumer would not know this. The presence of the umlaut above the “o” means

that it is likely to be seen as a foreign word, although the meaning is unknown. The earlier mark will therefore be seen as an invented word and be conceptually neutral.

32. The Applicant submits that its mark

*“will bring to mind chocolate by the image of the chocolate and reinforced by the word CHOCO. It may also bring to mind the idea that the chocolate belongs to Dan”*

Whilst I accept that the use of the word “Choco” together with the picture would allude to chocolate or confectionary, the word “Solen” in isolation or when read together with the other words has no conceptual meaning. There appears to be no conceptual similarity between the two marks.

## **Distinctiveness**

33. The matter must be considered based on inherent characteristics as the Opponent has not filed any evidence regarding its use of the mark. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, the CJEU stated that:

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

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been

registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

34. The earlier mark consists of one word, “SÖLEN”. There is no evidence filed associating the word with the goods covered by the registration. It has no apparent allusive or suggestive quality. Since the word will be considered to be invented it has a high degree of inherent distinctiveness.

### **Likelihood of confusion**

35. When considering whether there is a likelihood of confusion between the two marks I must consider whether there is direct confusion, where one mark is mistaken for the other or whether there is indirect confusion where the similarities between the marks lead the consumer to believe that the respective goods or services originate from the same or related source.

36. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognised that the later mark is different from the earlier mark. It therefore requires a mental

process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark, I conclude that it is another brand of the owner of the earlier mark.”

37. In determining whether there is a likelihood of confusion there are a number of factors to bear in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the Opponent’s trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must consider that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

38. In *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be

confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything, it will reduce it.”

39. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), Arnold J. considered the impact of the CJEU’s judgment in *Bimbo*, Case C-591/12P, on the court’s earlier judgment in *Medion v Thomson*. The judge said:

“18 The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

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

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

40. When comparing the two marks I take into account the elements of the Applicant's composite mark against the word only existing mark and the obvious visual differences between them. I think it is unlikely that the application would be directly confused with the earlier mark. The only and therefore the dominant element of the earlier mark is "SÖLEN" and it is highly distinctive. I have found that the Applicant's mark consists of a number of dominant components namely the words "Choco Dan's" and the picture of the nuts and chocolates. Although the word "Solen" is less noticeable, when taking into account the overall impression of the mark, the average consumer would consider the word "Solen" in the Applicant's mark to have an independent distinctive role and to represent a house mark with the remaining words "CHOCO DAN'S" classed as a sub-brand as per the explanation in the *Kurt Geiger* and *Whyte and Mackay* cases. The words "Solen" in both marks are identical; furthermore the goods are identical and highly similar. In my view I consider that the average consumer would view the goods as being under the umbrella of the same house mark and thus the same economically linked undertaking. There is a likelihood of confusion.

### **Outcome**

41. The opposition under section 5(2)(b) therefore succeeds.

### **Status of this decision**

42. This is a provisional decision because the earlier mark has not achieved protection. When the status of the earlier mark changes to protected or refused, wholly or partially, I will issue a supplementary decision which will include a decision on costs. The appeal period will run from the date of the supplementary decision.

### **Direction to the Opponent**

43. I direct the Opponent to inform me when the status of the earlier mark changes to protected or refused, wholly or partially.

Dated this 8<sup>th</sup> day of October 2018

*Leisa Davies*

Leisa Davies

For the Registrar